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All phases of preventive and correctional activities in delinquency and crime come within the fields of interest of FEDERAL PROBATION. The Quarterly wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of those engaged in the study of juvenile and adult offenders. Federal, state, and local organizations, institutions, and agencies — both public and private — are invited to submit any significant experience and findings related to the prevention and control of delinquency and crime.

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This Issue in Brief

ERRATUM: In Ted Palmer's article, "The 'Effectiveness' Issue Today: An Overview" (June 1983, pp. 5-10), the sentence on page 5, column 2, line 2, beginning with the words, "In contrast," and ending with "are also implied," should have read as follows: In contrast, the differential intervention view suggests that some offenders (BTA's amenables included) will respond positively to given approaches under certain conditions only, and that these individuals may respond *negatively* to other approaches under very similar conditions; other combinations of offender, approach, setting—and resulting outcome—are also implied.

The editors regret that the important missing words, "certain conditions only, and that these individuals may respond *negatively* to other approaches under," were inadvertently omitted.

Writing About Justice: An Essay Review.—This essay review by Dr. Benjamin Frank deals with what are generally considered the three most influential books on political and moral philosophy published in the past decade. They are, in effect, three competing theories of justice for contemporary liberal society. The focus of Dr. Frank's review is on the implications of each of these theories for penal policy.

Probation as a Reparative Sentence.—Probation as a reparative sentence should become the penalty of choice for property offenders, asserts Professor Burt Galaway of the University of Minnesota at Duluth. The reparative sentence requires offenders to restore victim losses either through monetary restitution or personal service. If there are no victim losses or the nature of the offense requires a more severe penalty, additional reparations can be made to the community in the form of unpaid service.

Selective Incapacitation: An Idea Whose Time Has Come?—Selective incapacitation is a popular, yet controversial new idea for dealing simultaneously with overpopulated prisons and jails and with the problem of high crime rates. Brian Forst of INSLAW, Inc., considers the pros and cons of the idea. His article focuses primarily on two issues: the compatibility of selective incapacitation with other strategies for determining criminal sanctions, and the problem of errors in predicting which offenders are the most dangerous.

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Recent Case Law on Overcrowded Conditions of Confinement

An Assessment of Its Impact on Facility Decisionmaking

BY JACK E. CALL*

THE PAST DECADE has been marked by unprecedented increases in prison populations, and concomitant increases in the level of overcrowding in our Nation's correctional institutions (Mullen and Smith, 1980). Moreover, during the same decade the courts have become far more active in accepting and deciding cases concerning conditions of confinement, including the issues of overcrowding and double-bunking (American Civil Liberties Union, 1982).

In order to accommodate the increasing volume of inmates, many jails and prisons have added a second bunk (or a third, even) or a floor mattress to cells that had been designed originally to house one inmate. In other instances, new jails or prisons have been constructed to solve the problem. Because of the austere fiscal policies that have characterized the public sector in recent times, governmental bodies considering the latter alternative must determine whether to build a facility with single cells, double cells, or dormitories. Since many authorities prefer to avoid the security problems associated with dormitories, the decision for corrections officials often boils down to a choice between double-bunking single cells or building a new facility with single or double occupancy cells. However the problem is approached, the growing body of case law on jail and prison conditions is an important factor which must be taken into account.

Traditionally, courts had assumed a "hands off" approach in cases involving prison administration (Gobert and Cohen, 1981). By the late 1960's, however, this approach began to change as courts were called upon to decide cases involving rather appalling conditions of confinement. In 1974, the Supreme Court provided some support for this interventionist movement when it declared that:

> though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country (*Wolff* v. *McDonnell*, pp. 555-56).

Indeed, the 1970's witnessed a virtual explosion of court cases dealing with the constitutionality of conditions of confinement (Fair, 1979; Gobert and Cohen, 1981). In most of these cases, a particular physical condition or the "totality of conditions" were declared unconstitutional. In many cases, the courts issued remedial orders which required

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governmental bodies to take extensive, and usually expensive, steps to rectify the constitutional violations.

A rather abrupt change in this interventionist approach occurred in 1979 when the Supreme Court issued its opinion in *Bell* v. *Wolfish.* The tone of the Court's opinion in this case, and in *Rhodes* v. *Chapman* decided 2 years later, was obviously antagonistic to the activist approach taken by the lower courts. In both cases, the Federal district court had found overcrowded conditions unconstitutional and the circuit court of appeals had upheld the district court, yet the Supreme Court overturned these decisions, declaring that the conditions of confinement were not unconstitutional.

Wolfish and *Chapman* are clearly landmark decisions. They represent the Supreme Court's first (and to date, only) pronouncements on the question of when physical conditions of confinement in correctional institutions (as opposed to institutional practices) violate the Constitution. The fact that the Supreme Court found the conditions of confinement constitutional in these cases is significant not only because of the hostility shown to the activist posture of lower courts, but also because of their effect on the precedential value of previous lower court decisions concerning conditions of confinement. Because the Court overturned the lower courts' findings of unconstitutionality in *Wolfish* and *Chapman,* and because the conditions of confinement in those cases were not substantially better than the conditions found unconstitutional in some prior cases, it is difficult to assess the present validity of cases decided prior to *Wolfish.* Indeed, it would appear that we are entering a new era of case law with respect to conditions of confinement.

Because of this change in judicial reaction, this article will concentrate on court cases decided since *Wolfish.* However, a brief treatment of case law on conditions of confinement prior to *Wolfish* is provided to place the subsequent discussion in proper historical and legal perspective. Following that, the opinion in *Wolfish* and lower court treatment of *Wolfish* are analyzed in detail. Then the opinion in *Chapman* and lower court reaction to that case are analyzed. The discussion concludes with an assessment of the effect of this case law on the issue of double-bunking cells designed for single occupancy and on the construction of facilities with cells designed for double occupancy.[1]

Case Law Prior to Wolfish

Most conditions of confinement cases prior to *Wolfish* dealt with two common issues: (1) the constitutionality of double-bunking cells designed for single occupancy (or the closely related issue of operating a jail or prison in excess of its "rated" capacity) and (2) whether the Constitution requires some minimum amount of living space per inmate, usually expressed in terms of square footage.

Pre-*Wolfish* cases were fairly evenly split as to whether double-bunking cells designed for single occupancy was constitutional, but most pre-*Wolfish* cases did not consider whether double-bunking alone was unconstitutional. Similarly, some pre-*Wolfish* cases held that allowing the inmate population to exceed the facility's design capacity was unconstitutional *per se,* but most cases did not frame the constitutional issues in these terms or found overcrowding unconstitutional because in combination with other substandard conditions it resulted in unconstitutional conditions.

Pre-*Wolfish* cases addressing the question of amount of living space per inmate also divided into two basic camps. A minority of the decisions insisted that the Constitution demanded a minimal amount of living space per inmate, and these decisions established a specific square footage requirement based on correctional standards (Commission on Accreditation for Corrections, 1977). However, most of the pre-*Wolfish* cases, while demonstrating concern for the amount of living space per inmate, declined to focus exclusively on this issue.

Increasingly the pre-*Wolfish* cases did not look to a single condition or factor related to overcrowding in reaching judgment on the constitutionality of the conditions of confinement. Instead, the courts examined a variety of conditions to determine if a combination of inadequate conditions rose to the level of unconstitutionality. Robbins and Buser (1977) suggest that these cases focused on 11 factors:

(1) Health and safety hazards created by the physical facilities
(2) Overcrowding
(3) Absence of a classification system
(4) Conditions in isolation and segregation cells
(5) Medical facilities and treatment

[1]This article focuses on the case law that would relate to a decision as to the most desirable celling arrangements in correctional institutions. The legal research has centered on conditions of confinement cases in which overcrowding was an issue or was closely related to the issues resolved by the cases. In the strict sense of the term, conditions of confinement cases include cases involving the legality of institutional practices, such as search procedures, visitation practices, classification systems, and disciplinary procedures. However, legal issues concerning institutional practices are not ordinarily relevant to celling arrangements except where such practices are affected by overcrowding. For the most part, the overcrowding cases have focused on the overcrowding itself or the effects of overcrowding on other physical or environmental conditions, such as sanitation, ventilation, and quality of medical care. Consequently, use of the term "conditions of confinement" in the article will refer to physical and environmental conditions rather than institutional practices.

(6) Food service
(7) Personal hygiene and sanitation
(8) Incidence of violence and homosexual attacks
(9) The quantity and training of prison personnel
(10) Lack of rehabilitation programs
(11) The presence of other constitutional violations

In addition to focusing on the combination or totality of conditions, pre-*Wolfish* cases developed a distinction, for purposes of constitutional analysis, between convicted offenders and pretrial detainees. Pre-*Wolfish* cases dealing with convicted offenders agreed that the conditions in which these inmates were confined could not be so harsh as to constitute cruel and unusual punishment, which is prohibited by the eighth amendment. The cases disagreed, however, as to the test to be employed in making that determination. Fair (1979) has identified four tests that the pre-*Wolfish* cases used: (1) the "shock the conscience" test under which the court asked if the proved conditions shocked its conscience; (2) the "totality of circumstances" test under which the courts asked if the cumulative effect of conditions amounted to cruel and unusual punishment; (3) the "evolving standards of decency" test under which the courts asked if the conditions exceeded "the evolving standards of decency that mark the progress of a maturing society" (quoting from *Trop* v. *Dulles*); and (4) the "balancing" test under which the courts compared the severity of the conditions with the need for those conditions in order to achieve legitimate penal goals.

The pre-*Wolfish* cases involving pretrial detainees generally agreed that the constitutional prohibition against cruel and unusual punishment did not apply. Rather, the due process clauses of the fifth and 14th amendments, which prohibit any punishment of pretrial detainees because they have not been convicted, were viewed as the appropriate standard. These cases generally required either that correctional authorities employ the least restrictive means necessary to insure the security of the facility and to assure the detainee's presence at trial or that any condition of confinement imposed upon a pretrial detainee be demanded by some compelling penal necessity (*U.S. ex rel. Wolfish* v. *U.S.;* Fair, 1979).

The Supreme Court and Pretrial Detainees

Prior to *Wolfish,* the U.S. Supreme Court seldom had occasion to address constitutional issues relating to the conditions of confinement in American jails and prisons. The issues which the Court had addressed dealt more with correctional practices, such as mail censorship or extent of medical care, rather than general conditions of confinement, such as double-bunking or overcrowding. In *Bell* v. *Wolfish,* however, the Court examined these issues directly.

Inmates at the Federal Metropolitan Correctional Center (MCC), a short-term facility primarily housing pretrial detainees, challenged the constitutionality of a number of practices and conditions including the double-bunking of a number of cells to accommodate a population 16 percent greater than MCC's design capacity. The lower courts in *Wolfish* had determined that since pretrial detainees are presumed innocent and are detained only to insure their presence at trial, it was unconstitutional to subject them to conditions which were not necessary to confinement alone, unless those conditions were justified by some compelling governmental necessity.

The Supreme Court rejected this relatively stringent test and held that the due process clause of the Constitution only prohibited the government from subjecting pretrial detainees to punishment. Under this approach, inmates can demonstrate that they are being punished by proving an intent to punish on the part of corrections officials, by showing that the challenged condition is not rationally related to some purpose other than punishment, or by showing it is excessive in relation to that alternative purpose. In particular, the Court indicated that there is no "one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment" and that the overcrowding at MCC did not amount to punishment of the pretrial detainees housed there.

In arriving at this conclusion, the Court seemed to stress several facts concerning the situation at MCC. First, the Court pointed out that detainees were required to spend only 7 or 8 hours in their cells, during which time they were presumably sleeping, and the 75 square foot cells provided "more than adequate space for sleeping," even when double-bunked. Second, the detainees were exposed to these conditions for relatively short periods of time—85 percent of the detainees were released from MCC within 60 days. And third, the Court noted that unlike other lower court cases in which courts had established minimum space requirements, *Wolfish* did not involve a traditional jail in which inmates were locked in their cells most of the day. It is unclear whether by this implied reference to MCC as a nontraditional jail the Court meant to suggest that the modern design of MCC and its cells with doors rather than bars, carpet rather than bare

floors, and windows rather than solid walls also militated in favor of its decision.

Lower Court Treatment of Wolfish

Undoubtedly, groups concerned with prison reform feared that *Wolfish* sounded the death knell for their movement in the courts. However, the reaction of the lower courts to *Wolfish* suggests that the reformers' fears were largely unfounded. Most lower court decisions in overcrowding cases after *Wolfish* (and before *Chapman*) have still found the conditions of confinement unconstitutional. In light of the response of the lower courts, it would appear that they did not find *Wolfish* persuasive. 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. In some instances the courts may simply have decided that the conditions at issue were intolerable and either ignored or thought it superfluous to distinguish *Wolfish*.

It is important to note that in most post-*Wolfish* cases, the plaintiffs consisted solely of, or included, convicted inmates and that the conditions were found unconstitutional as to the convicted inmates. In order to reach a finding of unconstitutionality, the courts had to determine that the conditions constituted cruel and unusual punishment, which is prohibited by the eighth amendment. Once the conditions were found to constitute cruel and unusual punishment as to convicted inmates, the conditions were obviously punishment as to the pretrial detainees. Since the conditions satisfied the more stringent standard of cruel and unusual punishment, the courts may have seen no need to distinguish or discuss *Wolfish*. Nevertheless, *Wolfish* should have been discussed and distinguished because if double-celling and overcrowding did not constitute punishment in *Wolfish*, the courts should have explained why these conditions would meet the more stringent criterion of cruel and unusual punishment in the case at hand.

Thus, it is difficult to arrive at a clear and precise statement of the effect of *Wolfish* on subsequent, and even current, cases concerning overcrowding and double-bunking. Some courts explicitly relied on *Wolfish* in their opinions, others seemed to ignore or give rather short shrift to *Wolfish*, while still others attempted to distinguish between *Wolfish* and the instant case. It is to the latter cases that we now turn so as to examine the factors that may still lead to a finding of unconstitutionality even in light of the Supreme Court's ruling in *Wolfish*.

From the written opinions of courts which (1) found overcrowded conditions unconstitutional and (2) explained the effect of *Wolfish*, five factors seem particularly important. The factor most often cited was the inability of inmates to escape the pressures of overcrowded cells. Typically, this conclusion was based upon the relatively brief periods of time that inmates spent outside their cells or dormitories. In a few cases inmates spent over 22 hours a day in their cells. But even in an instance when they normally spent as little as 7 to 12 hours per day in their cells, the practice was questioned because the overcrowding had so taxed prison activities that inmates were often forced to spend more than 7 to 12 hours in their cells (*Capps* v. *Atiyeh*, 1980). Another court was concerned because inmates' access to day rooms was limited to several points during the day (*Lareau* v. *Manson*, 1981). In two instances courts were even willing to permit the overcrowded conditions to continue so long as inmates were given significantly greater periods of time outside their cells (*Lock* v. *Jenkins; Campbell* v. *Cauthron*).

A second distinguishing factor was the smaller size of the cells or less square footage per inmate (which is usually the concern where a case involves overcrowding in general rather than double-celling *per se*). Only one court specifically mentioned this as a distinguishing factor and there the cells were 60-65 square feet (*Lareau* v. *Manson*, 1981). However, several of the courts which did not specifically distinguish *Wolfish* were dealing with cells of square footage significantly less than in *Wolfish*. In one case the space per inmate was reported to be only seven square feet during some periods of the day (*Jones* v. *Diamond*).

A third distinguishing factor was the longer period of incarceration experienced by inmates. One court was considering a long-term confinement facility in which the mean sentence served was 24 months (*Capps* v. *Atiyeh*, 1980). But even in cases where only 17 percent of the inmates were confined for more than 60 days (*Lareau* v. *Manson*, 1981) or where the average length of confinement was 60 days (*Lock* v. *Jenkins*), courts found these differences from *Wolfish* significant.

A fourth distinguishing factor was the difference in quality of the institutional facilities. This can be implied from the courts' descriptions of dirty, unsanitary conditions, poor ventilation, and inadequate food, or their reference to a facility as "a traditional jail."

The fifth distinguishing factor was increased security problems and inadequacies in classification methods. (*Lareau* v. *Mason*, 1981; *Lock* v. *Jenkins; West* v. *Lamb; Capps* v. *Atiyeh*, 1980). The two are included as one factor because they are closely related. Courts have stated that overcrowding often results in a "climate of tension, anxiety, and fear among both inmates and staff" (*Capps* v. *Atiyeh*, 1980), and that assaultive behavior may increase as a result of overcrowding. The failure to establish a careful method of classifying inmates, so as, for example, to avoid placing passive inmates in cells with aggressive inmates, is also seen to exacerbate these security problems.

In *Wolfish*, the Supreme Court held that double-bunking of cells designed for single occupancy was not unconstitutional *per se* and seemed to be suggesting to lower courts that they should be more restrained in their willingness to find overcrowded conditions of confinement unconstitutional. Nevertheless, in most decisions of the lower courts subsequent to *Wolfish*, overcrowded conditions of confinement were still found unconstitutional and the decision in *Wolfish* was either distinguished on the basis of different facts or was largely ignored. The factors most often used to distinguish *Wolfish* were: length of confinement per day, cell size, length of incarceration, the quality of the institution and increased security risks.

The Supreme Court and Convicted Inmates

If *Wolfish* had been the Supreme Court's only pronouncement on the constitutionality of overcrowded jails or prisons, lower court decisions would apparently have continued on a rather uninterrupted course. But within 2 years of *Wolfish*, the Court decided *Rhodes* v. *Chapman*. Whereas *Wolfish* had dealt with constitutional requirements concerning conditions of confinement for pretrial detainees, *Chapman* dealt with convicted offenders. *Wolfish* established that the constitutional standard for pretrial detainees is whether the conditions amount to punishment; *Chapman* confirmed that cruel and unusual punishment is the constitutional standard for convicted offenders. Moreover, for the first time the Supreme Court interpreted that standard in the context of crowded prison or jail conditions.

In *Chapman*, the Court summarized the law on cruel and unusual punishment that had developed in other contexts by indicating 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 punishment" (101 S.Ct. 2399). Applying these standards to the double-bunked cells at the Southern Ohio Correctional Facility (SOCF), Ohio's only maximum security prison, the court found no constitutional violations.

Like the MCC in *Wolfish*, SOCF is a modern facility (built in the early 1970's) consisting primarily of cells designed for single occupancy, but which had been double-bunked to accommodate an unanticipated increase in convicted offenders. Cells were 63 square feet, well-heated and ventilated, and day rooms equipped with television, card tables, and chairs were accessible by most inmates between 6:30 a.m. and 9:30 p.m. Food was adequate, cells did not smell, noise was not excessive, inmates were allowed contact visits, medical and dental needs were being reasonably met, a number of recreational and educational opportunities were available to most inmates, and the rate of violent behavior had not increased since double-bunking had been instituted. Those who believed that double-bunking should be permitted as a means of housing the spiraling increase in incarcerated offenders could not have hoped for a better factual situation for the Supreme Court to consider.

These rather felicitous conditions at SOCF could have made *Chapman* an easily distinguishable case for courts considering subsequent conditions of confinement cases, but the tone of the Court's opinion would appear to be difficult to sidestep by lower courts bent on finding prison or jail conditions unconstitutional. For example, in its determination that the conditions of confinement at SOCF were unconstitutional, the District Court had specifically relied on five considerations: "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" (101 S.Ct. 2399). However, the Supreme Court found that "these general considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double-celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of the crimes warranting imprisonment" (101 S.Ct. 2399). As we have seen, three of these considerations were important factual distinctions which lower courts had used to distinguish *Wolfish* from the cases before them. The language in *Chapman*, however, will make it more difficult for courts anxious to find conditions of confinement unconstitutional to distinguish between *Chapman* and subsequent cases.

In addition, the Court was careful to stress that "the Constitution does not mandate comfortable

prisons" and that prisons like SOCF "cannot be free of discomfort" (101 S.Ct. 2400). Furthermore, the Court reiterated a theme from *Wolfish*, that problems of prison administration are quite complex and require the special expertise of legislative and executive officials rather than judicial intervention (101 S.Ct. 2401, FN 16). The clear message was one that the Court had tried to communicate in *Wolfish* and perhaps felt that it had failed to express with enough force: Federal courts had become too enmeshed in the administration of America's jails and prisons.

The tone of the concurring opinion of three of the justices implies that they may have been concerned that the majority's message to the lower courts of disengagement was expressed with too much force. The concurring justices recounted the history of judicial involvement in conditions of confinement cases, reminding readers that much of this admittedly regrettable judicial intervention occurred in response to appalling circumstances in which a failure to respond would have resulted in great injustice. With this reminder as background, the concurring justices stressed three points: (1) SOCF is an unusually fine correctional institution—"one of the better, more humane large prisons in the Nation" (101 S.Ct. 2409). (2) Judicial scrutiny of conditions of confinement under constitutional standards must be conducted on the basis of the "totality of circumstances" at the institution, a test which the concurring justices believed the majority adopted in *Chapman* (101 S.Ct. 2407). (3) The touchstone of when conditions of confinement become cruel and unusual punishment is "the effect upon the imprisoned" (101 S.Ct. 2408). If the District Court had found that the overcrowded conditions at SOCF had seriously harmed the inmates confined there, the concurring justices apparently would have found a violation of the Constitution.

Lower Court Treatment of Chapman

In spite of the Court's clear desire to decrease judicial intervention in the administration of jails and prisons, it is the more equivocal spirit of the concurring justices that characterizes the lower court decisions since *Chapman*. The response of the lower courts has been somewhat similar to their response to *Wolfish*. In many instances, the treatment of *Wolfish* and *Chapman* by lower courts has been perfunctory. For example, in a jail overcrowding case in the Western District of Virginia involving primarily pretrial detainees, the court determined that the overcrowded conditions were unconstitutional without citing *Chapman* and cited *Wolfish* only to establish that the constitutional standard regarding pretrial detainees is whether the conditions of confinement constitute punishment (*Gross* v. *Tazewell County Jail*).

The court's slighting of *Chapman* and *Wolfish* could be explained on the basis that the defendants in *Gross* did not seriously question that the jail was unconstitutionally overcrowded. But even in more strenuously contested cases, the courts' treatment of *Chapman* and *Wolfish* has sometimes been unexpectedly brief. For example, the District Court for the Northern District of Indiana ruled that the Admissions and Orientation cells at the Indiana State Prison were so small that they violated the eighth amendment. These cells were only 38 square feet, but they housed one inmate who thus had more space than the two inmates who shared a 63 square foot cell in *Chapman*. The court disposed of *Chapman* and *Wolfish* by indicating that:

> The facilities at issue in *Wolfish* and *Rhodes* present quite a different perspective to the prisoners confined there than does the prospect faced daily by the inmates on A&O. The inmates on A&O at the I.S.P. are in much smaller cells and are not free to move about. The evidence shows the confinement in the A&O unit subjects the inmate to genuine privations and hardships (*Hendrix* v. *Faulkner*, p. 524).

Thus, the court distinguished *Chapman* and *Wolfish* on the basis of cell size and the amount of time spent in cells per day. Yet these two factors are virtually the same as two of the factors that the District Court in *Chapman* had relied upon and which the Supreme Court indicated were "insufficent to support (the District Court's) constitutional conclusion" (101 S.Ct. 2399).

Four courts have declared overcrowded conditions of confinement unconstitutional since *Chapman* and carefully explained why their cases differed from *Chapman* and *Wolfish*. They focused on the effects of overcrowding as the distinguishing factor (*Fairman* v. *Smith; Villanueva* v. *George; Union County Jail Inmates* v. *Scanlon; French* v. *Owens*). All four courts pointed to smaller cells and briefer periods of time afforded inmates outside their cells as important factors in their decisions, but they also emphasized other aggravating matters.

In *Villanueva* v. *George*, the Eighth Circuit Court of Appeals, sitting *en banc*, considered the constitutionality of the conditions to which a pretrial detainee had been subjected while incarcerated at the St. Louis Adult Correctional Institution. The plaintiff had been housed for 19 days in a six-foot by six-foot cell, furnished with a bed, combination toilet-sink, and light bulb. Every second or third day, he was allowed out of the cell for about 15 minutes to shower or walk in the hallway. The cell was infested

with insects and the inmate was bitten once by a rodent. He found hair and roaches in his food at least twice and was permitted no more than one phone call and one noncontact visit each week. In ruling that the inmate had produced enough evidence to permit a jury to find that his conditions of confinement were excessive, the circuit court explained that:

> our decision is not based solely on the fact that [plaintiff] was confined in a cell measuring six feet by six feet [citing *Chapman*]. It is rather based upon the totality of the circumstances, including cell size, time spent in cell, lack of opportunity for exercise or recreation, general sanitary conditions, and the fact that plaintiff's past behavior demonstrated an ability to be confined under less restrictive conditions without incident (659 F.2d 854).

In *Smith* v. *Fairman*, the District Court for the Central District of Illinois declared unconstitutional the overcrowded conditions at the Pontiac Correctional Center, a maximum security prison constructed in 1871. The prison's population was 33 percent above design capacity with inmates double-celled in approximately 400 cells, which ranged in size from 55.3 to 64.5 square feet. The court distinguished this case from *Wolfish* because the cells at Pontiac were much smaller, inmates could "escape" their cells only 4-6 hours a day, and the length of confinement for inmates was measured in years rather than days. *Chapman* was distinguished since the ameliorating conditions at SOCF, namely, the adequate ventilation, absence of offensive odors, well-controlled temperature, low noise level, adequate library resources and school rooms, and inmates' ability to leave their cells during nearly two-thirds of the day were absent at Pontiac. The court concluded that the conditions at Pontiac constituted cruel and unusual punishment because the prison:

> is overcrowded, antiquated, and has inadequate facilities to provide significant and constructive correctional programs to the inmtes. The confinement for years on end of two adult males for periods of eighteen to twenty hours a day in a cramped, ill-ventilated, noisy space designed a century ago for one person is contrary to every recognized modern standard of penology and is in conflict with minimum standards established by the Illinois legislature (528 F.Supp. 201).

In *Union County Jail Inmates* v. *Scanlon*, the New Jersey District Court declared unconstitutional the overcrowded conditions in a county jail that was housing pretrial detainess and convicted offenders, many of whom were state prisoners that the state refused to accept because of the overcrowded conditions in the state prisons. The population of the jail had been as much as 60 percent in excess of design capacity and cells of 39 square feet were being double-bunked by placing a mattress on the floor. The court distinguished *Wolfish* because the county jail was a traditional jail, the cells were much smaller, inmates lacked access to large dayrooms, and recreational and visitation opportunities had been severely impacted by the overcrowding. The court indicated that the Constitution does not condone such "spatial starvation" and "[e]ven the incarcerated are entitled to something more than a walk-in closet" (537 F.Sup. 1004). The court was not as careful in distinguishing *Chapman*, but it did point out that the Union County Jail was more like the older prisons which the Supreme Court described in *Chapman* as deplorable and sordid (537 F.Supp. 1007).

In *French* v. *Owens*, convicted offenders at the Indiana Reformatory were double-bunked in cells of 44 or 47.6 square feet. The court distinguished the Indiana Reformatory from the jail in *Wolfish* and the prison in *Chapman* because the two latter facilities were "new, clean, and relatively comfortable" (p. 936) whereas the Indiana Reformatory was "a 59 year old structure with inadequate ventilation, erratic heating, no cooling, and archaic electric wiring" (Id.). All witnesses at the trial agreed that the severe overcrowding at the Indiana Reformatory had "caused the confined persons unusual stress, discomfort, aggravation, and pain" (p. 937).

The conditions cited by these courts as establishing cruel and unusual punishment in the aggregate do not include references to an atmosphere of violence. However, there is considerable case law to support the principle that the eighth amendment requires correctional institutions to provide inmates reasonable protection from harmful assaults by other inmates (see cases cited in *Madyun* v. *Thompson*). These cases require a pattern of violence and not simply a few isolated instances of inmate assaults. Although this condition alone, even in an uncrowded jail or prison, would violate the Constitution, it seems probable that the likelihood of such an atmosphere is enhanced by overcrowded conditions. Some courts have found that this duty to protect inmates also gives rise to a duty to classify inmates so that a reasonable effort is made to prevent inmate assaults (Gobert and Cohen, 1981).

Although post-*Chapman* cases discussed above are arguably at odds with the Supreme Court's apparent desire to reduce judicial involvement in jail and prison cases, five decisions of Federal circuit courts of appeal have been more responsive to that concern. In *Ruiz* v. *Estelle*, the Fifth Circuit Court of Appeals stayed a district court injunction ordering the Texas Department of Corrections (TDC) to single-cell its

facilities. The majority of the TDC cells were 45 square feet and many double-celled inmates were not free to move about outside their cells. Nevertheless, the court of appeals noted that the factors which the district court relied on in *Ruiz* (the district court rendered its decision before *Chapman*) were very similar to those relied on by the district court in *Chapman* and were expressly repudiated by the Supreme Court. Although the cells in *Ruiz* were substantially smaller than those in *Chapman*, the court of appeals did "not believe that there is any constitutionally mandated square footage requirement per prisoner so long as the totality of conditions does not constitute cruel and unusual punishment" (650 F.2d 568). Consequently, the court of appeals granted Texas' request for a stay of the district court's injunction because it believed that "the State has made a substantial case on the merits respecting the serious legal question whether single-celling of inmates at TDC is constitutionally required under the district court's findings of fact" (650 F.2d 567).

When the Fifth Circuit subsequently decided the overcrowding issue *Ruiz*, it upheld the district court's finding that the overcrowded conditions at TDC violated the eighth amendment. However, the Fifth Circuit overruled the district court's order that all TDC inmates be single-celled. The appellate court noted the Supreme Court's admonition in *Chapman* that courts not substitute their judgment for the policy decisions of prison officials and determined that some of the other remedial orders issued by the district court might eliminate the harmful effects of overcrowding without the necessity of single-celling every inmate.

In *Nelson* v. *Collins*, the Fourth Circuit Court of Appeals decided three consolidated cases involving overcrowding in the Maryland prison system. Maryland had decided to solve temporarily its unanticipated increase in inmates by double-celling the new Jessup Annex and double-bunking some dormitories at another institution. The court of appeals saw no significant differences between Jessup Annex and SOCF.

> The facilities and conditions of confinement at the Jessup Annex are as good, if not better than those at SOCF. The cells are roughly the same size; there is no significant difference in the recreational opportunities; the provision for food, medical, dental, and psychiatric services are comparable; the facilities in the cells are practically the same; all in all, both facilities. . . are in line with the facilities in the most modern penal institutions (659 F.2d 428).

The double-bunking of the dorms was also held to be constitutional. In four dorms all beds in excess of 75 were removed and the 75 beds were double-bunked. As a result, each dorm housed nearly 40 additional inmates, but no inmate was assigned to a double-bunked dorm for more than 120 days. In an interesting approach to the space problem, however, the court reasoned that with fewer beds actually touching the floor the addition of new inmates still left "the actual space available to each inmate . . . substantially the same" (659 F.2d 429).

In *Hoptowit* v. *Ray*, the district court had found the overcrowded conditions at the Washington State Penitentiary unconstitutional. The prison had a rated capacity of 872 inmates but a population of 1,000 to 1,100. Some cells, ranging in size from 102.5 square feet to 130 square feet, were housing three and occasionally four inmates. The Ninth Circuit Court of Appeals overturned the district court's decision because the latter court had made no findings as to whether the overcrowded conditions had resulted in harmful effects on inmates. Citing *Wolfish*, *Chapman*, and other cases, the Ninth Circuit was careful to point out that "[c]ourts must recognize that the authority to make policy choices concerning prisons is not a proper judicial function . . . The Eight Amendment is not a basis for broad prison reform" (682 F.2d 1246).

In *Smith* v. *Fairman*, discussed earlier, the Seventh Circuit Court of Appeals overturned the lower court decision, finding that Pontiac inmates received adequate food and medical care and lived in reasonably sanitary conditions. The appellate court was particularly concerned that the district court had been inattentive to uncontroverted evidence at trial that physical violence at the prison had been on the decline. The Seventh Circuit noted that while the Supreme Court had established that "the eighth amendment prohibition of cruel and unusual punishment is a fluid concept which 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . .,'" the Supreme Court had also made it clear in *Chapman* that "this standard did not mean judges are free to substitute their subjective views on this subject for those of society" (690 F.2d 125).

As stated previously, the response of the lower courts to *Chapman* has been similar to the response to *Wolfish*. It should be apparent, however, that *Chapman* has proven to be more difficult for the lower courts to distinguish, even though they have still frequently made the distinction. Increasingly, the lower courts appear to be recognizing the need to find that some condition relating to the basic necessities of life and resulting from the overpopulation is inadequate. Such a finding has been appearing more frequently in the opinions since *Chapman*, although the courts have not always been careful to point to this finding as a fact which distinguishes *Chapman*.

The cases just discussed that upheld, or leaned toward upholding, crowded prison conditions against constitutional challenges are particularly significant. First, they carry considerable weight since they are appellate court decisions while nearly all the post-*Chapman* decisions finding overcrowded conditions unconstitutional are trial court decisions. Second, the cases are carefully considered, well-reasoned opinions which are likely to influence future appellate court decisions. Of course, *Chapman* is still a "new" case and the "early returns" are too inconclusive to permit confident prediction as to the eventual judicial response to *Chapman*.

Double-Celling in the Post-Chapman Era

The preceding discussion of the law relating to overcrowded jails and prisons is intended to provide a basis for answering two important questions: (1) What legal problems are likely to arise from construction of a jail or prison with cells designed for double occupancy? (2) What legal problems are likely to arise from double-bunking cells originally designed to house only one inmate?

The construction of a jail or prison with double occupancy cells poses few legal problems. It is clear that the size of such cells do not have to comply with published correctional standards, although state and local facilities may have to abide by a state law or regulation which establishes a minimum cell size. Constitutionally, there is surely some "critical size" which would be so small as to constitute cruel and unusual punishment. Prior to *Wolfish* and *Chapman*, a reasonably good estimate of this critical size would have been a size smaller than the smallest size espoused by any of the professional standards. It is impossible to hazard even a reasonable guess as to the critical size now. One can only say with confidence that based on *Chapman*, if all other conditions of confinement meet constitutional minima, a double occupancy cell of 65 square feet or more is constitutionally acceptable.

Of course, this hypothetical new jail or prison must be constructed and maintained so as to provide inmates the basic necessities of life: adequate food, habitable living conditions, adequate plumbing and sanitation, attention to serious medical needs, and a reasonably secure environment. It is this latter duty—to provide a reasonably secure environment—that is most likely to create potential legal problems for a new facility with double occupancy cells.

As indicated previously, several courts have held that the eighth amendment requires jails and prisons to take reasonable steps to protect inmates from attack by other inmates. In a facility consisting largely of double occupancy cells, this duty to protect places a significant burden on the facility to devise a reasonable method for making cell assignments so as to minimize the likelihood of placing a passive, "victim-prone" inmate in a cell with an aggressive one. The duty to protect would also suggest that staffing levels and the structural design of the institution be such that the double occupancy cells can be adequately monitored. For example, one would certainly want to avoid the situation that existed at the Hartford Community Correctional Center where double-bunked cells had solid doors with a glass window that did not open and there was no way for inmates inside the cell to contact guards. As a result, "if an inmate is being victimized by his cellmate, his only recourse is to slip pieces of paper or other narrow objects through the crack between the door and the doorjamb until the guard happens to look in his direction and notice" (*Lareau* v. *Manson*, 1981, p. 100).

Double-bunking of single cells is more likely to result in legal problems than constructing a facility with double occupancy cells. It is clear from *Wolfish* and *Chapman*, however, that double-bunking is not in itself unconstitutional. It would also appear from *Chapman* that double-bunking is constitutionally permissible for convicted offenders even though the double-bunking is permanent, the duration of confinement is lengthy, and the inmates in the double-bunked cells spend most of their time in their cells. As mentioned earlier, however, the lower courts are not consistently viewing *Chapman* this way. In addition, it is not clear that these conditions would be constitutionally permissible if the affected inmates are pretrial detainees.

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.[2] 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

[2]The Ninth Circuit Court of Appeals is an exception (*Hoptowit* v. *Ray*). Note also that *Chapman* does not prevent a court from basing a finding of cruel and unusual punishment on a single condition, such as inadequate medical care (*Estelle* v. *Gamble*). *Wolfish* also seems to call for the application of a totality of the circumstances test in determining whether the conditions of confinement of pre-trial detainees constitute punishments.

deteriorate.[3] 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, creating the potential legal problems discussed earlier with respect to double occupancy cells. 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.

Conclusion

The law, its interpretation, and the prediction of its future interpretation and application are obviously an inexact science. Officials with responsibility for the administration of a jail or prison who are concerned about being sued for overcrowded conditions are faced with a dilemma. A careful reading of *Wolfish* and *Chapman* would suggest to such officials that they can constitutionally operate penal institutions with populations greater than the institutional design capacity so long as they continue to meet adequately the inmates' basic necessities of life. However, the lower court decisions since *Wolfish* and *Chapman* suggest that at least some courts are still appalled by the conditions of confinement brought to their attention and are disposed to distinguish or even ignore those decisions. As a result, when correctional facilities become crowded the likelihood of a lawsuit still must be considered substantial and the court's resolution of the dispute cannot be predicted with confidence.

NOTE: Tables corroborating information presented in this article are available upon request from the author.

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[3] See *Lightfoot* v. *Walker* for an example of a case which was decided on the basis of the adequacy of the health care provided inmates. The court's decision was not based on the overcrowded conditions that existed, but it is clear that the overcrowding was a primary cause of the inadequate health care.

END