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# INSTITUTIONAL LITIGATION IN THE POST-CHAPMAN WORLD

SUSAN N. HERMAN\*

*Rhodes v. Chapman*<sup>1</sup> was the first case in which the Supreme Court was called upon to discuss the interplay between general prison conditions and the eighth amendment's ban on cruel and unusual punishment.<sup>2</sup> The stage had been set for *Chapman* long before the case arose. The Court had examined other, narrower eighth amendment claims;<sup>3</sup> lower federal courts had been entertaining a growing number of broad scale challenges to state prison conditions<sup>4</sup> and granting increasingly broad injunctive relief;<sup>5</sup> and with the explosion in prison population, overcrowding and overtaxed facilities had become the norm in the country's prisons and jails.<sup>6</sup> Unfortunately,

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1. 452 U.S. 337 (1981).

2. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. *Hutto v. Finney*, 437 U.S. 678 (1978), held that conditions in the Arkansas prison system's isolation cells constituted cruel and unusual punishment when viewed in conjunction with the length of confinement in such cells; *Estelle v. Gamble*, 429 U.S. 97 (1976), held that denial of medical care may constitute cruel and unusual punishment although it did not on the facts asserted.

4. Institutional litigation came of age with several pioneering cases in the south. See *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974), *vacated and remanded on other grounds per curiam*, 522 F.2d 81 (5th Cir. 1975) (en banc); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *vacated and remanded on other grounds per curiam*, 522 F.2d 71 (5th Cir.) (en banc), *cert. denied*, 421 U.S. 948 (1975); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). Prison condition litigation burgeoned until, when *Chapman* was decided in 1981, "individual prisons or entire prison systems in at least 24 States [had] been declared unconstitutional under the Eighth and Fourteenth Amendments . . .", 452 U.S. at 353 n.1 (Brennan, J., concurring), and 8,000 prison conditions cases were pending. *Id.* at 354 (citing 3 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 34 (1980)). According to a recent report of the National Prison Project of the American Civil Liberties Union, 28 states' prisons are now operating under court order. 13 NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CRIMINAL JUSTICE NEWSLETTER No. 5 (March 15, 1982).

5. See Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 899 n.50 (1977) [hereinafter cited as Robbins & Buser]; Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981) [hereinafter cited as Note, *Complex Enforcement*].

6. The National Institute of Justice, shortly before *Chapman*, published a five volume study of conditions and population trends in the country's prisons and jails. The study found that from 1973-78 the prison population had grown at a rate of 7.4% each year. 1 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 14, Table 1.1 (1980). Defining a

*Chapman* did little to resolve either the underlying problem of overcrowded prisons or several key questions of eighth amendment interpretation.

*Chapman* was a limited and factually based decision. The Court found that double ceiling was neither *per se* unconstitutional,<sup>7</sup> nor unconstitutional in the context of conditions at the Southern Ohio Correctional Facility (SOCF).<sup>8</sup> These holdings nevertheless left open many questions because the context of *Chapman* was an unusual one: the district court described SOCF as "unquestionably a top-flight, first-class facility,"<sup>9</sup> finding the food "adequate in every respect," the ventilation system adequate, the cells free of offensive odors, the temperature and noise levels well controlled, and the provision of medical care, library space, visiting and other recreational facilities acceptable as well.<sup>10</sup> The Supreme Court held that these "generally favorable findings"<sup>11</sup> overshadowed the factors the district court had used as a predicate for finding an eighth amendment violation.<sup>12</sup>

"crowded" facility as one providing less than 60 square feet of living space per inmate, the study found that 65% of state prisoners and 61% of federal prisoners were living in crowded conditions. *Id.* at 61-62. The study was not encouraging about the ability of the country's prison system to meet the demand for incarceration. Figures available for more recent years indicate that the situation is becoming even more disturbing. The Bureau of Justice Statistics estimated that in 1981, the total United States prison population increased by 11.8%, and that in 1982, the population increased by 6.9% in the first half of the year alone. BUREAU OF JUSTICE STATISTICS, PRISONERS AT MIDYEAR (1982).

7. 452 U.S. at 347.

8. *Id.* at 342.

9. *Id.* at 341 (quoting 434 F. Supp. 1007, 1009 (S.D. Ohio 1977) ).

10. *See* 452 U.S. at 341. These conditions differ radically from conditions usually at issue in institutional litigation. *See, e.g.*, cases cited *infra* note 20.

11. 452 U.S. at 343.

12. The district court had based its finding of an eighth amendment violation on five factors: 1) the length of the terms of imprisonment served by the inmates at SOCF, 2) the fact that the institution was housing 38% more inmates than its design capacity, 3) its acceptance of studies recommending allowance of at least 50 to 55 square feet of living quarters per prisoner as reflecting contemporary standards of decency, 4) a finding that inmates spent most of their time in their cells with their cellmates, and 5) the fact that double ceiling had become a practice at SOCF, rather than a temporary condition. The Supreme Court found that the length of confinement, the amount of time spent in the cell, and the permanency of the practice of double ceiling unimpressive in light of its holding that double ceiling is not *per se* unconstitutional, and that conditions at SOCF on the whole were not unconstitutional. The Court rejected the expert studies upon which the district court had relied and quoted the admonition in *Bell v. Wolfish*, 441 U.S. 520, 543-44 & 543 n.27 (1979) that while expert opinions may be helpful, they do not establish constitutional minima. *See* 452 U.S. at 348 n.13. As for the fact that prison population exceeded rated capacity, the majority seemed to willfully misunderstand the concept of design capacity, treating the rated capacity of SOCF as little more than an attempt to predict prison population. *See id.* at 349 n.15. Finally, again slighting the import of expert testimony, the Court treated the potential for frustration, violence and tension inhering in the practice of double ceiling as an unproven factual assertion, and disposed of this issue by observing that plaintiffs had not proven and the district court had not found that violence had increased disproportionately to the increase in population. *See id.* at 349 n.14. It is interesting to note that most of the district court's reasoning is discussed by the Supreme Court in footnotes, and treated as peripheral to what

The opinion thus provides a model for judicial review of institutions with relatively tolerable conditions. But most prisons and jails in the country are not shiny or new,<sup>13</sup> and bear little resemblance to the top-flight, first class facility involved in *Chapman*.<sup>14</sup> Lower courts reviewing conditions in the average institution will find that *Chapman* does not provide answers to their questions about the scope of the eighth amendment —cruel and unusual conditions are more miserable than those at SOCF, but how much more miserable? Finding the conditions at SOCF constitutional also permitted the Court to avoid the issue of remedies. The *Chapman* opinion even left room for disagreement as to the role of the federal courts in institutional litigation.<sup>15</sup> This paper will discuss the impact *Chapman* has had and is likely to have on federal and state court institutional litigation by focusing on these three areas: the scope of judicial review, the scope of the underlying constitutional right and the scope and nature of the remedial power. The impact, at least thus far, has not been as negative as some critics predicted.

## I

### INSTITUTIONAL LITIGATION IN THE FEDERAL COURTS

#### A. *The Scope of Federal Review*

One of the central tenets of the Burger Court's judicial philosophy has been that federal court intervention into state and local institutions should be limited. The play of federalism and comity concepts has been particularly evident in cases involving prisoners' rights.<sup>16</sup> *Rhodes v. Chapman* itself follows a series of Burger Court decisions that take a narrow view of prisoners' rights and a broad view of the deference due prison administrators. The case might, therefore, be viewed as part of a pattern of cases heralding a return to the "hands off" doctrine under which courts refused

the Court characterized as the true issue of the adequacy of conditions in the prison as a whole.

13. Of the 559 prisons and jails existing in the United States in 1978, 79 were built between 1875 and 1924, 141 between 1925 and 1949, 164 between 1950 and 1969, 150 between 1970 and 1978. An additional 25 are listed simply as having been built before 1975. 3 NATIONAL INSTITUTE OF JUSTICE, *AMERICAN PRISONS AND JAILS* 23 (1980).

14. Another shiny new facility was the subject of the case in which the Court considered the rights of pretrial detainees, *Bell v. Wolfish*, 441 U.S. 520 (1979). The Metropolitan Correctional Center (MCC) had been built in 1975, and the *Wolfish* case was commenced before the year ended. The Supreme Court declared that the MCC represented "the best and most progressive penological planning" and it differed "markedly" from the familiar image of a jail. *See id.* at 525. Conditions were found not to violate the detainees' due process rights because the detainees were not being "punished." *See infra* note 22.

15. Justice Blackmun expressed his concern that *Chapman* might be read as authorizing a federal court retreat. *Chapman*, 452 U.S. at 369 (Blackmun, J., concurring).

16. *See, e.g.*, *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

to review prison conditions at all.<sup>17</sup> But this view of *Chapman* is unnecessarily pessimistic. *Chapman* is, in fact, the most encouraging decision on prisoners' rights to have emerged from the Supreme Court in a decade. The majority of reported district court prison conditions cases decided since *Chapman* have taken a reasonably generous view of the permissible scope of federal court review and have found at least some of the conditions at issue to violate eighth amendment standards.<sup>18</sup>

Nothing in the *Chapman* opinion is inconsistent with the meaningful scope of review that these district courts have provided. *Chapman* did rule against the prisoner plaintiffs on the facts, but Justice Powell's opinion for the Court reaffirmed the point that "[c]ourts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as 'deplorable' and 'sordid.'"<sup>19</sup> The district courts have taken the Supreme Court at its word, and have shown themselves both willing and able to distinguish *Chapman* and to "discharge their duty to protect constitutional rights"<sup>20</sup> when confronted with deplorable prison conditions.<sup>21</sup>

17. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). The similarity of the Burger Court's recent theories of the proper scope of judicial review to the old "hands off" doctrine, is noted in Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211 (1980).

18. Decisions about overcrowding in jails, where the constitutional issue is due process rather than the eighth amendment are comparable. See *Martins v. Carey*, 563 F. Supp. 984 (D. Or. 1983); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1121-30 (M.D. Tenn. 1982) (prisons and jails); *French v. Owens*, 538 F. Supp. 910, 924-26 (S.D. Ind. 1982) (reformatory); *Union County Jail Inmates v. Scanlon*, 537 F. Supp. 993, 1007-08 (D.N.J. 1982) (jail with sentenced inmates and pretrial detainees); *McMurry v. Phelps*, 533 F. Supp. 742, 759-63 (W.D. La. 1982) (jail with sentenced inmates and pretrial detainees); *Smith v. Fairman*, 528 F. Supp. 186, 199-201 (C.D. Ill. 1981), *rev'd*, 690 F.2d 122 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2125 (1983) (prison); *Hendrix v. Faulkner*, 525 F. Supp. 435, 522-26 (N.D. Ind. 1981) (prison); *Heitman v. Gabriel*, 524 F. Supp. 622, 629 (W.D. Mo. 1981) (jail). Several courts found unconstitutional conditions in local jails without discussing the extent to which their findings might have been based on the eighth amendment rights of sentenced inmates housed in those institutions, or on the due process rights of pretrial detainees. See *Gross v. Tazewell County Jail*, 533 F. Supp. 413 (W.D. Va. 1982); *Vasquez v. Gray*, 523 F. Supp. 1359 (S.D.N.Y. 1981). The court in *Toussaint v. Rushen*, 553 F. Supp. 1365 (N.D. Cal. 1983) granted plaintiff state prisoners a preliminary injunction on finding that they were likely to succeed on the merits of their eighth amendment claim; the court in *Stickney v. List*, 519 F. Supp. 617 (D. Nev. 1981) appointed an expert witness to examine the conditions at the Northern Nevada Correctional Center and to report to the court on the constitutionality of those conditions. Other cases involving prison conditions, including overcrowding, have been resolved by consent decree. See, e.g., *Kendrick v. Bland*, 541 F. Supp. 21 (W.D. Ky. 1981).

This survey covers only reported cases. Although some unreported opinions may find eighth amendment violations, it is likely that dismissals for failure to state a claim make up the bulk of the unreported cases. Opinions in prison conditions cases seem to be written primarily as predicates for relief.

19. 452 U.S. at 352 (Brennan, J., concurring).

20. *Id.* at 352 (quoting *Procunier v. Martinez*, 416 U.S. at 405-06 (1974)).

21. A number of courts have focused on the differences between the institutions whose conditions they were reviewing and the modern facilities in *Chapman* and in *Wolfish*. See

To justify a retreat from federal court review of prison conditions, the courts would have to read the *Chapman* opinion as taking color from prior and subsequent Supreme Court prisoners' rights opinions that adopt a highly restrictive view of the federal court's role. *Chapman*, however, is not wholly a part of the same picture because the eighth amendment claim on which it is based is unique in several respects.

The Supreme Court prisoners' rights cases<sup>22</sup> can be roughly divided into three categories: 1) cases based on alleged violations of specific provisions of the Bill of Rights other than the eighth amendment; 2) procedural due process cases; and 3) eighth amendment cases. The first category of cases, specific constitutional violations, has principally involved first amendment claims: prisoners' claims of freedom of expression,<sup>23</sup> freedom of religion,<sup>24</sup> and even freedom of association.<sup>25</sup> The prototypical case, *Jones v. North Carolina Prisoners' Labor Union*,<sup>26</sup> exemplifies the Court's grudging attitude toward inmates' first amendment rights. The inmates in *Jones* claimed a right under the first amendment to form an inmate union.<sup>27</sup> Prison administrators claimed that the exercise of this freedom would jeopardize institutional security.<sup>28</sup> The Court held that in order to establish a constitutional

*supra* note 14; see also *French v. Owens*, 538 F. Supp. at 925 ("In contrast to the new, clean, and relatively comfortable facilities described in *Wolfish* and *Rhodes*, each affording the inmates ample time and space for day room activities, we find in the Indiana Reformatory the 'barred cells, dank, colorless corridors, and clanging steel gates' absent from the New York MCC."); *Union County Jail Inmates v. Scanlon*, 537 F. Supp. at 1003 (describing the Union County Jail as the "traditional jail" that *Wolfish* was declared not to involve); *McMurry v. Phelps*, 553 F. Supp. at 762 (finding *Wolfish* and *Chapman* "factually inapposite" to the "grossly overcrowded" conditions at the Ouachita Parish Jail); *Hendrix v. Faulkner*, 525 F. Supp. at 524 (differentiating the smaller cells and greater restrictions on personal freedom in Indiana State prison from the conditions present in *Wolfish* and *Chapman*). But see *Nelson v. Collins*, 659 F.2d 420, 427 (4th Cir. 1981) (en banc) (facility declared to present "almost a carbon copy" of the facts in *Chapman* and *Wolfish*).

22. *Wolfish*, 441 U.S. at 520, which dealt with the rights of pretrial detainees, is not a true prisoners' rights case because it draws a sharp distinction between the constitutional rights of pretrial detainees and those of prisoners. The Court held that the eighth amendment guarantee against cruel and unusual punishment does not apply to pretrial detainees, since individuals who have not been convicted are not to be subjected to any punishment at all. The source of protection for the constitutional rights of pretrial detainees was held to be the due process clause of the fifth or fourteenth amendment. Thus, the constitutional analysis differs in cases involving prisoners and pretrial detainees.

23. *Pell v. Procunier*, 417 U.S. 817 (1974) (access to news media); *Procunier v. Martinez*, 416 U.S. 396 (1974) (mail censorship). The first amendment, of course, applies to state prisoners through the due process clause of the fourteenth amendment.

24. *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam).

25. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

26. *Id.*

27. The inmates claimed the right to form an inmate "union," actually a lobbying group, to work for the improvement of prison conditions. *Id.* at 122.

28. Defendants asserted that the union would threaten discipline and control in the prison by increasing friction between inmates and prison personnel, creating a divisive element within the inmate population, fostering power figures among the inmates, and

violation, the plaintiff prisoners had the burden of proving that the defendants had "exaggerated their response" to security concerns.<sup>29</sup> Placing the burden on the plaintiffs to disprove the presence of any danger, rather than on the defendants to prove some basis in fact or experience for their dire predictions, changes and dilutes usual first amendment protections simply because prisoners are involved.<sup>30</sup>

The second category of prisoners' rights cases examines prisoners' rights to procedural fairness in connection with such decisions as parole release,<sup>31</sup> interprison transfers<sup>32</sup> and, most recently, transfers to administrative segregation units.<sup>33</sup> The Burger Court has evolved a bizarre doctrine in this area, holding that prisoners have no constitutional right to due process because they have no "liberty interest" in their own freedom.<sup>34</sup> Prisoners have a liberty interest, and a consequent right to some form of procedure before parole release decisions, for example, only when the state creates an interest in parole and confers it upon its prisoners.<sup>35</sup> This doctrine seems designed to deflect due process claims to state law and the state courts.<sup>36</sup>

Eighth amendment claims involve a constitutional right significantly different in nature and application from those in the first two categories. One of the major questions that occupied the Court in connection with the first amendment cases was whether and to what extent the first amendment should apply to prisoners at all. The Court wrote a lengthy opinion on censorship of inmate mail without ever deciding whether inmates have first

possibly encouraging work stoppages. *Id.* at 127. There was, however, no evidence that the union had created, or was likely to create, any such problems. *Id.* at 143-44 (Marshall, J., dissenting).

29. *Id.* at 128.

30. In first amendment cases not involving prisoners, it is the government's burden to justify restrictions, even incidental restrictions on free expression. *See, e.g.,* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 683 (1978). The *Jones* decision would be less severe if the burden of proof were not shifted in cases involving core first amendment rights of free expression and religion. *Compare* *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir. 1980) with *St. Claire v. Cuyler*, 643 F.2d 103 (3d Cir. 1980) (opinion on denial of petition for rehearing en banc).

31. *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979).

32. *Meachum v. Fano*, 427 U.S. 215 (1976).

33. *Hewitt v. Helms*, 103 S. Ct. 864 (1983).

34. *See* *Meachum v. Fano*, 427 U.S. at 224-27. The theory is that lawful incarceration extinguishes an inmate's right to liberty, whether that liberty be the conditional freedom of parole or the relative freedom of confinement in a less secure prison.

35. *Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. at 1, for example, held that Nebraska had created a liberty interest in parole by enacting a parole statute limiting the discretion of parole authorities.

36. An extreme example of the Burger Court's attempt to transfer due process litigation to state court is *Parratt v. Taylor*, 451 U.S. 527 (1981), holding that an inmate whose property was negligently lost by defendant prison officials was not denied due process so long as the state courts stood ready to hear his claim.

amendment rights.<sup>37</sup> Although the Court subsequently decided that the first amendment is one of the rights that prisoners do retain,<sup>38</sup> it has also stressed the need for accommodation between first amendment principles and the realities of prison life;<sup>39</sup> *Jones* is a prime example of this accommodation.

The Court's approach in this area necessitates examining each constitutional provision separately to determine whether the right it guarantees is one which survives lawful incarceration, and even if it does survive, whether and to what extent it will be subject to "accommodation" or dilution. With respect to a prisoner's right to fourth amendment protection against unreasonable searches and seizures, for example, the Court might recite that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system,"<sup>40</sup> and find that prisoners have no fourth amendment rights.<sup>41</sup> Alternatively, the Court might find that fourth amendment rights do survive, but have a different meaning in the prison context.

Similarly, the Court has taken the view that constitutional due process rights do not survive lawful incarceration.<sup>42</sup> Justice Rehnquist, speaking for the Court in its most recent due process opinion, expressed his attraction for the extreme view that prisoners should be deemed never to have a right to procedural due process in connection with decisions about the conditions of their confinement,<sup>43</sup> even if the state has created a liberty interest. While stopping short of adopting this extreme view, the majority nevertheless has found that inmates do not have a constitutional right to due process, but only such rights as the state allows. In due process cases too, the Court has stressed the need for an "accommodation" between the requirements of due process and the realities of prison life.<sup>44</sup>

37. *Procunier v. Martinez*, 416 U.S. at 408. The case was decided on the first amendment rights of the prisoners' correspondents rather than those of the inmates.

38. *Pell v. Procunier*, 417 U.S. at 822.

39. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 129 ("an inmate does not retain those first amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,' " quoting *Pell v. Procunier*, 417 U.S. at 822).

40. *Price v. Johnston*, 334 U.S. 266, 285 (1948), quoted in *Hewitt v. Helms*, 103 S. Ct. at 869 (1983); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 125; *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

41. Cf. *Wolfish*, 441 U.S. at 556-57; *Lanza v. New York*, 370 U.S. 139, 143-44 (1962). Both cases declined to decide whether inmates have any fourth amendment rights on finding that the search involved in each case was not unreasonable and would not have violated the fourth amendment.

42. See *Hewitt v. Helms*, 103 S. Ct. at 869-70; *Meachum v. Fano*, 427 U.S. at 224-26. See *supra* text accompanying notes 31-36. See generally Note, *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano*, 12 HARV. C.R.-C.L. L. REV. 405 (1977) for cogent criticism of this doctrine.

43. *Hewitt v. Helms*, 103 S. Ct. at 870-71.

44. *Wolff v. McDonnell*, 418 U.S. at 556 ("[T]here must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.").



By contrast, the eighth amendment unquestionably applies to prisoners. It would be absurd to contend that the eighth amendment is a right that conviction or lawful incarceration extinguishes, or even dilutes, since the amendment was designed to protect the rights of the convicted.<sup>45</sup> Eighth amendment protection is one of the very few rights, perhaps the only right, whose meaning expands in the context of prison.

The nature of the right involved is as distinctive as its status in the constitutional pantheon. The eighth amendment does not confer the kind of affirmative rights the Burger Court appears to deem luxuries or privileges to be permitted or denied prisoners at will.<sup>46</sup> Rather, the eighth amendment is negative; it limits the state's power to punish. While first amendment or due process cases generally involve discrete, individual claims dependent upon discrete, individual facts, eighth amendment conditions claims tend to be collective and systemic.<sup>47</sup> This distinction has implications for the amount and type of litigation the federal courts will hear on eighth amendment conditions claims as opposed to first amendment or due process claims;<sup>48</sup> more significantly, it has implications for the obligation of the federal courts to hear eighth amendment conditions claims.

The archetypal claim the Burger Court wishes to cast out of federal court is the allegation in *Parratt v. Taylor*<sup>49</sup> that state prison officials negligently allowed plaintiff's twenty-three dollar hobby kit to be lost. As one thoughtful judge observed, it is difficult to provide a wholly satisfactory

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45. As the Court noted in *Wolfish*, 441 U.S. at 535, those not convicted are not to be punished at all. See *Chapman*, 452 U.S. at 345 (citing *Hutto v. Finney*, 437 U.S. at 685; Granucci, "Nor Cruel and Unusual Punishment Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

46. Underlying *Jones v. North Carolina Prisoners' Labor Union* and other cases considering the scope of the first amendment rights of prisoners (the right to send and receive uncensored mail, for example) seems to be some notion that the interests involved are not critical, and may be freely surrendered in the face of any hint of a competing interest in institutional security. In *Hewitt v. Helms*, the Court exhibits a similarly cavalier attitude to the liberty interests of prisoners, remarking that a prisoner's interest in whether he is confined to administrative segregation is "not one of great consequence." 103 S. Ct. at 872. *But see id.* at 880 (Stevens, J., dissenting) (disparity between conditions in general population and administrative segregation is "drastic").

47. See Note, *Complex Enforcement*, *supra* note 5, arguing that the systemic focus of prison conditions cases strains even traditional eighth amendment doctrine derived from cases responding to discrete, individual claims.

48. Because of their collective nature, prison conditions cases are ideal for class action treatment, and even for consolidation of cases addressing conditions at different institutions that are part of the same system. See, e.g., *Grubbs v. Bradley*, 552 F. Supp. 1052 (M.D. Tenn. 1982) (examining conditions in twelve Tennessee institutions). Of course, individual eighth amendment claims such as that considered in *Estelle v. Gamble*, 429 U.S. 97 (1976) (individual denial of adequate medical care) will require individual treatment. It is the general conditions cases, claiming overcrowding or a systemic failure of services, for example, that are most easily distinguishable from cases involving other specific constitutional provisions, or the due process clause.

49. 451 U.S. 527 (1981).

answer to a hypothetical observer who questions the use of federal court resources to litigate every case in which an inmate alleges that several packs of cigarettes were taken from him.<sup>50</sup> There is an enormous and crucial difference between a due process claim based on the loss of a hobby kit or some cigarettes and a claim that all Texas prisoners are suffering cruel and unusual punishment due to prison overcrowding, and other abysmal conditions.<sup>51</sup> Whatever one's opinion of the Burger Court's reluctance to involve the federal courts in the protection of individual inmates' property or freedom of expression, the need to protect prisoners from systemic cruel and unusual punishment presents a strong, indeed a compelling justification for federal intervention.<sup>52</sup> The state, having made the policy or financial decisions that prevent prison administrators from operating less crowded and more humane facilities, cannot be relied upon to correct the problem.<sup>53</sup> The need for intervention is indisputable, and the constitutional obligation of the courts to intervene is inescapable.

Finally, the state's interest in the eighth amendment cases is of a different order than it is in the due process and first amendment cases. In *Jones* and other cases involving specific constitutional guarantees, the defendant prison officials claimed that the exercise of the right asserted would jeopardize a legitimate state interest in security, order or rehabilitation.<sup>54</sup> The Court was fearful of second guessing prison officials' judgment, lest escapes and riots ensue. The result of this fear was a policy of deferring to prison administrators' expertise.<sup>55</sup> Prison overcrowding, on the other hand,

50. As Judge Adams stated, holding that plaintiff has stated a due process claim under 42 U.S.C. § 1983 in such a case

will also no doubt generate a certain amount of disbelief in those taxpayers and citizens generally, not to mention judges and lawyers, who will ask how federal courts have come to be concerned with a case in which a state prisoner alleges simply that his constitutional rights were violated when a prison guard took seven packages of cigarettes from him. I have yet to answer this question satisfactorily for myself.

Russell v. Bodner, 489 F.2d 280, 282 (3d Cir. 1973) (Adams, J., concurring).

51. This was, and is the issue in *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 452 (1983), *modified on reh'g*, 688 F.2d 66 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983) (the most recent opinion on the merits in a litigation which has been pending for years).

52. See Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 385-88 (1977) [hereinafter cited as *Prison Reform*] Both authors advocate the duty of the federal courts to hear prison conditions cases, particularly where the state has shown itself to be insensitive to prevailing conditions.

53. See Johnson, *supra* note 52, at 905-16.

54. See *supra* note 28 for a description of the specters of danger defendants raised in *Jones* itself.

55. This deference also provides a convenient excuse for limiting the number of state prisoner cases the federal courts must hear. In fact, this concern seems to have inspired the

exists not by decision, but by default. No one has decided that overcrowding is sound correction policy; no one fears a deterioration of security, order or rehabilitation in the prisons if overcrowding is ameliorated by court order. To the contrary, court orders reducing overcrowding are welcomed by many prison administrators.<sup>56</sup> The principal state interest threatened by judicial decisions concerning overcrowding is fiscal; the constitutional problems here, unlike those at issue in *Jones*, can be cured to everyone's satisfaction with money.<sup>57</sup> Thus, the deferential stance adopted by the Court in its other prisoners' rights cases is simply not appropriate in overcrowding, or other general prison conditions litigation under the eighth amendment.<sup>58</sup> The few eighth amendment cases decided by the Court before *Chapman* also seem to recognize this, and do not share *Jones*' preoccupation with eliminating or accommodating the constitutional right involved, or with deference.<sup>59</sup>

When the opinion in *Rhodes v. Chapman* is viewed apart from the background of the due process and first amendment cases, its message becomes less clear. On the one hand, the Court strongly reaffirms the federal courts' obligation to "scrutinize claims of cruel and unusual confinement;"<sup>60</sup> on the other hand, the Court refers to legislative and public opinion as informing eighth amendment standards.<sup>61</sup> On the one hand, the Court cites, apparently approvingly, federal court cases finding prison conditions to be below constitutional standards and ordering broad injunctive relief;<sup>62</sup> on the other hand, courts are urged not to assume "that state

Court's procedural due process doctrine, see *Meachum v. Fano*, 427 U.S. at 229 ("The federal Courts do not sit to supervise state prisons . . .").

56. See *Chapman*, 452 U.S. at 360 (Brennan, J., concurring) ("Even prison officials have acknowledged that judicial intervention has helped them to obtain support for needed reform.")

57. The fear that a federal court might threaten the state's interest in incarcerating the convicted by opening the prison doors on finding unconstitutional overcrowding is not credible in light of the great caution shown by the courts in their choices of remedy. See, e.g., *Vazquez v. Gray*, 523 F. Supp. at 1365-66. See *infra* text accompanying notes 97-106. Confronted with a declaration that its prisons or jails are unconstitutionally overcrowded, a state will generally be allowed by the courts to choose whether to release selected inmates or whether to create more space. Building new facilities is an expensive solution. The National Council on Crime and Delinquency estimated that to build its way out of its overcrowding problem, California would have to construct one new facility per month for the next two years. See 30 CRIM. L. REP. 2259 (Jan. 6, 1982).

58. See *Chapman*, 452 U.S. at 362 (Brennan, J., concurring). See also, Note, *Complex Enforcement*, *supra* note 5, at 642 (the idea of deference is predicated upon features unique to discrete adjudication; expertise is irrelevant where the problem under review is a systemic dysfunction).

59. See *Hutto v. Finney*, 437 U.S. 678 (1978) (finding protracted isolated confinement cruel and unusual); *Estelle v. Gamble*, 429 U.S. 97 (1976) (denial of medical care may constitute cruel and unusual punishment).

60. 452 U.S. at 352.

61. *Id.* at 348-49 & 348 n.13.

62. *Id.* at 352 n.17.

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 . . . ."<sup>63</sup>

On balance, *Chapman* does not provide any final, clear or consistent answer to the question of the scope of federal court review of eighth amendment prison conditions cases. Given that the Court does reaffirm the federal courts' obligation in this area, however, and that its decision for the state is narrow and factually based, the opinion allows and even to some degree encourages meaningful federal court review. The opinion certainly does not justify wholesale abdication of federal court review.<sup>64</sup>

### B. The Scope of the Eighth Amendment

Federal court review, however vigorous, will not be meaningful unless the eighth amendment protection it provides is reasonably generous. Although the opinion in *Chapman* is dense with eighth amendment catch-phrases,<sup>65</sup> it does not directly address the two questions critical to defining the scope of the eighth amendment: How is cruel and unusual punishment to be measured,<sup>66</sup> and what minimum standard does the eighth amendment embody? On the first issue *Chapman* seems to provide an answer, albeit without justification or discussion: whether a particular prison condition is cruel and unusual is judged by viewing the totality of conditions at the

63. *Id.* at 352.

64. That some courts have derived more discouraging messages from *Chapman* is probably due at least in part to their viewing *Chapman* as part of a trend that includes the other prisoners' rights decisions. See *supra* text accompanying notes 21-58. Even reading *Chapman* by itself, one might take discouraging remarks out of context and conclude, as Justice Blackmun did, that "the Court's opinion in this case today might be regarded, because of some of its language, as a signal to prison administrators that the federal courts are now to adopt a policy of general deference to such administrators and to state legislatures . . . ." 452 U.S. at 369 (Blackmun, J., concurring). See Comment, Rhodes v. Chapman: Prison Overcrowding—Evolving Standards Evading an Increasing Problem, 8 N. ENG. J. PRISON L. 249, 260-62 (1982). I do not believe such a reading is required or even warranted.

65. The Court quotes prior cases describing the eighth amendment as prohibiting punishments that "involve the unnecessary and wanton infliction of pain," 452 U.S. at 346 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)); are "totally without penological justification," 452 U.S. at 346 (quoting *Gregg*, 428 U.S. at 183); or transgress the "evolving standards of decency that mark the progress of a maturing society," 452 U.S. at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

66. The Court protests that no static test can be used to measure eighth amendment violations, 452 U.S. at 346. However, the question of how cruel and unusual punishment is to be proved is distinct from the question of whether the guarantee against cruel and unusual punishment can be reduced to a formula.

A survey and discussion of the various tests used by the lower federal courts in eighth amendment prison conditions cases before *Chapman* can be found in Fair, *The Lower Federal Courts as Constitution Makers: The Case of Prison Conditions*, 7 AM. J. CRIM. L. 119 (1979); see also *Prison Reform*, *supra* note 52 (arguing for an eighth amendment analysis tying review of prison conditions to the legitimate purposes of punishment).

prison. This test can be inferred from one remark in the majority opinion,<sup>67</sup> from the fact that the Court actually reviewed a range of conditions at SOCF,<sup>68</sup> and from Justice Brennan's concurring opinion, asserting that this in fact is the test the Court sets forth.<sup>69</sup> Virtually all of the lower courts after *Chapman* have agreed that "totality of conditions" is the test the Court adopted;<sup>70</sup> only the Ninth Circuit rejects this test.<sup>71</sup> The choice of test, if choice it be, is unobjectionable. It is both more generous and more manageable than the alternative of examining prison conditions in isolation and, as one court put it, missing the forest for the trees.<sup>72</sup>

*Chapman's* decision that neither double celling nor, by implication, overcrowding,<sup>73</sup> is per se unconstitutional, does seem to necessitate a totality of conditions approach unless the courts are to ignore most overcrowding issues altogether. According to *Chapman*, it is the impact on other prison conditions, such as provision of food service, protection of personal safety, and so forth, that may render double celling or overcrowding cruel and unusual. If a prison were seriously overcrowded, a court using the totality of conditions test would examine the impact of the overcrowding on various facets of prison life. If the court were to find the food service, for example, to be deficient, it could then order relief.<sup>74</sup> Under a nontotality test, if the food service, viewed in isolation, did not amount to cruel and unusual

67. 452 U.S. at 347 ("Conditions . . . alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities").

68. *See id.* at 340-43, 348-49 & 348 n.13.

69. *Id.* at 363 n.10.

70. *See Ruiz*, 679 F.2d at 1139; *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982); *Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981); *Grubbs v. Bradley*, 552 F. Supp. at 1121; *Williams v. Lane*, 548 F. Supp. 927, 930-31 (N.D. Ill. 1982); *Union County Jail Inmates v. Scanlon*, 537 F. Supp. at 1001; *Bono v. Saxbe*, 527 F. Supp. 1182, 1195 (S.D. Ill. 1981); *Hendrix v. Faulkner*, 525 F. Supp. at 525; *see also Nelson v. Collins*, 659 F.2d at 430 (Winters, C.J., concurring in part and dissenting in part) (Fourth Circuit used totality of conditions test before *Chapman* and should continue to do so); *Heitman v. Gabriel*, 524 F. Supp. at 625 (totality of conditions test "seems currently to be accepted"); *cf. Villaneuva v. George*, 659 F.2d 851, 854 (8th Cir. 1981) (using a totality of conditions test to measure conditions suffered by a pretrial detainee in a jail).

71. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). The court in *Hoptowit* adhered to the prior Ninth Circuit decision in *Wright v. Rushen*, 642 F.2d 1129 (9th Cir. 1981), decided before *Chapman*. The Seventh Circuit, in *Smith v. Fairman*, 690 F.2d 122, 125 (7th Cir. 1982), attempted to reconcile the Ninth Circuit approach with that of the other federal courts, remarking that while *Chapman* does "essentially" mandate a totality of the conditions of confinement approach, vague conclusions that the totality of conditions amount to a constitutional violation are insufficient to make out a claim. The Ninth Circuit seems to intend something more than this bland statement, however. *See infra* text accompanying notes 100-06.

72. *Grubbs v. Bradley*, 552 F. Supp. at 1118.

73. The prison in *Chapman* was clearly overcrowded by any reasonable standard. *See supra* note 6; *infra* note 95.

74. How broad the court's order could be is a more difficult question. *See infra* text accompanying notes 97-106.

punishment, the court could not remedy either the inadequate food service or the overcrowding. Such an atomistic approach is not adequate to prevent or redress inhumane conditions, particularly in light of *Chapman's* declaration that neither double celling nor overcrowding is cruel and unusual per se. Although *Chapman* does not preclude finding overcrowding or even double celling cruel and unusual in an extreme case, even if other conditions are adequate,<sup>75</sup> lower courts are likely to regard *Chapman* as disfavoring such a holding. The totality test allows a court trying to follow *Chapman* a palatable and clearly permissible context in which to address overcrowding.

The seemingly objective focus of the totality test is a welcome departure from the more subjective focus in the only other case where the Court discussed the eighth amendment standard to be applied in prison—*Estelle v. Gamble*.<sup>76</sup> In that case, the Court determined whether denial of medical care amounted to cruel and unusual punishment by asking whether prison officials had shown “deliberate indifference” to a prisoner’s serious medical needs.<sup>77</sup> The objective approach of *Chapman* seems to connote the Court’s recognition of the fact that prison conditions may be cruel and unusual regardless of the mens rea of the warden, the state, or anyone else.<sup>78</sup>

The remaining question—really the more critical issue for defining the scope of the eighth amendment—is the question of minimum standards. The very idea of cruel and unusual punishment suggests that there is some minimum standard embodied in the eighth amendment—that there is a constitutional threshold below which no form of punishment, including prison conditions, may be permitted to fall. The principal task for a court judging whether conditions are cruel and unusual is to define this minimum standard.<sup>79</sup>

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75. At some point overcrowding itself might be cruel and unusual punishment, even if food and other services remained adequate—if instead of two, the cells at the SOCF held four, for example. See *Union County Jail Inmates*, 537 F. Supp. at 1004-05. Similarly, double celling might amount to cruel and unusual punishment, even in the context of otherwise adequate conditions, if the space per individual were significantly less than was available at the SOCF and inmates spent more time in their cells. See, e.g., *French*, 538 F. Supp. at 924-27 (ordering double celling to cease, after distinguishing *Chapman*).

Even if an inmate’s needs for food, clothing and other services were being met, the lowest standard for measuring inmates’ minimum rights includes a right to adequate housing. See *infra* notes 82-83. While the level of double celling in *Chapman* was found not to be cruel and unusual, at some point extreme overcrowding could, by itself, violate the Constitution by failing to meet the requirement of adequately housing prisoners.

76. 429 U.S. 97 (1976).

77. *Id.* at 104.

78. See Note, *Complex Enforcement*, *supra* note 5, at 638-41 (suggesting that the concepts of blame are more appropriate to discrete adjudication than to conditions cases); Comment, *Rhodes v. Chapman: Prison Conditions as Cruel and Unusual Punishment*, 22 S. TEX. L. J. 374, 377-78 (1982) (remarking favorably on the objective focus of *Chapman*).

79. See Robbins & Buser, *supra* note 5; Note, *Creatures, Persons and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment*, 55 S. CAL. L. REV. 1099 (1982) [hereinafter cited as Note, *Creatures, Persons and Prisoners*].

*Chapman* does not explicitly address this issue but, again by inference, it suggests that the Supreme Court is likely to be satisfied with quite a low standard. The majority speaks of an inmate's right not to be deprived of the "minimal civilized measure of life's necessities."<sup>80</sup> It describes Arkansas prison conditions found to be cruel and unusual in an earlier case as having caused "unquestioned and serious deprivations of basic human needs."<sup>81</sup> In the post-*Chapman* cases, several lower federal courts have declared that a prison's constitutional obligation is only to provide inmates with "basic human needs,"<sup>82</sup> and that "an institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety."<sup>83</sup> This standard approximates the standard the ASPCA and state law frequently use to define cruelty to animals.<sup>84</sup>

Given contemporary attitudes toward prisoners, most lower courts will probably continue to find the basic human needs standard a sufficient measure of the prison's or state's eighth amendment obligation. The *Chapman* opinion gives little indication that the Supreme Court will actively require a standard recognizing the human dignity of prisoners as worthy of constitutional protection.<sup>85</sup> The opinion belittles the loss of privacy inmates suffer due to double celling, scoffs at the idea of a constitutionally based right to rehabilitation,<sup>86</sup> and cheerfully accepts the notion that prisoners may be subjected to harsh and restrictive, uncomfortable, or even painful

80. 452 U.S. at 347.

81. *Id.*

82. *Hoptowit*, 682 F.2d at 1259.

83. *Id.* at 1246 (quoting *Wright*, 642 F.2d at 1132-33 (quoting *Wolfish v. Levi*, 573 F.2d 118, 125 (2d Cir. 1978), *rev'd on other grounds sub nom.* *Bell v. Wolfish*, 441 U.S. 520 (1979))).

84. The analogy between conditions to which pets are entitled and conditions to which prisoners should be entitled under the eighth amendment is drawn not infrequently, sometimes ironically and sometimes in earnest. See *French v. Owens*, 538 F. Supp. at 913 (treating as possibly dispositive of plaintiff prisoners' claim that their housing conditions violated the eighth amendment a section of the Indianapolis code setting forth requirements for animal owners regarding adequate shelter, ventilation, temperature control, and space for exercise); *Wickham v. Fisher*, 629 P.2d 896, 898 (Utah 1981) (report from the county health director stating that the SPCA would not permit animals to be housed under current county jail conditions); see generally Note, *Creatures, Persons and Prisoners*. See *supra* note 79 for elaboration on this analogy.

85. At least one member of the Court has expressed the view that dignity is not an appropriate concern in an eighth amendment prison conditions case, even though earlier Supreme Court case law had declared the touchstone of the eighth amendment to be "nothing less than the dignity of man," *Trop v. Dulles*, 356 U.S. at 100. See *Atiyeh v. Capps*, 449 U.S. 1312, 1315-16 (1981) (Rehnquist, Circuit Justice). There is also support for the opposite view, although probably by a minority of justices. See *Chapman*, 452 U.S. at 361 (Brennan, J., concurring) ("The task of the courts in cases challenging prison conditions is to determine whether a challenged punishment comports with human dignity.") (quoting *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring)).

86. *Chapman*, 452 U.S. at 348.

conditions<sup>87</sup> without those conditions being deemed cruel and unusual. The opinion reflects the Court's sympathy with a narrow interpretation of the eighth amendment, one which perpetuates the view of prisoners as creatures. Nevertheless, because the *Chapman* Court did not commit itself to a low eighth amendment standard, the courts are free for now to apply a standard that recognizes that prisoners are people and to hope that, despite hints to the contrary, the Supreme Court will not disagree.

Another troubling aspect of *Chapman's* eighth amendment teleology is the Court's suggestion that the content of a minimum standard might properly be determined by public opinion, perhaps as embodied in legislation.<sup>88</sup> Public opinion is characterized as a more objective standard than the subjective opinion of judges.<sup>89</sup> The Court neglected a more obvious limitation on the subjectivity of judicial opinion by taking a jaundiced attitude toward judicial reliance on expert and professional standards.<sup>90</sup> To the extent that legislation on prison capacity is likely to be based on expert studies and opinion, following the Court's suggestion might lead to the same results. However, the Court seems to be looking to legislation not for evidence of contemporary professional standards of decency,<sup>91</sup> but as evidence of majority will. The suggestion that untutored public opinion is the best measure of the eighth amendment's protection<sup>92</sup> is flatly inconsistent with the antimajoritarian thrust of the Constitution.<sup>93</sup> Perhaps for this reason, the lower federal courts thus far have shown little interest in referring to legislation for a standard. Another, more likely explanation is that the district court judges who view prison conditions are left with little doubt

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87. *Id.* at 347-49. A narrow view of the constitutional limitations on punishment, apparently based on an assumption that punishment is largely retributive, is again most clearly reflected in the theories of Justice Rehnquist. See *Atiyeh v. Capps*, 449 U.S. at 1316 (observing that prisoners were not promised a rose garden).

88. *Chapman*, 452 U.S. at 346-47.

89. *Id.*

90. See *id.* at 348 n.13.

91. See *id.* at 346-47, 349.

92. *Id.* The Court's opinions on the death penalty also suggest that legislation and public opinion are relevant as measures of the eighth amendment. See *Enmund v. Florida*, 102 S. Ct. 3368 (1982) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 592-97 (1977); see also *Rummel v. Estelle*, 445 U.S. 263, 279-81 (1980).

93. *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); see A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 83-84 (1978); Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1109 (1977); Swygert, *In Defense of Judicial Activism*, 16 VAL. U.L. REV. 439, 444-45 (1982).



that, by any reasonable standard, the conditions they confront are cruel and unusual.<sup>94</sup>

Subsequent litigation may provide a more expansive view of the eighth amendment than *Chapman* suggests. The context of *Chapman* made it difficult for the Court to be either more precise or more generous about the scope of the eighth amendment. Had the Court accepted plaintiffs' argument that each prisoner is entitled to a certain minimum amount of living space, it would have had to select a figure. Selecting a particular figure might have seemed subjective. Had the Court attempted to avoid the appearance of subjectivity by choosing a minimum space requirement endorsed by the majority of experts in the field,<sup>95</sup> the decision would have been tantamount to declaring approximately two-thirds of the occupants of the nation's prisons and jails to be suffering conditions violative of the eighth amendment.<sup>96</sup> The opinion in *Chapman* was, for this reason alone, no surprise.

### C. *The Scope of the Remedy*

It is in the area of remedy, curiously enough, that the *Chapman* decision has had the most constricting impact on the lower courts. *Chapman* did not reach the issue of remedy because it did not find any rights violated. Nevertheless, after *Chapman* several courts of appeals modified district court injunctions that had been issued before *Chapman*, rendering the district court orders more general and more conservative.<sup>97</sup> Most of the

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94. It is interesting to note that the district judges, perhaps for the same reason, have been more generous in their application of the eighth amendment than have the courts of appeals. See *Smith v. Fairman*, 690 F.2d 122 (7th Cir. 1982), *rev'g* 528 F. Supp. 186 (C.D. Ill. 1981) (district court found conditions at the Pontiac Correctional Center to constitute cruel and unusual punishment; court of appeals reversed, questioning the weight the district court placed on various findings of fact. The district judge had presided over twelve days of trial, viewed 114 exhibits and, probably most significantly, had toured the prison). See also *Ruiz*, 679 F.2d 1115. Justice Burger's remark that one visit to a prison is enough to make a prison reform zealot out of anyone seems to be as true as ever.

95. Expert estimates of the minimum amount of space needed for each prisoner range from 50 square feet per prisoner (National Council on Crime and Delinquency) to 55 (Army) to 60 (American Public Health Association, U.S. Department of Justice), to 75 (American Correctional Association) to 80 (National Advisory Commission on Criminal Justice Standards and Goals). See *Chapman*, 452 U.S. at 356 & n.5 (Brennan, J., concurring); 434 F. Supp. at 1021; 3 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 49-51 (1980). At SOCF, two inmates shared a 63 square foot cell.

96. Approximately two-thirds of all inmates of American jails and prisons at the time of the National Institute of Justice study were confined in cells or dormitories providing less than 60 square feet of space per inmate, 1 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 61-63 (1980). Justice Brennan noted the significance of this fact in his concurring opinion, *Chapman*, 452 U.S. at 356.

97. *Ruiz*, 688 F.2d at 266; *Hoptowitz*, 682 F.2d at 1237; *Nelson*, 659 F.2d at 420.

courts of appeals did not reverse the district courts' findings that eighth amendment violations existed,<sup>98</sup> demonstrating either a reasonably generous view of *Chapman's* eighth amendment standard, or a healthy respect for the district courts' findings of fact. However, in the area of remedy, the Fourth, Fifth and Ninth Circuits all seemed to interpret *Chapman* as requiring the federal courts to be extremely cautious about ordering any remedy more specific than one requiring defendant prison officials to submit a plan to correct conditions found unconstitutional.<sup>99</sup>

The Ninth Circuit's view of the remedial powers of federal courts is the most restrictive,<sup>100</sup> and is connected to that court's decision to reject the totality of conditions test.<sup>101</sup> The Ninth Circuit seems to believe that the totality of conditions test places federal courts in the untenable position of being unable to order relief for a constitutional violation. If, the argument runs, a court reviews a number of prison conditions, no one of which by itself violates the eighth amendment, but finds that an eighth amendment violation exists because of the totality of conditions, what then can the court do? It cannot order food service to be improved when the food service itself is not unconstitutionally inadequate; it cannot order additional guards to be hired if violence is no worse than at other facilities.<sup>102</sup> Not wishing to be confronted with this dilemma, the Ninth Circuit simply rejected the totality of conditions test. Taken to its extreme, this view would make it impossible for a court ever to order a prison to decrease overcrowding, since overcrowding, according to *Chapman*, is unlikely to violate the Constitution in and of itself, and would make federal court relief from sordid and deplorable conditions generally unlikely.

The Ninth Circuit's view is a *reductio ad absurdum* of a principle that other jurisdictions have found attractive: that a federal court should not

98. *But see* *Smith v. Fairman*, 690 F.2d 122 (7th Cir. 1982), *rev'g* 528 F. Supp. 186 (C.D. Ill. 1981); *Ruiz*, 688 F.2d at 266 & 679 F.2d at 1115, *rev'g in part* 503 F. Supp. 1265 (reversed some parts of the district court's findings of eighth amendment violations).

99. The remaining circuits have not yet had the opportunity to express their views on the impact of *Chapman*. In *Villaneuva v. George*, 659 F.2d at 851, a case on conditions in pretrial detention, the Eighth Circuit gave some indication that the reasonably generous views that circuit has been known for since its opinion in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) are likely to prevail after *Chapman* as well.

A deferential approach to remedy is recommended after extensive discussion of the process of implementing decrees in institutional reform litigation in Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COL. L. REV. 784 (1978) [hereinafter cited as Special Project].

100. *See Hoptowit*, 632 F.2d at 1247.

101. *See supra* text accompanying notes 67-71.

102. In *Hoptowit*, the Ninth Circuit perceived that under a totality of conditions test a broad remedy, correcting even conditions not unconstitutional if viewed in isolation, would be appropriate, 682 F.2d at 1247. *See Robbins & Buser, supra* note 5, at 922-26 (totality of conditions test requires a broad remedy, possibly affecting conditions not unconstitutional by themselves).

issue greater or more specific injunctive relief than is absolutely necessary to remedy the constitutional violation.<sup>103</sup> The totality of the conditions test itself does, as the Ninth Circuit perceived, create remedy problems. If neither the provision of food service nor the level of institutional violence is unconstitutional taken alone, but becomes unconstitutional in conjunction with heavy overcrowding, then the courts may be inclined to avoid issuing a specific order at all and to allow prison administrators to choose between reducing the inmate population and enhancing the provision of services.

There are several problems with this approach. Defendants in prison conditions litigation have not established a very impressive track record of correcting conditions found unconstitutional, of submitting workable plans, or of cooperating enthusiastically with the implementation of court orders.<sup>104</sup> It would be unfair to ascribe the indifferent, dilatory or even obstructionist attitudes of some defendants to all. However, as Ninth Circuit Judge Tang noted, his circuit's view of the totality of conditions test seems to disable a court from taking the next step and issuing a more specific order if the option of ordering defendants to submit a plan is tried but fails.<sup>105</sup>

Without a meaningful remedy, intervention and the ensuing declaration of eighth amendment violations are hollow. Of course, finding an eighth amendment violation should not be taken as a license to put a prison system into receivership and to usurp all the decision-making authority of prison administrators. But the breadth of remedies under the eighth amendment must be commensurate with the breadth of the right. Even if a court wishes to begin the remedial stage by asking defendants to choose among alternative means of redress, the court must be willing to elect and implement remedies to redress constitutional violations if the defendants fail to take adequate remedial measures.<sup>106</sup>

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103. "[A] court can order only relief sufficient to correct the violation found," and relief must be "consistent with the policy of minimum intrusion into the affairs of state prison administration." *Ruiz*, 679 F.2d at 1145. Therefore, a "wait and see" approach, ordering only moderate relief at first, with the possibility of more stringent and specific relief to follow if conditions are not corrected, is to be preferred. *Id.* at 1145-53. See Special Project, *supra* note 99, at 790-813.

Justice Rehnquist has suggested the existence of a Charybdis to oppose the Scylla of overly specific orders: the provision in FED. R. CIV. P. R. 65(d) that injunctive orders must be "specific in terms." *Atiyeh v. Capps*, 449 U.S. at 1317.

104. See Special Project, *supra* note 99, at 837-42 for a discussion of judicial responses to non-compliance and numerous cases in which such responses were necessary in a variety of institutional litigation. Even the Supreme Court has been confronted with this problem. See *Hutto v. Finney*, 437 U.S. 678 (1978) (affirming an award of attorneys' fees based on the District Court's finding that defendant prison officials acted in bad faith, stalling and failing to comply with court orders in the Arkansas litigation).

105. *Hoptowitz*, 682 F.2d at 1266 (Tang, J., concurring).

106. See Robbins & Buser, *supra* note 5, at 926-30; Robbins, *Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing and Redressing Constitutional Rights*, 26 U. KAN. L. REV. 551, 557-63 (1978) [hereinafter cited as Robbins].

With the scope of intervention, the scope of the constitutional right and the scope of the remedy all undetermined, the future of institutional litigation in the federal courts is difficult to foretell. In light of the Burger Court's notions of federalism and its general attitude toward prisoners, it seems unlikely that the Court will lead the way to a vigorously interventionist position. But *Chapman*, given its ambiguity, need not prevent the lower federal courts from defining and implementing their own concepts of appropriate federal court intervention.

## II

### INSTITUTIONAL LITIGATION IN THE STATE COURTS

Remarkably little litigation over prison conditions has taken place in the state courts. Since *Rhodes v. Chapman* was decided, there have been no more than ten reported state court decisions even citing *Chapman*. The hegemony of federal court litigation in this area is surprising given that a tremendous opportunity exists for plaintiffs to create a forum more hospitable to institutional litigation in the state courts.<sup>107</sup> The opportunity is born of need, but it is an opportunity nonetheless.

#### A. *The Scope of Review*

Although state courts may still wish to exercise a degree of judicial restraint, federalism and comity concerns can be bled out when institutional litigation takes place in state court. The federal courts' sometimes restrictive justiciability doctrines, for example, reflect a reluctance to interfere with state institutions.<sup>108</sup> Contrast that noninterventionist attitude with the approach of the judges in Kent County, Michigan. They found the conditions in the Kent County Jail overcrowded, set a population limit, and backed it up with a release order of the type the federal courts are reluctant to use.<sup>109</sup> They even set out a formula for determining the order in which inmates should be released if the population cap were exceeded.<sup>110</sup> The order was reversed by the Michigan Court of Appeals for the simple and unfortunate

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107. Professor Neuborne has argued that institutional differences between state and federal court in fact justify the public law litigator's traditional preference for federal court. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118-30 (1977).

108. See, e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976) for an extreme use of justiciability and federalism principles to defeat review of local police practices. Robbins & Buser, *supra* note 5, at 897-900, argue that the theories of *Rizzo* should not apply to institutional litigation concerning prison conditions. See also Robbins, *supra* note 106, at 563-67.

109. *Kent County Prosecuting Att'y v. Kent County Cir. Judges*, 110 Mich. App. 404, 405-06, 313 N.W.2d 135, 135-36 (1981). For an example of a federal court refusing to impose a mandatory population limit despite overcrowding, see *Vazquez*, 523 F. Supp. at 1365-66.

110. *Kent County Prosecuting Attorney*, 110 Mich. App. at 407-09, 313 N.W.2d at 136-37.

reason that no case had been before the judges when they issued their order.<sup>111</sup> Their decision was *sua sponte*, without even an inmate complaint for a base. Why had no case been brought before such eager judges?

### B. The Scope of the Right

Litigators concerned with the evidently meager content the Supreme Court seems willing to ascribe to the eighth amendment should be increasingly aware that the state courts are not necessarily limited either by the language of the eighth amendment or by the Court's restrictive interpretations of it. The recently rediscovered state constitutions<sup>112</sup> provide several avenues of escape from restrictive federal cases. First, some state constitutions contain helpful provisions not included in the federal Constitution. Justice Powell has told us that the Constitution does not mandate comfortable prisons.<sup>113</sup> The Wyoming<sup>114</sup> and Tennessee<sup>115</sup> Constitutions do. The Oregon Supreme Court, on the basis of some specific language in the Oregon Constitution, has suggested that Oregon prisoners have a state constitutional right to dignity,<sup>116</sup> the very right the Supreme Court seems inclined to read out of the eighth amendment.

Even where the state constitution contains language identical to that of the eighth amendment, the state courts are not bound to adopt the Supreme Court's interpretation of the parallel federal language.<sup>117</sup> In states whose constitutions contain a guarantee against cruel and unusual punishment,<sup>118</sup> the courts are as free to reject all or part of the Supreme Court's eighth amendment jurisprudence as the New York Court of Appeals was to reject the Supreme Court's declaration that the due process clause does not guarantee contact visits for pretrial detainees,<sup>119</sup> or the California Supreme Court was to reject the Burger Court's entire procedural due process doctrine.<sup>120</sup>

111. *Id.*

112. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *First Things First: Rediscovering the States Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); *Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 and sources cited at 1328-29, 1334 n.20 (1982) [hereinafter cited as *Developments*].

113. *Chapman*, 452 U.S. at 349.

114. WYO. CONST. art. I, § 16.

115. TENN. CONST. art. I, § 32.

116. *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981).

117. See *Developments*, *supra* note 112, at 1356-66 for a discussion of factors a state court should consider when deciding when to diverge from the federal courts' interpretation of identical constitutional language.

118. See, e.g., ALASKA CONST. art. I, § 12; N.Y. CONST. art. I, § 5.

119. *Cooper v. Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188 (1979), *cert. denied sub nom. Lombard v. Cooper*, 446 U.S. 984 (1980).

120. *People v. Ramirez*, 25 Cal. 3d 260, 266-69, 599 P.2d 622, 626-28, 158 Cal. Rptr. 316, 319-21 (1979). The California Supreme Court replaced the doctrine of *Meachum v.*

### C. The Scope of the Remedy

The state courts also have considerably more freedom to structure and implement effective remedies, without the bonds of federalism and comity. The tendency of the federal courts of appeals to reduce or dilute district court injunctions was noted above.<sup>121</sup> The Utah Supreme Court, by way of contrast, recently expanded a trial court injunction in a prison conditions case, adding more specific provisions concerning temperature, interior lighting and postage stamps to an order that already recommended the purchase of toothbrushes.<sup>122</sup> Justice Powell has cautioned that expert opinions and standards formulated by professional associations do not establish constitutional minima.<sup>123</sup> They do in West Virginia, however, where the West Virginia Supreme Court has adopted standards promulgated by the American Correctional Association and the Commission on Accreditation for Correctional Standards to define the minimum content of the West Virginia right to rehabilitation. This right was created by state legislation and is enforceable through the state constitution's due process clause.<sup>124</sup>

## III

### CONCLUSION

It is not my contention that state court judges throughout the country are sitting in their chambers eagerly awaiting prison conditions cases. The federal courts were not anxious to become involved with prison litigation and neither are the state courts.<sup>125</sup> Conditions in our prisons and jails are revolting—it is with good reason that the public turns a blind eye to them.<sup>126</sup> Conditions litigation is lengthy and tedious. Frequently the courts must retain jurisdiction for years and determine and redetermine the same issues, often dealing with defendants who may be powerless to correct conditions

*Fano*, see *supra* notes 31-36, 42-44, and accompanying text, with a novel doctrine declaring a substantive right to procedural fairness which the court derived from a law review article. See Van Alstyne, *Cracks in the New Property: Adjudicative Due Process in the Administrative State*, 62 CORN. L. REV. 445, 487-90 (1977).

121. See *supra* text accompanying notes 97-99.

122. *Wickham v. Fisher*, 629 P.2d at 902.

123. *Chapman*, 452 U.S. at 348 n.13 (quoting *Wolfish*, 441 U.S. at 543-44 & 543 n.27).

124. See *Cooper v. Gwinn*, 298 S.E.2d 781 (W. Va. 1981).

125. Witness the plaintive remark of a district judge in Indiana in a case challenging conditions at the Indiana State Prison: "This Judge has indicated from the beginning of this case to the present time, a complete and utter distaste for having to cross that Rubicon which separates the federal government from the state government and enter into the morass of the day to day operation of the prison." *Hendrix v. Faulkner*, 525 F. Supp. at 442.

126. See *Chapman*, 452 U.S. at 357-60 (Brennan, J., concurring). Michel Foucault has raised the fascinating and deeply troubling suggestion that our prisons may not in fact be failing to provide what the public really desires of punishment of the convicted. See M. FOUCAULT, *DISCIPLINE AND PUNISH* 271-72 (1977).

or recalcitrant to the point of contempt.<sup>127</sup> Judges are writing voluminous opinions in prison conditions cases.<sup>128</sup> Those who dismiss prisoner complaints or who find against the prisoner plaintiffs rarely see their decisions reversed, while judges who find constitutional violations face either the possibility of reversal or modification on appeal, or the certainty of having to implement their decrees. Despite all of these disincentives, the federal courts have learned to tolerate prison conditions litigation, if not to love it.<sup>129</sup> That they do so is in part a tribute to the dedication of our district judges and in part a tragic commentary on how deplorable the conditions in our prisons and jails truly are. We should expect and demand the same high personal standards from our state court judges, and higher, much higher, institutional standards from our corrections system.

As any major case dealing with a significant and controversial issue, *Rhodes v. Chapman* seemed to leave open more questions than it decided: Where will institutional litigation take place in the next decade? What is the standard against which our prisons will be measured? What remedies will the courts adopt, and how will those remedies be implemented? What must prisoners prove to establish an eighth amendment violation, and how, in the face of the Supreme Court's chary attitude toward expert testimony, can that burden of proof be met? To what extent will conditions in jails be judged differently from the conditions in institutions housing sentenced inmates?<sup>130</sup> The federal courts have already begun to forge answers to these

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127. The District Court in *Chapman v. Rhodes* ordered the defendants to submit plans five times and found the submitted plans inadequate each time before finally deciding to issue particular relief. See 452 U.S. at 344. *Ruiz v. Estelle* has been in litigation for over four years. The main trial in that case consumed 159 days. 679 F.2d at 1127. See *Hutto v. Finney*, 437 U.S. 678 (1978) for a partial account of the tortuous history of the Arkansas litigation.

Enforcement proceedings, which may lead to judicial involvement in a case for years after final judgment, also entail a new and expanded concept of a judge's proper role in litigation. See *Chayes, The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *Resnik, Managerial Judges*, 96 HARV. L. REV. 374 (1982); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977). The rather outmoded notion that it is unseemly for a court to play a major role in a case after final judgment may inform some courts' reluctance to issue specific decrees. In fact, institutional litigation has occasioned an increased use of special masters to supervise implementation of decrees. See *Nathan, The Use of Masters in Institutional Reform Litigation*, 10 TOL. L. REV. 419 (1979). This has occurred even in litigation over conditions in institutions other than prisons. See *New York State Ass'n for Retarded Children & Parisi v. Carey*, 706 F.2d 956 (2d Cir. 1983).

128. See, e.g., *Grubbs v. Bradley*, 552 F. Supp. at 1052-1132; *Hendrix v. Faulkner*, 525 F. Supp. at 435-527.

129. After expressing distaste for the process, see *supra* note 125, Judge Sharp went on to write an opinion of over ninety pages finding many of the conditions at the Indiana State Prison not only distasteful but unconstitutional, and to issue various forms of relief. *Hendrix v. Faulkner*, 525 F. Supp. at 435-527.

130. Several courts have opined that the "punishment" test of *Wolfish*, 441 U.S. at 520, should be read as guaranteeing pretrial detainees a standard of living superior to that guaranteed sentenced prisoners under *Chapman*. See, e.g., *Union County Jail Inmates*, 537

questions; the state courts should be given the opportunity to find their own answers. Institutional litigation can and should expand into state courts even though *Chapman* has in no way closed the federal forum. Wherever the court, judicial review of prison conditions is necessary. The courts cannot alone cure the epidemic of prison overcrowding, but their vigilance is necessary lest the default of the other branches becomes complete.<sup>131</sup>

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F. Supp. at 1002-09; *McMurry v. Phelps*, 533 F. Supp. at 759-62. See also *Atiyeh v. Capps*, 449 U.S. at 1316.

131. It has been argued that the principal function of the courts in prison conditions cases is to act as a prod to the other branches of government. See Special Project, *supra* note 99; *Prison Reform*, *supra* note 52. This does not imply, of course, that the courts have not been effective in improving conditions in particular prisons or prison systems by decree. See M. HARRIS & D. SPILLER, JR., *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 3-29 (1977).



