Federal Probation

JUNE 1988

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LII JUNE 1988 NUMBER 2

This Issue in Brief

Systems Therapy: A Multimodality for Addictions Counseling.—Chemical dependency is a growing problem which has increased at least tenfold over the past decade. Until recent years the phenomenon was not recognized as a disease, but rather a mental health problem, and current therapies still tend to address mental health aspects rather than the disease of chemical dependency. Alcohol, although a drug, is still considered to cause separate and distinct problems from other drugs. Author John D. Whalen maintains, however, that alcoholism and drug abuse can be treated as one common problem with a set of exhibiting symptomologies. This article describes Systems Therapy, a therapeutic approach developed by the author.

Assessment of Drug and Alcohol Problems: A Probation Model.—Authors Billy D. Haddock and Dan Richard Beto highlight the increased emphasis on assessment methods in drug and alcohol treatment programs and describe the assessment model used in a Texas probation department. Major theories of substance abuse and dependence are discussed as they relate to assessment. The objectives, components, and general functioning of the assessment model are described. A counselor/consultant is used in the assessment process to offer greater diagnostic specificity and make individualized treatment recommendations. According to the authors, the assessment process facilitates a harmonious relationship between probation officers and therapists, thus promoting continuity of care and quality services.

Drug Offenses and the Probations System: A 17-Year Followup of Probationer Status.—Authors Gordon A. Martin, Jr. and David C. Lewis provide the current status of 78 of 84 probationers previously studied in 1970. Of the original group, 14.1 percent are deceased and 18 percent have had constant problems with the law. Sixty eight percent have had varying degrees of success, with one-third essentially free of all criminal involvement. The study indicates that younger probationers who used heroin and barbiturates were the population at greatest long–term risk and merit the longest periods of probation

CONTENTS

and most intense supervision. For them, marijuana did not serve as a "gateway" drug, though alcohol may have. The authors note that the original group of probationers was supervised by a probation officer who was a specialist in drug offenders. While his probation load was sizeable, it was manageable. For probation to fulfill its crucial mandate—the authors conclude—more resources must be made available to it, and caseloads must be manageable.

All-or-Nothing Thinking and Alcoholism: A Cognitive Approach.—Self-destructive all-or-nothing thinking is both a correlate of alcoholic drinking and a likely area for cognitive intervention. Author Katherine van Wormer contends that it is not the alcoholic's personality but the alcoholic's thinking that is the source of the drinking. Specific cognitive strategies are offered—strategies that should be effective both in recovery from alcoholism as well as in its prevention.

Lower Court Treatment of Jail and Prison Overcrowding Cases: A Second Look.—In 1979 and 1981, the United States Supreme Court issued opinions in which it ruled that double-bunking of prison and jail cells designed for single occupancy was not unconstitutional *per se*. It also indicated that lower courts should demonstrate greater restraint in "second guessing" the decisions of correctional administrators. In 1983, *Federal Probation* published an article in which author Jack E. Call concluded that many lower courts were still quite willing to find overcrowded conditions of confinement unconstitutional. In this followup article, Call finds that after 4 more years of lower court decisions in overcrowding cases, this earlier conclusion is still valid.

Rewarding Convicted Offenders.—Offenders can be rewarded by deescalating punishments in response to behavior one wishes to encourage. This practice has distinguished origins, has been subjected to a variety of criticisms, but is regaining ascendance. In his review of the controversy, author Hans Toch suggests that defensible reward systems for offenders can be instituted and can enhance the rationality, humaneness, and effectiveness of corrections.

Current Perspectives in the Prisoner Self-Help Movement.—Prison rehabilitation programs are usually designed to correct yesterday's problems in order to build a better tomorrow for criminal offenders. Yet the struggle for personal survival in prison often diverts inmates' attention away from these "official" treatment policies and toward more informal organizations as a means of coping with the immediate "pains of imprisonment." Prisoner self-help groups promise to bridge the gap between immediate personal survival and official mandates for correctional treatment. Drawing on historical and interview data, author Mark S. Hamm offers a typology that endeavors to explain the promise explicit in prisoner self-help organizations.

Consequences of the Habitual Offender Act on the Costs of Operating Alabama's Prisons.—Habitual offender acts have been adopted by 43 states and are under consideration in the legislatures of others. According to authors Robert Sigler and Concetta Culliver, these acts have been adopted with relatively little evaluation of the costs involved in the implementation of this legislation. The data reported here indicate that one area of costs—costs to departments of corrections—will be prohibitive. The authors suggest that the funds needed to implement the habitual offender acts could be better used to develop and test community-based programs designed to divert offenders from a life of crime.

Evaluating Privatized Correctional Institutions: Obstacles to Effective Assessment.—Institutional populations in the American correctional system have increased dramatically during the last decade. This increase has produced serious concern about both overcrowding and the economic costs of imprisonment. One proposed solution to the current dilemma involves the engagement of the private sector in the correctional process. Although it is apparent that there are a number of potential benefits to be obtained from private sector participation in the administration of punishment, a variety of potential hazards have also been identified. In this article, author Alexis M. Durham III considers some of the hazards associated with the evaluation of privately operated correctional institutions. The discussion identifies some of these potential obstacles to effective evaluation and concludes that although evaluation impediments may well be surmountable, the costs of dealing with these problems may offset the economic advantages otherwise gained from private sector involvement.

Negotiating Justice in the Juvenile System: A Comparison of Adult Plea Bargaining and Juvenile Intake.—Plea bargaining and its concomitant problems have been of little concern to those who study the juvenile justice system. We hear little or nothing of "plea bargaining" for juveniles. However, in this article, author Joyce Dougherty argues that the juvenile system itself is based on the very same system of "negotiated justice" that lies at the

heart of adult plea bargaining. By placing society's interest in "caring for its young" (translated into the doctrine of parens patriae) over the individual rights of juveniles, the juvenile justice system has created a situation where the determination of a child's "treatability" has become more important than the determination of his or her guilt or innocence. The author compares adult plea bargaining and juvenile intake in an effort to illustrate how, despite all theoretically good intentions, the "justice" in the juvenile system is no better than the "negotiated justice" that is the end result of adult plea bargaining.

Lower Court Treatment of Jail and Prison Overcrowding Cases: A Second Look

BY JACK E. CALL, J. D., PH.D.*
Associate Professor of Criminal Justice, Radford University

Introduction

THE UNITED States Supreme Court has decided two cases involving the constitutionality of overcrowded prisons and jails. In 1979, the Court decided *Bell v. Wolfish.*[1] In that case, pretrial detainees in the Metropolitan Correctional Center (MCC), a modern Federal facility in New York City, alleged that the double-bunking of cells of 75 square feet was unconstitutional. The Court rejected the inmates' claim, pointing out that the inmates were confined to their cells only during ordinary sleeping hours, that the cells provided plenty of space for sleeping, that the vast majority of detainees spent less than 60 days confined in these conditions, and that the Metropolitan Correctional Center was anything but a traditional, dungeonlike correctional facility.

Less than 2 years later, the Supreme Court disposed of another claim that double-bunking had created unconstitutional conditions of confinement in *Chapman v. Rhodes.*[2] This time the claimants were convicted inmates and the cells were smaller (63 square feet), but the result was the same. In rejecting the arguments of the inmates at the Southern Ohio Correctional Facility (SOCF), the Court again pointed out that the inmates were incarcerated in a modern facility, that they were restricted to their cells only during normal sleeping hours, that the inmates' basic necessities of life were being more than adequately met, and that the rate of violence at the prison had not increased since the commencement of double-bunking.

While the constitutional standards in these two cases were different,[3] the cases were very similar in many important respects. As already indicated, both of the correctional facilities whose overcrowded conditions were challenged were relatively new and modern in both design and operation. Inmates were locked in their cells only during normal sleeping hours and had extensive access to recreational facilities and other diversionary activities during their waking hours. In neither facility had the overcrowding become so extensive that provision of basic necessities of life, such as adequate food, minimal opportunity for exercise, basic medical care, and the like, had been significantly impaired.[4] In short, they were both modern, top-flight correctional facilities.

Both cases were similar in another respect. In the opinion issued by the Court in each case, the Court went out of its way to make it clear that it believed lower courts had become too extensively involved in the operation of correctional facilities. The majority of the Court made it clear that it felt that lower courts had been substituting their own judgments for those of the administrative officials whose responsibility it was to manage these facilities. For example, in *Wolfish*, Justice Rehnquist, writing for the Court, indicated that

> [i]n determining whether restrictions or conditions are reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[5]

Justice Rehnquist also cautioned lower courts that in inquiring as to whether conditions of confinement constitute punishment, they should "be mindful that

*The author would like to express his appreciation to John Berry and Rebecca Farmer for research assistance provided in the development of this article.

[1] 441 U.S. 520 (1979).
[2] 452 U.S. 337 (1981).
[3] In *Wolfish* the Court held that the Due Process Clause prohibited the government from punishing pretrial detainees because they are presumed innocent until proven guilty. Pretrial detainees may show that they are being punished by proving that corrections officials intended to punish them, by proving that the overcrowded conditions are not rationally related to some legitimate purpose other than punishment, or by proving that the overcrowded conditions are excessive in comparison to that alternative purpose. In *Chapman* the Court held that conditions of confinement for convicted offenders are measured against the Cruel and Unusual Punishment Clause of the eighth amendment. The Court did not establish a clear test under that clause, but it did indicate that "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. 452 U.S. 337, p. 347 (1981).
[4] This is not meant to minimize the extent of the overcrowding in either facility. The population at MCC was 16 percent greater than its design capacity by 38 percent.
[5] 441 U.S. 520, p. 540, footnote 23.

these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility."[6]

Justice Powell, writing for the Court in *Chapman*, quoted this latter language from *Wolfish* with approval. He then cautioned lower courts that, in determining whether conditions of confinement constitute cruel and unusual punishment, they "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."[7]

Thus, the clear message from the Court to lower courts was that they should demonstrate less willingness to declare overcrowded conditions of confinement unconstitutional than they had previously. Corrections officials should be assumed to be aware of and responsive to their own constitutional responsibility to operate their facilities within the constraints imposed by the Constitution. The courts should back off and let these officials do their job.

Another important theme underlies the decisions in these two cases. The Court indicated that in order to find overcrowded conditions of confinement unconstitutional, courts should focus on more than simply the square footage available to inmates and the harshness of the conditions. After all, as one commentator put it, nobody promised these inmates a rose garden.[8] If conditions constitute punishment or cruel and unusual punishment, one should expect to see manifestations of harmful effects on inmates, such as increased rates of violence, deterioration of basic services, such as medical care, and increased mortality rates. In the absence of such harmful effects, conditions would probably be constitutional.[9]

In 1983 I explored the extent to which lower courts had heeded the admonition of the Supreme Court to give greater deference to the decisions of corrections officials in prison and jail overcrowding cases.[10] Essentially I concluded that the lower courts had not paid much attention to the Court's preaching. In 1983, Terence Thornberry and I considered the extent to which lower courts had considered the harmful effects of overcrowding on inmates in ruling on claims of unconstitutional overcrowding.[11] We concluded that demonstration of harmful effects had played a significant role in overcrowding cases. However, we also found that demonstration of harmful effects had played virtually no role in a substantial number of cases.

The purpose of the present research was to update the research done in these two 1983 articles. In particular, I wanted to see if the Court's sermon about giving greater deference to the decisions of corrections officials had "sunk in" with the passage of time. In addition, I was curious as to whether lower courts had begun to place greater emphasis on the need for plaintiff-inmates to demonstrate the harmful effects of overcrowding. And finally, I wanted to reassess the vulnerability to lawsuits of correctional facilities that double-bunk cells designed for single occupancy.

The Cases—Who Wins Them

This research is based on all the published opinions in prison and jail overcrowding cases decided since *Wolfish* in 1979. The cases include those decided through 1986.[12]

A total of 65 cases were decided with published opinions during the 8 years since *Wolfish*.[13] While this article is not intended to be a piece of rigorous quantitative research, an examination of some basic trends is useful as a means of developing a clearer overall picture of the cases.

As can be seen from table 1, inmates were on the whole quite successful in these cases—in 73.8 percent of the cases, the courts issued rulings in favor of the inmates. Inmates were just as successful during the last half of this period (winning 73.1 percent of the cases from 1983 to 1986) as they were during the first half (winning 74.4 percent of the cases from 1979 to 1982).

Inmates fared somewhat better in Federal trial courts than in Federal appellate courts. They won 80 percent of the cases decided by Federal district courts, compared to a 66.7 percent success rate in Federal circuit courts of appeals. Inmates' ability to win cases at either level was not substantially affected by time. Inmates' success rates at both levels of courts were about the same for the period 1979-82 as they were for the period 1983-86.

---

[6] *Id.*, p. 539.

[7] 101 S.Ct. 2392, pp. 2401-02.

[8] Ruthanne DeWolfe, "Nobody Promised Them a Rose Garden: Recent Developments in Prison Law," *Clearinghouse Review*, January 1982, p. 726.

[9] See Terence P. Thornberry and Jack E. Call, "Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects," *Hastings Law Journal*, Vol. 35, p. 313 (1983).

[10] Jack E. Call, "Recent Case Law on Overcrowded Conditions of Confinement," *Federal Probation*, September 1983, p. 23.

[11] Thornberry and Call, "Constitutional Challenges to Prison Overcrowding."

[12] If a case was decided by a lower court and appealed to an appellate court and if both courts issued a published opinion, both opinions were considered in this study, since the responses of both courts are relevant to the inquiry here.

[13] In *Ruiz v. Estelle*, the Fifth Circuit Court of Appeals issued three published opinions over the course of 2 years. Because these three opinions were issued so closely together and because they essentially involved reconsiderations of the same issues, the three opinions were counted as one.

TABLE 1. DISPOSITION,
BY TYPE OF COURT AND BY YEAR

	1979		1980		1981		1982		1983		1984		1985		1986		Total	
	Inm	G	Inm	G	Inm	G	Inm	G	Inm	G	Inm	G	Inm	G	Inm	G	Inm	G
TC	1	1	6	1	5	1	7	1	5	2	4	1	0	1	4	0	32	8
App.	1	0	3	2	5	2	1	1	1	1	1	0	2	0	0	1	14	7
SC	0	0	0	0	0	1	0	0	1	1	0	0	0	0	1	0	2	2
	2	1	9	3	10	4	8	2	7	4	5	1	2	1	5	1	48	17
	(3)		(12)		(14)		(10)		(11)		(6)		(3)		(6)			

Inm = Inmates won all or important part of the case.
G = Government won all or all important parts of the case.

Consideration of Harmful Effects by the Courts

The last 4 years have also witnessed very few changes in the extent to which courts emphasized the need to show the harmful effects of overcrowding. In the 1983 harmful effects article, Thornberry and I divided overcrowding cases into four categories. In the Class I cases, courts demonstrated very little concern about harmful effects. Rather than examine the consequences of overcrowding, typically these cases merely compared the challenged conditions with the conditions in *Wolfish* or *Chapman* or both. Class II cases demonstrated some concern about harmful effects, but the concern was either mentioned only very briefly or, more commonly, was implicit in the analysis employed by the court. Class II cases generally did not require (or at least did not refer to) any specific evidence of harmful effects.

Class III cases did emphasize harmful effects. They based their findings on explicit evidence of harmful effects (or upon the absence of such evidence). However, the evidence of harmful effects was usually impressionistic evidence, such as the observations of expert witnesses. In Class III cases, the judges did not explicitly make the point that it was necessary for the inmate-plaintiffs to prove harmful effects, but the opinions made frequent references to such effects.

Class IV cases required more rigorous evidence of harmful effects than the other classes of cases. In these cases, evidence was received about empirical studies showing harmful effects of overcrowding in prisons and jails generally, such as increased violence, increased reports of psychological problems, increased rates of disciplinary infractions, increased rates of illness, and the like. In addition, these courts considered evidence about specific harmful effects on the inmates in the prison or jail at issue.

As indicated in table 2, most courts have not demonstrated much concern about the need to show harmful effects. Slightly more than half the cases (35 of 65 cases) fall into Classes I or II.[14] Courts demonstrated more concern about harmful effects during the last 4 years studied, but the difference was slight (50 percent of cases during 1983-86 were Class III or IV; 43.6 percent during 1979-82).

Just as Federal district courts were more inclined than Federal appellate courts to rule in favor of inmate-plaintiffs, so were they more inclined to emphasize evidence of harmful effects. Fifty-five percent of the Federal district court cases were Class III or IV cases, while only 33.3 percent of the Federal appellate court cases fell into those categories. Only one of the four state court cases fell into the Class III or IV categories (a Class III case).

While the propensity of the courts to require proof of harmful effects did not increase substantially in the period since my last research, three cases in that period provide excellent examples of the approach to deciding overcrowding cases that Thornberry and I advocated in our 1983 article. In the first of these, *Grubbs v. Bradley*,[15] the court considered allegations of unconstitutional conditions of confinement in 12 Tennessee state penal institutions. In finding the overcrowding in two of these institutions unconstitutional, the court placed great importance on the testimony of an expert witness who testified that "overcrowding in penal institutions can lead to

[14] In the cases decided since my previous research in this area, it is more difficult to distinguish between Class II and Class III cases. It is more common now for courts to mention harmful effects and the testimony of expert witnesses, while remaining unclear as to the exact nature of the testimony given by those witnesses. *Toussaint v. McCarthy* provides a good example of this problem. In its discussion of the double-bunking of cells ranging in size from 40 to 50 square feet, the court concluded that confinement in these cells, "in the midst of the other abhorrent conditions detailed below, engenders tension and psychiatric problems. Still worse, it inevitably engenders violence." (p. 1395) Later, the court reiterated this finding and concluded, "based on the virtually unanimous testimony of witnesses at trial, that the double-celling of segregated inmates at San Quentin and Folsom under conditions now prevailing or likely to prevail in the foreseeable future is cruel and inhuman . . ." (p. 1409) However, nowhere does the court tell us whether the expert witnesses collected data about the effects of these conditions on the segregated inmates or even whether the expert witnesses had formed their opinions based on personal observations of the inmates. Since it seems unlikely that the court would have given much credence to the testimony of the expert witnesses here unless the latter had at least observed the inmates in the conditions at issue, I place this case in Class III.

[15] 552 F.Supp. 1052 (M.D.Tenn. 1982).

TABLE 2. CONSIDERATION OF HARMFUL EFFECTS, BY TYPE OF COURT AND BY YEAR

	1979				1980				1981				1982				1979–82			
Class:	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4
TC	1	1	0	0	0	1	4	2	3	1	1	1	3	1	3	1	7	4	8	4
																		(11)		(12)
App.	1	0	0	0	3	0	2	0	4	2	1	0	0	0	0	2	8	2	3	2
																		(10)		(5)
SC	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0
																		(1)		(0)
	3		0		4		8		11		3		4		6		22		17	

	1983				1984				1985				1986				1983–86			
Class:	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4
TC	2	1	3	1	3	0	2	0	0	0	0	1	0	1	3	0	5	2	8	2
																		(7)		(10)
App.	1	1	0	0	0	0	1	0	0	1	1	0	1	0	0	0	2	2	2	0
																		(4)		(2)
SC	1	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	1	1	0
																		(2)		(1)
	7		4		3		3		1		2		2		4		13		13	

TC = Federal Trial Court (District Court) Cases
App. = Federal Appellate Court Cases
SC = State Court Cases
1 = Class I Cases
2 = Class II Cases
3 = Class III Cases
4 = Class IV Cases

depression and stress; increased disciplinary problems; increased suicide rates; increased death rates; increased psychiatric commitment rates; increased hypertension rates and attendant cardiovascular damage; and increased incidence of illnesses."[16] The court also referred to the testimony of a psychological expert witness who testified that there is a causal relationship between overcrowding and psychological problems experienced by inmates.

The court then buttressed this general expert testimony with evidence that overcrowding had brought about adverse effects in the institutions at issue. It referred to the findings of both Federal and state epidemiologists who had concluded that overcrowding had caused outbreaks of hepatitis at the two most severely overcrowded prisons.[17] It also cited the testimony of the deputy commissioner of the state Department of Corrections, who testified that overcrowding had been the principal cause of a riot at one of the prisons.[18]

Fischer v. Winter[19] involved conditions of confinement at the Santa Clara Women's Detention Facility (WDF). The court heard expert testimony concerning the adverse effects of overcrowding on physical security, physical health, and the ability of an institution to properly segregate its population so that vulnerable inmates were not housed with aggressive inmates. The court also heard evidence about the effects of overcrowding on the inmates at WDF, including evidence that the rate of assaults by inmates on other inmates had increased by a factor of 2.5 while the population had increased by a factor of 2.0 and that the rate of inmate assaults on staff had remained basically the same. This evidence combined with other more impressionistic evidence of harmful effects to convince the court that the "level of physical security and psychological comfort" was so inadequate that it would "offend the general public's view of what decency requires in the long-term confinement of jail inmates."[20] However, the court also declined to find that the overcrowded conditions had created unconstitutional adverse effects on the physical health of the WDF inmates, because of the absence of any specific evidence that the physical health of WDF inmates had declined since the jail had become overcrowded.[21]

Dohner v. McCarthy[22] involved the double-bunk-

[16] *Id.*, p. 1119.
[17] *Id.*
[18] *Id.*
[19] 564 F.Supp. 281 (N.D.Cal. 1983).
[20] *Id.*, p. 301.
[21] *Id.*, p. 302.
[22] 635 F.Supp. 408 (C.D.Cal. 1985).

ing of 56 square foot cells that housed special inmates in the California penal system—the mentally ill, the medically afflicted, and inmates requiring protective custody. The court heard expert testimony about the adverse effects of overcrowding. However, one expert testified that he observed none of the usual signs of unusual tension in a penal institution, such as

> the state of inmate dress or undress; inmate annoyance; unacceptable language or behavior; indications that passive inmates are being exploited; "bully boy" inmates running the prison; laxity in relation to weapons and contraband; inmates drunk or under the influence of drugs; and evidence of the staff's not being present or in control.[23]

In addition, the court considered regression analysis evidence as to the effects of overcrowding on the rate of violence in the institution. While this evidence convinced the court that the rate of violence had increased as the prison had become more overcrowded, the court was unconvinced that the rise was caused by the increased overcrowding because of the absence of control variables in the analysis, such as "inmate characteristics, presence of individuals who repeatedly commit assaults, and the single/double-cell status of the offenders."[24]

Based on this evidence, the court concluded that the overcrowded conditions were not unconstitutional. However, it seemed clear that the court would have concluded otherwise if there had been more specific evidence of adverse effects. At one point the court stated that "[o]vercrowding itself is not a violation of the Eighth Amendment . . . unless specific effects flowing from that condition form the basis for a violation."[25]

Some Other Recent Trends

A few other points made in the 1983 *Federal Probation* article are worth reexamining in light of the additional evidence provided by 4 more years of overcrowding litigation. In that article I commented that "[a] surprising number of lower courts only mentioned *Wolfish* briefly and made little effort to analyze the effect of *Wolfish* on the case at hand."[26] Later in the article, I made a similar comment about lower court treatment of *Chapman*.[27]

That trend has largely dissipated. Of the 26 cases in which opinions have been published since my 1982 research, only five opinions gave short shrift to *Wolfish* and *Chapman*. Only two of those cases made no mention at all of either case.[28] In one of those cases the failure to mention either is understandable because the court was considering the same case on appeal for the second time and had discussed both *Wolfish* and *Chapman* in its prior decision.[29] Two other prison cases gave only a passing mention to *Chapman* and clearly should have devoted considerably more attention to it.[30] The remaining case discussed *Chapman* at some length, while barely mentioning *Wolfish*.[31] However, since the plaintiffs in that case were all pretrial detainees, *Wolfish* was the case on which the court should have focused its attention, while *Chapman* was only of minimal relevance.

Another comment made in the *Federal Probation* article was that *Chapman* was a more difficult case for lower courts to distinguish than *Wolfish* because the Supreme Court in *Chapman* specifically rejected the lower court's findings that overcrowded conditions at SOCF were unconstitutional because of

> the long terms of imprisonment served by inmates at SOCF; the fact that SOCF housed 38 percent more inmates than its "design capacity"; the recommendation of several studies that each inmate have at least 50-55 square feet of living quarters; the suggestion that double-celled inmates spend most of their time in their cells with their cellmates; and the fact that double-celling at SOCF was not a temporary condition.[32]

Nevertheless, I found four cases in which lower courts had determined that *Chapman* was distinguishable.

That trend has continued. In the four cases discussed in my earlier research, the courts had distinguished *Chapman* by emphasizing that 1) the cells in the case at hand were smaller than at SOCF; 2) inmates in the case at hand were afforded less time out of their cells than were the inmates at SOCF; 3) SOCF was a new, modern "top-flight" facility whereas the prison at hand was old, archaic, and suffering from a host of other problems, such as inadequate ventilation, offensive odors, heating and cooling problems, and inadequate programs for inmates; or 4) the overcrowding in the case at hand had brought about harmful effects that were absent in *Chapman*.[33]

Courts have practically ceased comparing the cell size in *Chapman* with the cell size in the case at hand,[34] and emphasis on the amount of time inmates are out of their cells or have the opportunity to be outside of their cells was also rather infrequent in

[23] *Id.*, pp. 417-18.
[24] *Id.*, p. 418, footnote 26.
[25] *Id.*, p. 428.
[26] Call, "Recent Case Law on Overcrowded Conditions of Confinement," p. 26.
[27] *Id.*, p. 28.
[28] *Blake v. Fair; Hoptowit v. Spellman.*
[29] *Hoptowit v. Spellman.*
[30] *Delgado v. Cady; Wellman v. Faulkner.*
[31] *Bradford v. Gardner.*
[32] *Rhodes v. Chapman*, p. 2399.
[33] *Id.*, pp. 28-29.
[34] See *French v. Owens (II)* for the lone exception.

cases over the last four years.[35] However, references to the antiquated and dismal conditions existing at the institution at issue were frequent.[36] In particular, considerable emphasis was placed on two factors—the absence of meaningful activities for inmates to engage in when outside their cells[37] and the absence of opportunities for inmates to exercise.[38] And, of course, as is apparent from our earlier discussion, some courts continued to emphasize the importance of the harmful effects caused by the overcrowded conditions, and some of them used this as a means of distinguishing *Chapman*.[39]

It should be clear from the discussion thus far that the Supreme Court's apparent desire expressed in *Wolfish* and *Chapman* that lower courts show less inclination to find overcrowded conditions of confinement unconstitutional has not had its intended effect. Inmate-plaintiffs continue to be quite successful in their litigation of overcrowding cases. Courts have not developed a greater tendency to require proof of harmful effects in such cases, but in any event, inmate-plaintiffs do quite well even in those cases where proof of harmful effects is required. Should it be concluded that *Wolfish* and *Chapman* have had no effect on the disposition of overcrowding cases?

I had anticipated that one emerging effect of *Wolfish* and *Chapman* might be that courts would become more solicitous of the government and would at least give the government a break on the remedy ordered by allowing the government to develop its own compliance plan for correcting conditions found to be unconstitutional. In one case, for example, the court ruled against a county government, but said

> We cannot end . . . without noting the Supreme Court's admonition in *Wolfish* . . . and *Rhodes* . . . that the operation and management of a detention facility are usually best left to the prison officials and state legislatures, unless these parties have failed to perform these duties in an adequate manner. We could not agree more and drafted the 1978 and 1980 orders [in previous decisions in this case] with that in mind. A court cannot and should not impose its own view as to how a particular facility should be run, absent a highly unusual situation.[40]

In another case, the court found overcrowded conditions at the South Dakota State Prison unconstitutional, but it gave the state 120 days in which to submit a compliance plan.[41] In a third case, the court found overcrowded conditions at the Kentucky Correctional Institution for Women unconstitutional, but said

> The state has, in the past, demonstrated a willingness to take steps to correct this problem and this Court, therefore, will not "assume that . . . prison officials are insensitive to the requirements of the Constitution" [quoting *Chapman*] in the crucial area of overpopulation.[42]

The court then indicated its willingness to allow the state a reasonable time to find its own solution to the problem.

This expected development has not occurred (at least not in the cases resulting in published opinions). In case after case, courts which have found overcrowded conditions unconstitutional have also demonstrated their willingness to impose tough remedies on the government. This pattern is clearest at the trial court level, where courts develop the most vivid picture of the grim conditions that often are shown to exist. Federal district courts have ruled in favor of inmate overcrowding complaints and issued orders in 29 cases. In 13 of those cases, the court ordered a ceiling on the population of the institution.[43] In five other cases, the court enjoined the double-bunking of cells designed for one inmate.[44] In other cases, the court ordered a limit to the number of inmates per cell (two cases),[45] closed the institution (one),[46] ordered minimum cell sizes (one),[47] and ordered the removal of state prisoners from a local jail (one).[48] In only three cases did the court allow the government first crack at a solution by submitting a compliance plan for the court's consideration.[49]

The State Cases

Only four of the opinions in this study were issued by state courts. The small number was not unexpected, because many civil rights attorneys believe that state courts provide a hostile forum for civil

---

[35] *Crain v. Bordenkircher* and *Reece v. Gragg* are two cases that did emphasize this factor.

[36] See *Cody v. Hillard, French v. Owens (II), Inmates of Riverside County Jail v. Clark, Toussaint v. McCarthy,* and *Toussaint v. Yockey.*

[37] See *Albro v. County of Onondaga, Cody v. Hillard, Crain v. Bordenkircher,* and *Reece v. Gragg.*

[38] See *Crain v. Bordenkircher, Inmates of Riverside County Jail v. Clark, Mallery v. Lewis* (dissenting opinion), and *Reece v. Gragg. Dohner v. McCarthy, Inmates of Allegheny County Jail v. Wecht, Medina v. O'Neill, Monmouth County Jail Inmates v. Lanzaro,* and *Wellman v. Faulkner* are cases that did not distinguish *Chapman* but placed considerable emphasis on the importance of exercise opportunities for inmates.

[39] See *Fischer v. Winter, Toussaint v. McCarthy,* and *Toussaint v. Yockey.*

[40] *Inmates of Allegheny County Jail v. Wecht,* p. 1297.

[41] *Cody v. Hillard,* p. 1062.

[42] *Canterino v. Wilson,* p. 214.

[43] The 13 cases are *Batton v. North Carolina, Capps v. Atiyeh, Feliciana v. Barcelo, French v. Owens (I), Gross v. Tazewell County Jail, Hendrix v. Faulkner, Inmates of Allegheny County Jail v. Wecht, Jackson v. Gardner, Lareau v. Manson, Monmouth County Jail Inmates v. Lanzaro, Palmigiano v. Garrahy, Reece v. Gragg,* and *West v. Lamb.*

[44] The five cases are *Dawson v. Kendrick, Grubbs v. Bradley, Ruiz v. Estelle, Smith v. Fairman,* and *Toussaint v. McCarthy.*

[45] *Heitman v. Gabriel* and *Hutchings v. Corum.*

[46] *Ramos v. Lamm.*

[47] *Martino v. Carey.*

[48] *Union County Jail Inmates v. Scanlon.*

[49] The three cases are *Albro v. County of Onondaga, Canterino v. Wilson,* and *Cody v. Hillard.*

rights claims.[50] One of these cases was a rather ordinary case in which the Fourth District Court of Appeal in California upheld a trial court's finding that the conditions in an understaffed, outmoded jail that provided inmates as little as 33 square feet of living space at times and only 2 hours of exercise a week were unconstitutional.[51] However, the other three cases were quite unusual.

In the first of these cases, the West Virginia Supreme Court of Appeals provided anything but the hostile forum feared by civil rights attorneys.[52] The trial court had found unconstitutional the "deplorable conditions that were found to exist" at the West Virginia Penitentiary.[53] The state had filed a compliance plan, which a subsequent trial court judge had approved. The inmate-plaintiffs were appealing on the basis that the plan was inadequate in addressing the needs for recreation, rehabilitation, and new physical facilities, including increased living space. Current living arrangements consisted of 5′ × 7′ cells, occupied by one inmate. The trial court's Final Order had stated that the "physical facilities, due primarily to age, are in such a state of disrepair and obsolescence, that massive renovation bordering on new construction would be required to render the Penitentiary habitable."[54] The West Virginia Supreme Court concluded that the major renovations called for in the state's compliance plan fell short of "bordering on new construction." It further concluded that "[i]f the State is to meet its constitutional duty to refrain from inflicting cruel and unusual punishment, then it must cease confining inmates at WVP to cells measuring only thirty-five square feet."[55] The court, in effect, ordered the state to build new facilities.

The courts in the other two state cases acted more consistently with the pessimistic predictions of civil rights attorneys, but not precisely in the way they would predict. In the first case, the Utah Supreme Court had before it a case involving the conditions in a pretrial detainment section of a county jail. This section was "divided into cells, used only for sleeping, and a day room. There are no facilities for exercise. When the day room is filled to capacity, there is an average of 12.2 square feet of space per detainee."[56] The lower court had concluded that these conditions "would not be tolerated in a Federal Court contest if the confinement was for a long period of time."[57] The Utah Supreme Court was of the same equivocal frame of mind as the trial court, concluding that these conditions raised "serious constitutional issues as to a detainee's right of due process to be free from unduly harsh and rigorous treatment."[58] What is so curious is that neither court ever decided whether the conditions were indeed unconstitutional. Furthermore, the court issued a kind of order in which it indicated that the jail "should . . . if at all practicable" provide for "[f]ull utilization of the day room and the space in the sleeping cells during the day, if consistent with the safety of the prisoners and the security of the facility."[59]

In the second case, the justices of the Idaho Supreme Court demonstrated that they must have gone to the same law school as the justices of the Utah Supreme Court. In another case involving the pretrial detainee section of a county jail, inmates were subjected to extremely crowded conditions.[60] At times, six inmates were confined for 22 to 23 hours per day in cells that provided 16 square feet of floor space per inmate—3 to 4 feet when the space taken up by the bunks was deducted. The trial court declined to find that these conditions were punitive in nature (as *Wolfish* would require for a finding of unconstitutionality), but "advised" county officials that "the confinement of more than two inmates in the smaller cells should be limited and if it were necessary to confine more than two in the cell [they] should consider allowing the detainees out of their cells for longer periods of time."[61] The Idaho Supreme Court was in a bolder frame of mind. It "held" that these conditions "did in fact fail to meet reasonable standards," but concluded that since the trial court "did order remedial action eliminating the overcrowding" the inmate-plaintiffs were not entitled to further relief.[62] As a dissenting justice pointed out, the court's review of the trial court's action was more like that of "a parishioner's review of a Sunday sermon" than of a court determined to see that important constitutional rights were vindicated.[63]

Of course, four cases are far too few to permit even tentative conclusions about the extent to which state

---

[50] See, for example, Burt Neuborne, "The Myth of Parity," *Harvard Law Review*, Vol. 90, p. 1105 (1977). It is apparent from the "Jail Litigation Status Report" (1985) and the "Status Report—The Courts and Prisons" (March 1, 1987), published by the ACLU's National Prison Project, that attorneys bringing lawsuits involving conditions of confinement in jails and prisons agree with this "common wisdom." Very few of the lawsuits reported in those two reports, which are probably the most comprehensive listing of such lawsuits to be found, were brought in state courts.

[51] *Inmates of Riverside County Jail v. Clark.*

[52] *Crain v. Bordenkircher.*

[53] *Id.*, p. 426.

[54] *Id.*, p. 445.

[55] *Id.*, p. 447.

[56] *Wickham v. Fisher*, p. 898.

[57] *Id.*

[58] *Id.*, p. 901.

[59] *Id.*, p. 902.

[60] *Mallery v. Lewis.*

[61] *Id.*, p. 23.

[62] *Id.*

[63] *Id.*, p. 27.

courts are receptive to allegations of unconstitutionally overcrowded conditions of confinement. Nevertheless, they do little to inspire confidence in inmate-plaintiffs who would seek relief there.

Conclusions

Perhaps the single most important question facing corrections officials whose facilities are becoming overcrowded is whether their facilities are likely to be sued successfully if they double-bunk cells designed for single occupancy. In concluding my 1983 *Federal Probation* article, I offered this opinion:

> Nearly all the courts that have cited *Chapman* and addressed the issue of double-bunking have concluded that *Chapman* requires courts to consider all the circumstances relating to the conditions of confinement in determining whether the eighth amendment has been violated. The greatest legal danger created by double-bunking is that as the double-bunked facility becomes more overcrowded, the quality of other conditions of confinement is likely to deteriorate. It becomes more difficult to keep the facility clean, to provide adequate and properly prepared food, to keep the plumbing in good working order, to permit sufficient exercise, to provide adequate health care, and even to allow inmates adequate time out of their double-bunked cells. The duty to protect inmates from each other will also become more difficult . . . This analysis suggests that as double-bunking becomes more prevalent in an institution, the likelihood of a lawsuit based on overcrowded conditions will increase with the age of the institution and the degree to which the institution is unable to expand its resources, particularly size of staff.[64]

Those comments are as timely today as they were 4 years ago. All courts except the Federal courts in the Ninth Circuit have read *Chapman* as requiring that they examine the totality of conditions in determining whether overcrowding has resulted in "wanton and unnecessary infliction of pain" or in conditions that are "grossly disproportionate to the severity of the crime warranting punishment." In looking at those conditions, many courts have made it quite clear that gruesome living conditions are not shielded by either the eighth amendment or by the Supreme Court's comments in *Wolfish* and *Chapman*. State and local officials who allow overcrowding to deteriorate substantially the quality of living conditions in correctional institutions continue to do so at considerable risk.

---

[64] Call, "Recent Case Law on Overcrowded Conditions of Confinement," pp. 31-32.