A G E N D A

ALTERNATIVES TO LITIGATION PROJECT
National Institute of Corrections

Sheraton National Hotel
Arlington, Virginia
October 12, 1989

8:00 am - 8:30 am	Continental Breakfast	
8:30 am - 9:00 am	Overview Introductions	Norm Carlson
9:00 am - noon	Roundtable Discussion of Briefing Paper; Additional Suggestions	Norm Carlson
12:00 pm - 12:30 pm	Working Lunch	
12:30 pm - 3:45 pm	Focused Discussions and Development of Concepts	Norm Carlson
3:45 pm	Summary	
4:00 pm	ADJOURN	

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PRISON CROWDING AND CONDITIONS OF CONFINEMENT ALTERNATIVES TO LITIGATION

BRIEFING PAPER

October 12, 1989

I. INTRODUCTION: The Litigation Problem

Prisons and jails throughout the United States find themselves in a continuing, unrelenting crisis because of burgeoning inmate populations. Despite attempts to find ways of managing the problem, public pressure continues to demand that those who violate the law spend substantial periods of time in confinement as punishment for their crimes.

One of the results of the crowding is a continuing flow of litigation in both federal and state courts which claims that conditions of confinement in overcrowded facilities is cruel and unusual punishment and/or violates Due Process or violates provisions of state constitutions or statutes.

Not only has crowding led to new cases being filed, it has prolonged older cases which may have been pending in a relief phase for years. In these cases, the influx of new inmates either prevents defendants from correcting previously identified problems to the satisfaction of the court or creates new problems which lead the court to continuing to retain jurisdiction over the case.

In more than one situation a population cap on a state system has seriously exacerbated jail crowding, and contributed to jail conditions litigation because jails suddenly find themselves unable to get rid of sentenced offenders in a timely way.

Increasingly, courts are devoting substantial amounts of time, energy, and resources to cases concerning conditions of confinement. This litigation can impact heavily on federal courts, particularly in states where overcrowding is acute. The time and resources required by these cases significantly detract from the abilities of courts to perform their other tasks.

The burden of litigation (and the crowding which typically is the root of such litigation today) falls even more heavily on correctional agencies. As a result of the pressure to incarcerate more offenders for longer periods, prisons and jails across the country have experienced significant stresses in attempting to fulfill their missions.

Correctional administrators are frequently required to spend disproportionate amounts of time and energy in defending programs and operations in court. At times, they are required to defend conditions and practices which they personally believe are not proper or in accordance with accepted standards but which arguably still do not violate the Constitution. The costs of litigation (measured in both time and money) can detract from attempts to correct the very issues and conditions being litigated.

Compounding the problem is the fact that correctional employees are cast as "the villains" in suits. There is a natural tendency for any "defendant" to defend, even when the defendant may in many ways share a concern about the problems raised in the suit. This "defense reaction" may impede attempts to resolve issues in the suit.

Some would argue that courts are ill-equipped to "micro-manage" prisons and jails and have exceeded the scope of their powers by attempting to impose judicial remedies for exceedingly complex social problems which go far beyond the operation of a prison or prison system. In many situations, crowding litigation seems to be subverting fundamental state criminal justice policy, if arrests cannot be made because they would cause the jail to violate the court ordered population lid or if offenders are released prior to the normal expiration of their sentence under an emergency release plan necessitated by a court-imposed population lid.

Special masters have been appointed in some cases to oversee the remedial plans formulated by the courts. In most instances, the masters have worked with the parties involved to insure that the court orders are properly implemented. But there are other instances where masters have been given tremendous authority over correctional institutions without any corresponding responsibility for their actions. Critics allege that in some cases, masters have gone far beyond the court orders and have expanded the scope of the case well beyond its original dimensions. No time limit may be established for some masters and they appear to go on indefinitely, all at public expense and sometimes at a rate which exceeds the salary the judge who appointed them.

But others would argue that without court involvement, there would be no effective means of addressing the problems caused by overcrowding. That absent even the threat of suit, far fewer population control mechanisms would be adopted and the conditions in prisons and jails across the country would be far worse than they are today.

Often in cases where court intervention is the most extensive and dramatic, intervention comes after a long history of the defendants' failure to meet the demands of less intrusive or sensational court orders. For instance, two recent facility closure orders (one jail, one prison) came as a result of the court in each case deciding, after six to twelve years of litigation, that less dramatic orders were simply not going to solve the continuing problems, Inmates of Allegheny County Jail v. Wright, 699 F. Supp. 1137 (W.D. Pa., 1988), aff'd 874 F.2d 147 (3rd Cir., 1989), Crain v. Bordenkircher, 376 S.E.2d 149 (W. Va., 1988).

Most observers would agree that the increasing burden of conditions litigation on both the courts and corrections should be reduced. The time and resources required detracts from both the courts' and corrections' abilities to perform other duties. Substantial amounts of money from state and local governments wind up being spent for litigation, money which might otherwise be available for improvement of the correctional system.

II. GOAL: Finding Alternatives

There is a need to develop and use more non-judicial or quasi-judicial means of identifying and resolving problems arising from overcrowding before they culminate in some form of judicially imposed resolution. As long as we accept that state and federal Constitutions apply to custodial institutions and protect the inmates in those institution to at least some degree, the potential for court intervention remains. But there should be ways of addressing problems in correctional facilities which, if used, could minimize and/or simplify the role of the courts in this area.

Before reviewing alternatives, one must recognize how courts address crowding issues. Crowding per se is not a violation of the Constitution nor is it measure of a constitutional violation, Bell v. Wolfish, 441 U.S. 520 (1979), Rhodes v. Chapman, 452 U.S. 337 (2392). In applying the Eighth Amendment (or Fourteenth Amendment, if dealing with conditions in pretrial detention facilities), the courts focus on the effects of the conditions on the inmates, attempting to decide if those effects "involve the unnecessary and wanton infliction of pain" or deprive inmates of "the minimal civilized measure of life's necessities," Rhodes, supra.

This leads to this paper's preference for the phrase "conditions of confinement" cases instead of "overcrowding" cases because technically crowding it not the court's primary concern in determining if a constitutional violation exists. Crowding may become the court's primary concern in the relief phase of a case, if the court is convinced that the unconstitutional conditions are the product of crowding.

Typically, a court must evaluate the cumulative effect of various conditions ("basic human needs," including food, clothing, sanitation, shelter, medical care, and personal safety are often the key areas of concern) against these vague, subjective standards. This approach does not lend itself to simply settlement of conditions disputes, because of its inherent vagueness - one almost always can argue conditions alone or in combination do not violate this standard.

This "totality of the conditions" approach also is inconsistent, if not incompatible, with most modern approaches of evaluating organizations or institutions. These usually begin with a set of relatively objective standards and try to assess compliance with each individual standard before trying to make a comprehensive judgment about the organization's overall quality (if such a judgment is even attempted).

The point is that if one tries to follow the judicial approach to conditions case resolution, one is drawn into a very subjective area where it may be very difficult to reach any sort of consensus about the seriousness of the problems or the structure of a comprehensive solution.

The remainder of this briefing paper is devoted to identifying various alternatives to litigation which have been used in various places or which might be considered for implementation. None of the alternatives described below is a panacea. All can be criticized for one deficiency or another. But particularly when used in combination, they may offer some realistic alternatives to problem resolution through trial and court order.

The following list is by no means inclusive, but is offered as a means of provoking thought and discussion. Participants are encouraged to offer additional suggestions.

III. PROBLEM SOLVING: Avoiding litigation altogether

Some alternatives are designed to identify and address problems in ways which avoid litigation and the courts altogether or which may ultimately rely on courts in a far different way than is customary today. Some of these methods may be internal to

the agency, some may act on the agency from the outside. They may be voluntary or compulsory.

A. Internal Audits

Formal audit systems, based on agency policies and procedures which in turn are based on recognized standards may allow the early identification of problems which could be part of a conditions case. An audit system also tends to commit the agency to certain criteria of operation.

Audit systems are voluntary and their effectiveness depends a great deal on the commitment of the agency to adhering to its own requirements.

B. Inspector General

An Inspector General may be internal or external. The internal IG could inspect against agency standards (i.e., conduct internal audits) and inspect and investigate specific problems and issues. The products of these efforts would primarily be used by the agency.

The outside IG could perform the same functions, but could submit reports both to the agency and to the Governor and Legislature. Coming from an external officer, independent of the corrections agency, these reports could be more credible than those generated by the agency.

The English Inspector of Prisons is a variation of the external Inspector General model. Enabling legislation directs the Inspector to review "the treatment of prisoners and conditions in prisons" and to report directly to the Home Secretary as well as to Parliament. In addition to making findings and conclusions regarding conditions of confinement, the reports may contain specific proposals for ending practices that are considered untenable.

The Inspector of Prisons is appointed by the crown for a term of five years. Since 1986, the incumbent has been an active member of the judiciary who is detailed to the position for the five year term. This reinforces the independence of the office and also provides credibility with both Parliament and the Judiciary.

This format could readily be adapted to the American situation and presently is analogous in some respects to independent correctional ombudsmen.

All of the mechanisms described above are best considered problem

identification techniques, since they lack any sort of enforcement authority.

C. Standards and Accreditation

During the past twenty years, the American Correctional Association has been involved in the development of Standards for correctional institutions and programs. These Standards define policies and procedures deemed essential in order to operate institutions in a manner which protect the life, health, and safety of both offenders and staff.

A formal accreditation process similar to that used in hospitals and educational institutions has been established. To date over 800 correctional agencies and organizations have been involved in the accreditation process (accreditation not limited to prison and jails, but includes juvenile facilities, community programs, work release, etc.).

A number of courts, both federal and state, have cited accreditation standards with approval in deciding cases involving conditions of confinement. Accreditation is not an automatic defense to a conditions of confinement. But an institution (accredited or not) which is truly following ACA Standards should be much less likely to be sued and should be able to easily defend itself against a conditions of confinement claim.

ACA Standards also provide benchmarks of what correctional leaders consider proper and appropriate in correctional administration. As such they can be useful to assisting courts and others in resolving problems created by crowding. The Standards also have provided the starting point for standards adopted by state agencies.

D. Mandatory State Standards: The Licensing Model

Several states have adopted legislation giving some state agency (sometimes the department of corrections, sometimes an independent agency) authority to adopt and enforce standards for jails.

New York may be unique in creating a Commission on Corrections with authority over both jails and state correctional facilities. The Commission is empowered to conduct inspections of state prisons as well as the authority to investigate inmate deaths, allegations of physical abuse, as will as other individual complaints or problems. It has statutory enforcement powers which have yet to be tested in a major confrontation with the state Department of Correctional Services.

The state enforcement agency approach may draw its ultimate power from the courts, since typically the agency would have to go to court to enforce its orders. However, this judicial approach may be far simpler than litigating issues at the constitutional level. "Liability" is much easier to determine if based on compliance or noncompliance with an objective square footage crowding Standard than if based on an "unnecessary and wanton infliction of pain" test. Likewise, relief may be much easier to address ("reduce the population until it meets the Standard").

The state standard-enforcement agency approach is analogous to present state regulation of hospitals and nursing homes, which may not be permitted to operate unless they meet certain regulations.

E. Emergency Release Mechanisms

Some states have adopted legislation which allows (or could require) the release of inmates when institution populations reach certain points. These do not address other operating problems which may contribute to conditions cases, nor do they approach the problem from a systematic approach.

Emergency release mechanisms have been criticized on various grounds. The releasing authority may face harsh political pressure if the mechanism is invoked often. But they may provide at least short term relief.

F. Federal Commission of Corrections

Congress could establish a Commission of Corrections (a federal prison "czar") with responsibility for developing and enforcing standards for at least all prisons and jails utilizing federal funds. In this respect, the office would be comparable to present federal regulatory authority in the hospital and nursing home field which is tied to the receipt of federal moneys.

A review or advisory opinion regarding conditions in a facility could be required as a condition precedent to a conditions of confinement case proceeding in a federal court.

G. Emergency Declaration

A process could be developed whereby an emergency would be declared which would require the legislature to convene and address the emergency.

The initial statute would need to define the types of emergency (population, etc.), who could declare the emergency and the types of action which would follow (including the requirement for prompt prioritization by the legislature).

IV. DISPUTE RESOLUTION: Resolving Litigation Without The Court

Even once a dispute is identified and "parties" identify themselves, the dispute may be resolved in ways which minimize the level of actual court involvement. Perhaps one key to the success of these approaches is to avoid the creation of an adversary relationship as much as possible.

A. Grievance Processes

Almost all prisons (and probably most jails) have some form of formal grievance process. While these are designed primarily to resolve individual complaints rather than systemic issues, by helping to reduce some of the day to day annoyances in a correctional facility, they can help relieve the tension which builds as a result of crowding. They also can provide cumulative information about problems in an institution which might not readily be identified through formal inspections or audits.

In 1980 Congress enacted the Civil Rights of Institutionalized Persons Act, 42 USC Sec. 1997, (CRIPA) which allows the Attorney General to bring a civil rights action on behalf of incarcerated persons.

The Act also encourages states to adopt grievance procedures by providing that when a state (or local agency) adopts a grievance program which meets standards adopted by the Attorney General, inmates must exhaust that process before a suit brought under 42 USC Sec. 1983 may proceed (the delay in processing the suit may not exceed 90 days).

The exhaustion of administrative remedies carrot has not succeeded. Only a handful of states have sought or obtained certification of their grievance systems. The most common reason given for this lack of interest is opposition to a requirement in the rules (and underlying statute) that inmates be involved in the development, operation, and review of the system. Most correctional administrators are reluctant to allow offenders to have a role in the decision making process on grievances filed by fellow inmates.

CRIPA could be amended to provide greater incentive for states to adopt effective administrative remedy systems. Research could be undertaken of the many

existing systems around the country to identify factors leading to successful systems.

B. Ombudsman

Similar to a grievance system is the ombudsman's office. This may be within an agency or formed as an independent body (a status giving it more facial credibility with inmates).

The Office of Ombudsman typically investigates individual complaints but which may have larger implications. Their role could formally be expanded to include larger, system-wide issues, thus making it more comparable to the Inspector of Prisons position described earlier in this paper.

C. Mediation

Attempts to negotiate settlements of suits may be more successful if conducted under the guidance of a skilled mediator. The U.S. District Court for the Southern District of Florida has used such a procedure in conjunction with one or more conditions cases by directing the parties to participate in a settlement conference. Mediators involved include former state trial court judges.

A variation on traditional mediation (where the mediator may not have experience in the subject of the lawsuit) is to involve persons with extensive correctional experience as mediators. This approach could use a single person or a panel of experts. In either case, the mediator(s) may be in a better position to understand the nature of the problems and to suggest solutions than if the mediator has no specific familiarity with the operation and management of a correctional facility or system.

Under the panel approach, each party may designate one member of a three person group, with those representatives selecting the third member of the group. The panel approach may remove lawyers somewhat from the negotiation process.

While mediation of lawsuits is not a new procedure, it may become a more significant alternative in conditions of confinement cases if courts put greater pressure on parties to at least attempt mediation or some other formal settlement technique.

Mediation, or any other technique intended to lead to a settlement of a conditions case short of trial, results usually in some form of agreed order between the parties which in turn is approved by the court ("consent decree"). Consent decrees will usually avoid an admission of liability by the defendants but also result in

a court order which is more detailed and comprehensive than an order would be which followed a contested trial. This combination court order and contract may be more binding that a court order entered following a contested case.

Much of the controversy in conditions cases swirls around consent decrees, not the original trial. Examples abound of defendants encountering major problems in complying with the requirements of a decree, even though they agreed to its terms.

An "alternative" to traditional court involvement (through trial, finding of liability, and subsequent injunction) which results in an agreed order leading into years of litigation over the requirements of that order is no real alternative. There are those who suggest that it may be more advantageous to the defendants to litigate a case through a trial (or simply admit liability) but force the court to set the terms of the injunctive relief granted to the plaintiffs.

To succeed, mediated settlements must recognize and address the various problems which have led to their long term failure in the past. These problems relate both to the substance of what an agency may agree to (agreeing to more than it can deliver, not understanding the full ramifications of their agreement, etc.) and to procedural issues surrounding the decree (how long will it last, how may it be amended, how will non-compliance questions be resolved, etc.).

D. Court Advisory Panels

In a variation of the panel settlement approach described above, courts could appoint advisory panels of knowledgeable individuals who could assist in evaluating a facility (becoming, in a sense, the court's experts). This group could assist them both in assessing the facts of a case, but also in formulation of relief.

E. Special Legal Aid Programs

Legal aid programs could be established and given the responsibility to investigate complaints involving correctional facilities. Following investigations, reports could be issued.

CONCLUSION

There are undoubtedly many additions and variations on the ideas set out in this paper. The goal of this paper is not to advocate any of the ideas or suggestions contained herein, but simply to set out for discussion a broad variety of issues. Participants are urged to try to expand on the contents of this paper.

CORRECTION DEPARTMENTS/INSTITUTIONS UNDER COURT ORDER

(as of June 30, 1988)

	ADULT					JUVENILE				
STATE	Entire Dept. Under Order	Master or Monitor Assigned	One or More Inst. Under Order	Master or Monitor Assigned	How Many Institutions	Entire Dept. Under Order	Master or Monitor Assigned	One or More Inst. Under Order	Master or Monitor Assigned	How Many Institutions
AL	Yes[1]	Yes	No			Yes[2]	Yes	No		
AK	Yes	Yes	Yes	Yes	14	No		No		
CA	No		Yes	Yes	5	No		No		
CO	No		Yes	No	3	No		No		
CT	No		Yes	No	5	No		No		
DE	No		Yes	Yes	4	No		No		
FL	Yes[3]	Yes	Yes	Yes	1	No		Yes	Yes	2
GA	No		Yes	No	3	No		No		
HI	No		Yes	No	2	†				
ID	No		Yes	Yes	2	No		No		
IL	No		Yes	No	2	†				
IN	No		Yes	No	4	†				
IA	No		Yes	No	1	No		No		
KS	No		Yes	No	1	No		No		
KY	No		Yes	No	3	No		No		
LA	Yes[4]	No	No			†				
MD	No		Yes	No	4	No		No		
MA	No		Yes	—	—	No		No		
MI	No		Yes	Yes	4	No		No		
MS	Yes	No	Yes	No	1	No		Yes	No	1
MO	No		Yes	No	4	No		No		
NV	Yes[5]	Yes	Yes	Yes	2	No				
NH	No		Yes	No	1	No				
NM	No		Yes	Yes	4	†				
NY	No		Yes	Yes	1	No		No		
NC	No		Yes	No	6	No		No		
OH	No		Yes	No	1	No		No		
OK	No		No			Yes[6]		No		
PA	No		Yes	No	6	No		No		
RI	Yes[7]	Yes	Yes	Yes	8	Yes[8]	Yes	No		
SC	Yes[7]	No	Yes	No	28	No		No		
SD	No		Yes	No	1	†				
TN	No		Yes	Yes	11	†				
TX	Yes[9]	Yes	Yes	Yes	29	Yes[8]	Yes	Yes		6
WA	No		Yes	No	2	No		No		
WV	No		Yes	Yes	2	†				
WI	No		Yes	No	1	†				
DC	No		Yes	Yes	4	Yes	Yes	Yes	Yes	3
NYC	No		Yes	Yes	12	No	No			
PHL[1]	Yes	Yes	Yes	Yes	5	†				

Notes:

† Combined adult and juvenile departments.

— Information not available at time of publication.

1. AL(A), PHIL—Overcrowding.
2. AL(J)—Admission waiting list.
3. FL(A)—Overcrowding and provision of health services.
4. LA—To maintain proper levels of staffing and population.
5. NV(A)—Mental Health services.
6. OK(J)—Class action lawsuit.
7. RI(A), SC(A)—Impact of overcrowding on conditions of confinement.
8. RI(J), TX(J)—To improve conditions.
9. TX(A)—Totality of conditions.

As of June 30, 1988, the following states had no correctional departments or institutions under court order: AR, AZ, ME, MN, MT, NE, NJ, ND, OR, UT, VT, VA, WY, and FBP.

Source: 1989 Directory
American Correctional Association

RESEARCH FINDINGS AND PUBLICATIONS RELATING TO THE IMPACT OF COURT-ORDERED PRISON CAPS

A. Overview of Policy Implications

At the end of 1987, the state prison population, up 75 percent since the end of 1980, stood at 533,000, in facilities intended for 436,000 to 501,000 inmates. The entire corrections departments of eight states were under court order or consent decree to relieve prison crowding. Another 27 states plus the District of Columbia were operating at least one facility under similar court order or decree.

Research findings of OJP's Bureau of Justice Statistics indicate that an estimated 95 percent of incarcerated offenders in this country had been convicted of violent crimes or were repeat offenders. With continuing high crime rates and the need to incapacitate serious offenders, the demand for more prisons and increased prison bed space will continue.

Court-ordered prison caps and early release may conflict with public safety needs by permitting serious offenders back into society with insufficient safeguards and supervision. Recent research findings at OJP's Bureau of Justice Statistics indicate that an estimated 62.5 percent of former state inmates were rearrested for a felony or a serious misdemeanor within 3 years of their release from prison. An earlier study found that 23 percent of those who entered prison in 1979 would still have been in prison at the time of their admission if they had served their maximum prior confinement sentence.

While court-ordered caps and prison improvements improve the conditions of confinement, the mandated changes can be very expensive and interfere with the ability of the correctional system to handle its assigned inmate population. With their correctional systems stretched beyond their limits of capacity, States are struggling to meet both the need to incapacitate increasing numbers of offenders and the requirements of the courts. In 1988, 17 states reported a total of 14,314 State prisoners held in local jails because of crowding in State facilities. During 1985, 19 States reported early release of a total of 18,617 inmates because of prison crowding.

The use of new and improved intermediate sanctions will become increasingly important in protecting the public safety and dealing with increasing numbers of convicted offenders. As approximately three-fourths of convicted offenders are not institutionalized, increased supervision and monitoring (e.g. drug testing) is needed. New punishment options such as shock incarceration may provide increased levels of control for appropriate non-violent, first time offenders, as well other services. However, these intermediate sanctions will not

eliminate the need for increased prison capacity.

B. Dimensions of The Problem

The Bureau of Justice Statistics and the National Institute of Justice have considerable data on crowding in the nation's prisons and jails. In general, the following statement from an August, 1988, Research in Action publication may best summarize their findings:

> "The findings of the NAP survey reflect a correctional system already extended beyond the limits of its capacity. Correctional administrators are in serious need of additional space, programs, and services to keep pace with an increasing population. Additionally, they require more training and programs for dealing with specialized offender needs. Moreover, these needs must be addressed within the context of continued scrutiny by the courts."

The following are summaries of recent OJP publications and studies regarding prison crowding:

Prisoners in 1988, Bureau of Justice Statistics Bulletin, April 1989--To estimate the capacity of the Nation's prisons, as part of a study conducted by BJS during 1988, States were asked to supply up to three measures for yearend 1988--rated, operational, and design capacities. These measures were defined as follows:

> Rated capacity is the number of beds or inmates assigned by a rating official to institutions within the State.
>
> Operational capacity is the number of inmates that can be accommodated based on a facility's staff, existing programs, and services.
>
> Design capacity is the number of inmates that planners or architects intended for the facility.

Most jurisdictions are operating above reported capacity.

> Forty jurisdictions and the Federal Prison System reported operating at 100% or more of their lowest capacity; 34 of these held populations that met or exceeded their highest reported capacities.
>
> Ten States reported they were operating below 95% of their highest capacity.
>
> State prisons were estimated to be operating at

approximately 107% of their highest reported capacities and at 123% of their lowest reported capacities.

The Federal system was estimated to be operating between 133% and 172% of capacity.

At the end of 1988, 17 States reported a total of 14,314 State prisoners held in local jails because of crowding in State Facilities.

Six States--Idaho, Kentucky, Louisiana, Mississippi, New Jersey, and Tennessee-- held more than 10% of their State-sentenced prisoners in local jails because of State facility crowding.

Overall, 2.5% of the State prison population was confined in local jails on December 31, 1988, because of prison crowding.

Population Density in State Prisons, Bureau of Justice Statistics Special Report, December 1986--Based on the 1984 Prison Census, which collected detailed information on over 180,000 housing units at 694 State prisons, this report examines the amount, nature and use of housing space in State prisons.

Between 1979 and 1984, the opening of 138 new State prisons and the renovation or expansion of existing prisons added nearly 5.4 million square feet of housing space, an increase of 29%. Inmate population, however, increased 45% over the same period. As a result, the average square feet per inmate dropped 11%.

Data from the 1984 Census indicate that the greatest number of inmate deaths, assaults, and institutional disturbances generally occurred in medium and maximum security facilities; the least number occurred in minimum security facilities. For each type of negative event a consistent pattern can be seen.

When density levels are compared with equivalent security grades, no clear pattern emerges.

The highest density maximum security facilities evidenced the highest rate of suicide but had a rate of homicide lower than that reported in moderate density prisons and about the same as that in low density prisons.

For prisons of each security level inmate-on-inmate assaults were most prevalent in the lowest density prisons. Institutional disturbances in minimum and medium security facilities were most prevalent in prisons with the lowest population densities.

In general, no consistent pattern emerges from these data indicating that the incidence or prevalence of these negative events increases with greater population densities.

In addition, it remains to be determined whether rates for certain events, such as illness, deaths, or suicides, are more likely to occur in prison than they occur outside prison for comparable race, age, and sex groups.

There is some evidence that correctional systems may respond to pressures of population growth by increasing the level of supervision over inmates.

The 527 prisons that were included in both the 1979 and 1984 Censuses experienced a 34% increase in their inmate populations and a 29% expansion in their housing space, but a 43% increase in their number of correctional officers.

These prisons reported more suicides in 1984 than in 1979, but fewer homicides.

Though inmates in State prisons may have had less space available per person in 1984 than in 1979, the improvement in staffing may have helped to control the prevalence of some negative events.

Research in Brief, National Institute of Justice, June, 1984, "Assessing Criminal Justice Needs"--2400 criminal justice administrators across the country were asked "what do you feel is the most pressing problem confronting your State's criminal justice system today?" Respondents included attorneys general, district judges, police chiefs, heads of criminal justice agencies and corrections officers.

Jail and prison crowding was identified as the most pressing issue facing criminal justice institutions by 32% of the respondents.

Police officials identified jail and prison crowding twice as often as any other problem.

Prosecutors identified jail and prison crowding three times as often as any other problem.

C. The Impact of Court-Ordered Prison Caps on Public Safety

Court ordered prison caps have led to the premature release of convicted felons. Early release of offenders solely because of the shortage of space calls into question the integrity of the

administration of justice and may pose a threat to public safety. The following OJP publications address this issue:

Report to The Nation on Crime and Justice, Second Edition, Bureau of Justice Statistics, March, 1988--Generally, the three types of early release programs are:

> Emergency Release--This permits jurisdictions to release inmates who are approaching the end of their sentences. Alaska, for example, allows early release of nonviolent offenders within 4 months of release. Wisconsin inmates may be discharged early if they are within 135 days of release.
>
> Sentence Rollback--Nine states use sentence reductions to achieve population control. Generally, this approach requires a formal declaration that the prison system is above its authorized capacity and sentences of selected inmates (such as first offenders or nonviolent offenders) may be reduced by up to 90 days. Some States permit reductions to be applied to the same offender more than once during a term of imprisonment.
>
> Early Parole--Eight States allow parole release dates to be advanced for certain categories of offenders when the prison system is crowded. Such programs may also entail a period of more stringent supervision by a parole officer or participation in special community-based programs.

Many states hold prisoners in local jails because of prison crowding.

> At yearend 1985, 19 States reported more than 10,000 State-sentenced inmates in local jails because of prison crowding.
>
> Nationally, locally retained State prisoners accounted for about 2% of the total prison population.
>
> States with the largest percentage of prison inmates held in local jails were Louisiana (21%), Mississippi (15%), Kentucky (14%) and New Jersey (12%). Together, these States account for 62% of the prisoners backed up in local jails.

Prisoners 1985, Bureau of Justice Statistics Bulletin, June, 1985--During 1985, 19 States reported early release of a total of 18,617 inmates because of prison crowding. About two-thirds of these early releases occurred in three States--Georgia, Florida and Tennessee.

Twenty-nine of 52 jurisdictions reported jail backups or early releases because of crowding during 1985.

Nine of these--Arkansas, Kentucky, Mississippi, New Jersey, South Carolina, Tennessee, Utah, Washington, Wisconsin--reported using jail backups, early releases and populations in excess of capacity as measures.

Profile of State Prison Inmates, 1986, Bureau of Justice Statistics Special Report--An estimated 95% of men and women serving sentences in State prisons throughout the country in 1986 had been convicted of violent crimes or were recidivists.

The remaining 5% were first-time offenders convicted of nonviolent crimes. More than half of these had been convicted of burglary or drug trafficking.

More than 13,700 inmates were selected as a representative sample of the approximately 450,400 inmates in State prisons during 1986.

About 80% were recidivists.

More than 60% had been incarcerated or on probation at least twice before.

45% had previously served 3 or more terms of probation or incarceration .

Almost 20% had served 6 or more prior terms.

57% said they had a full-time job when they committed the offense for which they were currently serving time.

Recidivism of Prisoners Released in 1983, Bureau of Justice Statistics Special Report--An estimated 62.5% of former State inmates were rearrested for a felony or a serious misdemeanor within 3 years of their discharge from prison.

More than 16,000 men and women were selected as a representative sample of the approximately 109,000 offenders who were released from prisons in 11 states during 1983.

47% of former prisoners were convicted of a new crime.

41% were sent back to prison or jail.

The prisoners released in the states studied are estimated to have been charged with 1.7 million serious crimes throughout their lifetimes. About 265,000 were violent crimes.

Before their 1983 releases, the inmates averaged more than 12 criminal charges each. Approximately two-thirds had served a previous jail or prison sentence.

An estimated 68 % of those younger than 25 years of age at the time of their release were rearrested within 3 years, compared to 40% of those 45 years old or older.

Recidivism rates are higher during the first year of release. 25% of the former prisoners were rearrested within 6 months and almost 40% within one year.

An estimated 77% of the prisoners released during 1983 had been arrested for a violent crime at least once during their lives.

Examining Recidivism, Bureau of Justice Statistics Special Report, February, 1985--Twenty-eight percent of those who entered prison in 1979 would still have been in prison at the time of their admission if they had served their maximum prior confinement sentence.

These avertable recidivists accounted for approximately 20 percent of the violent crimes committed by all those sent to prison that year as well as 18 percent of the burglaries and auto thefts, and 31 percent of the stolen property offenses.

An estimated 46% of the recidivists entering prison in 1979 would still have been in prison at the time of their admission if they had fully served the maximum term of their last sentence to confinement.

Research in Brief, National Institute of Justice, July, 1987, "Making Confinement Decisions"--The costs of constructing and operating prisons are easy to tally and therefore frequently put forth in discussions about prison crowding. However, the true costs of not building prisons are more difficult to quantify.

Arguments that confinement is too expensive may not be valid when weighed against the value of crimes prevented through incapacitation and crimes deterred by the threat of imprisonment.

Annual per prisoner cost of confinement is estimated at $25,000 per year. This includes confinement costs of $20,000 and $5,000 in loss to the society in potential income taxes and other payments. The loss to society figure also includes an off-set for potential savings in unemployment compensation and social service payments to individuals who were unemployed before incarceration.

Release costs can be approximated by estimating the number of crimes per year an offender is likely to commit if released and multiplying that number by an estimate of the average social cost of a crime.

An NIJ survey found that inmates averaged between 187 and 287 crimes per year exclusive of drug deals.

Using victimizations reported in the National Crime Survey, adjusted to account for victimizations of commercial firm and other office buildings, and published expenditures on crime, the cost per crime was estimated at $2,300.

By combining the crime costs ($2300 per crime) and offense rates (187 per inmate), NIJ estimates that the average inmate is responsible for $430,000 per year in crime costs.

Sentencing 1,000 more offenders, similar to current inmates, to prison would obligate correctional systems to an additional $25 million per year. However, about 187,000 felonies would be averted through incapacitation of these offenders. These crimes represent about $430 million in social costs.

<u>Research in Brief</u>, National Institute of Justice, March, 1985, "Probation and Felony Offenders--This study tracked 1,672 felons on probation in California's LA and Alameda Counties in 1983. The findings indicate that felony probation presents a serious threat to public safety.

Over a 40-month period, 65 percent of the probationers were rearrested and 53 percent had official charges filed against them.

Of these charges, 75 percent involve burglary or theft, robbery, or other violent crimes-- the crimes most threatening to public safety.

Fifty-one percent of the sample were reconvicted--18 percent for homicide, rape, weapons offenses, assault, or robbery; and 34 percent eventually were returned to jail or prison.

With the exception of drug offenders, probationers were most often rearrested and convicted of the same crimes for which they had originally been convicted.

Property offenders tended to be rearrested more quickly than those originally convicted for violent crimes or drug offenses.

Both property and violent offenders either committed new crimes or "retired" within 2 years, while drug offenders continued to recidivate.

D. The Impact of Court Orders on the Operation of Prison Systems

In recent decades, courts have become more active in reviewing the conditions of confinement in jails and prisons. During the 1970's, the courts faced a proliferation of cases dealing with the constitutionality of double-bunking, operating a correctional facility beyond its rated capacity and whether the Constitution mandates a minimum amount of physical space per inmate.

The courts have often found conditions of confinement unconstitutional and have required government officials to take remedial, and often expensive, courses of action. In some cases the Courts are requiring administrators to meet population ceilings, even though the administrators lack the resources and support to do so. Recent OJP publications in this area are as follows:

Research in Action, National Institute of Justice, August, 1988, "Wardens and State Corrections Commissioners Offer Their Views in National Assessment"--This publication reports the results of a National Assessment Program (NAP) survey of 44 State commissioners of corrections and 106 wardens.

Sixty-four percent of the commissioners report their systems are under court order regarding conditions of confinement.

Thirty-five percent of the State systems are under court order for various other class actions (such as suits involving equal protection and due process issues).

The percent of systems with other class action suits is significantly greater in systems with 5,000 to 12,000 inmates.

Forty-six percent of the wardens report that their facilities are under court order regarding conditions of confinement, while 35 percent are under court order for other class actions.

Facilities under court order for conditions of confinement are likely to be the subject of court intervention for other class-action suits as well.

Facilities under court order, however, are not necessarily the

most crowded. Those facilities that are double-celling are less often involved in conditions-of-confinement litigation than those that are not.

The need for additional security staff is greater in systems under court order for conditions of confinement. Clerical staff needs follow a similar pattern, with shortages reported more in those facilities under court order. The volume of paperwork required to respond to court requests for information may account for this result.

Research in Action, **"Nation's Jail Managers Assess Their Problems"--August, 1988**--Crowding is a major problem in jails as well as prisons. Prison systems in states with crowding problems and court orders are depending more upon jails to alleviate State system crowding.

Jail managers cited both pretrial and postconviction remedies as possible solutions to their problems. The tone of responses varied from confident to the following frustrated responses:

> "We have been unable to keep our population below the cap (by consent decree). This is true even though the county must pay fines for those inmates sleeping on the floor."
>
> "Turn them loose on the public is what we do. The State refuses to build and use prisons."

E. The Use of Intermediate Sanctions

Given the passage of tougher sentencing laws, increased sanctions for drug related offenses and intensifying public concern about increases in violence, the demands for prison space can be expected to continue to increase. As OJP data on recidivism demonstrate, there are many public safety implications to be considered as alternatives to incarceration are developed and implemented.

There will continue to be a need for new prison beds to incapacitate the growing number of violent and repeat offenders. Many offenders must be removed from society for a significant period of time to protect the public. Most of these offenders will eventually be released back into the community. Attention must be given to providing more intensive supervision and support programs when the offender returns to the community. OJP's National Institute of Justice and Bureau of Justice Assistance have undertaken a wide range of research and development activities in the area of intermediate sanctions to meet this need. Examples of intermediate sanctions are: drug testing as a

means of improving offender supervision, urine testing offenders at the pre-trial or post-conviction stage, as a tool for reducing drug use and related criminal activity, electronic monitoring, and shock incarceration.

Treatment Alternatives to Street Crime (TASC), Bureau of Justice Assistance--The goal of TASC is to interrupt the drug-using behavior of offenders by linking the sanctions of the criminal justice system to the therapeutic processes of drug treatment programs. Chronic, repeat offenders tend to also have drug and alcohol problems. However, the persistent criminality of these people can be interrupted, curtailed, and in many cases, stopped by intervening in the drug-using behavior.

TASC assists in bridging the gap between the justice system and the treatment community by making necessary services available to drug-dependent offenders who would otherwise continue to move in and out of the justice system. TASC also improves justice system oversight of the offender when that individual is in treatment.

As a result of the technical assistance and training rendered by the Bureau of Justice Assistance, 23 states have adopted or are considering adopting, the TASC program model.

The benefits of TASC programs, as documented by field reports from criminal justice system practitioners include the following:

TASC helps relieve prison crowding by placing drug-dependent offenders in supervised treatment programs

TASC assists court personnel reduce and expedite caseloads from adjudication through probation

A TASC supervised offender in a treatment program tend to remain in the program longer than an offender who is in treatment without the sanction of the criminal justice system. Time in treatment has been shown to be a major predictor of successful treatment outcomes.

Comprehensive State Department of Corrections Treatment Strategy for Drug Abuse, Bureau of Justice Assistance--Reducing recidivism rates of drug using offenders by providing a range of drug treatment programs within correctional institutions and in conjunction with community supervision program is the goal of the Comprehensive State Department of Corrections Treatment Strategy for Drug Abuse.

The major objective of the program is to develop a range of model state drug treatment activities including: drug education, drug resource centers, self-help groups and therapeutic communities

that can be integrated into existing and proposed institutions and programs. Corrections and treatment staffs are trained in the latest techniques of drug treatment. Participating states are provided with a small amount of discretionary funds to assist with implementation, but most of the resources for implementation come from state funds and/or the state's formula grant funds.

Drug Testing and Intensive Supervision Program, Bureau of Justice Assistance--As many drug offenders are released into the community while awaiting trial, they should be properly supervised and tested for drugs. Findings indicate that the safeguards were very successful as the rated of rearrest and failure to appear for this group were no higher for those who had tested positive for drugs than for arrestees who did not test positive for drugs.

The drug testing and intensive supervision program has the following three objectives:

use urinalysis to quickly identify arrestees who use drugs

provide the courts with information useful in making decisions regarding pretrial release of arrestees

provide periodic urinalysis and intensive supervision of arrestees to monitor their behavior while released from custody pending trial

Pretrial drug testing and intensive supervision programs also have been established and an additional six sites are receiving intensive technical assistance and financial assistance to prepare for possible future implementation.

Drug Testing Technology/Focused Offender Disposition, Bureau of Justice Assistance--This BJA program has drawn upon field experience and recent research to develop an offender profile index, which provides judges with a tool to assist them in making decisions regarding which defendants/offenders are in need of treatment and which treatment regimen or program is best suited to each drug involved individual.

The index examines the:

stakes in conformity, such as education, employment and residential stability

drug use pattern

drug treatment history

criminal justice history

HIV risk behaviors

The application of this index yields disposition recommendations from among a specific range of services including urine monitoring only, outpatient treatment, short-term residential treatment or long-term residential treatment.

The index is being tested in three sites. Each site is assigning some drug abusing offenders to probation, some to TASC and the services recommended by the index and others to the existing service delivery system. A process evaluation and a follow-up of each of the groups are being conducted to assess the effectiveness of the index in identifying the proper intervention.

Drug Testing Technology Evaluation, Bureau of Justice Assistance --Preliminary results from a Bureau of Justice Assistance and National Institute of Justice sponsored evaluation of drug testing technologies demonstrates that certain of the most commonly used urine testing technologies are more accurate than others.

The evaluation was conducted in Los Angeles County, CA. Parolees provided urine specimens that were divided into five containers. Each container was tested by one of the technologies for five drugs. The final report on this evaluation should be available to criminal justice practitioners in the summer of 1989.

Drug Testing Standards, Bureau of Justice Assistance--Who should be tested for drugs, the circumstances under which testing should occur and the uses of test results are issues which will be addressed in the drug testing standards and guidelines being developed with Bureau of Justice Assistance support.

The guidelines are being developed to assist probation and parole officers with the issues and procedures surrounding drug testing of arrestees and offenders under correctional supervision. The standards should be available by December 1989.

Innovative Local Disposition and Management of Drug-Dependent Offenders Programs--The goal of this project is to increase the existing body of knowledge regarding programs related to the drug-dependent offender by providing modest assistance to innovative local programs in order to document the program. Information on these innovative programs, which include correctional alternatives, is distributed to criminal justice practitioners and policy-makers who are dealing with the same types of issues.

Electronic Monitoring, Bureau of Justice Assistance--A monograph entitled "Electronic Monitoring in Intensive Probation and Parole Programs" has been published by BJA to assist criminal justice agencies define the objectives of electronic monitoring, develop policies, review equipment bids and secure technical assistance.

The use of electronic monitoring devices has spread rapidly. First used in December 1984, electronic monitoring devices were being used in 20 states by early 1987 and in 32 states by early 1988. The purpose of this publication is to provide guidance in the planning and implementation of electronic monitoring in intensive supervision probation and parole programs.

<u>NIJ Reports</u>, **National Institute of Justice, January/February, 1989, "Electronic Monitoring of Offenders Increases"**--During 1988, 33 States used electronic monitoring devices to supervise nearly 2300 offenders.

Most of those monitored were sentenced offenders on probation or parole, participating in a program of intensive supervision in the community.

Florida and Michigan account for 49.5 percent of monitored offenders. Most programs were monitoring fewer than 30 offenders.

25.6% of offenders monitored were charged with major traffic offenses. Most of the offenders in this group were charged with driving while under the influence or while intoxicated.

15.2% of monitored offenders were charged with drug law violations. Of these, slightly more than half were charged with possession of drugs. The rest were charged with distribution.

20.1% of monitored offenders were charged with property offenses. They committed a few closely related offenses, burglary, thefts and larcenies and breaking and entering.

<u>Issues and Practices</u>, **National Institute of Justice, June, 1989, "Shock Incarceration: An Overview of Existing Programs"**--Patterned on the highly disciplined military "boot camps", shock incarceration programs provide an intermediate punishment for young offenders. This study provides an overview of shock incarceration programs in seven states. It looks at the history, costs and goals of shock incarceration, as well as the various elements of the programs in the seven states.

PRISON REFORM ISSUES FOR THE EIGHTIES: MODIFICATION AND DISSOLUTION OF INJUNCTIONS IN THE FEDERAL COURTS

by Sarah N. Welling and Barbara W. Jones***

During the past two decades, federal courts have become involved in the supervision of state and local prison systems. This supervisory role is the result of a new type of litigation, the institutional reform lawsuit.[1] These lawsuits originate when prisoners sue state or local prison administrators, alleging unconstitutional conditions of confinement. Plaintiffs usually seek a permanent injunction outlining a plan to eliminate the offending conditions. If an injunction is granted, the court will retain jurisdiction after it is entered to monitor compliance. Often this implementation phase lasts for years.

The majority of prison reform lawsuits were filed in the 1960's and 1970's.[2] Early prison reform litigation focused on the definition of substantive rights,[3] the appropriate extent of injunctive

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1. Institutional reform lawsuits protect rights by defining and implementing changes in the operation of complex social institutions. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986). This article examines the complex social institutions of state and local prison systems.

2. *See, e.g., infra* notes 3-4; *see also* Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1106 (1986) (the 1960's and 1970's were "the heyday of equity in the federal courts").

3. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (disciplinary procedures); Procunier v. Martinez, 416 U.S. 396 (1974) (mail censorship regulations); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (overcrowding), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) (medical treatment), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied.*, 421 U.S. 948 (1975); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (forced, uncompensated farm labor; prison conditions; and racial segregation), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

relief,[4] and the role of the courts in administering relief.[5] As prison litigation matured, the normal evolution of these lawsuits led to new questions taking center stage in the 1980's, questions of injunction, modification, and dissolution.

Modification has been discussed frequently by both courts and commentators. Dissolution, in contrast, has been the focus of relatively little attention. This article begins with a summary examination of prison reform litigation, and then analyzes the standards for modification and dissolution of injunctions. The article concludes that in spite of some ambiguous decisions and some references to a new, more flexible modification standard, courts in prison reform cases are actually applying the strict standard formulated by the Supreme Court in *United States v. Swift & Co.*[6] In addition, courts are uncertain whether to use different modification standards for consent decrees and litigated injunctions. The courts that have distinguished the two types of orders disagee on the impact of the distinction. This article stresses that the best approach is not to distinguish consent decrees and litigated injunctions, but rather to apply the strict modification standard to both types of orders.

As for dissolution, courts agree that the critical factor is that there be no risk of noncompliance in the future. In assessing the risk of future noncompliance, courts have identified several relevant factors but have overlooked the educational impact of prison reform decisions. The dissolution standard is good and the few cases decided indicate that the courts are applying it conscientiously. However, the potential exists for the courts to succumb to intuitive reluctance to dissolving injunctions. Courts should resist this temptation and dissolve injunctions if the dissolution standard is met. The article finally concludes that a stringent standard for injunctive modification, in combination with the current standard for dissolution, will provide the necessary institutional reform.

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4. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (enjoinment); Rizzo v. Goode, 423 U.S. 362 (1976) (order overhauling police disciplinary procedures exceeded authority); Kendrick v. Bland, 740 F.2d 432 (6th Cir. 1984) (enjoinment from performing certain responsibilities inappropriate where defendants exhibited a history of good faith cooperation); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) ("Federal courts lack the power to interfere with decisions made by state prison officials, absent constitutional violations."); Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (discretion in tailoring a remedial injunction is not unconfined), *cert. denied*, 460 U.S. 1042 (1983).

5. *See supra* note 4.

6. 286 U.S. 106 (1932).

I. BACKGROUND: A PRIMER ON PRISON REFORM LITIGATION

Prison reform litigation usually begins when inmates sue state or local prison administrators, alleging that the confinement conditions are unconstitutional, either as cruel and unusual punishment or as a denial of due process.[7] Early cases challenging prison conditions determined that the conditions violated the eighth amendment's prohibition against cruel and unusual punishment and, therefore, warranted judicial intrusion upon state administration of the prison.[8] Later, courts decided that additional protections in the Bill of Rights applied to incarcerated felons to a limited extent.[9]

Although remedies for prison conditions lawsuits include damages,[10] plaintiffs usually seek a permanent injunction.[11] These injunctions have been called "structural" because they "restructure the organization to eliminate a threat to [constitutional] values posed by the present institutional arrangements"[12] and are "the means by which these reconstructive directives are transmitted."[13] Structural injunc-

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7. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987) (per curiam) (suit brought by inmates of the Texas Department of Corrections); Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983) (prison inmate filing pro se), *cert. dismissed*, 465 U.S. 1014 (1984); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) (prison inmate filing pro se); Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979) (inmates brought suit naming the governor of Colorado, the executive director of the Department of Corrections, and the superintendent of the maximum security unit as defendants), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Johnson v. Levine, 450 F. Supp. 648 (D. Md. 1978) (class action brought by state prisoners), *modified*, 588 F.2d 1378 (4th Cir. 1978). Inmates have challenged the adequacy of living space, *see, e.g.*, *Ruiz*, 811 F.2d 856; food, exercise, lawbooks, security, visitation, *see, e.g.*, Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985); and medical services, *see, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976), *reh'g denied*, 429 U.S. 1066 (1977). In evaluating these claims, courts have examined the totality of the circumstances rather than isolated factors. Rhodes v. Chapman, 452 U.S. 337, 363 n.10 (1981) (Brennan, J., concurring) ("The Court today adopts the totality-of-the-circumstances test.").

8. *See, e.g.*, *Estelle*, 429 U.S. 97 (deliberate indifference to serious medical need).

9. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (right of access to the courts); Wolff v. McDonnell, 418 U.S. 539 (1974) (due process as applied to disciplinary proceedings); Procunier v. Martinez, 416 U.S. 396 (1974) (free speech as applied to censorship of mail); Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (religion); Johnson v. Avery, 393 U.S. 483 (1969) (no absolute ban on prisoners assisting each other with habeas corpus suits).

10. *See, e.g.*, Smith v. Wade, 461 U.S. 30 (1983) (punitive damages available to inmates under 42 U.S.C. § 1983); Landman v. Royster, 354 F. Supp. 1302, 1318-19 (E.D. Va. 1973) (compensatory damages allowed for "psychic damages and suffering").

11. *See* Special Project, *supra* note 1, at 813.

12. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). *See generally* O. FISS, INJUNCTIONS 1, 415-17 (1972); Jost, *supra* note 2; Note, *supra* note 1.

13. Fiss, *supra* note 12, at 2.

tions have been entered to limit punitive isolation,[14] enjoin poor sanitation[15] and overcrowding,[16] and mandate adequate medical care.[17] Usually the injunctions are very detailed.

Injunctions in prison reform lawsuits can be entered in two ways. One alternative is litigation, which allows the judge to define the terms of the injunction. The other alternative is for the parties to settle the lawsuit and negotiate the terms of an injunction, which must then be approved by the court.[18] These negotiated injunctions, or consent decrees, are court orders embodying the parties' negotiated resolution of the litigation.[19]

Aside from the procedural difference in the way litigated injunctions and consent decrees are derived, other distinctions exist. First, consent decrees usually give the plaintiff more relief than the law provides,[20] while litigated decrees can only give the plaintiff the minimum required by the law.[21] Second, consent decrees generally lack the clear purpose of litigated decrees,[22] so interpretational problems arise when a court attempts to facilitate the decree's purpose.[23] Third, the terms of a litigated injunction are interpreted through principles of equity,[24] but a consent decree is a hybrid—a contract and a judgment[25]—so its terms

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14. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978), *reh'g denied*, 439 U.S. 1122 (1979).

15. *See, e.g.*, Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala. 1978), *aff'd*, 614 F.2d 42 (5th Cir. 1980).

16. *Id.*

17. *Id.*

18. Once a suit is filed, the court must approve any consent decree. *See, e.g.*, United States v. Armour & Co., 402 U.S. 673 (1971); System Fed'n No. 91 v. Wright, 364 U.S. 642 (1961). Moreover, many prison reform suits are litigated as class actions, and Federal Rule of Civil Procedure 23(e) requires court approval of any settlement involving a class. FED. R. CIV. P. 23(E).

19. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579, 584; *see also* Note, *supra* note 1, at 1020 n.2 ("A consent decree is a compromise reached by two parties that is approved by a judge. It is thus a hybrid of a judicial order and a private contract. The parties themselves fix the terms of a consent decree, typically after lengthy negotiations, and a judge adds his signature to the pact.") An example of a consent decree is attached as an appendix to Kendrick v. Bland, 541 F. Supp. 21 (W.D. Ky. 1981).

20. *See System Fed'n*, 364 U.S. 642; Duran v. Elrod, 760 F.2d 756, 760 (7th Cir. 1985); Note, *supra* note 1, at 1027 n.41.

21. *See* Pennhust State School & Hosp. v. Halderman, 465 U.S. 89 (1984); Washington v. Penwell, 700 F.2d 570, 573 (9th Cir. 1983); *see also supra* note 4.

22. *See* United States v. American Cyanamid Co., 719 F.2d 558, 563 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *Penwell*, 700 F.2d at 575; *see also* Jost, *supra* note 2, at 1144.

23. *See infra* note 118 for a discussion of the significance of interpreting the decree's purpose.

24. *System Fed'n*, 364 U.S. 642; United States v. Swift & Co., 286 U.S. 106 (1932).

25. United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 n.10 (1975); *see* Anderson, *supra* note 19, at 584-86; Jost, *supra* note 2, at 1103; *see also supra* note 19 and

are interpreted primarily through contract law and and then by resort to principles of equity.[26] Finally, some courts and commentators suggest that consent decrees should be more difficult to modify than litigated injunctions.[27]

Consent decrees are used frequently in prison reform litigation,[28] and have been more popular than litigated injunctions[29] for several reasons. A consent decree allows structural change to be made relatively quickly, rather than awaiting the end of litigation.[30] The defendants' attitude toward compliance may be better with a consent decree than a coercive judicial decree.[31] A consent decree may save public money and avoid the risk of publicity from an adverse civil rights judgment.[32] Settlement also saves judicial resources.[33] Finally, the parties can achieve more individualized relief when they negotiate the terms of the decree because they are more familiar than the judge with all the nuances of the conflict.[34]

Consent decrees also have some drawbacks. In entering into a decree, the defendant state officials agree to changes that may not be constitutionally required. Increased concessions by the defendants require more extensive monitoring by the court. This monitoring can be more expensive than the cost of a litigated judgment with an order providing for only the minimum constitutional remedy. Moreover, the implementation phase can become so complex, based on the detailed terms in the consent decree, that more court time is absorbed than if the case had been litigated originally. Finally, a consent decree has drawbacks in that the defendant gives the plaintiffs contractual rights

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accompanying text.

26. *American Cyanamid*, 719 F.2d at 564; *Penwell*, 700 F.2d at 573.

27. Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980); *see* Jost, *supra* note 2, at 1129 n.173, 1162. The significance of this final distinction is considered in the discussion of modification. *See infra* notes 113-23 and accompanying text.

28. *See, e.g.*, Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983). Federal courts are currently managing corrections systems under consent decrees in thirty-four states. 19 CORRECTIONS DIGEST No. 5, at 1 (Mar. 19, 1988).

29. *See* Anderson, *supra* note 19, at 580-82; Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 401, 402 (1987) [hereinafter Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*] (consent decrees have become widely used over the last thirty years).

30. *See* Anderson, *supra* note 19, at 580-82.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

above the legal minimum and thereby relinquishes more control over the penal system.

Once the injunction is entered, either by consent or after trial, the implementation phase begins.[35] Implementation usually involves disputes over interpretation of terms and allegations of noncompliance. If a dispute over terms arises, the court will first interpret the decree to clarify the obligations of the parties.[36] Then, if allegations of noncompliance are made, the court has several enforcement options. The first step usually involves judicial threats,[37] sometimes coupled with a specific compliance order.[38] If noncompliance continues, the court may hold a party in civil contempt.[39] One important limitation on this enforcement option is that impossibility is a defense to a civil contempt citation.[40] If noncompliance continues, the more drastic enforcement powers of the court are to order a release of inmates[41] or to close a facility.[42] These measures are a last resort that courts are reluctant to use.[43]

II. Defining the Standard for Modification of Injunctions

Modification of structural injunctions in institutional reform lawsuits has recently received much attention from both courts[44] and com-

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35. *Id.* at 583.

36. *See, e.g.*, United States v. Armour & Co., 402 U.S. 673 (1971); United States v. Atlantic Ref. Co., 360 U.S. 19 (1959); Hughes v. United States, 342 U.S. 353 (1952).

37. *See* Special Project, *supra* note 1, at 838 & n.449.

38. *See, e.g.*, Morris v. Travisono, 373 F. Supp. 177 (D.R.I. 1974) (court enjoined defendant from continued violations of original consent decree), *aff'd*, 509 F.2d 1358 (1st Cir. 1975).

39. *See, e.g.*, Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984); Gomes v. Moran, 605 F.2d 27 (1st Cir. 1979); Jordan v. Arnold, 472 F. Supp. 265 (M.D. Pa. 1979), *appeal dismissed*, 631 F.2d 725 (3d Cir. 1980); *see generally* Special Project, *supra* note 1, at 838-41.

40. United States v. Bryan, 339 U.S. 323, 330-31 (1950) (ordinarily, one charged with contempt makes a complete defense by proving that he is unable to comply); Maggio v. Zeitz, 333 U.S. 56, 72-77 (1947) (a contempt order should not issue if there is a present inability to comply); Brotherhood of Locomotive Firemen v. Bangor & A.R.R., 380 F.2d 570, 581 (D.C. Cir. 1967) (inability to comply is a defense in coercive contempt proceedings); *see generally* Special Project, *supra* note 1, at 839.

41. *See, e.g.*, *Newman*, 740 F.2d at 1520-22.

42. Inmates v. Eisenstadt, 360 F. Supp. 676, 689-91 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974).

43. *See, e.g.*, *Newman*, 740 F.2d at 1521 (release of prisoners only required if state cannot continue confinement in constitutional facility).

44. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987); Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985); *Newman*, 740 F.2d 1513; Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983); Gomes v. Moran, 605 F.2d 27 (1st Cir. 1979).

mentators.[45] This spate of attention is due to conflicting signals from the courts regarding the standard for granting modification.

A. *The Original Standard for Modification*

The original standard for modifying permanent injunctions was formulated and developed in four Supreme Court cases.[46] The leading case is *United States v. Swift & Co.*,[47] a Sherman Act antitrust action brought to dissolve a monopoly of five meat-packers. The parties entered into a consent decree in 1920 that enjoined the defendants from maintaining a monopoly and from engaging in, or continuing, any combination in restraint of commerce.[48] The decree explicitly defined prohibited conduct. A permanent injunction was ordered, and the court retained jurisdiction to enforce the order.[49]

Ten years later, the defendants petitioned the court to modify the consent decree to accommodate industry changes.[50] The language of the consent decree specifically granted the court the power to modify the decree,[51] but the Supreme Court noted that even if the authority to modify had not been included in the decree, principles of equity would permit modification.[52] It stated that this authority exists regardless of whether the injunction was entered subsequent to litigation or by consent, and that equity demands that a court order not become an instrument of wrong so that the original purpose is defeated.[53] The Court concluded:

> We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in

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45. *See, e.g.*, Jost, *supra* note 2; Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification and Dissolution*, 66 CORNELL L. REV. 27 (1980); Comment, *Judicial Modification of Consent Judgments in Institutional Reform Litigation*, 50 BROOKLYN L. REV. 657 (1984); Note, *supra* note 1.

46. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); System Fed'n No. 91 v. Wright, 364 U.S. 642 (1961); United States v. Swift & Co., 286 U.S. 106 (1932). A fifth Supreme Court case, United States v. United Shoe Mach. Corp., 391 U.S. 294 (1968), is discussed in text accompanying notes 114-16. For an extensive analysis of this line of cases, see Jost, *supra* note 2, at 1107-13, 1121-23, 1152-61; Steinberg, *supra* note 45, at 41-43, 47-50; Comment, *supra* note 45, at 671-73; Note, *supra* note 1, at 1022-26.

47. 286 U.S. 106 (1932).

48. *Id.* at 111.

49. *Id.*

50. *Id.* at 113-14.

51. *Id.* at 114.

52. *Id.*

53. *Id.* at 114-15.

> changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting . . . . The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow . . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.[54]

Applying this standard, the Court held that modification was not warranted because there had not been a sufficient change in industry conditions.[55]

The next two Supreme Court cases involved modification of a permanent injunction based on a change in the underlying substantive law. In *System Federation No. 91 v. Wright*,[56] a consent decree was entered that enjoined a railroad and various labor unions from discriminating against any plaintiff. The decree referred to provisions established in the Railway Labor Act,[57] which at that time barred union shops. After the consent decree was entered, the Railway Labor Act was amended by Congress to permit union shops.[58] In response to the amendment, the unions moved for modification of the consent decree.[59] The modification was denied by the district court and the Sixth Circuit affirmed.[60]

The Supreme Court reversed, finding that the Railway Labor Act provided the basis for the consent decree and guided the formulation of its terms.[61] The Court determined that when Congress amended a substantive portion of the Act referred to in the consent decree, circumstances were so changed that the lower court was erroneous in denying modification.[62] Under the *Swift* analysis, the circumstances had so changed that the decree had become an instrument of wrong.[63] The Court stated that because the Railway Labor Act was the source of the

54. *Id.* at 119.
55. *Id.* at 115-20.
56. 364 U.S. 642 (1961).
57. *Id.* at 644.
58. *Id.*
59. *Id.* at 644-45.
60. *Id.* at 645-46.
61. *Id.* at 652-53.
62. *Id.* at 648.
63. *Id.* at 650-51.

consent decree, "[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives."[64]

In *Pasadena City Board of Education v. Spangler*,[65] the Supreme Court examined whether a change in the law effected through a judicial decision rather than a legislative amendment was sufficient to warrant modification. The district court had determined that the Pasadena schools were unconstitutionally segregated, and ordered the school board to devise and adopt a plan to redress the racial imbalance, including a provision prohibiting a majority of minority students from attending any one school.[66] The board devised such a plan, and the parties and court accepted it. Four years later, the school board moved to modify the "no majority" provision of the plan because it would require rearranging the school zones annually. The district court denied modification on the ground that in every year but the first one, the school board had failed to comply with the literal terms of the order. The Ninth Circuit affirmed the denial of modification.[67]

The Supreme Court reversed the court of appeals and held the denial of modification to be error.[68] After the trial court's decision in *Pasadena*, the Supreme Court had decided *Swann v. Charlotte-Mecklenburg Board of Education*,[69] which disapproved of precise racial balancing. *Swann* created a substantive conflict with the terms of the *Pasadena* desegregation plan, and the denial of modification was therefore an abuse of discretion.[70]

Firefighters Local Union No. 1784 v. Stotts[71] is the most recent Supreme Court decision on the authority of courts to modify consent decrees. In *Stotts* a consent decree had been entered to increase the hiring of minorities as fire fighters in Cincinnati. The city later proposed a layoff plan that had a discriminatory impact. Although the consent decree made no reference to layoff plans, the district court nonetheless enjoined use of the plan on the basis that it would undermine the purpose of the consent decree.[72]

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64. *Id.* at 651-52.
65. 427 U.S. 424 (1976).
66. *Id.* at 427-28.
67. *Id.* at 429.
68. *Id.* at 438-41.
69. 402 U.S. 1 (1971).
70. 427 U.S. at 433-35. *See also* United States v. Georgia Power Co., 634 F.2d 929, 934 (5th Cir. 1981) (modification allowed based on change in common law), *vacated sub nom.* Local Union No. 84, Int'l Bhd. of Elec. Workers v. United States, 456 U.S. 952 (1982).
71. 467 U.S. 561 (1984).
72. *Id.* at 567.

The Supreme Court found that the lower court had gone beyond the terms of the consent decree when it enjoined the layoff plan.[73] The injunction was not authorized by the consent decree, and it exceeded the decree's purposes. The Court reasoned that the injunction was essentially an unauthorized modification of the consent decree,[74] and courts cannot grant modification without consent of the parties or a showing of changed circumstances that satisfies the requirements of *Swift*. Here, neither condition was met, so the injunction was error.

These four cases indicate the Supreme Court's position with respect to modification of injunctions. If the underlying law, whether statutory or decisional, changes so as to render the injunction inconsistent with the law, modification should be granted. If no change of law has occurred, *Swift* sets the standard for determining when modification is available.[75] *Stotts* made no change in *Swift* but rather indicated its continued vitality.[76] The Supreme Court's adherence to *Swift* and its hostility to modification continues.[77]

B. *A Freer Standard for Modification in the Circuit Courts*

In contrast with the Supreme Court's attitude, several circuit courts have endorsed a more lenient standard for granting modification of consent decrees. The two leading cases articulating the new standard are institutional reform cases, but do not involve prisons. In 1979, the Third Circuit allowed modification of a consent decree in *Philadelphia Welfare Rights Organization v. Shapp*.[78] The court stated:

> Where an affirmative obligation is imposed by court order on the assumption that it is realistically achievable, the court finds that the defendants have made a good faith effort to achieve the object by the contemplated means, and the object nevertheless has not been fully achieved, clearly a court of equity has power to modify the injunction in the light of experience.[79]

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73. 467 U.S. at 573-75.
74. *Id.*
75. Furthermore, this standard is codified in FED. R. CIV. P. 60(B)(5), governing relief from judgments. United States v. City of Chicago, 663 F.2d 1354, 1359 n.16 (7th Cir. 1981), *cert denied sub nom.* Augustus v. United States, 107 S. Ct. 1291 (1987). *See generally* Comment, *supra* note 45, at 670 n.74.
76. Steinberg, *supra* note 45, at 43, 59.
77. Note, *supra* note 1, at 1022, 1031.
78. 602 F.2d 1114 (3d Cir. 1979).
79. *Id.* at 1120-21.

In 1983, the Second Circuit reached a similar conclusion in *New York State Association for Retarded Children v. Carey*,[80] allowing modification of a consent decree that required a public home for the mentally retarded to move patients to smaller community facilities. The city argued that the limited housing market made community placement facilities impossible. The court stated that "[i]t is well recognized that in institutional reform litigation such as this, judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves . . . ."[81] *Shapp* and *Carey* were both decided before *Stotts*, therefore, their significance is diminished. Yet even after *Stotts* was decided, courts continue to cite these cases as leading precedents.[82]

C. *Prison Cases in the Circuit Courts: Basic Adherence to the Swift/Stotts Standard*

Although the Supreme Court has never defined the standards for modification specifically in the context of prison reform litigation, several circuit courts have addressed this issue. The early decisions apply the strict standards established in *Swift* and its progeny to the modification requests. For example, in *Mayberry v Maroney*,[83] the Third Circuit reversed the district court's grant of modification on the ground that the record showed no evidence of the "changed circumstances" required by *Swift*.[84] Similarly, in *Gomes v. Moran*,[85] the First Circuit endorsed a modification, but only because intervening judicial decisions rendered the decree inconsistent with the law.[86] The case thus fell within the *System Federated-Pasadena* change of law doctrine.

In contrast, some of the later circuit court prison reform decisions seem to endorse the more flexible approach to modification articulated in *Shapp* and *Carey*. In *Newman v. Graddick*,[87] the Eleventh Circuit stated that "modification can be considered when . . . significant time has passed and objectives have not been met, . . . continuance is no longer warranted, . . . [or] continuation would be inequitable."[88] The

80. 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).
81. *Id.* at 969.
82. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987) (per curiam); Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985).
83. 558 F.2d 1159 (3d Cir. 1977).
84. *Id.* at 1163-64.
85. 605 F.2d 27 (1st Cir. 1979).
86. *Id.* at 30-31.
87. 740 F.2d 1513 (11th Cir. 1984).
88. *Id.* at 1520 (citations omitted).

court characterized the decree as provisional and tentative, stating that "[t]he question is whether conduct or conditions have changed that would justify modification."[89] Consequently, the court remanded the case for reconsideration of modification under these standards.[90]

In 1985, the Seventh Circuit recognized a flexible modification standard in *Duran v. Elrod*.[91] Relying on *Carey*, *Shapp*, and *Newman*, the court stated that "recent decisions have suggested that a more liberal standard than that laid down in *Swift* for exercising the power to modify . . . is appropriate in the case of decrees supervising public institutions . . . ."[92] The court held, however, that a choice between old and new modification standards was unnecessary because the district court's decision was error under either standard.[93]

Most recently, in *Ruiz v. Lynaugh*[94] the Fifth Circuit recognized the emergence of a "less demanding standard for modification of consent decrees . . . within the institutional reform arena."[95] The court defined the less demanding standard as an approach that permits modification even if the *Swift* requirements are not met. It stated that defendants who "establish some change in circumstance," who show that they have made a good faith effort to comply with the decree, and who request "a modification that does not frustrate the original and overall purpose(s) of the decree," meet the standard for modification.[96] However, as in *Duran*, the court held that a choice between old and new modification standards was unnecessary because the district court's decision was correct under either standard.[97] The emergence of this flexible approach to modification of injunctions is related to the unique characteristics of institutional reform lawsuits and the structural injunctions they generate. The courts have limited their endorsement of the more flexible standard to this type of case.[98]

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89. *Id.*
90. *Id.* at 1521.
91. 760 F.2d 756 (7th Cir. 1985).
92. *Id.* at 758.
93. *Id.*
94. 811 F.2d 856 (5th Cir. 1987).
95. *Id.* at 861.
96. *Id.* at 861 n.8.
97. 811 F.2d at 862. In *Duran*, the district court's refusal to modify was held erroneous under either standard, *see supra* notes 91-93, whereas in *Ruiz*, the district court's refusal to modify was correct under either standard, *see supra* notes 94-96.
98. In *Ruiz*, the Fifth Circuit stated that "[c]ourts and commentators have asserted that the unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification," *Ruiz*, 811 F.2d at 861, while in *Duran*, the Seventh Circuit referred to "decrees

Some commentators have endorsed the more liberal modification standard for institutional reform litigation as well.[99] One commentator analyzed the distinctive traits of institutional reform litigation and identified three characteristic features: the speculative and complex quality of relief, the role of the government as original defendant, and the effect of the litigation on nonparties.[100] That commentator argued that each of these characteristics militates for a more flexible approach to modification.[101]

Although the language of *Newman*, *Duran*, and *Ruiz* suggests that the standards for granting modification may be becoming more flexible, closer scrutiny of the cases reveals adherence to the strict *Swift—Stotts* standard. The *Duran* and *Ruiz* courts acknowledged the existence of a more flexible standard, but neither court applied the "new" standard because it would not have changed the outcome of either case.[102]

The more ambiguous opinion is *Newman v. Graddick*,[103] where the court cites *Carey* and indicates that a more flexible standard may be applicable to prison reform consent decrees.[104] The court discusses the flexible standard, but concludes only that the question is "whether conduct or conditions have changed that would justify modification."[105] The reference to changed conditions is very similar to the terminology used by the *Swift* Court, so *Newman* can be interpreted to comport with *Swift*. However, the *Newman* court's phrasing seems to temper or dilute the shrill language of *Swift*, which provided that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" would justify modification.[106] Moreover, the ambiguity is exacerbated because the Eleventh Circuit does not apply either standard to the record in the case, but rather remands for consideration by the district court. Thus *Newman* sends mixed signals and cannot be

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supervising public institutions . . . ." *Duran*, 760 F.2d at 758.

99. *See, e.g.*, Jost, *supra* note 2, at 1146; Note, *supra* note 1, at 1039; *cf.* Steinberg, *supra* note 45, at 71 (neither the *Swift* standard nor lower court formulations are necessarily the appropriate standard; rather, courts should engage in *ad hoc* balancing test). *But see* Comment, *supra* note 45, at 677 (no consensus among commentators for modification under "freer hand" standard).

100. Note, *supra* note 1, at 1033-37.

101. *Id.* at 1033-39.

102. *See supra* note 97 and accompanying text.

103. 740 F.2d 1513 (11th Cir. 1984).

104. *See supra* note 89 and accompanying text.

105. 740 F.2d at 1520.

106. United States v. Swift, 286 U.S. 106, 119 (1932).

interpreted to establish a more flexible approach to modification.

More confusing yet is the Ninth Circuit's decision in *Washington v. Penwell*,[107] where state officials entered into a consent decree that required them to fund nine months of legal services for the inmates and to formulate plans for the provision of such legal services in the future.[108] When a dispute arose over these provisions, the district judge modified the decree to eliminate them, declared that the purpose of the consent decree had otherwise been met, and terminated the litigation.[109] The Ninth Circuit affirmed the modification,[110] explaining that the Constitution did not mandate the provision of legal services to the extent provided for in the consent decree.[111] The district judge applied a very liberal standard of modification, and the Ninth Circuit affirmed the decision. This case is an aberration that is irreconcilable with the others. Careful scrutiny of the other cases reveals the continued vitality of the *Swift* standard. Thus, while courts discuss a more relaxed standard, none has explicitly relied on that standard.[112]

D. *Distinctions in the Standards for Modification of Consent Decrees and Litigated Injunctions*

Up to this point, fully litigated injunctions and consent decrees have been treated as interchangeable, but a subsidiary issue is whether the modification standards for the two types of orders are the same. The courts have not provided a clear answer. In *Swift*, the Court stated that "[a] continuing decree of injunction directed to events to come is

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107. 700 F.2d 570 (9th Cir. 1983).

108. *Id.* at 572.

109. *Id.*

110. *Id.* at 574.

111. Consent decrees generally require the defendants to do more than the constitution mandates. *See supra* notes 20-21 and accompanying text. The court's conclusion that modification was warranted because the consent decree provisions in question were not constitutionally required is odd and has drastic implications for the continued vitality of consent decrees. The implications of this case are currently the focal point in Duran v. Carruthers, 678 F. Supp. 839, 851 (D.N.M. 1988). The district court recently denied a motion by the defendants to vacate major portions of the consent decree on the basis that its provisions were not constitutionally required. For authority, the defendants cited *Penwell*. In ruling against the defendants, the district court made a valiant effort to distinguish *Penwell*. *See Duran*, 678 F. Supp. at 851 n.23. The defendants filed notice of appeal on March 10, 1988. Prison officials are watching this case closely.

112. The difference between talk and action was recognized by Judge Hill in Ruiz v. Lynaugh, where he specifically lamented the panel's reluctance to adopt explicitly the flexible approach. He wrote, "I believe we should explicitly endorse the flexible approach for modification of instituitional reform consent decrees as a guide for district courts involved in on-going and future public law litigation." 811 F.2d 856, 863 (5th Cir. 1987) (Hill, J., concurring).

subject always to adaptation . . . . The result is all one whether the decree has been entered after litigation or by consent. In either event, a court does not abdicate its power to . . . modify its mandate."[113] This language clearly indicates that there is no distinction between consent decrees and litigated injunctions for purposes of modification. The water was muddied, however, in 1968 when the Court decided *United States v. United Shoe Machinery Corp.*[114] In *United Shoe*, the Court allowed modification of a fully litigated injunction and distinguished *Swift* on the basis that "the defendants [in *Swift*] sought relief not to achieve the purposes of the provisions of the decree but to escape their impact."[115] *United Shoe* seems to allow modification more freely than *Swift*, but the extent of the holding is uncertain. Although the Court did not explicitly limit its holding to litigated injunctions, some commentators have concluded that the law announced in *United Shoe* extends only to litigated injunctions.[116]

There is uncertainty whether a distinction exists in the standards for modifying consent decrees and litigated injunctions, and if a distinction does exist, whether it should render modification of consent decrees more or less difficult than modification of litigated injunctions.[117] *Swift* seems conclusive that no distinction exists; however, *United Shoe* provides some basis for concluding that the Supreme Court recognizes

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113. United States v. Swift & Co., 286 U.S. 106, 114 (1932) (citations omitted).

114. 391 U.S. 244 (1968). *See generally* Jost, *supra* note 2, at 1119; Steinberg, *supra* note 45, at 47-48; Note, *supra* note 1, at 1024-26.

115. 391 U.S. at 249.

116. *See, e.g.*, Note, *supra* note 1, at 1025 n.33.

117. One recent analysis of modification standards for litigated injunctions and consent decrees is provided by Professor Jost. *See* Jost, *supra* note 2. He distinguishes consent decrees from litigated injunctions and contends that courts should be more hesitant to modify consent decrees than litigated injunctions for the following reasons: (1) A consent decree is a contract and is, therefore, presumably the most efficient allocation of risk; (2) easy modification of consent decrees would frustrate the parties and, therefore, deter settlement; (3) strict modification standards compel the parties to bargain with each other, which is preferable to judicial modification because the parties have superior knowledge of the facts; and (4) it is more difficult to discern the original intent behind a consent decree than a litigated injunction, therefore, it is more difficult for the court to modify a consent decree to facilitate the original intent. *Id.* at 1124-30, 1142-45, 1162; *see also* Steinberg, *supra* note 45, at 65 & n.188. Although Professor Jost writes that consent decrees should be more difficult to modify, he points out that modification must still be available for consent decrees. Jost, *supra* note 2, at 1146-47, 1162. Otherwise, one danger of a judicial standard that makes modification significantly more difficult to establish for consent decrees than fully litigated orders would be to deter parties from settling their lawsuits. *See* Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

a distinction in modification standards.[118] While no circuit court has considered the question directly, some circuits have hinted at support for a distinction. One Third Circuit decision[119] and one Ninth Circuit decision[120] seemed to consider the question of whether the injunction was litigated or consensual to be a relevant factor in the modification analysis. Notwithstanding the fact that these courts agreed that the type of injunction is relevant, they disagreed on what impact the distinction should have. The Third Circuit hinted that a consent decree is more difficult to modify,[121] while the Ninth Circuit implied that a consent decree is easier to modify, at least as to those terms in the decree not constitutionally required.[122] However, the language from the Third

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118. One factor courts often cite in deciding whether modification is warranted is whether conditions have changed so much that the injunction is no longer serving its original purpose. *See generally* Jost, *supra* note 2, at 1142-48 (modification to effectuate the rights of the beneficiary as one form of flexibility). The relevance of this factor was first suggested in *Swift* where the Court stated that a court may modify an order "if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." United States v. Swift & Co., 286 U.S. 106, 114-15 (1932). Later, the Supreme Court interpreted *Swift* explicitly to establish the role of the injunction's purpose. In *United Shoe*, the Court stated: "Swift teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendant if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968). Many of the circuit courts have relied on this "purpose analysis" as one factor in deciding prison modification questions. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856, 861 n.8 (5th Cir. 1987) (per curiam); Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984); Nelson v. Collins, 659 F.2d 420, 423-24 (4th Cir. 1981).

This approach has one drawback. To determine whether the injunction is still serving the litigated purpose, the purpose must be identified. While litigated decrees have a clear purpose (for example, in *United Shoe*, the elimination of monopoly practices), consent decrees are just contracts between parties, which often do not have an identifiable purpose. *See* United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); Washington v. Penwell, 700 F.2d 570, 575 (9th Cir. 1983). *See generally* Jost, *supra* note 2, at 1143-44. Thus, the courts' analyses of whether an injunction is still serving its purpose may be helpful for modifying litigated injunctions, but it creates confusion for modifying consent decrees. The point is not that the courts' reliance on the purpose of the injunction renders modification easier for one type of injunction or another, but only that the "purpose analysis" tends to reinforce distinctions between litigated injunctions and consent decrees.

119. *Shapp*, 602 F.2d at 1120.

120. *Penwell*, 700 F.2d 570; *see supra* notes 107-12 and accompanying text.

121. The court stated: "And where, as here, the defendants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden under Rule 60(b) is *perhaps* even more formidable than had they litigated and lost." 602 F.2d at 1120 (emphasis added).

122. The Ninth Circuit affirmed a district court's modification of a consent decree where the trial judge had eliminated a provision requiring the funding of legal services for prison inmates on the grounds that it was not mandated by the Constitution. The court ruled that the prison officials who had consented to the provision had exceeded their authority, and thus implied that modification of a consent decree is easily available for terms not constitutionally required.

Circuit is only a hint,[123] and the Ninth Circuit decision is not explicit, so the law remains unclear.

E. *The Preferable Modification Standard for Litigated Injunctions and Consent Decrees*

The modification standard applied by the courts remains strict, and confusion surrounds the question of whether to distinguish litigated and consensual orders. What is the most desirable approach? The courts' adherence to the strict *Swift* modification standard for both types of injunctions is wise policy. In the case of litigated injunctions, the trial provides a full record of all the facts. Both parties have an opportunity to raise all their claims and defenses. After the court enters judgment, the parties have the opportunity for appellate review. Thus, both parties have access to all the facts and all the questions have been fully examined. The result of this careful effort should not be set aside short of a dramatic change in conditions—the situation accommodated in *Swift*.

With consent decrees, negotiations do not begin until discovery is well under way. Extensive discovery allows both parties access to all the facts. The parties are represented by counsel engaged in arms-length negotiations, and they enter the agreement voluntarily, with their eyes open. As with litigated injunctions, neither party must take any risks based on ignorance. The parties have a duty to anticipate reasonable future changes, and if either side makes what turns out to be a bad bargain, it should not be relieved simply because they did not predict the future accurately. Short of drastic change, the parties should assume the risk of their own misjudgments; they should be allowed relief only when they can meet the rigorous standard of *Swift*.

These policies are not affected because one of the litigants happens to be the state. The eleventh amendment prohibits lawsuits against a state directly, so these conditions suits are filed against the individual state officers in their official capacity.[124] Defendants have argued that an injunction entered against their predecessors cannot bind them.[125] This argument has been rejected by the courts,[126] and wisely so. Two drawbacks would arise from endorsing such a loophole. First, the de-

123. *See supra* note 121.
124. *See Penwell*, 700 F.2d at 573 n.3, 574 and cases cited therein.
125. *See, e.g.*, Newman v. Graddick, 740 F.2d 1513, 1517-18 (11th Cir. 1984); Duran v. Carruthers, 678 F. Supp. 839, 851 (D.N.M. 1988).
126. *See, e.g., Newman*, 740 F.2d at 1517-18.

fendants could easily avoid the court order by changing personnel. Second, this approach would create an incentive to change state officers, thereby undermining professionalism and continuity. Furthermore, as a policy matter, state officials should not be held to a lesser standard on their errors in judgment than private litigants. State officials are not under any special or particular disability that would militate for different treatment; they should bear the risk of their mistakes like any other party. Thus, the law does not treat state officials differently, and it should not. Standards for modification should not be readjusted because one of the parties is the state.

Finality in the terms of these prison injunctions is important for reasons unrelated to whether the injunction is agreed upon or litigated. The goal of these lawsuits is dissolution—to get the defendants in compliance with the law and the court out of the prison business. Progress towards this goal is undermined if modification is readily accessible, because if modification is always an option, the defendants can hardly avoid being less committed in their compliance efforts. For example, if the state legislature denies corrections officials funding to ease overcrowding, those officials will be less prone to insist on the funding and more prone to consider the alternative of seeking modification of the injunction. A strict modification standard forces both parties to prioritize their interests and choose their battles judiciously, without relying on the availability of modification. Moreover, forcing parties to shoulder the risk of their own misjudgments creates an incentive for the parties to be cautious, both in negotiating or litigating. The strict modification standard also keeps modification motions to a minimum, thus easing the burden on the courts. Finally, for intractable issues, there is always the option of the parties themselves agreeing to modify the injunction. If the defendant has a serious problem with a term in the injunction, it will often be a problem for the plaintiff as well. Even if that term is not a problem for the plaintiff, there may be another provision on which the plaintiff needs a compromise. For intractable situations, these private compromises are available solutions regardless of the legal standard for modification. This option of a private response indicates further that freer modification is not necessary. Actually, the strict modification standard promotes cooperation and compromise between the parties.

Accordingly, no distinction should be made between modification of litigated injunctions and consent decrees, not because a distinction is per se unwise, but because both types of injunction independently call

for application of the strict modification standard.

III. Defining the Dissolution Standard

A. *Background*

The term dissolution, as used in this article, refers to the court's action in dissolving the injunction. The impact of dissolution differs slightly for a consent decree and a litigated injunction. With a consent decree, dissolution ends the contract. No contract would exist without the court's approval;[127] once the court dissolves the decree, the contract is deemed performed and neither party has any further duties under it. The defendant retains the duty to comply with the law but has no duty to do more than the law requires.

A litigated injunction is more complex. As noted above, a litigated injunction can only compel the defendants to do the minimum required by the law,[128] that is, run a constitutional prison. Theoretically, dissolution of that injunction would have no impact because it imposes no additional duty: The defendant is always required to comply with the law. Thus, dissolution of a litigated injunction would be a pointless step if the injunction merely ordered the defendants to run a constitutional prison. But the injunctions that courts enter after litigation are actually more detailed. They do not merely order a prison to operate constitutionally; rather, the court selects a specific manner in which the prison can achieve constitutionality and orders the defendants to pursue that particular approach. Constitutionality can be achieved on any given point in a number of ways, but when a court enters an injunction after litigation, the defendant loses the choice and the court selects the method. Dissolution of such specific injunctions does have an impact because once it is dissolved, the defendants can choose their own approach to achieving constitutionality rather than having one imposed upon them.

On the other hand, courts entering litigated injunctions will sometimes allow the corrections officials to help define the terms of the injunction. A court faced with entering an injunction after prison conditions have been found unconstitutional may give the defendants an opportunity to submit a plan to cure the problem. This approach appeals to the courts because it undermines the defendants' potential

127. *See supra* note 18.

128. *See supra* note 21 and accompanying text.

claims of overintrusiveness[129] and makes it awkward for the defendants to complain about the content of the injunction. When the court takes this approach, the impact of dissolution on the defendant is reduced because the impact of the injunction was minimized. Because it was a litigated injunction, it only ordered the defendants to provide the constitutional minimum, and because the judge allowed the defendant to participate in defining the cure, the defendant had some input into the remedy.

Dissolution has another impact on the defendant as a practical matter. The injunction imposes an administrative burden on the defendants because the court supervision involves a workload in the form of responses to allegations of noncompliance, correspondence with the parties and the court, and other miscellaneous matters. Dissolution eliminates this workload. This impact of dissolution operates equally for consent decrees and litigated injunctions.

Accordingly, dissolution of either type of injunction leaves defendants with the duty to comply with the law and no more, and leaves to the defendants the choice of how to achieve that compliance. In addition, dissolution further relieves the administrative burden on the defendants.

Relinquishment of jurisdiction refers to the court's action in terminating its supervision over the prison and formally ending the litigation. The relationship between dissolution and relinquishment of jurisdiction has not been carefully analyzed. Courts have not distinguished the issues. If the questions are approached separately, it is clear that the question of whether the court should retain or relinquish jurisdiction is controlled by the question of whether the court has dissolved the injunction. If the injunction is dissolved, there is no point in the court retaining jurisdiction over the prison and the court should relinquish jurisdiction. If the injunction has not been dissolved, the court should obviously retain jurisdiction to monitor compliance. Thus, the real question is whether the court should dissolve the injunction, and there is no reason to address relinquishment of jurisdiction as a discrete issue.[130] Because courts have not distinguished the issues of dissolution

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129. *See infra* note 133.

130. *Cf.* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees*, *supra* note 29. Professor Anderson considers the questions of dissolution and relinquishment of jurisdiction to be separate questions. *Id.* at 413. He does not analyze the standards for dissolution of injunctions. Rather, he assumes that the injunction has not been dissolved, and analyzes two questions: When should the court release jurisdiction? And if the court does release jurisdiction and noncompliance recurs, how can the court resume jurisdiction? Professor Anderson's assumed sce-

and relinquishment of jurisdiction, and because there is no reason to do so, this article treats these questions together.

Unlike modification, the question of when dissolution is appropriate has not received much attention. Few courts have considered the issue,[131] and commentators have not generally analyzed the dissolution and modification issues independently.[132] However, dissolution is a distinct issue because it raises concerns not implicated by modification. Specifically, the duration of the injunction and concomitant court supervision raises issues of federalism. Federal courts intervening into areas of state power, like state prison systems, operate under constitutional limits designed to minimize the intrusiveness of the remedy.[133] The potential for overintrusiveness flowing from excessive federal court supervision distinguishes dissolution from modification.[134]

Once an injunction is entered, either through consent or after litigation, courts routinely retain jurisdiction of the lawsuit to supervise the implementation phase.[135] The court retains jurisdiction for several purposes: Retention allows the court to consider remedial questions as they arise without new suits being filed; it allows the court to supervise compliance with the injunction generally; and it signals the parties that the court will continue to be involved—a signal with symbolic value.[136]

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nario—that dissolution of the injunction is not warranted but the court might nonetheless release jurisdiction to monitor compliance—is unlikely. If the standards for dissolution are not met, why would the court give up jurisdiction? The assumption makes some sense when the author provides his definition of release of jurisdiction. His definition is that such release does not really terminate jurisdiction or the litigation, but merely places the case on inactive status, *id.* at 413, a step that ends only the court's active supervision. *Id.* at 404. Thus, a situation could be imagined where the parties are not entitled to dissolution of the injunction, but the court nevertheless feels safe in limiting its active supervision. In contrast, in this article, the phrase "relinquish jurisdiction" does not mean put on inactive status or relinquish active monitoring; instead it means completely terminate supervision and formally end the litigation. With this definition of relinquishment, there is no point in analyzing relinquishment of jurisdiction separately from dissolution. If the injunction is not dissolved, the court should retain jurisdiction. If the injunction is dissolved, the court should terminate jurisdiction. The only real question is should the injunction be dissolved.

131. *See infra* notes 140-49 and accompanying text.

132. *See* Jost, *supra* note 2, at 1105 n.30; Steinberg, *supra* note 45, at 41-73. *But see* Special Project, *supra* note 1, at 817-21 (discussion of modification), 842-44 (separate discussion of dissolution).

133. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979); Rizzo v. Goode, 423 U.S. 362 (1976); Procunier v. Martinez, 416 U.S. 396 (1974).

134. *See generally* Special Project, *supra* note 1, at 866-69. The author points out that the Supreme Court has never reversed a remedial scheme solely on the basis of constitutional overintrusiveness, but has expressed its concern in several cases. *Id.* at 868.

135. *Id.* at 816-17.

136. *Id.*; *see also* M. HARRIS & D. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 17-20 (1977).

Jurisdiction is usually retained for an indefinite period,[137] and unless the decree has an expiration date written into its terms,[138] it remains in effect until it is dissolved. Thus, some action is required or the decree and court supervision will continue indefinitely. How do these lawsuits end? Some, of course, just lapse into a dormant state from lack of attention, but occasionally parties move to dissolve the injunction.[139] In these cases the courts must define when a particular piece of prison litigation should end.

B. *The Standard: Assessing the Risk of Future Noncompliance*

1. Case Law

The Supreme Court has never addressed the dissolution issue in the context of a prison conditions or an institutional reform case. The closest Supreme Court authority is *United States v. W. T. Grant Co.*,[140] a case in which the United States sought an injunction under the Clayton Act against an individual who held interlocking directorates in competing corporations. Prior to the issuance of the injunction, the individual resigned the relevant directorates. The question was whether the district court had the power to grant the injunction when the illegal conduct had been discontinued. The Court held that the district court did retain that power, notwithstanding that there was no "danger of recurrent violation." The Court stated that the relevant factors to consider were: the "bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, . . . the character of the past violations."[141] *W.T. Grant* is analogous to prison reform cases in that the illegal conduct had been discontinued, and the question was the power of the court to enjoin potential illegality. *W.T. Grant* is dissimilar to prison reform cases in that the issue in *W.T. Grant* was, assuming no current violation, whether an injunction could be entered, whereas the issue in prison cases is, assuming no current violation, whether the in-

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137. *See, e.g.*, Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) ("This Court will retain continuing jurisdiction over this action and the parties thereto . . . for a sufficient length of time . . . to make it reasonably certain that the changes of methods and practices required will not be abandoned . . . ."); *see generally* Special Project, *supra* note 1, at 842 & n.494.

138. *See* Steinberg, *supra* note 45, at 63-64 (expiration date can be negotiated and included in the terms of the consent decree).

139. *See, e.g.*, Kendrick v. Bland, 659 F. Supp. 1188 (W.D. Ky. 1987) (defendants moved for dissolution).

140. 345 U.S. 629 (1953).

141. *Id.* at 633.

junction must be dissolved. The Supreme Court's decision to allow an injunction when there was no current illegality indicates that the Court would not conclude that prison conditions injunctions must be dissolved simply because there is current compliance. Aside from this case, the only clue to the Court's attitude toward dissolution is its repeated emphasis on deference to state administrators.[142]

Several circuit courts, however, have confronted the specific question of when dissolution and relinquishment of jurisdiction are proper. In *Battle v. Anderson*,[143] the Tenth Circuit examined how long the supervision of the Oklahoma prison system should continue. The court stated that the goal of judicial intervention is the permanent achievement of remedial objectives and not total implementation of the changes required in the decree.[144] Thus, while concluding that the district court retained jurisdiction over the system, the court of appeals also recognized that there were limits to the jurisdiction: "These limits are defined by the purpose of the continuing jurisdiction—to assure that the court's intervention has achieved lasting institutional reform. Accordingly, the court may exercise continuing jurisdiction over the Oklahoma prison system to the extent necessary to assure that eighth amendment violations will not recur."[145]

The First Circuit reached a similar conclusion in *Lovell v. Brennan*.[146] In affirming the district court's denial of continued jurisdiction over prison suits, the court stated that in certain circumstances jurisdiction could be retained in order to monitor conditions at a prison, but only "if it found a likelihood that the constitutional rights of the plaintiffs would be violated in the near future."[147]

Similarly, in *Taylor v. Sterrett*, the Fifth Circuit concluded that if there is no evidence that the violations initially remedied are likely to recur, then retention of jurisdiction and continued monitoring by the district court exceed the court's authority and are error.[148] And the

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142. *See, e.g.*, Turner v. Safely, 107 S. Ct. 2254, 2261-62 (1987); O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404-05 (1987); Whitley v. Albers, 475 U.S. 312, 322-26 (1986); Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 455-56 (1985); Rhodes v. Chapman, 452 U.S. 337, 352 (1981); Bell v. Wolfish, 441 U.S. 520, 531 (1979).

143. 708 F.2d 1523 (10th Cir. 1983), *cert. dismissed sub nom.* Meachum v. Battle, 465 U.S. 1014 (1984).

144. *Id.* at 1539 (quoting Special Project, *supra* note 1, at 842-43). In other words, if the goals are achieved without total implementation, the remaining changes are unnecessary.

145. *Id.*.

146. 728 F.2d 560 (1st Cir. 1984).

147. *Id.* at 564.

148. 600 F.2d 1135, 1141, 1145 (5th Cir. 1979). *See generally* Anderson, *Release and Re-*

Sixth Circuit affirmed a district court's decision to retain jurisdiction "for a sufficient length of time . . . to make it reasonably certain that the changes of methods and practices required will not be abandoned, forgotten, or neglected, but have become permanently established."[149]

These circuit court cases are consistent with *W. T. Grant*[150] in that they express a future-oriented dissolution standard.[151] This approach also is consistent with the theory of equitable relief, the purpose of which is not to punish, but to deter illegal conduct in the future.[152] If an injunction is no longer necessary to deter future noncompliance, it stands only as a punishment for past transgressions and should be dissolved. Alternatively, if the injunction is still deterring noncompliance, it should be continued.[153]

2. Relevant Factors in Assessing the Risk of Future Noncompliance

The future-oriented dissolution analysis is problematic because it involves prediction of the risk of future violations.[154] What evidence should courts look to in predicting that risk? Some factors relevant to the risk of future violations are more easily identified than others. As the Supreme Court noted, one index is "the bona fides of the expressed intent to comply."[155] Assuming the defendants articulate their intent to comply, how can the court assess the bona fides of that intent? Two indices are the defendant's track record with respect to compliance and its cooperative spirit, including good faith efforts to comply.[156] It is also possible, but extremely rare, for the defendant to replace correction officials who were responsible for prior misconduct.

A second factor mentioned by the Supreme Court is "the effective-

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sumption of Jurisdiction over Consent Decrees, *supra* note 29, at 409 n.32.

149. Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

150. 345 U.S. 629; *see supra* notes 140-42 and accompanying text.

151. *See* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 406 (articulating two-pronged test for release of jurisdiction that focuses, in part, on the likelihood that defendants will violate the decree in the future). *See generally id.* at 409-12.

152. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

153. *See generally* Steinberg, *supra* note 45, at 60-64.

154. Of course, the difficulty of predicting the recurrence of violations will vary with the particular issues involved. If a prison builds a hospital wing to provide constitutional medical care, the facility will likely be there for some time. In contrast, it is very difficult to guage the likelihood of overcrowding because intake increases are often unpredictable.

155. *W.T. Grant Co.*, 345 U.S. at 633.

156. Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 411.

ness of the discontinuance."[157] The more common term for this factor is compliance. Substantial compliance is surely necessary for dissolution of an injunction. The more critical question is whether substantial compliance[158] is sufficient for dissolution of an injunction. The cases examined above indicate that mere compliance is not sufficient. Rather, there must be some basis for the court to conclude not just that there are no violations today, but also that there will be no violations tomorrow.[159] Only one case has suggested that mere compliance is sufficient for dissolution. In *Washington v. Penwell*,[160] the decree required *inter alia* that the defendant state officials fund legal services for inmates, provide paralegals and libraries, and develop plans for inmate access to the courts.[161] The district court judge found the defendants to be in substantial compliance with the paralegal and library provisions, modified the decree to eliminate the other requirements, terminated jurisdiction, and dismissed the action.[162] The Ninth Circuit affirmed the district court's decision, stating that "the finding that defendants had complied with the library and paralegal provisions of the decrees was not clearly erroneous. These provisions did not require further enforcement."[163] This language suggests that the district court's finding of compliance alone was enough to warrant dissolution. As noted above, *Penwell* is an aberration with respect to modification standards, and it has turned out to be an aberration on dissolution standards as well. Commentators have agreed with the majority view that compliance alone is not sufficient to warrant dissolution.[164]

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157. *W.T. Grant Co.*, 345 U.S. at 633.

158. Courts distinguish total compliance from substantial compliance: only substantial compliance is required for terminating a consent decree. *See, e.g.*, Washington v. Penwell, 700 F.2d 570, 572 (9th Cir. 1983) (consent decree terminated partly because defendants in substantial compliance with decree provisions concerning libraries and paralegals); *see also* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees*, *supra* note 29, at 406 (compliance as one prong of two-pronged test).

159. *See* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 404 ("[T]he judge should release jurisdiction if the defendant has substantially complied with the decree, and if there is no reasonable likelihood that the defendant will violate the decree in the future."); *see also id.* at 406 (proposing same two-pronged test).

160. 700 F.2d 570 (9th Cir. 1983).

161. *Id.* at 572.

162. *Id.*

163. *Id.* at 575.

164. *See* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 406 (two-pronged test for release of jurisdiction: substantial compliance and no risk of noncompliance in future); Jost, *supra* note 2, at 1151-52 (compliance is only a mitigating factor if other reasons to dissolve the injunction are present); Steinberg, *supra* note 45, at 66 (compliance alone is not sufficient, but compliance with two other factors—hardship on the enjoined party and

The final factor recognized by the Supreme Court is the character of past violations.[165] In the prison context, application of this factor presumably indicates that the more extensive and egregious the unconstitutional conditions of confinement, the more wary a court should be of concluding that there is no danger of future violations.[166]

In predicting the risk of recurrent noncompliance, district judges may also consider other factors that indicate that the changes are permanent or temporary. For example, they might look to proposed state budgets and prison appropriations,[167] legislative acts relating to the prisons, and prison policies in assessing how ingrained the changes are.[168]

One factor not mentioned in the cases that is relevant in predicting future violations is the educational impact of recent Supreme Court guidance in defining the constitutional prison.[169] As more cases are handed down in this young area, prison administrators are being educated in two ways. First, these cases make prison administrators and state legislators aware of minimum constitutional requirements. Second, the cases also show administrators what happens to a system when those minimums are not met—the local federal court will supervise the prison's administration. This increased guidance of the substantive law, coupled with the knowledge that failure to comply will result in continued federal court involvement, gives state officials both the ability and the incentive to avoid future violations.[170] Therefore, the educational impact of prison reform lawsuits may diminish the risk of future unconstitutionality, making dissolution more feasible.[171]

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rehabilitation—is sufficient to dissolve injunction).

165. *W.T. Grant Co.*, 345 U.S. at 633.

166. For example, if the prisoners are badly beaten and brutalized, a court should be cautious in predicting that brutality will not recur.

167. *See, e.g.*, Kendrick v. Bland, 659 F. Supp. 1188, 1196, 1198, 1200-01 (W.D. Ky. 1987).

168. *See generally id.*

169. *See supra* notes 140-42 and accompanying text.

170. It might be argued that this view is naive; that in other areas, like school desegregation, years of litigation have had little impact on recurring unconstitutionality. But prison reform is distinguishable from school desegregation in that constitutionality standards have been more clearly defined, and the defendants' incentive to comply is reinforced by the threat of individual damage suits. Individual suits are not a significant threat in school desegregation law.

171. In analyzing the propriety of dissolution, if we go beyond the limited focus on the likelihood of future violations, other factors become relevant. Professor Steinberg has identified two ways in which the public interest would be disserved by making dissolution readily available. *See* Steinberg, *supra* note 45, at 62. First, structural injunctions serve not only as a specific deterrent to future violations, but also as a general deterrent. Therefore, a stringent dissolution standard has a beneficial deterrent impact on prison systems other than those engaged in illegal conduct. *Id.*

C. *The Best Approach to Dissolution*

The current legal standard for dissolution of prison conditions injunctions requires the defendant to prove that it is currently in substantial compliance with the injunction and that there is no risk of recurring violations in the future. Thus, dissolution is not a question of the past (punishment), but of the present (compliance) and the future (risk of noncompliance). This formulation of the dissolution standard is sensible; the courts are wise to require both current compliance and evidence that the compliance will continue. Dissolving the injunction if the prison were not presently in compliance would render the litigation pointless. Likewise, dissolving the injunction if the evidence indicated noncompliance was likely to recur in the future would defeat the purpose of the litigation because it would require only temporary changes by the defendant. The courts' analyses of the risk of future noncompliance ensures that the purpose of the prison reform lawsuit—permanent change—is achieved.

When courts are assessing the risk of future noncompliance, there are several factors the courts consider. One factor which has received no attention but should be considered is the educational impact of prison reform litigation during the last twenty years. As noted above, state prison administrators and state legislators have been educated on the requirements of a constitutional prison.

Although the dissolution standard is sensible, and the few cases decided indicate that the courts are applying it conscientiously, courts may fall prey to an unarticulated reluctance to dissolve the injunctions.[172] This reluctance has three causes. First, the courts have no established tradition of dissolving these injunctions, and in a system based on precedent, a lack of experience can make a court wary. Second, the courts are aware that many states are struggling with budget

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Second, if dissolution is readily available, congestion will result as parties badger the courts with frequent motions to dissolve the injunctions. *Id.* These concerns cannot be accommodated by the future-oriented focus of the current dissolution standard. Whether the standard should be adjusted to accommodate such concerns is a more thorny question. These are speculative concerns. Even assuming they are deemed compelling, they are insufficient justification for continuing an injunction against a prison, or prison system, that has established no risk of future noncompliance. Such injunctions limit the methods prison administrators can use to achieve compliance with the law and also impose administrative burdens. *See supra* notes 127-30 and accompanying text.

172. Only six states have been released from the supervision of a court in a major conditions lawsuit: Alabama, Arkansas, Georgia, Kentucky, Oklahoma, and Utah. Telephone Survey by the Kentucky Cabinet for Corrections, Nov. 1986; *see also* Special Project, *supra* note 1, at 842; NATIONAL PRISON PROJECT, Number 13, Fall 1987, at 24 (listing the status of 80 prison suits currently pending in 47 states and the District of Columbia).

crunches, and corrections is an easy area to target for reduced spending. Thus, courts are reluctant to conclude that there is no risk of future noncompliance and relinquish their authority over the prison.[173] Third, the courts may be generally reluctant to commit to a prediction of the future when the alternative is merely to continue the status quo—to keep monitoring the parties' compliance with the injunction.

Although a court may be tempted to act with an excess of caution and continue the injunction, there are several reasons why courts should resist any intuitive sentiment against dissolution. If the dissolution standard is met, that is, there is current compliance and no risk of future noncompliance, there is no reason for the court to continue the injunction. At this point, the injunction serves no purpose and the federal court's involvement in the state's business is overintrusive and disrupts the balance of federalism. Moreover, dissolution is not irreparable. If the court dissolves the injunction and it turns out that the defendant is soon operating unconstitutionally, the plaintiffs can always present the issue again, either through a new lawsuit or through resumption of the old one.[174] Either way, the plaintiffs are not left unprotected once the injunction is dissolved. Finally, the defendants have an incentive to continue complying with the law independent of their quest for dissolution of the injunction. Once the injunction is dissolved, prisoners can file individual suits against the state system and get damages if their constitutional rights are violated. These damage actions remain available to prisoners after the injunction is dissolved and, therefore, create an incentive for the state to continue operating constitutionally. Thus, the courts should not be hesitant to grant dissolution if the standard is met.[175]

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173. When a court refuses to dissolve an injunction entered against correction officials because of suspicion that the state legislature will reduce spending on corrections and the prisons will sink into illegality, the court actually becomes the correction officials' ally in working towards adequate funding.

174. *See generally* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra*, note 29, at 413-16.

175. Courts recognize that it is best to end their involvement in the state prison systems promptly. *See, e.g.*, Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 216 (8th Cir. 1974) ("We recognize that the sooner the district court may discharge its jurisdiction of the case, the better it is for everyone."), *aff'd sub nom.* Hutto v. Finney, 439 U.S. 1122 (1979); *see also* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees supra*, note 29, at 409-11 (articulating three reasons why it is important for courts to confront and decide the issue of whether to release jurisdiction); Special Project, *supra* note 1, at 844 ("Although detailed substantive provisions offer considerable advantages for monitoring compliance and for administration, they restrict the defendants in ways that may prove unreasonable in the long run.").

D. *The Relationship between the Modification and Dissolution Standards*

The strict modification standard and the dissolution standard are a good combination. Dissolution is the ultimate goal of prison reform litigation because dissolution means that the corrections system is in compliance with federal law and there is no reason to doubt that compliance will continue. As noted above, dissolution restores the balance of federalism. It allows the state administrators to make their own choices on how to remain in compliance with the law, and it reduces the administrative burden on the defendants. In addition, the plaintiffs are not left unprotected by dissolution because they can reopen the lawsuit or file a new one.

Adopting a free, flexible modification standard would undermine the ultimate goal of dissolution. Planning toward dissolution would be impossible if the standards for compliance were always shifting in response to modifications. Moreover, if modification were always an option, it would too easily replace dissolution as the goal of the parties. A stringent modification standard is essential to moving the parties toward the goal of dissolution rather than postponing any conclusion through a potentially endless series of adjustments and modifications.

CONCLUSION

Courts resist the modification of structural injunctions in prison reform cases. While some courts discuss a more relaxed standard for modification, close analysis of the case law reveals continued reliance on the strict modification standard articulated by the Supreme Court in *Swift* and *Stotts*. The issue of whether consensual and litigated injunctions should be distinguished with respect to ease of modification is confused, and even courts that agree there should be some distinction cannot agree on its impact. The wisest course is for courts not to distinguish litigated and consensual injunctions but to review both types under the stringent *Swift* standard. Litigated and consensual injunctions both deserve the respect of finality. As for dissolution, courts generally agree on the legal standard and relevant factors. One factor which courts have overlooked is the educational impact of prison reform litigation over the last 20 years. But courts must guard against reluctance to dissolve prison reform injunctions. This reluctance is unwarranted if the dissolution standard is met.

The combination of a strict standard for modification and a future-oriented standard for dissolution should provide the necessary

institutional reform. Dissolution is the ultimate goal of prison reform litigation; the strict modification standard actually encourages progress toward this goal. Once the dissolution standard is met, that is, once compliance is achieved and there is no risk of falling out of compliance in the future, the federal court can dissolve the injunction and relinquish supervision of the prisons to state officials.

MEDIATION--THE ROLE OF THE MEDIATOR

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You have previously seen how the role of the Judge fits into the mediation framework. We will now examine the mediation conference and its impact on the attorney and the party. You will become familiar with the framework of the mediation process and learn how it affects the attorney, the client and the Court. You will learn how mediation operates so you can effectively represent your client at the mediation conference.

The application of Mediation in Circuit Court arena can take many forms. The following information relates to one form that is commonly being used in several circuits in Florida.

I. Description of a Mediation Conference.

A. The mediation conference is basically a supervised settlement conference conducted with the assistance of a trained Attorney/Mediator who assists the parties and attorneys in negotiating the resolution of their own dispute. The mediator does not act as a fact finder, arbitrator or Judge. The concept of mediation has long been used to resolve labor disputes. It has been recently applied to complex civil suits with amazing results.

B. The opposing attorney/client teams know more about their case than a judge or jury will. They are best suited to resolve the case. The purpose of the conference is to allow them to craft a solution for themselves based on their superior knowledge of the case. It is a last ditch effort to create an environment to allow the attorneys and parties to settle their case 30-60 days prior to trial.

C. It is conducted in a controlled atmosphere with the required attendance of all parties along with trial counsel. Corporate representatives must be empowered with sufficient authority to negotiate the resolution of the case.

D. Every case should be thoroughly analyzed by each side (attorney and client) and the various factors computed into whether or not to settle. Compare the impact of settlement against the educated guess of trial outcome. The attorney retains the responsibility for settling or not. Nothing is forced upon them.

E. From an attorney's point of view, it is a negotiation conference with the presence of a Mediator. The parties will be making a business decision to settle or continue to litigate.

F. Do not expect to settle a lawsuit on any different basis in a mediation conference than normal negotiations. Do not expect to settle a case and achieve a 100% victory.

G. The Mediation Conference lasts as long as is necessary to settle the case or until the Mediator declares an impasse. Only large complex cases usually take more than three or four hours. The Mediation Conference is usually set thirty to sixty days before trial. Discovery and motion practice continue unabated. The conference should be scheduled after most of the discovery is done and the parties are fully informed as to their respective positions.

H. The authority of the persons who attend the Conference on behalf of a corporate party is a critical element.

I. The Court has created an event at which:

- -- All authorized and necessary persons who can negotiate the resolution of the case are present
- -- The parties and attorneys jointly focus on this case for a stated time
- -- Counsel is required to make a succinct statement of the case which is heard by all concerned including opposing parties and attorneys
- -- A Mediator is present to help analyze the issues, suggest alternatives, help with communication, etc.

J. The cost of the Mediation Conference, unless the Mediator is a volunteer, is assessed against the parties by the Mediator splitting the cost and billing the attorneys directly. The Mediator's rate of compensation is set by the Mediation order. The average cost per side is less than two hundred dollars. The probability of settlement at the Mediation conference is seventy percent. Arrangement can be made for pro bono Mediation for recognized charities and religious organizations if they are defendants. The parties have the right to object within 15 days if a mediation fee is involved.

K. One basic structure of Mediation Conferences is as follows:

-- Introduction by Mediator
-- Fact Presentations by each attorney
-- Private Meeting (Caucus) with attorney and client from a side with Mediator
-- Private Meeting (Caucus) with attorney and client from the other side with Mediator
-- Negotiation by attorneys
-- Settlement Agreement

1. The Introduction by Mediator - The Mediator introduces him/herself and presents a narrative discussion in which the basic plan of the Conference is explained to attorneys and clients in a group meeting. The Mediator assures everyone of neutrality and explains the process and distinguishes it from Arbitration. Much of the information set forth above (A-J) is covered in the Mediation Introduction. Typically 10 minutes.

2. Presentation of Facts by Attorney - The attorneys, in the group meeting, present their interpretation of the facts and law of the case as it relates to their right to prevail. The scope of these remarks should not be adversarial but rather a succinct logical presentation of their case to give a capsule understanding to everyone present. Do not reveal any matters that have not been previously discovered or reveal any unique theories unless you intend to. Typically 10 minutes per side.

3. Private Meetings with Mediator/Attorney/Client - Purpose is to review the analysis of the case. Mediator may be the devil's advocate and discuss the strengths and weaknesses of that side's case. Everything in the private meeting is private and confidential. There may be various meetings with the Mediator and one or both attorneys without the clients. The attorney is the main participant. The client participates in the decision of what offer to make or accept in light of all relevant information presented. Typically 30 minutes per side.

4. Negotiation - The group reconvenes (or attorneys only) and begins normal bargaining to try to settle the case. The Mediator assists in determining the order of negotiation. The Mediator may engage in "Shuttle Diplomacy" by conveying offers back and forth

between sides in lieu of face to face meetings. Private attorney /client meetings may be held between rounds of negotiation. If the negotiation does not progress the Mediator will declare an impasse.

5. Settlement Agreement - If the parties and attorneys agree on a settlement, the Mediator convenes the entire group and causes the settlement to be announced in very specific terms. Depending on the facts of the case, one of the following pertains:

   -- Taken immediately by the Judge in open court
   -- Announced on the record with a Court Reporter
   -- Tape recorded
   -- A handwritten outline of agreement is signed by everyone
   -- A handshake deal

II. Role of Mediator

A. There are some basic principles and practices which will be common threads throughout any properly conducted Mediation. Each attorney has the right to expect consistency in the framework of various Mediation Conferences so as to maximize his ability to properly represent his client in the Conference. This is not a free form process but all Mediators will place more or less emphasis on different elements in different Conferences.

B. The approach of the Mediator generally depends on the experience, training and native ability of the particular Mediator. The approach will vary from case to case depending on many elements including the procedural posture of the case, the particular facts of the case, the attorneys involved, the personality of the parties, and what unfolds and develops during the Mediation Conference.

C. The particular elements of a Mediator's duties in a Conference include:

   -- Total neutrality - It is essential that the Mediator be neutral and disclose any bias he may have about the subject matter or any relationship past or present he may have with a party or attorney.
   -- Explain the process very clearly to all attorneys and parties

-- Be a good listener and be sure the communication between parties and attorneys is understood
-- Probe the various elements of each side's case in private meetings with that side
-- Assist the attorney's analysis of his case
-- Be the "Devil's Advocate"
-- Crystallize issues. Be logical
-- Be realistic
-- Be non-judgmental
-- Suggest alternatives - create options
-- Keep order and control of the Conference. Allow venting
-- Encourage negotiation
-- Respect confidential information
-- Be flexible
-- Be silent and allow the attorneys to negotiate

THE MEDIATOR SHOULD NOT::

-- Become a player in the dispute by contradicting or disagreeing with the attorney or party.
-- Offer or force his opinion as to the outcome of the case
-- Hear any testimony or examine evidence

III. Role of Trial Attorney

A. From the attorney's point of view, it is a Negotiation Conference rather than a Mediation Conference. The Court has created the event which allows trial counsel and client, in this ideal setting (all authorized persons are present, the parties are focused and prepared, time has been set aside for the negotiation and a third party is present to facilitate the negotiation and prevent premature termination) to negotiate the resolution of the case. The attorney must become a good negotiator. The Mediator sets the stage and makes suggestions but the attorney is the player.

B. The benefits of Mediation for the attorney include:

-- Enables the attorney to negotiate the settlement which may be more favorable than the expected result at trial

- -- Forces the creation of an event at which both sides must be present and negotiate in good faith
- -- Accomplishes the goal of the client (resolution of the dispute) on a basis which the client accepts and therefore is pleased with his attorney
- -- Provides more effective use of the attorney's time
- -- Protection of having the client participate and view the negotiation process
- -- The result is a durable agreement which does not involve an appeal
- -- Sure trial date if Mediation fails

C. The benefits of Mediation for the <u>client</u> include:

- -- Allows client some control over the resolution of the dispute
- -- Prevents the unlimited exposure and uncertainty of trial
- -- Avoids the expense of final trial preparation and trial
- -- Allows each side to see the other's best offer/demand - Decide to accept it or go to trial
- -- Enables a party to stop his own expenditure of time and personal involvement in the litigation and return his total energy to his business pursuits or other normal activities

D. The attorney needs to understand the process, decide who to bring to the meeting to maximize the possibility of a good result and needs to address himself to the preparation of a Facts Summary. Negotiation preparation is a necessity. The attorney needs also to be aware of the types of cases which respond well to Mediation and the procedure to initiate the Mediation Order.

IV. Protocol and Ethical Considerations

Mediation has only recently been applied to the case flow in the trial Courts of Florida and certain areas are worthy of concern to develop practices and ethical considerations:

A. The entire process of Mediation and the summaries created for Mediation are privileged as settlement talk and should not be subject to discovery or used as evidence at trial under the general settlement privilege rule. The attorneys should decide whether or not to exchange the

factual summaries and/or file them in the Court file. If you have a concern, you should submit it only to the Mediator. There is no record of the Mediation Conference. The Order Appointing Mediator usually states that the matters are privileged and the Mediator is not subject to subpoena.

B. The Mediator's relationship with the attorney is quite different than the Attorney/Judge relationship. Private conferences are contemplated throughout the Mediation Conference and therefore preliminary conferences outside the presence of the other attorney are certainly permitted for scheduling purposes and preliminary procedural discussions. The Mediator is not a fact finder and the opinion of the Mediator does not bear any weight in the result. If an attorney and Mediator have litigated with each other or have or any relationship, that should be disclosed to all and the Mediator should offer to recuse himself.

C. Judge/Mediator Communication - The Mediator does not discuss the case with the Trial Judge. The Mediator does <u>not</u> report any details of the negotiation or proceeding to the Judge. The written report should contain only a statement of whether or not the proper parties attended the Conference and whether or not the case settled.

D. Should the Mediator be litigating in the same Court as he is mediating? Will that create the appearance of a special relationship between the Mediator and the Court? Mediators who generally practice out of the circuit where the Mediation is occurring do not know either the client or the attorney and are not presently litigating in that court. The possibility for ethical dilemmas diminishes greatly.

E. Some provisions should be made in a Mediation Program for pro bono Mediation in the event a charity or religious organization is a defendant.

F. If the Mediator is a Senior Judge and sits as Mediator one week and the next week sits as a Trial Judge by appointment of the Court, is it appropriate for attorneys to appear before him who owe him money for prior Mediation Conferences?

G. Is it proper for a Mediator to ever in the future represent a person he meets or who hears of him as a result of a Mediation Conference?

POPULAR READING ON NEGOTIATION

Cohen, Herb: You Can Negotiate Anything (Bantam Books 1980)

Fisher, Roger: Getting to Yes (Penguin Books, 1981)

Goldberg, Stephen B.: Dispute Resolution (Little, Brown and Company, 1985)

Raiffa, Howard: The Art and Science of Negotiation (Harvard University Press, 1982)

MEDIATION, INC.

800 East Broward Boulevard
Sixth Floor
Fort Lauderdale, Florida 33301-2084
(305) 764-1000
(800) 422-9294

Re: Trial Court Mediation

Dear Judge:

A Trial Court Mediation Program is in operation to provide Mediation for General Civil Matters. This Pilot Program has been in active use since 1986 in several circuits and the results show a 70% settlement rate. (see statistical abstract).

The Federal District Courts are implementing this program under the Provisions of Rule 16 of the Rules of Civil Procedure. The general approach of this program sets the cases for mediation but allows the attorneys to file objections. Judges are now utilizing mediation through our program as a docket management tool. It has been received extremely well by the Judges, attorneys and parties.

Very simply stated, Mediation is a supervised settlement conference ordered by the Court. The Mediator presides over the conference (which may last several hours), suggests alternatives, caucuses with the attorney and client from each side and the attorneys negotiate a settlement on some common ground. The Mediator does **not** hear testimony or examine any evidence or make any decisions. This is **not** arbitration.

The Mediators all have extensive mediation training and are attorneys with significant trial experience or are former Florida Judges, and are compensated by the parties at an hourly rate (see "Standards"). This program helps dispose of cases at no cost to the Governmental Entity or the Court.

Mediation, Inc. is a group of sixteen experienced Florida Trial attorneys and/or former Judges who have mediated over 3,000 Trial Court cases in Florida.

I am enclosing a file of information on Mediation with form orders and suggestions for choosing cases for mediation. Please note the types of cases amenable to mediation and the settlement rate.

Please review this data and call me if I can meet with you and supply further information.

Very truly yours,

James B. Chaplin
Attorney/Mediator

DISTRICT COURT MEDIATION
DESCRIPTION OF THE PROCESS

MEDIATION is not to be confused with arbitration. MEDIATION is a supervised settlement conference presided over by the neutral mediator who suggests alternatives, analyzes issues, questions perceptions, uses logic, conducts private caucuses, stimulates negotiations between the opposing sides and keeps order. The mediator does **not** hear any testimony, review any evidence or make a decision. The only result of the Mediation Conference is the agreement of the parties.

The Mediation Conference is created by the Court on its own motion or at the suggestion of one or both parties. The Court enters the Order Appointing Mediator which requires the parties to appear with their counsel at the Mediation Conference. The individual parties and all corporate management respresentatives must have complete authority to settle. The parties and attorneys are required to remain in the Mediation Conference until the dispute is resolved or until the mediator declares an impasse. The Mediation Conference usually lasts several hours. The statistics show 70% of the cases settle at the Mediation Conference.

The Mediators are either: a) Former Florida judges who have been trained as mediators, or b) Florida Attorneys with extensive trial experience who have been trained and certified as Mediators and are not presently litigating in this Court. The Mediator is compensated at the rate of $150.00 per hour. The cost is split between the parties. The average charge has been around $200.00 per party.

MEDIATION is a docket management and litigation management tool to secure a higher percentage of settlements on an amicable basis without the expense, exposure and uncertainty of trial. It is most fruitful when the Mediation Conference occurs less than 90 days before trial when the discovery is substantially complete and the parties are fully informed as to their respective positions.

The Mediation Conference is conducted either in a conference room in the Courthouse or in a Mediation Center so as to stay away from the law office adversary atmosphere. Private rooms are made available for individual attorney/client caucuses and conferences. It is essential that the parties be under a Court Order to attend the Conference, even it is an Agreed Order. The Order Appointing Mediator compels attendance and prevents a party from employing the tactic of leaving the conference as a display of power in hopes of securing a better offer later.

The advantages of having a Mediation conference in a particular case are:

For the Court:

1. Docket Management and Control.

2. Resolves the case without the necessity of additional judicial labor for trial.

3. The dispute is resolved early and not on the eve of trial, thereby allowing the Court to schedule other cases in the allotted time.

4. Voluntary settlements as a result of bargaining by the parties usually do **not** need post trial enforcement proceedings or appeals and resolve all outstanding issues between the parties.

5. Citizens and attorneys are most satisfied with the "System".

For The Attorneys:

1. Enables them to negotiate a settlement which may be more favorable than their expected result at trial.

2. Facilitates negotiation - forces the creation of an event at which both sides must negotiate in good faith.

3. Accomplishes the goal of the client without a disproportionate expenditure of attorney's fees.

4. Client satisfaction - enables the attorney to deliver a product (resolution of the dispute) favorable to their client with which their client is satisfied and is in the client's best interest.

5. Provides more effective use of the attorney's time.

6. Insures client satisfaction by having the client participate in the negotiation process.

7. Durable agreement - No appeal - No collection problem.

8. Prevents settlement negotiation distraction during trial preparation.

For The Parties:

1. Allows them some management control over the resolution of the dispute.

2. Each side gets to see the other's best offer/demand and then the parties can decide to take it or litigate.

3. Prevents the unlimited exposure and uncertainty of a trial.

4. Allows them to exert some informed direct influence over the outcome of the dispute after observing the other attorney, the other party and hearing a capsule discussion of the case with a neutral outsider.

5. Avoids the expense of final trial preparation and trial.

6. Allows the party to bargain through his attorney for certain key elements which are extremely important to him in exchange for other elements which are less important. The Court would make a decision without knowledge of or regard for these key elements.

7. Enables a party to stop his own expenditures of time and personal involvement in the litigation and therefore, devote his energies to his business pursuits or other normal activities.

MEDIATION, INC.
STATISTICAL ABSTRACT
December 31, 1988

Settlements	1,653
Mediation Conferences	2,374
Settlement Percentage	70 %
Total Trial Days saved for the Presiding Judge	5,228 Days

The success rate per types of cases settled during 1987 is as follows:

Rate		Cases Settled	Total Conferences
82%	Business Contract-Construction Cases	96	117
79%	Real Estate Cases	62	79
65%	Tort Cases - Neg. & Malpractice	64	98
85%	Domestic Cases - Large Property	25	29
71%	Other - Misc.	14	20

The values of a current sample of cases settled are as follows:

More than - $ Fifty Million	2 cases	
More than - $ Ten Million	7 cases	1%
More than - $ One Million	61 cases	6%
$ 100,000 - $ 1,000,000	378 cases	37%
$ 10,000 - $ 100,000	488 cases	47%
Less than - $ 10,000	70 cases	7%
Intangible Value Exchanged	19 cases	2%

Of these 1987 cases, the following facts appear:

	Yes	No
Set for Trial	205	56
Discovery Substantially Completed	194	67
More than Two Parties	110	151
Insurance Company	96	165

James B. Chaplin, Esquire
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DISTRICT COURT
MEDIATION PROGRAM STANDARDS

1. **Mediator Qualifications:**

A. Former Florida Judges; or

B. Florida Attorney:

(1) significant trial experience,

(2) trained and certified as a Mediator by a written proficiency examination, (training as specified by Florida Supreme Court).

(3) not currently litigating in this Court.

C. The Mediators who will handle cases involving the District Court have each mediated over 200 complex civil cases.

2. **Mediator Compensation:**

Hourly rate as set by Trial Judge in Order of Appointment which also provides that the cost will be split equally between the parties.

3. **Location:**

The Mediation Conferences should be conducted outside the Courthouse in a neutral Mediation Center (not a law office) which is set up specifically for mediation with conference rooms and caucus rooms. More than a single conference room is required and the Courthouse does not have the space available. It is important for the parties and the attorneys to be very clear that they are not in Court. It is important for them to know this is a Mediation Conference and not a court proceeding. The attorneys are well aware of this distinction but the parties must also be so informed and the location is important to reinforce that understanding. There is a significant amount of psychology involved in negotiation and mediation, and therefore, the furnishings of the room and arrangement plays a significant part in enhancing an environment for dispute resolution.

4. **Administration:**

The Administration of the program is handled by James B. Chaplin, an attorney/mediator, who arranges for his staff to handle the scheduling, assignment of

mediators, and billing. The Administrator assists Judges in choosing appropriate cases for mediation and carries the Program to the community-at-large by articles, speeches, etc. and by education of the Insurance industry to the benefits of mediation.

The space required for mediation and all other expenses associated with the administration of the Program are privately funded from the revenue. There is no need to allocate expenses, support staff, utilities, space, equipment, etc. between the government and the Mediation Program.

The individual court files would be made available to the Mediator for review prior to and during the mediation conference. Permission should be granted to remove court files on an "as needed" basis and arrangements should be made with the Clerk's Office for access to the file room for review of files and prearranged pulling of files for review.

5. **Selection of Cases:**

Cases which would likely respond to Mediation can generally be found by considering the following:

A. Four days or more of Jury Trial.

B. Two days or more of Non-Jury Trial.

C. Multi-party Cases. - Multiple Defendants generally need to negotiate among themselves as to contributions before settling with Plaintiff.

D. Corporate Plaintiffs in Jury Trials.

The subject matter indicates cases that are appropriate for Mediation and those subjects include:

A. Securities Cases,

B. Contract Cases,

C. Construction Cases,

D. Employment Discrimination,

E. Business Disputes involving Corporate Plaintiffs.

The Mediation Conference should be set 30-120 days prior to trial depending on the size of the case. As this process becomes more accepted by the Bar in a particular locale, the attorneys generally want to see the Conference earlier in the process of the case. If a case appears that needs a quick resolution (a perishable commodity, or situation), the Court could consider a Mediation Conference extremely early in the case.

This order used by Judge Jose Gonzalez - S.D. of FT. Lauderdale - To refer Detention Center Civil Rights case to mediation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

Plaintiff(s),

vs.

Defendant(s).

_____/

ORDER REFERRING CASE TO MEDIATION

Upon review of the instant files the court finds that the parties have estimated a trial time in excess of several days. Because of limited judicial resources available to try all civil cases, and given the nature of this proceeding, it is imperative that all possible avenues of settlement be explored prior to trial. Therefore, in accordance with Fed.R.Civ.P. 16(a)(5), 16(c), and upon the Court's own motion:

IT IS ORDERED THAT:

(a) This case shall be referred to mediation in an attempt to achieve an equitable settlement of the issues.Further, the court appoints Mr. James B. Chaplin[1], or his designee, who shall either be a former Florida Judge or a qualified attorney/mediator, to serve as the Court's Mediator in accordance with the procedures

1 Mr. James B. Chaplin, Esquire, Suite 610, 800 East Broward Boulevard, Fort Lauderdale, Florida 33301, (305) 764-1000.

outlined in the exhibit attached to this Order.

(b) The Mediation Conference will be conducted at the _____

_____,

_____.M., on _____. Counsel and parties are required to report to the Clerk's Office 20 minutes prior to the scheduled Mediation Conference to determine the Courtroom or hearing room designated for the conference.

(c) In order to coordinate the conference, the mediator shall have authority to set an abbreviated scheduling conference prior to the scheduled mediation. At such time the mediator may designate lead attorney(s) who shall be responsible for conferring with the Mediator regarding the mediation conference. In addition, the lead attorney shall be in charge of rescheduling the mediation conference should any conflicts arise.

(d) The General Rules governing the Mediation Conference shall be as follows:

(1) **Case Summaries:** Not later than 15 days before the Conference, parties shall mail to the Mediator a written summary of the facts and issues of the case not to exceed five (5) pages.

(2) **Identification of Corporate Representatives:** As part of the written case summaries, counsel for corporate parties will also state the name, and general job description, of the employee or agent who will attend and participate on behalf of the corporate party.

(3) **Attendance Requirements and Sanctions:** Appearance and participation by trial counsel and their clients, or representatives of each party with full authority to enter into a full and complete compromise and settlement is mandatory. The Court will impose sanctions upon parties that do not attend the Mediation Conference.

(4) **Authority to Declare Impasse:** Participants shall be prepared to spend as much time as may be necessary to settle the case, or until an impasse is declared by the Mediator.

(5) **Confidential Nature of Mediation Conference:** All discussions, representations and statements made at the Mediation Conference shall be privileged as settlement negotiations and nothing related to the Mediation Conference shall be admitted at trial, or be subject to discovery.

(e) The Mediator shall be compensated at an hourly rate of $150.00, which shall be borne equally by the parties, which may, upon motion of the prevailing party, be taxed as costs in the instant action.

(f) Not later than ten (10) days from the date of this Order, any party may file written objections to this Order, or to the appointment of Mr. Chaplin, or his designee, to serve as the Court's Mediator. Any such objection shall also be served upon the Mediator as well. The absence of any such objection shall constitute acknowledgment and consent to the appointment.

DONE AND ORDERED this _____ day of _____, in , Florida.

_____

United States District Judge

Plaintiff -

Defendant -

Defendant -

Defendant -

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FEDERAL COURT MEDIATION

DESCRIPTION OF THE PROCESS

MEDIATION CONTRASTED TO ARBITRATION

First of all, it is important to understand that Mediation is not to be mistaken for just another form of our Court Annexed Arbitration Program. Although the goals for the latter program are more clearly set forth in Local Rule 8.01, it is sufficient here to note that arbitration is designed to provide an alternate dispute resolution forum for a limited class of less complex civil cases at the early stages of the case.

In contrast to that program, mediation is designed to serve the interests of the more complex civil case which has already completed most, if not all discovery requirements, and is now set for a protracted trial.

WHY THIS CASE IS BEING REFERRED TO MEDIATION

It is important for counsel to understand that the Court has coordinated its trial docket to ensure that this case will be tried as scheduled. However, given the protracted trial estimate for this case, and the statistical reality that over 80% of all scheduled trials settle prior to the morning of trial, the Court has a duty to the other cases on its docket to ensure that all possible avenues of settlement in this case are explored prior to trial.

Although the importance of coordinating the Court's trial calendar cannot be overemphasized, the Court is also cognizant of the successful track record for mediation of similarly complex and protracted cases in the Florida state courts. With nearly two years of experience behind the mediation program, the statistics demonstrate that nearly 75% of all mediated cases settle at the Mediation Conference. Consequently, the Court has determined that mediation is the best and most appropriate forum in which to consider the possibilities for settlement in this particular case.

WHAT IS MEDIATION

Mediation is in fact, a supervised settlement conference presided over by a neutral mediator who suggests alternatives, analyses issues, questions perceptions, uses logic, conducts private caucuses, stimulates negotiations between the opposing sides and keeps order.

Mediation is also a docket management and litigation management tool which has proved successful in securing a high percentage of settlements on an amicable basis without the expense, exposure and uncertainty of trial. Mediation has proven to be most effective when it occurs within 30-90 days prior to the actual trial date, when the discovery is substantially complete and the parties are fully informed as to their respective positions.

The Mediation Conference is conducted either in a courtroom or conference room at the United States Courthouse, rather than in the adversary environment of a law firm's office. During the mediation process, private rooms or offices are made available for individual caucuses and conferences.

The mediation process itself is intended to be informal in nature, while the actual ebb and flow of the process is structured by the Court's Mediator. Unlike arbitration which results in an award and possible judgment, the only result of the Mediation Conference is the agreement of the parties.

Although the mediation process is flexible, the following guidelines apply to the conduct of the mediator:

The Mediator will:

- Be impartial
- Suggest alternatives
- Have private meetings (caucuses) with the parties and attorneys during the conference
- Assist in clearly identifying the issues
- Privately debate each side's perceptions and logical base
- Respect confidential and/or privileged information
- Be silent and allow parties to negotiate
- Guide parties and counsel in finalizing specific settlement agreement

The Mediator will not:

- Act as judge or arbitrator
- Render a decision or award
- Hear testimony or examine evidence

Trial counsel and the actual parties to the litigation are required to appear and participate in the mediation process. Individual parties, or in the case of a corporate party the corporate representative, must have complete authority to compromise and settle the instant action. Additionally, trial counsel and the parties, to include corporate representatives, are required to remain and participate in the Mediation Conference until the dispute is either resolved, or until the mediator declares an impasse. As a rule, the mediation process usually lasts somewhere between three to four hours.

WHO ARE THE MEDIATORS AND HOW ARE THEY SELECTED AND PAID

The Court appointed Mediators are either: (1) Retired Florida state circuit or district court of appeals judges; or (2) Attorneys with significant trial experience and are not presently litigating in this court. Each Mediator has been specially trained and certified as a mediator, and prior to the mediation of this case, has mediated more than 100 similarly complex and protracted cases.

The mediators are compensated at the rate of $150.00 per hour of service and the cost of their services are borne equally by the parties to the mediation conference. In the past, the average cost of the mediation conference is approximately $200.00 per party.

MEDIATION COMMENTS

Mediator _____

Please take a few minutes to provide us with your thoughts and suggestions on Mediation. Please utilize this form or write a letter if you prefer.

1. Did the case settle? ___ Yes ___ No

2. Your opinion of the Mediation Process:

3. Your suggestions for improvement:

4. Your overall degree of Satisfaction with the Mediation Conference:

Very Satisfied — Very Unsatisfied

5 4 3 2 1

4. Your Client's overall degree of Satisfaction with the Mediation Conference:

Very Satisfied — Very Unsatisfied

5 4 3 2 1

Comments:

_____

_____

_____

_____

_____

James B. Chaplin

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Congressional Research Service
The Library of Congress

Washington, D.C. 20540

June 7, 1989

TO : Hon. Phil Gramm
Attention: Richard L. Ribbentrop

FROM : American Law Division

SUBJECT : Power of Congress Under 14th Amendment to Structure Federal Court Decrees Under Eighth Amendment

This memorandum responds to your inquiry for an evaluation of the constitutional validity of your proposed legislation to establish standards governing the authority of federal courts to issue decrees providing remedies for prison conditions found to violate the Eighth Amendment's cruel and unusual punishments clause, as made applicable to the States through the due process clause of the Fourteenth Amendment.

Confinement in prison is a form of punishment subject to scrutiny under Eighth Amendment standards. *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981). A considerable number of States now operate their prisons under federal court orders mandating various remedial steps to correct denials of constitutional rights found by those courts; the exact number is unclear. It has been argued that many federal courts have exceeded the scope of their equity powers in imposing comprehensive remedies upon prison systems, once having made a finding of unconstitutionality with respect to some of the prevailing conditions in a system. This memorandum does not attempt to evaluate that allegation nor to discuss the judicial holdings, except to the extent required to assess the standards set forth in the proposed bill in the context of present law.

Basis for Congress' jurisdiction in this field is stated to be, by the proposed bill, the enforcement power conferred by § 5 of the Fourteenth Amendment. In the first part of this memorandum, we set out the understanding to date of that enforcement power. The second part briefly states an additional basis of power: Congress' legislative responsibility to create the lower federal courts, to define their jurisdiction, and to regulate their proceedings. The third part compares the standards to be enacted by the bill with the standards that have judicially evolved over the last two decades. The fourth part then addresses the constitutional issues raised by the proposed legislation and appraises the likely success of any challenge to the legislation if it is enacted.

In brief, we conclude that the precedents indicate that Congress' power under the Fourteenth Amendment and its power over the federal courts generally do enable it to act in the manner prescribed by the proposed bill; especially is this conclusion apt inasmuch as we also conclude that the standards set out in the bill appear largely to conform, in any event, with the standards determined by the Supreme Court to be the governing ones with regard to the equitable, remedial powers of the federal courts.

The Fourteenth Amendment Enforcement Power

Under § 5 of the Fourteenth Amendment, Congress is empowered "to enforce, by appropriate legislation, the provisions of this article." In one respect, of course, this enforcement power of the Fourteenth Amendment is equivalent to the "necessary and proper" clause, Article I, § 8, cl. 18, which similarly authorizes Congress to implement the powers granted to it, and to § 2 of the Thirteenth and § 2 of the Fifteenth Amendments. But in some still ill-defined sense, the Reconstruction Amendments' enforcement clauses are authorizations to Congress to define *what* is to be protected as well as *how* a right is to be protected. The Court has held that Congress has *some* power to define the content of rights that are protected or unprotected by the Amendments and may, at least in some circumstances, act counter to judicial holdings.

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court indicated the existence of such a power in Congress. By the Voting Rights Act of 1965, Congress had barred the application of English literacy requirements to certain classes of potential voters, who had been educated in Puerto Rico, intending to enfranchise such voters primarily if not exclusively in New York. Noting that in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), the Court had held that English literacy requirements for voters, fairly administered, did not violate the equal protection clause of the Fourteenth Amendment, challengers of the law argued that a congressional proscription of a practice under § 5 of the Fourteenth Amendment could be sustained only if the Court independently determined that the practice violated the Amendment. The Court rejected this contention. On the one hand, Justice Brennan for the Court reasoned that Congress might not have overridden the state law because it itself violated the equal protection clause but because persons denied the right to vote were discriminated against and empowering them to vote enabled them to resist discrimination. Supra, 384 U.S., 652-653. On the other hand, Justice Brennan reasoned that Congress might have made a determination that the literacy requirement did deny equal protection and was invalid. Thus, Congress might have questioned the justification offered by the State in defense of its law and might have concluded that instead of being supported by acceptable reasons the requirement was unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations which might have led Congress to its conclusion; since Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Congress' prerogative to weigh" the considerations, and the Court would

sustain the conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination. Id., 653-656.

Checkered though the progress of the *Katzenbach* principle has been in subsequent cases, it is evident that Congress does have the power to make determinations with regard to constitutional protections which extends beyond what the Court itself would find. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), no majority of the Justices could be assembled behind a conclusion about Congress' decision in a Voting Rights Act extension to lower the voting age nationally in all elections to 18 years of age. Different coalitions of Justices sustained the action as applied to federal elections but voided it as to all other elections. But, unanimously, in a variety of separate opinions, the Justices upheld Congress' decision to impose a five-year nationwide ban on literacy tests as voting qualifications and to prescribe uniform residency and absentee voting requirements for the conduct of presidential elections. Congress, it was agreed, could reasonably determine that its legislation was an appropriate method of attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might now have discriminatory effects only and thus not be susceptible to judicial invalidation.

Similarly, the later uses of Congress' power have related to the extension of remedial legislation to practices that have only a discriminatory impact.[1] In *City of Rome v. United States*, 446 U.S. 156 (1980), the City attempted to escape from coverage of the Voting Rights Act by showing that it had not utilized any discriminatory electoral practices within the prescribed period. The lower court found that the City had engaged in practices without any discriminatory motive but that the practices had had a discriminatory impact. Agreeing that the absence of purposeful discrimination would have required a ruling for the City under the Constitution, the Supreme Court held the City still subject to the Act. The Court held that Congress could proscribe practices that did not themselves violate the Constitution, here § 1 of the Fifteenth Amendment. Congress could prohibit state action that perpetuated the effect of past discrimination or that, because of the existence of past purposeful discrimination, raised a risk of purposeful discrimination that might escape judicial condemnation. "It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,'" as that term is defined in the context of the "necessary and proper" clause. Id., 177. Moreover, in the 1982 extension of the Voting Rights Act, Congress amended § 2 of the Act to cover

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[1] It is, of course, a requirement under the equal protection clause that facially neutral measures which have a discriminatory impact will fail judicial scrutiny only if government intended to discriminate. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Massachusetts Personnel Admr. v. Feeney*, 442 U.S. 256 (1979).

electoral practices that had the effect of discriminating, setting aside *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which had limited § 2 of the Act to the scope of § 1 of the Fifteenth Amendment, intentional discrimination, This legislative proscription beyond what the Constitution itself reached was upheld by the Court through a summary affirmance, without oral argument, of a lower court decision, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), and was broadly applied by the Court, with no reference to constitutional considerations, in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

The scope of this congressional power, we reiterate, remains unclear. In large part, it is a remedial power, but it partakes as well of a substantive nature. In *Fullilove v. Klutznick*, 448 U.S. 448, 476-478, 482-484 (1980), and see id., 500-502 (Justice Powell concurring), Chief Justice Burger in the principal opinion of the Court relied heavily on Congress' § 5 power in upholding a race-conscious set-aside program for public works. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Id., 483. But the opinion immediately shades off into substantive power. "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, *where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.*" Id., 483-484 (emphasis supplied). See also *City of Richmond v. J. A. Croson Co.*, 109 S.Ct. 706, 717-720, 726-727 (1989). "The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." Id., 719 (emphasis by Court).

All the decided cases at the Supreme Court level have involved equal protection clause rights, but no reason suggests itself why Congress could not as well legislate to define due process clause rights. See *Katzenbach v. Morgan*, supra, 384 U.S., 668 (Justice Harlan dissenting). Inasmuch as it is through the Fourteenth Amendment's due process clause that the Eighth Amendment's cruel and unusual punishments clause is made applicable to the States, see, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Robinson v. California*, 370 U.S. 660 (1962), Congress ought to be enabled therefore to legislate, to some extent, to define what state action violates the cruel and unusual punishment clause and what action would be required to correct the violation.

A more difficult question arises when the Court issues a constitutional ruling expressly finding some state action to constitute a denial of constitutional rights and mandating a particular remedy for the correction of the violation, and Congress enacts a law to the effect that some or all of the state action is permissible, because that requires Congress to overturn a decision extending a constitutional right. That issue found Justice Harlan, in dissent, and Justice Brennan in conflict in *Katzenbach v. Morgan*. Thus, Justice Harlan protested that "[i]n effect the Court reads § 5 of the

Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court." Id., 668 (dissenting; emphasis in original). To this argument, the Court responded that "[w]e emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." Id., 651 n. 10. See also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731-733 (1982).

Whatever may be the answer to this particular issue, we do not believe the proposed bill, for the reasons set forth below, requires an answer to be developed.

Congressional Control Over Federal Court Jurisdiction and Processes

While the proposed bill is based expressly upon Congress' § 5, Fourteenth Amendment, power, it bears noting that Congress is delegated powers to legislate with respect to the jurisdiction and processes of the federal courts. That Congress may rely on one power does not mean that reviewing courts will not assess its enactments under the totality of its authority. E.g., *Fullilove v. Klutznick*, supra, 448 U.S., 473-475. After all, it would be wasteful of judicial sources to decide that Congress could not do something under power *X* if it could then reenact the same measure validly under power *Y*. Thus, for example, in *Fullilove* Congress had asserted authority under its power to condition federal spending, under Article I, § 8, cl. 1, but the Court assessed that exercise under the commerce clause and the Fourteenth Amendment as well as the spending power.

Thus, Article III, § 1, of the Constitution provides that the judicial power of the United States "shall be vested" in a Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." In Article I, § 8, cl. 9, Congress is empowered "[t]o constitute Tribunals inferior to the supreme Court." Under the necessary and proper clause, Article I, § 8, cl. 18, Congress is authorized to legislate to carry into effect not only "the foregoing Powers" granted to it but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Debate in the Constitutional Convention, as recorded and reported, reveals considerable division on the question whether there was to be a federal judicial system comprised of lower courts of original jurisdiction and a Supreme Court with appellate jurisdiction or whether the state courts were to be depended on to hear federal claims with a Supreme Court exercising appellate jurisdiction over their decisions. The result was a compromise in which only a high court was provided for in the text of the Constitution, and Congress was given the discretion to provide for, "from time to time ordain

and establish," lower federal courts in its discretion.[2] The First Congress in the Judiciary Act of 1789 acted upon its understanding of its power, creating a system of lower federal courts, but conferring upon those courts much less than what it could have under Article III conveyed.[3]

Decisions of the Supreme Court from the beginning reflect its understanding that whether there are to be lower federal courts and what their jurisdiction is to be is wholly dependent upon congressional legislation. E.g., *Turner v. Bank of North America*, 4 Dall. (4 U.S.) 8, 10 (1799)(Justice Chase); *Ex parte Bollman*, 4 Cr. (8 U.S.) 75, 93 (1807)(Chief Justice Marshall); *Cary v. Curtis*, 3 How. (44 U.S.) 236, 244-245 (1845); *Sheldon v. Sill*, 8 How. (49 U.S.) 441 (1850). See, more recently, e.g., *Palmore v. United States*, 411 U.S. 389, 400-402 (1973); *Swain v. Pressley*, 430 U.S. 372 (1977). Along with the power to create and confer jurisdiction on federal courts, Congress has been recognized to possess authority to regulate the writs and processes of federal courts. The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding courts, times of adjournment, appointment of officers, issuance of writs, citations for contempt, and many other matters as to which it might be supposed courts had some authority of their own to regulate.[4] The validity of these regulations, and of those that

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[2] The Convention adopted the proposition that a national judiciary was to be established, but it defeated language that it was to consist of a Supreme Court and "of one or more inferior tribunals." Opponents argued for dependence on state courts with federal appellate review in the Supreme Court. 1 M. FARRAND (ed.), THE RECORDS of the FEDERAL CONVENTION of 1787 (rev. ed. 1937), 95, 104, 105, 116, 119, 124-125. Madison and Wilson persuaded the Convention to adopt language, that was gradually altered to become the now-existing provisions, giving Congress discretion in providing for "inferior" tribunals. 1 id., 125; 2 id., 182, 186, 315, 422-423, 428-430, 600. Although there has been much scholarly debate about the intention of the Framers as to the federal courts and mandatory jurisdiction over the subjects set out in Article III as being with the federal judicial power, there seems little disagreement that Congress has (perhaps total) discretion whether to create lower federal courts.

[3] Much scholarly debate exists about the correctness of Congress' understanding. Compare Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986), with Casto, *The First Congress' Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B. C. L. REV. 1101 (1985). And see Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. REV. 205 (1985).

[4] For a comprehensive discussion with itemization, see Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts - A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

followed, delegating to the judiciary the authority to promulgate regulations for their procedures and operations, has long been settled. *Wayman v. Southard*, 10 Wheat. (23 U.S.) 1 (1825); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Mistretta v. United States*, 109 S.Ct. 647, 662-664 (1989).

These regulations have grown in number and scope since. Federal courts have been curbed in the power to issue injunctions against the collection of federal and state taxes and the enforcement of state rate-making orders. Act of March 2, 1867, § 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421; Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341; Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. §1342. See also Act of March 2, 1793, § 5, 1 Stat. 334, as amended, now 28 U.S.C. § 2283 (injunctions by federal courts to stay state court proceedings). Reacting to judicial abuse of injunctions in labor disputes, Congress in 1932 enacted the Norris-LaGuardia Act, which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and factfinding process, which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be prevented. The Court experienced no difficulty in sustaining the law. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938). In constructing wartime price controls, Congress, fearful that the scheme could be undone by the use of federal court injunctions, provided for a special federal court in which persons could challenge the validity of price regulations, but denied recourse to injunctions, as well as denied the ability to contest the invalidity of regulations in a subsequent district court criminal trial, whether the defendant had been enabled to raise a claim in the special court or not. This system was upheld in *Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States*, 321 U.S. 414 (1944).[6] See also *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966).

Without overly prolonging the discussion, it is necessary to note that there are two possible objections, nonetheless, to full congressional control over the processes of the federal courts. First, there is, to some extent, a measure of "inherent" power existing in the courts. While the Supreme Court's discussion of such power has always been more suggestive than definitive, it has indicated that this "inherent power" is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. R.*, 370 U.S. 626, 630-631 (1962). "[T]he inherent powers of federal courts are those which 'are necessary to the exercise of all others.'" *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)(quoting *United States v. Hudson & Goodwin*, 7 Cr. (11 U.S.) 32, 34 (1812)).

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[6] But see *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987)(applying due process to require in some circumstances an opportunity for one to have meaningful review of administrative proceedings); and see *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978)(foreshadowing *Mendoza-Lopez*, but avoiding holding through statutory construction).

Along with an inherent power over purely matters of procedure, federal courts also possess, for example, such power to punish contempts of the courts' authority. *Michaelson v. United States ex rel. Chicago, St. Paul, M. & O. R. Co.*, 266 U.S. 42, 65-66 (1924); *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 795-796 (1987). Even so, the Supreme Court has recognized the power of Congress to regulate the use of the contempt power by the lower federal courts. E.g., *Ex parte Robinson*, 19 Wall. (86 U.S.) 505, 510-511 (1874)(Congress created these courts and their powers and duties depend upon the act calling them into existence; law limiting cases in which summary contempts are possible is binding); *Young*, supra, 799. Some cases have asserted, however, that there are areas into which Congress may not intrude. E.g., *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924)("the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative"). Despite the suggestions which can be drawn from some cases, the Supreme Court seems settled on the proposition that inherent power cannot exceed the boundaries set by Congress or the Court itself through exercise of the rule-making power delegated by Congress. E.g., *Bank of Nova Scotia v. United States*, 108 S.Ct. 2369, 2374 (1988); *United States v. Payner*, 447 U.S. 727, 737 (1980).

Second, just as Congress might in other fields exercise its legislative powers to exceed the limits placed thereon by the Constitution, *Williams v. Rhodes*, 393 U.S. 23, 29 (1968), it seems evident that Congress could utilize its admittedly extensive powers over the federal courts in an unconstitutional manner. See *United States v. Klein*, 13 Wall. (80 U.S.) 128 (1871).[6] Without establishing the existence of limitations and their nature, it can be assumed that at some point a congressional regulation that denied constitutional rights pronounced by the courts or that denied a remedy for a constitutional violation would exceed Congress' power. Yet, it is also evident that the Court has permitted Congress a role in regulating the scope of the remedies to be made available, even to the extent of providing less than one might be entitled to under another remedy made unavailable.

To take one example, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court implied the existence of a federal damage remedy against federal officers on behalf of persons whose Fourth Amendment search and seizure rights had been violated. See also *Davis v. Passman*, 442 U.S. 228 (1979)(implying a damage remedy for a denial of due process). But the Court recognized that Congress would be able to displace the implied damage remedy with a remedial scheme of its own, although the Court was hazy with respect to how coextensive with the implied remedy a congressional alternative must be. Id., 241-244, 245-247; *Carlson v. Green*, 446 U.S. 14, 18-23 (1980). In subsequent cases, the Court found that congressional alternatives did preclude implication of a damage remedy,

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[6] For consideration of *Klein*, see Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189.

although in one case the result was denial of any remedy at all to a claimant and in another he received much less than he would have under a *Bivens* remedy. *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

Thus, while we may assume that there are limits to Congress' power, it seems safe to conclude that such limits are not passed simply because Congress may provide less than a claimant might be entitled to if a court were left to act in its own discretion. Because we conclude below that the proposed legislation largely restates the present law as enunciated by the Supreme Court, we need not seek the point at which Congress might exceed its powers.

Constitutional Standards and the Standards of the Proposed Bill

Following a statement of findings that federal courts are endangering the community by their orders in prison condition cases and that those courts are exceeding their powers because they do not have before them inmates who have proved that conditions inflict cruel and unusual punishment upon them, the proposal would cause to be enacted a three-part statute, to be codified at 18 U.S.C. § 3626,[7] dealing with the situation.

> (a) A federal court shall not hold prison or jail overcrowding unconstitutional under the Fourteenth Amendment except to the extent plaintiff inmates prove the overcrowding causes the infliction of cruel and unusual punishment as to them. The relief in such cases shall extend no further than to removing the conditions that are causing the identified inmates cruel and unusual punishment.
>
> (b) A Federal court shall not place an inmate ceiling on State or local detention facilities as an equitable remedial measure for conditions that violate the Eighth Amendment unless overcrowding itself is inflicting cruel and unusual punishment on individual prisoners. Federal judicial power to issue other equitable relief, including improved medical or health care or civil contempt fines, or damages where appropriate, shall not be affected by this subsection.
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> (c) Each Federal court order seeking to remedy an Eighth Amendment violation shall be reopened for recommendation or alteration at a minimum of two-year intervals.

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[7] It may be suggested that it would be preferable to place the proposed statute in title 28, dealing with the federal courts, rather than in title 18, the federal criminal code. The other limitations on the injunctive powers of the federal courts mentioned in this memorandum are contained in title 28.

From the discussion in the two previous sections, it is evident that Congress does have power under its Fourteenth Amendment enforcement authority to make substantive decisions respecting the meaning of the "liberty" that is protected by due process of law, in this context, the liberty to be free from the infliction of cruel and unusual punishments, and the authority to determine what remedial measures would assure the protection of this liberty. It seems also evident that pursuant to its powers to create lower federal courts and to regulate their procedures and processes, Congress has the authority to regulate the remedies which those courts utilize to correct constitutional violations. That the Constitution may impose some limits upon Congress in so acting we may assume. In order to ascertain whether Congress might have exceeded those limits if it should enact this proposal, we must first establish what present judicial standards are and compare them to the standards of the bill.

Until recently, the view prevailed that a convicted inmate "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state." *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871). Federal judicial concern with the rights of prison inmates and with the conditions prevailing in prisons and jails is largely an outgrowth of the increased emphasis upon constitutional and civil rights that began with the effectuation of the desegregation decision, *Brown v. Board of Education*, 347 U.S. 483 (1954)(declaration of rights); id., 349 U.S. 294 (1955)(remedial decision). Judicial experience with the remedial powers of federal equity courts, primarily the injunction, to direct public entities to carry out the implementation of desegregation orders, evolved into an expanded judicial form, public law litigation.[8] In contrast with traditional private law litigation - between two private parties, over an event or events in the past, in which the right and remedy were interdependent, and the impact of the suit was confined to the parties - public law litigation generally seeks structural change from governmental entities, and its most striking feature is the expansive use of injunctive relief to coerce compliance.[9] Although this form of litigation certainly did not originate in the 1950s and 1960s, the modern version did come of age then, and this development was attributable to several factors.

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[8] These developments were celebrated in a now well-known and frequently cited article: Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). See also Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982). For the background and influence of the Chayes article, see Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J. L. REF. 647 (1988).

[9] Development of injunctive relief in the context of institutional reform was chronicled in O. FISS, THE CIVIL RIGHTS INJUNCTION (1978). See the broadened treatment in O. FISS & D. RENDLEMAN, INJUNCTIONS (2d ed. 1984). One entire chapter of the volume, id., 528-830, is devoted to the injunction in structural cases, using the Arkansas prison case as the model.

First, there was the merger in 1938 of law and equity following the promulgation by the Supreme Court of rules of civil procedure, with the concomitant flexibility that federal judges now possess to address the correction of conditions in the future than to determine damages for past occurrences.[10] The Supreme Court has emphasized this characteristic of equity. E.g., *Brown v. Board of Education*, supra, 349 U.S., 300; *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15-18, 31-32 (1971). Second, the Court expansively interpreted the Reconstruction-era civil rights statutes remaining on the books, especially 42 U.S.C. § 1983, to broaden the jurisdiction of the federal (and state) courts to hear complaints of denials of federal constitutional rights. See *Monroe v. Pape*, 365 U.S. 167 (1961). Early, the Court approved the use of § 1983 by state prisoners challenging conditions of their confinement. E.g., *Cooper v. Pate*, 378 U.S. 546 (1964)(religion claims); *Houghton v. Shafer*, 392 U.S. 639 (1968)(confiscation of legal materials); *Wilwording v. Swenson*, 404 U.S. 249 (1971)(living conditions and disciplinary measures); *Haines v. Kerner*, 404 U.S. 519 (1972)(unlawful confinement in solitary). Particularly important in the context of this avenue of relief is that the Court interpreted § 1983 as imposing no requirement of exhaustion of state remedies, either administrative or judicial, so that prisoners could come directly to federal court,[11] whereas if they resorted to *habeas corpus*, as they must to challenge the fact or duration of their imprisonment, exhaustion of remedies was required. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Because prisoners retain the right to petition for redress of grievances, they must not be denied access to courts, *Ex parte Hull*, 312 U.S. 546 (1941); *White v. Ragan*, 324 U.S. 760 (1945), which the Court specified included access to legal materials or to persons trained in the law.

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[10] Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). At least some of the persons responsible for the rules did intend to enlarge the capacity of the federal courts to accommodate public law litigation, id., 961-973, a result orientation stressed by Professor Chayes. Op. cit., n. 7, 1288-1302. See Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1469-1476, 1478-1480 (1987).

[11] The absence of a general exhaustion requirement was affirmed in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), but in the Civil Rights of Institutionalized Persons Act of 1980, 94 Stat. 349, 352, 42 U.S.C. § 1997e, Congress authorized a limited exhaustion requirement in § 1983 prisoner actions, provided the States follow required procedures to adopt a system and the system complies with standards set out in the Act and the Attorney General of the United States certifies the standards are met and the court in each case finds that requiring exhaustion would be "appropriate and in the interest of justice." Not surprisingly, few States have applied for certification of grievance procedures. Lay, *Exhaustion of Grievance Procedures for State Prisoners under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935 (1986).

Younger v. Gilmore, 404 U.S. 15 (1971); *Bounds v. Smith*, 430 U.S. 817 (1978). See also *Johnson v. Avery*, 393 U.S. 483 (1969)(ban on assisting other inmates in preparing legal writs impairs right to *habeas corpus*).

Third, Congress has enacted legislation which has resulted in increases in prisoner suits. In addition to the Civil Rights of Institutionalized Persons Act of 1980, 94 Stat. 349, 42 U.S.C. § 1997, which was primarily intended to ensure that the Attorney General had standing to sue on behalf of institutionalized persons, the major legislative enactment was the Civil Rights Attorneys' Fees Award Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988, under which the prevailing party in § 1983 (and other listed civil rights actions) cases are ordinarily entitled, "absent special circumstances [that] would render an award unjust," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), to a reasonable attorney's fee as part of the costs.[12]

In any event, cases seeking institutional relief involving not only prisons but hospitals and other facilities for the retarded and handicapped and other agencies were brought in federal courts, and, responding to evidence showing widespread maltreatment, federal courts found Eighth Amendment violations and directed extensive remedies, often involving an almost total restructuring of institutions. Paradigmatic examples are *Holt v. Sarver*, 309 F. Supp. 362 (E.D.Ark. 1970), *affd.*, 442 F.2d 304 (8th Cir. 1971), and *Pugh v. Locke*, 406 F. Supp. 318 (M.D.Ala. 1976), *affd. & remanded sub nom., Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *remanded with instructions sub nom., Alabama v. Pugh*, 438 U.S. 781 (1978). In *Holt*, the court, considering conditions at two Arkansas prison farms, evaluated, for purposes of cruel and unusual punishments analysis, prison conditions in their totality. Id., 309 F. Supp., 373. It found the system violated the Eighth Amendment. Singled out was a "trusty" system, which the court found to be "brutal," id., 373-376, and an open-barracks sleeping arrangement, which the court found to encourage sexual attacks and other violence. Id., 376. But the court also mentioned inadequate medical and dental facilities, unsanitary kitchen conditions, churlish policies regarding personal hygiene, and an absence of rehabilitation programs, id., 378-380, as conditions that "do not rise to constitutional dignity but which aggravate the more serious prison defects and deficiencies," id., 380, making these matters subject to remedial orders.

Judge Frank Johnson's decision and orders in *Pugh v. Locke* extended this tendency to treat the totality of the circumstances and to formulate expansive remedies. The court found severe overcrowding, which it deemed to be "primarily responsible for . . . all the other ills of Alabama's penal system." Id., 406 F. Supp., 323. The lack of adequate facilities mandated the total abnegation of a prisoner classification system, so that the ten percent of the prison population known to be psychotic, as well as many others known to be

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[12] See Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988), esp. 770-774.

violently disposed, were dispersed throughout the several prisons. Id., 324-325. The court also found that the physical plants, electrical wiring, heating, plumbing, and ventilation were in disrepair and that the decrepit facilities promoted the "gross infestation" of vermin. Id., 323. Food service equipment and storage and preparation techniques were unsanitary, and personal hygiene among inmates presented an "insurmountable problem." Ibid. Overworked prison personnel contributed considerably to "the rampant violence and jungle atmosphere." Id., 325. Finally, the court found the vocational, educational, work, and recreational programs available to Alabama state prisoners was "totally inadequate to provide reasonable opportunities for rehabilitation - or even to prevent physical and mental deterioration - of most of the inmate population." Id., 326. On the basis of these findings, the court declared that "[t]he living conditions in Alabama prisons constitute[d] cruel and unusual punishment." Id., 329.

As a remedy, the court imposed a set of "Minimum Constitutional Standards for Inmates of Alabama Penal System" and directed that the State report to the court in six months on implementation of the standards. Id., 332. It ordered the formation of a Human Rights Committee for the prison system to monitor implementation. Failure to comply with the standards, the court announced, "will necessitate the closing of those several prison facilities herein found to be unfit for human confinement." Id., 331. The standards promulgated by the court were based in part on court decisions interpreting due process and the Eighth Amendment, but they also drew on professional standards developed by corrections associations and in some instances exceeded them. To remedy overcrowding, for instance, Judge Johnson ordered the State to furnish each inmate with at least 60 square feet of living space, and he prohibited the housing of additional residents until the population did not exceed design capacity. Id., 332. Each prison cell was to be equipped with a toilet that could be flushed from the inside and a sink with hot and cold running water. Ibid. Personal hygiene was to be facilitated through provision of utensils and supplies - toothbrushes, shaving creams, razors, soap, shampoo, linens, et cetera - and a minimum daily exercise regimen was required. Id., 334. Adequate feeding of inmates was mandated, encompassing three meals a day, with proper eating and drinking utensils, a food service supervisor for each institution with a minimum of a bachelor's level training in dietetics, and a registered dietician to act as a nutrition consultant to the Board of Corrections. Ibid. Rehabilitation was to be promoted by assigning every inmate a meaningful job, based on his abilities and interests, and by providing prisoners with the opportunity to receive a basic education, participate in vocational training programs, and to attend a "transitional program" prior to release. Id., 330-335. Inmates were to be furnished a storage locker and lock, to alleviate the problem of inmate thievery. Id., 334.[13]

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[13] The remedies ordered in *Pugh* and in other cases are recited at length and discussed in Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977),

The Supreme Court's first review of an Eighth Amendment decision involving prison conditions,[14] came in the appeal of a later holding in *Holt. Finney v. Hutto*, 410 F. Supp. 251 (E.D.Ark. 1976), *affd.*, 548 F.2d 740 (8th Cir. 1977). The Court, with only Justice Rehnquist dissenting on the point, upheld a challenged district court order denying the prison system the authority to confine in punitive isolation an inmate for more than 30 days. *Hutto v. Finney*, 437 U.S. 678 (1978). The district court had granted that punitive isolation "is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof." Id., 685-686 (quoting 410 F. Supp., 275). The district court had, the Supreme Court indicated, looked to the totality of the circumstances, taking note of the deplorable prevailing conditions in the prison. "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." Id., 687.

Emphasizing the broad, remedial powers of the federal courts, the Court noted that while state and local authorities have primary responsibility for curing constitutional violations, "[i]f, however, [those] authorities fail in their affirmative obligations . . . judicial authority may be invoked. . . . Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" Id., 687 n. 9 (quoting, respectively, *Milliken v. Bradley*, 433 U.S. 267, 281 (1976), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971)). But the Court did emphasize the limited nature of the challenged order, how little it interfered with prison administrators, and how deferential the district judge had been in the course of years of litigation. Id., 688.

While *Hutto v. Finney* predominantly may have encouraged federal prisoner claims, the results of the next two major challenges indicated a Supreme Court reluctance to permit too much interference with prison administration. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the challenge was to conditions in a federal facility for pretrial detainees. Because the inmates had been convicted of no offense, the Court held that they were entitled under the Fifth Amendment's due process clause to be free of conditions or restrictions during confinement that were punitive. Id., 535. But the Court upheld all the

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and see esp. 895-897, 916-920. For another notable case, the Texas prison litigation, see *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D.Tex. 1980), *affd. in part and vacated in part*, 697 F.2d 1115 (5th Cir.), *amended in part*, 688 F.2d 266 (5th Cir. 1982), *cert. den.*, 460 U.S. 1042 (1983).

[14] But see *Estelle v. Gamble*, 429 U.S. 97 (1976), an earlier decision of more limited scope. The Court held that the Texas prison system violated its duty to provide health care when prison authorities deliberately failed to treat a prisoner's condition, delayed his access to care, and interfered with his treatment.

contested practices and conditions as being rationally related to the legitimate nonpunitive purposes of the detention center. Id., 538-541, 560-561. Thus, the facility was permitted to place two detainees in a cell built for one, prohibit receipt of books and magazines except directly from publishers, limit gift packages to one package of food at Christmas, conduct unannounced searches of the living areas outside of the inmates' presence, and conduct visual anal and genital searches for contraband after every contact visit, without probable cause. Id., 541, 550, 553-555, 557, 560.

Conflicting signals, however, may be perceived in the next decision, *Rhodes v. Chapman*, 452 U.S. 337 (1981), in which the Court, only Justice Marshall dissenting, upheld the practice of "double celling" at a modern Ohio correctional facility. On the one hand, the Court stressed that the cruel and unusual punishments clause could not be cabined by some "static" test, that its meaning evolved in a maturing society. Conditions of confinement must be judged under the Eighth Amendment. "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. . . . Conditions . . . alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in *Gamble* [supra, 429 U.S., 103-104]. But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional." Id., 347.

Stressing that the prison in question was recently built and was well-designed and maintained, id., 340-343 (summarizing district court findings), the Court declined to find that double celling was cruel and unusual; it did not deprive inmates of essential food, medical care, or sanitation, and it did not increase violence among prisoners. Although job and educational opportunities were somewhat diminished and the number of psychiatrists and social workers were not increased after the double celling began, such minimal deprivations did not impose cruel and unusual punishments. Id., 348. The five principal factors relied on by the district court in reaching its conclusion - the long terms served by inmates, the fact that 38% more inmates were housed than the facility was designed for, the exceeding of prevailing correctional standards of living space, the length of time each day inmates spent in their cells, and the permanence of double celling - may have inflicted some pain on the inmates but not to the extent of violating the Constitution. Id., 347-350.

While approving federal judicial responsibility to prevent cruel and unusual punishments in prisons, the Court noted, courts must proceed cautiously and act on the basis of constitutional requirements, not on their ideas of how best to operate a detention facility. "In discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future

crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens." Id., 352.

Moreover, the Court expressed its skepticism about the reliance of the district court, and other courts, on the "opinions of experts" as establishing contemporary standards of decency as to prison conditions. Such opinions may be helpful, but they do not establish constitutional minima; "indeed, generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as 'the public attitude toward a given sanction.' . . . We could agree that double celling is not desirable, especially in view of the size of these cells. But there is no evidence in this case that double celling is viewed generally as violating decency." Id., 348 n. 13.[15]

Thus, the Court approved judicial policing of prison conditions that were severe or harmful or unusual enough to constitute cruel and unusual confinement, but it cautioned deference to government officials, especially prison administrators. Further, it asserted that inmates should not be deprived of the "minimal civilized measure of life's necessities," id., 347, while taking a somewhat grudging view of what might constitute a minimal standard, which could result in a rather relaxed review of conditions. The aftermath was a series of conflicting lower court opinions, in many of which, however, prison conditions, including overcrowding and double celling, were declared unconstitutional, and some population caps were imposed, without Supreme Court interference.[16]

Although the Court did not revisit the issue of prison conditions as a denial of Eighth Amendment rights,[17] it did in two important respects in

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[15] In addition to Justice Marshall's dissent, id., 369, Justices Brennan, Blackmun, and Stevens issued concurring opinions, stressing that the decision should not be read to retreat from a requirement that careful judicial scrutiny be afforded prison conditions. Id., 352, 368.

[16] E.g., *Ramos v. Lamm*, 639 F.2d 559 (10th Cir.), *cert. den.*, 450 U.S. 1041 (1981); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *amended in part*, 688 F.2d 266 (5th Cir.), *cert. den.*, 460 U.S. 1042 (1983); *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984)(preliminary injunction); *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D.Cal. 1984), *affd. in part, revd. in part, and remanded*, 801 F.2d 1080 (9th Cir. 1986)(permanent injunction), *cert. den.*, 481 U.S. 1069 (1987); *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. den.*, 468 U.S. 1217 (1984); *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), *cert. den.*, 479 U.S. 817 (1986); *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984); *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir.), *cert. den.*, 465 U.S. 1102 (1983)

[17] But see *Whitley v. Albers*, 475 U.S. 312 (1986)(shooting of inmate during quelling of prison disturbance, arguably excessive force, not cruel and unusual punishment). In dictum, however, the Court expressed views reaching

separate series of rulings appear to invite a withdrawal to some extent of active federal judicial supervision of prison conditions. More important than the results in these two lines of cases was the language used, language which had been present early in the development of the case law, but which took on more significance in the later decisions. Again, it may be said that the Court sent mixed signals, creating some difficulties for the lower courts.

First, during the early 1970s, prisoners were assured a range of protections of their constitutional rights: due process in the imposition of discipline, religious liberties and some degree of speech and expression interests, and careful analysis of statutes and regulations to safeguard whatever procedural guarantees prisoners had been given before transfers to more severe institutionalization.[18] Increasingly, decisions grew more restrictive and the boundaries of constitutionally protected areas became much more circumscribed.[19] The critical point, however, was the reiteration of and strengthening of language which had been present from the beginning in the

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beyond the immediate question before it. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." Id., 319.

[18] E.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974)(procedure in disciplinary proceedings); *Cruz v. Beto*, 405 U.S. 319 (1972)(religion); *Procunier v. Martinez*, 416 U.S. 396 (1974)(mail censorship regulations but analyzed in terms on infringement of rights of nonprisoners); but see *Pell v. Procunier*, 417 U.S. 817 (1974)(ban on face-to-face media interviews with individual inmates upheld). With respect to transfers, the Court looked to positive state creations of entitlements, and the results were mixed. *Meacham v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Vitek v. Jones*, 445 U.S. 480 (1980).

[19] E.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)(refusal to accommodate inmates' religious practices valid); *Turner v. Safley*, 482 U.S. 78 (1987)(very restrictive limit on inmate-to-inmate correspondence upheld); *Thornburgh v. Abbott*, 57 U.S.L.W. 4517 (May 15, 1989)(regulation of receipt of outside publications, including ban on 46 specific items, sustained); *Olim v. Wakinekona*, 461 U.S. 238 (1983)(no protected interest requiring hearing or other procedures before interstate transfer); *Hudson v. Palmer*, 468 U.S. 517 (1986)(no expectation of privacy, hence no protection from unannounced search and seizure in inmate's absence); *Kentucky Dept. of Corrections v. Thompson*, 57 U.S.L.W. 4531 (May 15, 1989)(prison restrictions on visitation of inmates, including ban on some visitors, not subject to challenge or explanation, upheld). But see *Turner v. Safley*, supra, 94-99 (ban on inmate marriage voided); *Board of Pardons v. Allen*, 482 U.S. 369 (1987)(statutory provision on parole creates liberty interest entitling inmate to procedural protection).

cases stressing the limited function of the courts and which culminated in the promulgation of a test that gives great deference to prison administrators.

Thus, in one of the early cases, the Court was almost fatalistic. "[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all these reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of these facts reflects no more than a healthy sense of realism. Moreover, when state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Procunier v. Martinez*, supra, 426 U.S., 404-405. See, e.g., *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125, 129, 130 (1977); *Bell v. Wolfish*, supra, 441 U.S., 544, 547; *Hewitt v. Helms*, 459 U.S. 460, 470 (1983); *Hudson v. Palmer*, supra, 468 U.S., 526; *Turner v. Safley*, supra, 482 U.S., 84-85; *O'Lone v. Estate of Shabazz*, supra, 482 U.S., 348-350.

In addition to this kind of language mandating deference, the Court developed a standard by which to review prisoner complaints of denials of constitutional rights, and the standard effectuated deference. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, supra, 482 U.S., 89. The standard was purportedly, and in large part was, drawn from a long line of decided cases. E.g., *Pell v. Procunier*, supra, 417 U.S., 827 (1974); *Jones v. North Carolina Prisoners' Union*, supra, 433 U.S., 125, 129, 130; *Bell v. Wolfish*, supra, 441 U.S., 550, 551; *Block v. Rutherford*, 468 U.S. 576, 586, 589 (1984). Applying a standard of "reasonableness" to a prison regulation or to the actions of prison authorities is practically always to defer to the official decision,[20] in just the same way that the "rational basis" test of economic and similar regulation under the due process and equal protection clauses lacks bite, an intended result. See esp. *O'Lone v. Estate of Shabazz*, supra,, 482 U.S., 349-353 (prison accommodation of religious practices).

The second line of cases, nonprison cases, occasioned statements by the Court about the "controlling principle" guiding equity courts in correcting constitutional wrongs. "The controlling principle consistently expounded in our holdings," said the Court in *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 744 (1974), "is that the scope of the remedy is determined by the nature and extent of the constitutional violation." See also *Hills v. Gautreaux*, 425 U.S. 284, 294 n. 11 (1976); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976); *Austin Ind. School Dist. v. United States*, 429 U.S. 990, 991

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[20] But see *Turner v. Safley*, supra, 482 U.S., 94-99, in which the Court, supposedly still applying the "reasonableness" test, invalidated the prison ban, save only in narrow circumstances, on inmate marriages.

(1976)(Justice Powell concurring). That is, the remedy must be related to the condition offending the Constitution, it must be remedial in nature, in the sense that "it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,'" and it must take into account the interests of state and local authorities in managing their own affairs. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280-281 (1977)(quoting *Milliken I*, supra, 746).

And yet, the decision in *Milliken II* similarly sends mixed signals. The remedy imposed by the lower court, having found unlawful, *de jure* school segregation, was to mandate compensatory or remedial educational programs for school children who had been subjected to the past acts of discrimination. The State contended that, the wrong having been the separation of pupils by race, the remedy must correct unlawful pupil assignment. That the nature and scope of the remedy was to be determined by the violation, replied the Court, "means simply that federal-court decrees must directly address and relate to the constitutional violation itself." Thus, "decrees exceed appropriate limits if they are aimed a eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation . . . . But where, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the *condition* that offends the Constitution." Id., 281-282 (emphasis by Court; internal quotation marks omitted).

The condition which offended the Constitution was the *de jure* segregated school system. "[T]he need for the educational component flowed directly from [these] constitutional violations by both state and local officials." Therefore, "[t]hese specific educational remedies . . . were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation." Id., 282.[21] See id., 292 (Justice Powell concurring). Without discussing them, it can be said that in other school cases, there also existed a tension between the purported tight connection between violation found and remedy imposed. E.g., *Keyes v. Denver School Dist.*, 413 U.S. 189 (1973), and compare *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977), with *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), and *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

That these cases enunciating the "controlling principle" of equity jurisprudence apply to prison cases has already been noted. *Hutto v. Finney*, supra, 437 U.S., 687 n. 9; *Rhodes v. Chapman*, supra, 452 U.S., 352. It appears that in the lower federal courts there is developing a trend toward

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[21] In terms of the differences in interpretation possible, compare the views of Judge Starr, in *Inmates of Occoquan v. Barry*, 844 F. 2d 828, 841-843 (D.C.Cir. 1988), with those of Judge Greene, in id., 850-853 (dissenting).

more complete application of the restrictive standards of the Supreme Court's equity principles and their application to institutional litigation, although, strictly speaking, it may be too early to speak of a trend.

The two principal decisions are *Cody v. Hillard*, 830 F.2d 912 (8th Cir. 1987)(*en banc*), *cert. den.*, 108 S.Ct. 1078 (1988), and *Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C.Cir.), *pet. for reh. en banc den.*, 850 F.2d 796 (D.C.Cir. 1988). In the former case, the district court, hearing a challenge to conditions of confinement in the South Dakota penitentiary, applied a totality of circumstances standard and found overall conditions, relating to the physical plant, security, staffing, sanitation, safety and fire hazards, overcrowding, violence, and medical and other prisoner services, which it deemed to violate the Eighth Amendment; it found that the effects of double celling were causally related to the deficiencies it found existed and directed its cessation. The *en banc* court, having before it only the State's appeal of the double-celling order, reversed. The court recited the Supreme Court's cautions with respect to the difficulty of regulating prisons, and it noted the limited role of courts. It relied strongly on *Rhodes*, for its holding that double celling was not per se unconstitutional and for the principle that only "wanton and unnecessary infliction of pain" would constitute cruel and usual punishment. The court refused to treat double celling in the context of other existing conditions; it could not see that the condition was related to the circumstances found to be unconstitutional by the court nor could it see that ending double celling would remedy those situations. "An appropriate remedy would relate to correction of the constitutionally deficient conditions that have been found to exist, if any there be, rather than to the elimination of double celling." Id., 830 F.2d, 914. "The present case," the court said, "is light years removed from the torture, cruel deprivation, and sadistic punishment with which the Cruel and Unusual Punishments Clause is concerned." Id., 915.

Disputed in *Inmates of Occoquan* was a district court decision that found numerous "deficiencies" in the District of Columbia's facilities at Occoquan, Virginia, which it found to violate the Eighth Amendment and which it proposed to remedy by a population cap on the entire facility. Reversing, the appeals panel read *Rhodes* as establishing a strict test governing federal judicial review of prisons and the imposition of remedies. It read *Rhodes* as mandating not only a "totality of the circumstances" test but also as requiring objective indicia relating to violations; that is, only after finding intentional deprivation of essential human needs, infliction of pain or punishment that is cruel and beyond the needs of the system, may a court find a constitutional violation. "It is cruel conditions, defined by reference to community norms, to which the Constitution speaks; neither 'deficient' conditions nor conditions that violate 'professional standards' rise to the lofty heights of constitutional significance." Id., 844 F.2d, 837. "[W]hat we see . . . wanting in the [district court's] analysis is a determination that these 'deficiencies' and shortfalls - alone or in combination - rose to the level of deprivations of the 'minimal civilized measure of life's necessities.' Those necessities - food, shelter, health care, and personal security - must be analyzed with specificity to determine whether *essential* mainstays of life have been denied to the inmates of

Occoquan. If the necessities are provided, then the Eighth Amendment has been satisfied . . . ." Id., 839(emphasis by court).

Having found the analysis flawed, the appeals court found the remedy - the population cap - erroneous because it was not tailored to fit the violation. Overcrowding, the Court of Appeals emphasized, had not been found to be cruel and unusual; rather, the district court found overcrowding exacerbated the effects of numerous deficiencies, which, taken together, violated the Constitution. But a court must identify each violation and order it remedied. A population cap "was much too blunt an instrument" and invaded the prerogative of other branches of government to decide how many prisons to build and how large to build them. Id., 842-843.

Although five of the judges of the full D. C. Circuit voted to rehear the decision *en banc*, the other six declined, thus placing the Eighth and D. C. Circuits in some conflict with a number of other circuits in somewhat older decisions.[22] In particular, the Seventh Circuit decision in *French v. Owens*, supra, which the Supreme Court refused to review, upheld a ban on double celling, granting that it was not *per se* unconstitutional, but finding that under a totality of the circumstances test the combination of double celling as a feature of severe overcrowding, along with unsafe and unsanitary conditions, the district court was justified in imposing the remedy. Id., 777 F.2d, 1253.[23] Of course, in one sense, two court decisions which reach different conclusions on the basis of an assessment of the totality of the circumstances existing in two separate institutions can never be in conflict, inasmuch as there will never be two identical institutions to assess. Nevertheless, the tenor of the Seventh Circuit (and earlier decisions from other circuits) opinion and that of the Eighth and D. C. Circuit are manifestly different.

While the Supreme Court over the years has grown more restrictive in its language respecting the equitable powers of the lower courts and in its language and results in prisoner rights cases, there do appear to be, as the recital of the case law suggests, some inconsistencies in application. Thus, the Court has both used limiting language and approved broad decisions in the

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[22] See also contemporaneous decisions, which, while they concern an individual prisoner and conditions of a more circumscribed nature, read the Supreme Court's decisions in *Rhodes*, *Wolfish*, and others, more broadly than the two courts just discussed. *Foulds v. Corley*, 833 F.2d 52 (5th Cir. 1987); *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987); *Beck v. Lynaugh*, 842 F.2d 759 (5th Cir. 1988).

[23] See also *Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir.), *cert. den.*, 109 S.Ct. 260 (1988); *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988), *cert. den.*, 109 S.Ct. 879 (1989); and compare *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988)(rejecting Eighth Amendment attack on conditions in federal maximum security prison because of nature of inmates).

context of equitable powers. More specifically, it appears to be content to allow the lower courts to administer largely free of review the application of cruel and unusual punishment standards. The only two cases it reviewed were practically polar opposites. *Hutto v. Finney* involved a system found by the lower courts, findings approved by the Court, to be quite brutal. Only Justice Rehnquist disagreed with this aspect of the decision, the only part to reach the merits, and that of only one portion of a decree, the only part appealed by the State. Indeed, it appears that the only reason *certiorari* was granted was to review the attorneys' fees decisions of the lower court, an issue about which four Justices dissented. Supra, 437 U.S., 689-700(opinion of the Court); id., 704, 710(Justices Powell, White, Rehnquist, and Chief Justice Burger dissenting). *Rhodes v. Chapman* involved a modern correctional facility in which conditions, while not good,[24] still did not approach the conditions found in the great number of lower court decisions. Only Justice Marshall dissented, although three other Justices concurred in opinions which expressed concern that the decision not be read as a retreat from judicial concern about prison conditions. With regard to the not insubstantial number of appeals in other cases, the Court has declined to step in.

It may be concluded that in Eighth Amendment prison institutional litigation, the Court prefers to let the issues percolate for an extensive period through the lower courts.[25] It seems more than willing to permit a great deal of diversity in the lower courts.

Whatever may be the differences in application and the differences in emphasis, the standards enunciated by the Supreme Court and most lower courts appear to be comparable with the standards set out in the proposed bill. That, for example, an inmate ceiling, a population cap, may be imposed only to remedy a finding that overcrowding itself inflicts cruel and unusual punishment appears to reflect the case law. Under the judicial decisions, a federal court may remedy that only which is unconstitutional; it may not attempt to make a prison a "better" place or to implement professional standards as to desirability, absent a finding that a condition inflicts cruel and unusual punishment or, in the case of confinement of persons unconvicted, denies due process. A measure of ambiguity can be read into the bill's requirement that "overcrowding itself" inflict cruel and unusual punishment. As the *Rhodes* Court said, "[c]onditions . . . alone or in combination," may violate the Eighth Amendment. But it seems to be the point of the Court's language that the challenged condition be unconstitutional, whether it is so alone, i.e., absent any other contributing factor, or because the effect of other

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[24] But see Judge Starr's reading of the conditions in *Rhodes*. *Inmates of Occoquan*, supra, 844 F.2d, 837-838; compare that of Judge Greene. Id., 848-849.

[25] For the concept of "percolation," see *United States v. Mendoza*, 464 U.S. 154, 160 (1984). It is discussed in S. ESTREICHER & J. SEXTON, REDEFINING the SUPREME COURT'S ROLE (1986), 48, 50-52, 73-74.

conditions makes this condition cruel and unusual. In any event, content for the bill's phrase may be supplied as the legislative process continues, either within the text of the provision or in authoritative legislative history.

That to be successful a prison suit must be pursued by inmates who prove the overcrowding inflicts cruel and unusual punishment on them is unexceptionable in its bases both in justiciability and in the entitlement to a remedy. As a measure of standing, plaintiffs must show injury, actual or imminently threatened. E.g., *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982). Most institutional litigation is brought as a class action, and it remains true that the representative plaintiffs suing must have and must retain the Article III requirements entitling them to sue. *United States Parole Comm. v. Geraghty*, 445 U.S. 388, 396 (1980); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). Thus, only plaintiffs who prove a violation that injures them are entitled to seek and receive a remedy. Of course, it is possible to read the proposed bill to require that a remedy is available only to each individual prisoner who proves that he suffers cruel and unusual punishment because of overcrowding and to deny the ability to proceed in a class action. Class actions, of course, while historically an avenue of suit, are a consequence of positive entitlement, at present pursuant to Rule 23, Federal Rules of Civil Procedure. Individual actions could be required as a general matter, subject to a possible claim of denial of equal protection principles under the Fifth Amendment's due process clause.[26] But if that is your wish, leaving the matter to inference may not be desirable.

Requiring federal court orders remedying Eighth Amendment violations to be reopened at least every two years would not appear to present a constitutional problem, save again for a claim of singling out of one kind of court action, which would not seem to be a serious obstacle. It is always, in any event, open to one of the parties to move to revise a decree in the light of changed conditions or compliance or whatever. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *United States v. Swift & Co.*, 286 U.S. 106, 114-115 (1932). Mandating periodic review, especially in an area as sensitive to public concern as prison conditions, would appear to be well within congressional power.

The Constitutionality of the Bill's Standards

Although it appears plausible on one reading of the decisions of the Supreme Court, not only *Hutto* and *Rhodes*, but as well the school cases in

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[26] Individual suits for damages for injuries incurred in prisons are, of course, common. E.g., *Vosburg v. Solem*, 845 F. 2d 763 (8th Cir.), *cert. den.*, 109 S.Ct. 313 (1988)(involving the same prison and prison conditions as the injunction suit in *Cody v. Hilliard*). A series of qualified immunity defenses may prevent recovery from official defendants and in the case of state prisons the Eleventh Amendment bars recovery from the State itself.

which the "controlling principle" of equity jurisdiction has been propounded, to conclude that the proposed bill sets out standards fully consonant with those already the law, there are other possible readings, taking into account also the sometimes disparate results that have been forthcoming, making it desirable to analyze to some extent Congress' power to legislate to cause a deviation from judicial pronouncements. Certainly, at the foundation of Congress' power is its authority to create lower federal courts, to prescribe their jurisdiction, and to regulate their processes. Standing alone, this authority, in the context of the discretion afforded congressional decisionmaking under the necessary and proper clause, would enable Congress to provide rules governing the exercise of equity powers in an area so sensitive with issues not only of public safety but of federalism and respect for state and local autonomy as well.

But it is also clear from the precedents that Congress has the power under § 5 of the Fourteenth Amendment to *define* the substance of equal protection and due process rights. The Court's explanation for this defining power of Congress has sometimes referred to the fact-specific nature of some inquiries into what constitutes a constitutional deprivation and emphasized the superior factfinding abilities of Congress in contrast with judicial abilities. Moreover, in the capital punishment cases, the Court adverted to the fact that at least 35 States had reenacted the death penalty following the Court's invalidation of the previous statutory effectuations of the penalty made it impossible to conclude that it was unacceptable to public opinion, one of the "objective" standards for determining what is cruel and unusual. E.g., *Gregg v. Georgia*, 428 U.S. 153, 168-187 (1976)(Justices Stewart, Powell, and Stevens); *Roberts v. Louisiana*, 428 U.S. 325, 350-356 (1976)(Justices White, Blackmun, Rehnquist, and Chief Justice Burger). In *Rhodes v. Chapman*, supra, 452 U.S., 345-347, 348 n. 13, Justice Powell expressly relied on *Gregg* and emphasized that "the public attitude toward a given sanction" is critical in a court's determination. Congress, of course, in elaborating the meaning of the Eighth Amendment acts both as factfinder and as the body expressing the public attitude.

More than this function, however, is involved. Congress, to a much greater extent than the States, to a greater extent than the courts, has the substantive power to determine what is and what is not violative of the Fourteenth Amendment, *Fullilove v. Klutznick*, supra, 448 U.S., 483-484; *City of Richmond v. J. A. Croson Co.*, supra, 109 S.Ct., 719, and it is the Fourteenth Amendment that subjects the States to the cruel and unusual punishments clause of the Eighth Amendment.

To Justice Harlan's challenge in *Katzenbach v. Morgan*, supra, 384 U.S., 668, that by its decision the Court was enabling Congress to dilute constitutional guarantees, Justice Brennan responded with what has been called the "ratchet" theory of congressional enforcement: Congress may expand, but it may not "restrict, abrogate, or dilute these guarantees." Id., 651 n. 10. Justice O'Connor reiterated this response in *Mississippi Univ. for Women v. Hogan*, supra, 458 U.S., 731-733. If one adopts certain expansive

readings of *Hutto* and *Rhodes*, and certainly if one merely reads some of the lower court decisions since, the standards of the bill do, to a perceptible degree, qualify, if not "restrict, abrogate, or dilute" the judicial standards of judging prison overcrowding conditions.

It may well be sufficient, in this instance, to observe that where Congress adopts one plausible reading of Supreme Court precedent in enacting legislation to guide the lower courts, the likelihood that the Court would pronounce the congressional judgment wrong would in any event be small, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), but in those instances in which Congress has exercised its powers under the Fourteenth Amendment and its powers over the federal courts to determine that one plausible reading is correct, the extent of deference to the congressional judgment would doubtless be large. That a Court which has in numerous cases pronounced a restrictive view of equity powers would now decide that Congress in adopting a measure of the text of that view had exceeded its powers seems doubtful.

Conclusion

To reiterate, it appears that Congress has extensive powers in respect of the issue concerned here. The Supreme Court has held that Congress' § 5, Fourteenth Amendment, powers include the authority to define, to some extent, the substance of constitutional rights. The Court has held that pursuant to its power to create and regulate lower federal courts Congress may limit the exercise of the equity power of those courts and may restrain their injunctive powers. Moreover, in certain fields, such as the *Bivens* implied-cause-of-action line of cases, the Court has recognized Congress' power to substitute remedies which do not accord litigants as much in the way of relief as they might otherwise be entitled to and in some instances to deny them relief and this in the field of constitutional rights.

The extent of Congress' power is unclear. But, as we have seen, the standards promulgated by the Court largely coincide with those provided in the bill. There may be some inconsistency in the judicial application of these standards, but that fact should not retard Congress' legislative power to impose uniformly these standards on federal courts.

Thus, it is not believed that we need to reach, in this instance, the hard question of the outer boundaries of congressional power. It is enough to conclude that the bill does not appear to approach any outer perimeter.

Johnny H. Killian
Senior Specialist
American Constitutional Law

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

June 7, 1989

TO : Hon. Phil Gramm
Attention: Dick Ribbentrop

FROM : American Law Division

SUBJECT : Basis of Court Decisions in Prison Reform Cases

This memorandum is in response to your request for a review of court decisions concerning prisons listed in a recent ACLU report (attached). You asked for the constitutional or statutory basis of each decision. Several of these cases are pending or were decided by an unreported court order or consent decree, and we have been unable to obtain copies of those orders or decrees. A list of available cases follows.

Alabama: *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd in substance, Newman v. Alabama*, 559 F.2d 283 (4th Cir. 1977), *cert. denied*, 433 U.S. 915 (1978) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process violations.

Arkansas: *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment; Fourteenth Amendment due process violations. In *Finney v. Mabry*, 458 F.Supp. 720 (E.D. Ark. 1978), and 546 F.Supp. 628 (E.D. Ark. 1982), a special master was appointed to oversee implementation of a consent decree covering the Fourteenth Amendment due process violations, and compliance with the court's orders was determined.

California: *Toussaint v. Rushen*, 553 F.Supp. 1365 (N.D. Cal. 1983), *aff'd in part*, 722 F.2d 1490 (9th Cir. 1984) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process; California Constitution Article I §7 (due process, inmate administrative segregation). *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984), *aff'd in part, rev'd in part, vacated in part, and remanded*, 801 F.2d 1080 (9th Cir. 1986) -- Eighth Amendment cruel and unusual punishment; California Penal Code §§ 2931, 2933 and Fourteenth Amendment (state statutes on administrative segregation create liberty interest).

Colorado: *Ramos v. Lamm*, 485 F.Supp. 122 (D. Col. 1979), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), *on remand*, 520 F.Supp. 1059 (D.Col. 1981) -- Eighth Amendment,

applied to states through Fourteenth Amendment, cruel and unusual punishment; Fourteenth Amendment due process; First and Fourteenth Amendments, rights of association, expression, due process resulting from mail restrictions. The district court also found violations of state statutes requiring all inmates to have jobs (Colo. Rev. Stat. 1973, §§17-20-115, 17-24-102(1)), but this was not upheld on appeal.

Connecticut: *Lareau V. Manson*, 507 F.Supp. 1177 (D. Conn. 1980), *aff'd*, 651 F.2d 96 (2nd Cir. 1981) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process.

Delaware: *Anderson v. Redman*, 429 F.Supp. 1105 (D. Del. 1977) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment; Fourteenth Amendment due process; 11 Del. Code §§ 6530, 6531, 6535, 6536 (state rules on overcrowding which had statutory effect, Del. Code. Ann. Const. art. I, § 11). The court noted that its analysis of violations, based in part on state law, was not intended to imply that no federal constitutional violations were demonstrated, but conformed to the principle that cases, where possible, should be decided on state law rather than federal constitutional grounds.

Florida: *Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1977), *aff'd*, 553 F.2d 506 (5th Cir. 1977) (*en banc* court reinstated opinion of 525 F.2d 1239) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process.

Idaho: *Balla v. Idaho State Bd. of Corrections*, 595 F.Supp. 1558 (D. Idaho 1984) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process.

Illinois: *Lightfoot v. Walker*, 486 F.Supp. 504 (S.D. Ill. 1980) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process. *Smith v. Fairman*, 528 F.Supp. 186 (C.D. Ill. 1981), *rev'd*, 690 F.2d 122 (1982) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment.

Indiana: *French v. Owens*, 538 F.Supp. 910 (S.D. Ind. 1982), *aff'd in pertinent part*, 777 F.2d 1250 (7th Cir. 1985) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process. The district court found violations of several Indiana statutes, but on appeal only the constitutional claims were considered. *Hendrix v. Faulkner*, 525 F.Supp. 435 (S.D. Ind. 1981), *aff'd sub nom. Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment.

Iowa: *Watson v. Ray*, 90 F.R.D. 143 (S.D. Ia. 1981) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment.

Kentucky: *Kendrick v. Bland*, 541 F.Supp. 21 (W.D. Ky 1981), *aff'd in substance*, 740 F.2d 432 (6th Cir. 1984) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment. *Canterino v. Wilson*, 546 F.Supp. 174 (W.D. Ky. 1982) -- Fourteenth Amendment equal protection and due process; Education Amendments of 1972, 20 U.S.C. § 1681(a), Comprehensive Employment & Training Act, as amended, 29 U.S.C. § 834(a), Omnibus Crime Control & Safe Streets Act of 1968, 42 U.S.C. § 3589 d(c)(1), concerning job and rehabilitation opportunities; state statutes Ky. Rev. Stat. §§ 196.110(2), 196.610, 197.065, 439.590, concerning inmate rehabilitation. *Canterino v. Wilson*, 564 F.Supp. 711 (W.D. Ky 1983) -- Fourteenth Amendment equal protection and due process; Fifth Amendment; Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*.

Louisiana: *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment.

Maine: *Lovell v. Brennan*, 566 F.Supp. 672 (D. Maine 1983), *aff'd*, 728 F.2d 560 (1st Cir. 1984) -- Eighth Amendment cruel and unusual punishment.

Maryland: *Johnson v. Levine*, 450 F.Supp. 648 (D. Md. 1978) -- Eighth Amendment cruel and unusual punishment. *Nelson v. Collins*, 455 F.Supp. 727 (D. Md. 1978), *aff'd*, 588 F.2d 1373 (4th Cir. 1978) -- Eighth Amendment cruel and unusual punishment. The judgment entered on remand, which found constitutional violations, was not reported, but was reversed and remanded by the Fourth Circuit, 659 F.2d 420 (4th Cir. 1981)(*en banc*). *Washington v. Keller*, 479 F.Supp. 569 (D. Md. 1979) -- Eighth Amendment cruel and unusual punishment.

Massachusetts: *Blake v. Hall*, 668 F.2d 52 (1st Cir. 1981), *cert. denied*, 456 U.S. 983 (1982) -- Eighth Amendment cruel and unusual punishment.

Michigan: *Glover v. Johnson*, 478 F.Supp. 1075 (E.D. Mich. 1979) -- Fourteenth Amendment equal protection and due process. *Knop v. Johnson*, 685 F. Supp. 636 (W.D. Mich. 1988), discussing 667 F. Supp. 467 (W.D. Mich. 1987) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment equal protection and due process; First, Sixth and Fourteenth Amendment rights violated by policies regarding privileged (legal) mail.

Mississippi: *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment; Fourteenth Amendment equal protection; First Amendment free speech, right of association; Code Miss. 1942, §§ 7930, 7942, 7959, 7965, 7968.

Missouri: *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment; Fourteenth Amendment due process.

New Hampshire: *Laaman v. Helgemoe*, 437 F.Supp. 269 (D. N.H. 1977) -- Eighth Amendment cruel and unusual punishment. The court's analysis mentioned the First and Sixth Amendments in connection with visitation and withholding of legal mail, and also discussed Fourteenth Amendment due process rights, but the holding was based on the totality of conditions as they violated the Eighth Amendment.

New Mexico: *Duran v. Carruthers*, 678 F.Supp. 839 (D. N.M. 1988) -- Motion to vacate consent decree in effect since 1980. The court noted that the underlying complaint, which resulted in the consent decree, claimed that the totality of conditions violated the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments, as well as unspecified state constitutional and statutory claims.

New York: *Mitchell v. Cuomo*, 758 F.2d 804 (2nd Cir. 1984) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment.

North Carolina: *Batton v. North Carolina*, 501 F.Supp. 1173 (E.D.N.C. 1980) -- Fourteenth Amendment equal protection. The court also noted that a Fourth Amendment search and seizure issue might exist.

Ohio: *Chapman v. Rhodes*, 434 F.Supp. 1007 (S.D. Oh. 1977) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process.

Oklahoma: *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1979) -- Eighth Amendment cruel and unusual punishment.

Oregon: *Capps v. Atiyeh*, 495 F.Supp. 802 (D. Ore. 1980) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment.

Pennsylvania: *Hassine v. Jeffes*, 846 F.2d 169 (3rd Cir. 1988) -- Eighth Amendment cruel and unusual punishment. The Court of Appeals vacated the district court's order denying a class action, and remanded for an order granting class certification and adjuciation of the class action claims.

Rhode Island: *Palmigiano v. DiPrete*, 443 F.Supp. 956 (D. R.I. 1977) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment; Fourteenth Amendment equal protection, due process.

South Carolina: *Plyler v. Evatt*, 846 F.2d 208 (4th Cir. 1988) -- Eighth Amendment cruel and unusual punishment.

South Dakota: *Cody v. Hillard*, 599 F.Supp. 1025 (D. S.D. 1984), *aff'd in part, rev'd in part, remanded with directions*, 830 F.2d 912 (8th Cir. 1987) (*en banc*) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment equal protection.

Tennessee: *Grubbs v. Bradley*, 552 F.Supp. 1052 (M.D. Tenn. 1982) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment.

Texas: *Ruiz v. Estelle*, 503 F.Supp. 1265 (S. D. Tex. 1980), *stay granted and denied*, 650 F.2d 555 (5th Cir. 1981) -- Eighth Amendment, applied to states through Fourteenth Amendment, cruel and unusual punishment; Fourteenth Amendment due process; Fifth Amendment due process; First Amendment redress of grievances; Vernon's Ann. Tex. Civ. Stat. art 6184k-1, concerning inmate authority. On appeal, *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), the court discussed the Eighth Amendment, Fourteenth Amendment, and Fifth Amendment issues.

Virginia: *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985) -- Eighth Amendment cruel and unusual punishment.

Washington: *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) -- Eighth Amendment cruel and unusual punishment. *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985) -- Eighth Amendment cruel and unusual punishment.

West Virginia: *Crain v. Bordenkircher*, 342 S.E.2d 422 (Sup. Ct. W.Va. 1986) -- Eighth Amendment cruel and unusual punishment; West Virginia Constitution Art. 3 § 5 cruel and unusual punishment.

Wisconsin: *Delgado v. Cody*, 576 F.Supp. 1446 (E.D. Wisc. 1983) -- Eighth Amendment cruel and unusual punishment.

District of Columbia: *Inmates of D.C. Jail v. Jackson*, 416 F.Supp. 119 (D.D.C. 1976) -- Eighth Amendment cruel and unusual punishment. *Campbell v. McGruder*, 416 F. Supp. 100 & 111 (D.D.C. 1976), *aff'd & remanded*, 580 F.2d 521 (D.C. Cir. 1978), *on remand* 443 F.Supp. 562 (D.D.C. 1982) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process; Fifth Amendment due process. *Inmates of Occoquan v. Barry*, 650 F. Supp. 619 (D.C.D.C. 1988), *vac. and remanded* 844 F.2d 828, *motion for r'hing en banc denied* 850 F.2d 796 (D.C. Cir. 1988) -- Eighth Amendment cruel and unusual punishment.

Puerto Rico: *Martinez-Rodrigues v. Jiminez*, 409 F.Supp. 582 (D.P.R. 1976) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process; Sixth Amendment right to counsel. *Morales-*

Feliciano v. Barcelo, 497 F.Supp. 14 (D.P.R. 1979) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment due process; Fifth Amendment due process and unnecessary and wanton infliction of pain.

Virgin Islands: *Barnes v. Government of the Virgin Islands*, 415 F.Supp. 1218 (D.V.I. 1976) -- Eighth Amendment cruel and unusual punishment; Fourteenth Amendment equal protection and due process.

We hope this is helpful and that you will call if you have further questions.

Lou Fields
Legislative Attorney

PRESENTATION

by

HARDY RAUCH, DIRECTOR

STANDARDS AND ACCREDITATION DIVISION

AMERICAN CORRECTIONAL ASSOCIATION

before the

SENATE WAYS AND MEANS COMMITTEE

SENATOR WINTON WINTER, VICE CHAIRPERSON

April 21, 1989

Topeka, Kansas

TABLE OF CONTENTS

Thank you for the opportunity to appear before the Committee and to present information about the National Standards and Accreditation Program. To fully explain the development of correctional standards, it is necessary to describe briefly the American Correctional Association.

The Association was founded in 1870 for the purpose of improving correctional programs and operations throughout the United States. The Association's first president was Rutherford B. Hayes, then Governor of Ohio, who, subsequently, was elected President of the Nation, and later returned to serve again as President of ACA from 1883 to 1892. In his inauguration remarks of 1870, Mr. Hayes dedicated the Association to the golden rule: "As ye would that men should do to you, do ye also to them likewise!" During that first Congress of Corrections, the participants established a set of general rules relating to prison discipline and prisoner rehabilitation. This practice of issuing annual guidelines, or position papers, on a variety of prison issues was followed by the group for another 75 years.

By the 1940's, the leaders of the Association recognized the need for developing and producing a more comprehensive set of national standards that would address the philosophical and operational problems of prison management. To meet this need, they appointed a series of subcommittees to assemble and publish the first manuals of standards. This process served the nation's

prisons well during the 1940's and 50's. But this system had one major weakness: it did not contain a method for verification of compliance. While many correctional practitioners followed the national standards and provided regular reports to their governing bodies, others preferred to operate without a system of specific goals and standards. It was recognized that some prison systems were able to operate correctional facilities that were safe, humane, efficient, and effective, while others were seriously lacking. It was during this period that the courts began to take an increased interest in prison conditions and abandoned the "hands-off" doctrine by considering the constitutionality of a wide variety of prison practices. The provision of prison programs that met the demands of both legislation and constitutional requirements was not only a good idea; it was being increasingly mandated by the courts during the late 1950's and the decade of the 60's.

This occurrence did not go unnoticed by the Association or by the prison administrators who were being ordered by the courts to improve prison practices and procedures through court orders which were inconsistent and expensive. Even though judges frequently expressed their reluctance to intervene in prison management issues because of their belief that prison operations were more appropriately the province of the executive branch, the judicial intervention often continued when the court was convinced that a system violated basic constitutional rights.

In 1969, the American Correctional Association was awarded a grant from the Ford Foundation to conduct a study of the desirability and feasibility of establishing national correctional standards that would take into consideration the interests of prison administrators, the public, prisoners, legislators, and the courts. Acting upon that premise, the Association, with assistance from the Federal Department of Justice and 18 major corporations, began development of the national correctional standards that exist today. During the developmental stages of the standards, it was recognized that if a correctional system hoped to convince its critics that it was functioning in accordance with high professional and constitutional standards, it would be necessary to develop a system that could review, evaluate, and measure the level of compliance with those standards.

Throughout the century of standards evolvement and development, the Association has sought to involve a broad spectrum of the criminal justice field. A listing of the members of the Committees on Standards, the Commission on Accreditation, officers of the Association, and other organizations involved is attached as an appendix to these printed comments.

The committee memberships include representatives from every segment of the correctional scene, representing every state of the Union and Canada. Members of the various committees who have served the standards development process form a veritable "who's

who" of corrections, and illustrate the widespread interest and high level of support for the concept.

I referred earlier to the need to develop a system for review and evaluation of the levels of compliance with national standards. To achieve this goal, in 1974 the Association established the Commission on Accreditation for Corrections as a separate, independent, nonprofit corporation committed to the achievement of four major goals:

- To formalize a system for the development and revision of standards in conjunction with the American Correctional Association in order to maintain their relevance and usefulness;

- To improve the administration and operation of correctional agencies through the implementation of a national standards and accreditation program;

- To establish and maintain a system to review and monitor correctional agencies seeking national accreditation; and

- To award certificates of accreditation to correctional agencies that are found to be in compliance with national correctional standards.

The Commission is comprised of a Board of Commissioners that represent the full spectrum of adult and juvenile correctional agencies, the judiciary, and other law enforcement groups. The ACA nominates and elects 15 of the Commissioners; others are appointed by professional organizations with interest in the corrections systems. This group includes representatives from the American Bar Association, the American Institute of Architects, the National Sheriffs' Association, and the National Association of Counties.

Since 1977, 10 manuals of standards have been published to embrace the diversity of correctional agencies. These manuals are:

Standards for Adult Correctional Institutions
Standards for Adult Community Residential Services
Standards for Adult Local Detention Facilities
Standards for Adult Probation and Parole Field Services
Standards for Adult Parole Authorities
Standards for Juvenile Training Schools
Standards for Juvenile Detention Facilities
Standards for Juvenile Community Facilities
Standards for Juvenile Probation and Aftercare Services
Standards for the Administration of Correctional Agencies

The standards are the foundation of the accreditation process. In measurable terms, they define the policies and

procedures that are necessary for the operation of correctional programs that safeguard the life, health, and safety of offenders and personnel. Moreover, they define the policies and procedures required for providing essential programs that consider the interests of the executive, legislative, and judicial branches of the government. Two examples of the 451 Standards for adult facilities are:

> **2-4401** The system for classifying inmates specifies the level of custodial control required and requires a regular review of each classification. (Essential)
>
> DISCUSSION: A correctional system should provide for at least three degrees of custodial control for inmates. All inmates should be assigned the least restrictive custodial level necessary.

> **2-4275** An adequately equipped medical facility, which meets the legal requirements for a licensed general hospital with respect to the services it offers, is available to all inmates. (Mandatory)
>
> DISCUSSION: If an institution does not have the resources to meet these standards in-house, it should provide infirmary care inside the institution and hospital care through contractual arrangements outside the institution.

Like hospital and educational accreditation programs, correctional accreditation is a system designed for improvement and change. Primarily a management tool, accreditation provides the organization and structure by which administrators can upgrade the quality of correctional services and programs. These standards are increasingly recognized and accepted by judges, legislators, and corrections professionals as representing the best correctional practices, and are used by correctional facilities and programs around the country as a benchmark of quality.

BENEFITS OF ACCREDITATION

Agency involvement in accreditation represents a commitment to excellence and professionalism. Through accreditation, agencies can achieve the following:

- To assure that their system is being operated in compliance with standards that are developed, reviewed, and updated constantly by correctional professionals throughtout the United States.

- To protect the life, safety, and health of staff and offenders, whether adult or juvenile, adjudicated or not adjudicated, who are in custody or under correctional supervision.

- To assess the strengths of a correctional unit and identify methods to maximize resources and implement change.

- To minimize the potential for costly, time-consuming litigation by careful attention to detail and the maintenance of accurate records.

- To enhance credibility with the courts and the public.

- To provide professional and public recognition for the high level of correctional programming.

- To improve staff and offender morale.

- To provide a system to reduce allegations of arbitrary and capricious actions by prison administrators.

THE ACCREDITATION PROCESS

The Commission on Accreditation for Corrections has invited all correctional agencies to apply for accreditation. To participate, an agency contracts with the Commission and agrees to complete the requirements necessary for accreditation.

The accreditation process usually takes 12 to 18 months to complete and consists of these 6 major components:

- Contract Agreement
- Self-Evaluation
- Association/Commission Staff Review
- Compliance Audit Review by ACA Auditors
- Accreditation Decision
- Annual Review by ACA Staff (Record Review or Site Visit)

When a facility achieves 100-percent compliance with all mandatory standards and at least 90-percent compliance with other standards, accreditation is granted for a three-year period. During that time, the agency must maintain its standards compliance levels and implement plans of action for those standards with which it did not comply at the time of the audit. Infrequently, and under special circumstances, the Commission may grant a waiver of a plan of action. The Commission monitors each accredited agency through periodic visits and the submission of annual reports detailing agency progress toward full standards compliance. If compliance levels are not maintained, an agency's accreditation may be revoked.

ACCREDITATION ACCEPTANCE

Today, 804 correctional organizations in the United States are either accredited or in the process of accreditation. Those facilities provide service to or incarcerate over 750,000 persons annually. The Association and the Commission has made concerted efforts to involve those systems and facilities housing the larger numbers of prisoners on the theory of providing service to the "greater need." We are now placing emphasis on the small jails in America, of which there are more than 2,000 units, each housing less than 50 persons.

IN CONCLUSION, I remind you that the operation of an accredited facility is not easy. It requires the provision of adequate medical care for inmates and residents, adequate fire protection for the staff and those offenders in their custody, regular fiscal audits to ensure that funds are adequately controlled, adequate security to ensure protection of the public; and a commitment from the executive and legislative branches to provide the staff and facilities necessary for carrying out correctional supervision under conditions that are constitutionally required. To do less is to fail our duty. To paraphrase the words of the first president of the Association, "Society has a right and a duty to punish criminals for their behavior, but it has a corresponding responsibility to punish them in facilities that are humane and constitutional."

I would be happy to respond to any questions.

July 24, 1989

UPDATE OF 4-21-89 remarks.

PRESENTATION BY HARDY RAUCH

I. The Background/Need for Standards

A. Desire for Professionalism

1. Following AMA - ABA - NEA, and other professions.

2. Court involvement spurred the process.

B. Movement in the '50's and '60's from occasional inquiry to small group discussions to formal meetings with increasing recognition of the need for national standards. This recognition culminated in 1968 with a $240,000 grant from the Ford Foundation to explore the development process and to formulate an accreditation plan for the '70's.

II. The Standards Developmental Process (the 1970's)

A. Obtaining Funding -

Private Sector - IBM, U.S. Chamber of Commerce, U.S. Steel, Alcoa, Bristol Myers, Woolworth, and major funding from the various sections of the United States Department of Justice.
- $4.5 million.

B. Selecting Representatives of All Fields for Corrections.

- During the past twelve years, 130 persons have served on the Standards Committee and 92 have served as Commissioners on Accreditation.
  - Standards Committee members are appointed by the President of ACA.
  - 15 persons of the 20-member Commission are elected by ACA membership, and five of the twenty are appointed by related professional groups such as:

    The American Bar Association
    The National Association of Counties
    The American Institute of Architects
    The National Sheriff's Association
    The American Medical Association

- The effort to involve representatives from probation; parole; adult corrections; juvenile corrections; jails; the courts and community centers was considered equally important to the

desire to have broad geographical, racial, and other minority participation.

An example of this strong desire for broad involvement is indicated by the positions held by Committee and Commission members. Thirty-seven persons were directors of state systems; ten, deputy directors; ten, wardens/superintendents; eight, directors of probation; eight, parole; and eleven, administrators of community programs.

In addition to this impressive group of correctional managers, the committees have also included men and women from all the major professions associated with criminal justice such as attorneys, judges, physicians, architects, engineers, and educators.

The end result has been that the membership lists of Commissioners and Standards Committees are a veritable "Who's Who" of corrections for the past 15 years.

III. The Evolvement of the Accreditation Process

A. The need for a separate body for accreditation

B. The Key Components of the Commission.

1. <u>The ability to make accreditation decisions that</u>:

   a. are not influenced by political considerations of any kind, and

   b. are based upon compliance with the national standards.

2. <u>The auditing process</u> is designed to provide the Commissioners with information with information that:

   a. accurately describes conditions in the agency, and

   b. evaluates the level of compliance with standards, based upon the firsthand knowledge and experience of the audit team.

3. <u>Fiscal Responsibility</u> - The Commission has dual goals. These are:

   a. to maintain fees and associated expenses to the accredited agencies that are reasonable and considerate of budget limitations, and

b. to operate the accreditation program at a level that portrays the correctional field as a professional group of capable and dedicated public servants.

4. To accredit only those agencies and facilities that comply with national standards that are responsive to the needs of:

a. society
b. clients/inmates
c. staff
d. taxpayers
e. legislators
f. the courts

IV. Current Status of Standards and Accreditation

A. Involvement of Agencies and Facilities

	'79	'80	'81	'82	'83	'84	'85	'86	'87	'88	'89
ACA	0	0	11	1	3	3	4	3	3	3	4
APA	7	7	7	8	6	8	8	9	7	7	8
ACRS	121	139	185	178	169	167	167	187	188	195	219
APPFS	14	15	36	41	41	25	18	19	41	31	36
ACI	144	151	186	190	198	189	189	191	208	256	298
ALDF	12	17	25	31	31	34	38	48	49	55	62
JCRS	2	4	7	16	44	49	48	52	76	82	84
JPAS	3	5	4	5	9	10	11	12	12	9	9
JDF	3	3	4	8	32	32	34	33	26	27	28
JTS	3	3	9	20	32	32	34	39	69	59	67
CERTIFICATION										9	9
TOTAL	309	310	363	498	565	549	561	600	679	733	824

This listing includes all correctional units with signed contracts. It includes agencies that are correspondence status, candidate status, and fully accredited.

B. Agency costs range from a low of $3,300, or $2.20 per day, to a high of &7,900 or $5.50 per day. These costs are based upon historical experience that the typical facility is accredited one year after entering into contract and the accreditation period is for three years.

C. Auditor Involvement - At the present time, there are 347 active, approved, accreditation auditors. Of this number, 309 are currently employed in corrections and 36 are retired from accredited agencies or facilities.

Auditors are assigned, based upon:

1. knowledge of the national standards,
2. experience in the appropriate field of corrections,
3. demonstrated ability to evaluate programs,
4. geographical location, and demonstrated ability to communicate orally and in writing.

GOALS FOR THE 1990's

There is a total of 5,712 correctional facilities in the United States, including 925 prisons, 3,450 jails, 610 juvenile facilities, and 727 community centers.

The current 824 accredited agencies represent 14 percent of the correctional units in the United States. During the 1990's, we will strive to raise this level of involvement to 70 percent, or about 5,000 based upon the anticipated number of facilities projected for the Year 2,000.

This growth will require consistent expansion in the following areas:

- increase in the number of Commissioners from 20 to 60,
- office staff increase from 12 to 44, and
- increase in auditors from 347 to 1,000.