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Debra Borenstein

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DOUBLE-CELLING AT PONTIAC: ARE INMATES BEING SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT ARISING OUT OF OVERCROWDED CONDITIONS?

Smith v. Fairman
690 F.2d 122 (7th Cir. 1982)

DEBRA BORENSTEIN*

The eighth amendment, which is applicable to the states through the fourteenth amendment, imposes limitations upon the conditions in which a state may confine those convicted of crimes. Punishments cannot be "cruel and unusual." The United States Supreme Court has interpreted this limitation to mean that prison conditions "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." The eighth amendment prohibition of cruel and unusual punishment has been defined as a fluid concept which draws its meaning from "evolving standards of decency that mark the progress of a maturing society." Accordingly, in the late 1960's to early 1970's prison inmates obtained a series of unprecedented federal rulings that confinement under conditions as they existed in the Arkansas penal system violated their constitutional rights. After the Arkansas prison cases there were general attacks on the conditions in state prisons throughout the country, particularly in the South. This litigation produced widespread ju-

1. U.S. Const. amend. VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
4. Id. at 347.
5. Id. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
7. Prison Reform, supra note 6, at 109. See, e.g., ALABAMA: McCray v. Sullivan, 509 F.2d

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dicial recognition of the right of every prisoner to be confined in decent and humane surroundings. Individual prisons or entire prison systems in at least twenty-four states have been declared unconstitutional under the eighth and fourteenth amendments, with litigation pending in many others.10

Much of this litigation concerned the issue of overcrowding which


10. There are over 8,000 pending cases filed by prisoners challenging prison conditions,
DOUBLE-CELLING

is considered responsible for many of the major problems in correctional institutions.\textsuperscript{11} For example, in a typical case,\textsuperscript{12} a federal district court described the Alabama penal system as “horrendously overcrowded”\textsuperscript{13} to the point where many inmates were forced to sleep on mattresses spread on floors in hallways and next to urinals.\textsuperscript{14} A United


State prisoners alleging violations of their constitutional rights concerning conditions of confinement and/or treatment during confinement may be heard in federal court by filing an action under the Federal Civil Rights Act, 42 U.S.C. § 1983 (Supp. IV 1980) [hereinafter referred to as § 1983], or by filing a writ of federal habeas corpus, 28 U.S.C. § 2254 (1976). Most of the litigation attacking prison conditions has arisen under the Federal Civil Rights Act, 42 U.S.C. § 1983, because filing under § 1983 carries distinct advantages. For example, exhaustion of state judicial and administrative remedies is not required before filing a § 1983 complaint, Monroe v. Pape, 365 U.S. 167 (1961); Wilwording v. Swenson, 404 U.S. 249 (1971), the doctrine of abstention is usually inapplicable, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), \textit{pro se} complaints are liberally construed by the courts and judged by less stringent standards than formal pleadings drafted by attorneys, Haines v. Kerner, 404 U.S. 519 (1972), it is easy to obtain class action certification pursuant to the Federal Rules of Civil Procedure, Rule 23, Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975) (The general rules regarding the burden of proof in establishing a class must not be rigidly applied), and § 1983 offers a wide range of possible remedies for violations of prisoners’ rights. \textit{A Bronstein & P. Hirschkop, Prisoner Rights} 1979, at 77 (Vol. One).

Section 1983 provides:

\textit{Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.} 42 U.S.C. § 1983 (Supp. IV 1980). Jurisdiction to hear § 1983 cases is vested in the federal courts under 28 U.S.C. § 1343(3) and (4).

State prisoners may also have their complaints attacking conditions of confinement entertained in the federal courts by filing a writ of habeas corpus, 28 U.S.C. § 2254 (1976). See Johnson v. Avery, 393 U.S. 483 (1969). Under 28 U.S.C. § 2254 the federal courts can consider a prisoners’ application if he is being held in custody in violation of the Constitution or laws of the United States. However, under § 2254(b), a writ of habeas corpus cannot be granted, “unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.” Exhauster must include both available state judicial and state administrative remedies. Preser v. Rodriguez, 411 U.S. 475 (1973). Further, if a claim involves the challenge to a conviction or affects the duration of confinement of a state prisoner, the \textit{sole} means of obtaining relief is through the federal habeas corpus. \textit{Id.} For a discussion on federal prisoners’ access to federal courts, see \textit{A. Bronstein & P. Hirschkop, Prisoners’ Rights} 1979, 85-91 (Vol. One).


13. \textit{Id.} at 332. In addition to being overcrowded, the physical facilities were dilapidated and infested with vermin. Sanitary facilities were limited and in ill repair. In one instance, over two hundred men were forced to share one toilet. Inmates were not provided with toothpaste, toothbrushes, shampoo, combs, or other such necessities. Food was unappetizing and unwholesome. There were no meaningful rehabilitation programs, and violence was rampant. \textit{Id.} at 323-26.

14. \textit{Id.} at 323.
States health officer described the Alabama prisons as "wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors."

Overcrowding is due to the unprecedented upsurge in the number of inmates in federal and state correctional facilities. The increase in prison population is so severe that one court recently stated that a Texas prison could not hope to eliminate double and triple-celling, even with a new forty-three million dollar unit.

Under these circumstances, courts have emerged as a critical force behind efforts to ameliorate inhumane prison conditions. Judicial intervention has been responsible for remedying some of the worst abuses due to overcrowding. Overcrowding and cramped living conditions, however, remain pressing problems in many prisons. In most cases, courts easily apply eighth amendment prohibitions upon a finding of overwhelmingly offensive prison conditions. Where prison conditions are not overwhelmingly offensive, however, courts have a more difficult task in examining overall conditions and determining whether the aggregate effect of prison conditions on inmates is violative of the Constitution. Therefore, courts place great emphasis on the presence of objective criteria when they determine the constitutionality of prison conditions.

15. Id. at 323-24. Evidence also revealed that weaker inmates were repeatedly victimized by the stronger inmates. Robbery, rape, extortion, theft, and assault were everyday occurrences among the general inmate population. Id.


18. 503 F. Supp. at 1280-81.


20. See supra cases cited note 9. See also Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar consideration. . .").

21. See, e.g., Ramos v. Lamm, 639 F.2d 559, 567 (10th Cir. 1981), cert. denied, 450 U.S. 1041 (1981) (living conditions of the prison were "unfit for human habitation").

Recently, in *Smith v. Fairman*, an inmate challenged confinement conditions at the State of Illinois' Pontiac Correctional Center (Pontiac), alleging that the institutional practice of housing two prisoners in a single cell violated the eighth amendment's prohibition against cruel and unusual punishment. The United States Court of Appeals for the Seventh Circuit held that an examination of the totality of conditions at Pontiac revealed that overcrowding had not produced unconstitutional living conditions therein. The court based its holding on uncontroverted statistics which showed that institutional violence at Pontiac had declined in the last few years, even with the upsurge in prison population. Thus, the facts failed to support many experts' projections as to the deleterious effects of overcrowding on inmates. The court concluded that although prisoners spent extended periods of time in small, crowded, two-man cells, conditions at Pontiac were merely restrictive and harsh; they did not rise to the level of cruel and unusual punishment.

This case comment will focus on the court's opinion in *Smith*. It will review and analyze the Seventh Circuit's ruling that the totality of conditions at Pontiac did not rise to the level of cruel and unusual punishment. This analysis will demonstrate that the court properly construed the issues of law before it and correctly emphasized the effects of double-celling on Pontiac inmates. This case comment will also demonstrate, however, that the court may have misconstrued the factual issues involved by giving too much weight to the data produced by prison officials and not enough weight to the abstract studies produced by expert witnesses who visited with prisoners at Pontiac. In its quest to find credence in the prison officials' data, the court often stretched to find explanations that would deny the findings of the plaintiffs' expert witnesses. In this process, the court relied on facts that were contradictory. The result was that some conditions at Pontiac, such as the ventilation system and the presence of vermin, remain in dispute. Because it was not clear what some of the conditions at Pontiac were like, it is difficult to say with certainty that overall prison conditions at Pontiac did not violate the Constitution. Finally, this comment will consider

23. 690 F.2d 122 (7th Cir. 1982).
24. *Id.* at 123.
25. *Id.* at 125.
26. *Id.* at 124.
27. *Id.* at 125.
28. *Id.* at 125-26.
the significance of the Smith decision and the impact it will have on future eighth amendment litigation.

JUDICIAL INVOLVEMENT IN EIGHTH AMENDMENT CASES

A. The Eighth Amendment

Traditionally, judicial intervention in prison administration was subject to the hands-off doctrine.29 Under this doctrine, courts were without power to supervise prison administration or interfere with ordinary prison regulations.30 Only in exceptional circumstances such as beatings, tortures, and other physical abuse would courts interfere.31 Further, the judicial attitude towards prisoners was indifferent and harsh.32

In the middle to late 1960's, however, courts began to extend constitutional rights to prisoners.33 Federal courts began to hold that although the lawful incarceration of prisoners brings about the limitation of many privileges and rights, prisoners retain "all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."34 Recognition of prisoners' rights imposed an obligation on federal courts to enforce these rights and adherence to the hands-off doctrine declined.35


30. Banning v. Looney, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954). For a list of cases explaining the limitations of the hands-off doctrine, see Eighth Amendment Challenges, supra note 29, at 291 n.27.

The hands-off doctrine was based on several rationales, including separation of powers, federalism which bars federal intervention on behalf of state prisoners, lack of judicial expertise in penology, and a fear that intervention would subvert internal prison discipline. Haas, Judicial Politics and Correctional Reform: An Analysis of the "Hands-Off" Doctrine, 1977 DET. C.L. REV. 795, 797 [hereinafter cited as Haas].

31. For an extensive discussion of the hands-off doctrine, see Haas, supra note 30, at 796.

32. For example, one court stated that the convicted felon "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him. He is for the time being a slave of the state." Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 792 (1871) (emphasis added).

33. Federal courts began to review prison conditions. See, e.g., Johnson v. Avery, 393 U.S. 483 (1969) (the Right of Court access); Cooper v. Pate, 378 U.S. 546 (1964); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) (the right of inmates to practice religion); Jackson v. Goodwin, 400 F.2d 529 (5th Cir. 1968) (racially discriminatory practices in prisons).


35. Eighth Amendment Challenges, supra note 29, at 292. For excellent discussion on the
Judicial intervention, however, remained restrictive and inadequate because courts did not examine the totality of prison living conditions. Rather, tests determining whether particular actions constituted cruel and unusual punishment were applied only to isolated prison practices that endangered the life or health of individual prison complainants. Accordingly, poor prison conditions (not individually violative of the eighth amendment) affecting the entire prison were insufficient to constitute eighth amendment violations.

However, in *Holt v. Sarver*, a federal court adopted the “totality of conditions” approach to testing the constitutionality of confinement. *Holt* stated that courts considering an eighth amendment challenge to conditions of confinement must examine the totality of the circumstances. Even if no single condition of confinement is unconstitutional in itself, inmates may be subject to cruel and unusual punishment based on the net effect on the prison environment. Today, the totality of conditions test has been adopted by virtually all federal courts.


39. 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971). The Holt court stated that individual conditions "exist in combination; each affects the other; and taken together they [may] have a cumulative impact on the inmates." *Id.* at 373. The court found that the prison in question was run by inmate trusty guards who bred hatred; open barracks invited frequent physical and sexual assaults; the isolation cells were overcrowded and unsanitary; and there was no rehabilitation or training programs available to inmates. The court held that these conditions, as a whole, violated the eighth amendment. *Id.*


41. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (mandating that prison conditions alone or in combination may constitute cruel and unusual punishment); Hutto v. Finey, 437 U.S. 678, 687 (1978) ("We find no error in the court's conclusion that, taken as a whole conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.")
In simpler terms, there are two steps in utilizing the totality of conditions approach. As noted, aggregating conditions of confinement is the first step,\(^4\) and an application of realistic yet humane standards to the conditions as observed\(^4\) is the second. In short, the court must determine whether aggregated conditions constitute cruel and unusual punishment.\(^4\)

In determining whether aggregated conditions constitute cruel and unusual punishment, the United States Supreme Court has characterized the eighth amendment’s basic concept of cruel and unusual punishment as “nothing less than the dignity of man.”\(^4\) Therefore, the scope of the amendment is not static, nor is it easily or precisely defined.\(^4\) It “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”\(^4\) However, the Court has held that eighth amendment judgments should not be merely the “subjective views” of judges.\(^4\) Emphasis should be placed on objective factors to the maximum extent possible.\(^4\)

In defining the scope of the eighth amendment, contemporary analysis\(^5\) examines whether punishment is disproportionate to the severity of the crime,\(^5\) shocks the court’s conscience,\(^5\) or involves the


42. Eighth Amendment Challenges, supra note 29, at 294.
44. Eighth Amendment Challenges, supra note 29, at 294.
46. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).
49. Id.
50. Historically, the Supreme Court first applied the eighth amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment because the primary concern of the drafters was to proscribe tortures and other barbarous methods of punishment. Granucci, Nor Cruel and Unusual Punishment Inflicted: The Original Meaning, 57 CALIF. L. REV. 839, 842 (1969). Accord, Estelle v. Gamble, 429 U.S. 97, 102 (1976). See also Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment.”) In re Kemmler, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death.”).
52. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976). In Gregg v. Georgia, 428 U.S. 153 (1976), the Court stated that the standard to be applied is that the punishment must not be “excessive.” Two factors are important in determining whether the punishment is excessive. One, the punishment must not involve the unnecessary and wanton infliction of pain; and two, the punishment must not be grossly out of proportion with the severity of the crime. Id. at 173.
unnecessary and wanton infliction of pain.\textsuperscript{53} Although each of the above tests provides useful guidelines, ultimately, the court attempting to apply them is left to rely on its own experience and knowledge of contemporary standards.\textsuperscript{54} In determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the "touchstone is on the effect on the imprisoned."\textsuperscript{55} The court must examine the condition of the physical plant, sanitation, safety, inmate needs and services, and staffing.\textsuperscript{56} At the point where the "cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration,"\textsuperscript{57} courts will conclude that the conditions violate the Constitution.

\textbf{B. Overcrowding}

Eighth amendment violations are often found in prisons with severe overcrowding. Historically, courts have grappled with the problems and conditions of overcrowding in two ways.\textsuperscript{58} Overcrowding has been found to be per se unconstitutional\textsuperscript{59} and conditions as exacerbated by overpopulation have been found to be unconstitutional.\textsuperscript{60} The latter theory focuses on the effects of overcrowding and whether problems caused by overcrowding, such as increased violence and sexual assaults, render prison conditions unconstitutional. Neither theory, however, is mutually exclusive because overcrowding in prisons
often produces a host of collateral problems that when considered in their "totality" are violative of the Constitution.

Courts have found conditions of overcrowding to be per se unconstitutional because the purpose of the prohibition against cruel and unusual punishment is to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely due to conditions which inflict needless mental or physical suffering.\textsuperscript{61} Such confinement, courts hold, "shock(s) the general conscience"\textsuperscript{62} and "offends standards of human decency."\textsuperscript{63} Thus, the Tenth Circuit\textsuperscript{64} has held that housing two men in a small 35-40 square foot "cubbyhole" offends the contemporary standard of decency and has ordered the Oklahoma Department of Corrections to provide each inmate with a minimum of 60 square feet.\textsuperscript{65} Similarly, in \textit{Hutto v. Finney}\textsuperscript{66} the Supreme Court affirmed the district court's finding that the conditions of "punitive isolation" in the Arkansas prisons were cruel and unusual where an average of four, and sometimes as many as ten or eleven, prisoners were crowded into windowless 8 by 10 foot cells containing no furniture other than a source of water and a toilet that could be flushed only from the outside.\textsuperscript{67} In another case,\textsuperscript{68} a prisoner was held to have stated an eighth amendment claim where he was confined to a cell, measuring 5 by 7 feet, for nearly six months, along with four other inmates, and received inadequate bedding, light, toilet facilities, showers, access to legal materials, medical and dental care, and food.\textsuperscript{69}

Eighth amendment violations have also been found where overcrowding has created a host of collateral problems. Several courts, for

\footnotesize{61. Battle v. Anderson, 564 F.2d 388, 394-95 (10th Cir. 1977). The \textit{Battle} court stated that crowding is \textit{per se} unconstitutional where prisoners were forced to sleep in garages, barber shops, libraries, and stairwells; and when they were placed in dormitories without any toilet and shower facilities. The court continued, however, to state that it could also find that the effects of the crowding as it related to conditions of confinement with regard to health, safety, and security was unconstitutional. Here, the crowding had caused the kitchen water and sewer systems to be overtaxed. The dining facilities were unsanitary, the prisoners were housed in substandard living quarters that were "firetraps" and violence was prevalent. \textit{Id.} at 395.}

\footnotesize{62. Stringer v. Rowe, 616 F.2d 993, 998 (7th Cir. 1980).}


\footnotesize{64. Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977).}

\footnotesize{65. \textit{Id.} at 397.}

\footnotesize{66. 437 U.S. 678 (1978).}

\footnotesize{67. \textit{Id.} at 682.}

\footnotesize{68. Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981). \textit{See also} Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (Severe overcrowding; inmates were forced to sleep on floors, in tents, and sometimes as many as four in one cell measuring 45 square feet constituted cruel and unusual crowding).}

example, have held that overcrowding may render a system unconstitutional by creating an environment in which prisoners are constantly subjected to threats of violence and sexual assault.70

A number of courts have addressed the issue of whether there is a constitutional right to a minimum number of square feet per prisoner. For example, in 1976,71 a federal district court, recognizing that overcrowding was primarily responsible for the many ills of Alabama's penal system, specified that each prisoner be housed in a separate cell containing no less than 60 square feet, and that the prison population may not exceed the design for that prison. On appeal, however, the Fifth Circuit found no constitutional basis for the requirement that Alabama state prisoners be housed in separate cells and stated that design standards, without more, cannot amount to a per se constitutional limitation on the number of prisoners that may be housed in a given prison facility.72 Nevertheless, by 1976, numerous other courts had held that the Constitution required that each inmate be provided with a minimum of between 60 and 80 square feet.73

The United States Supreme Court74 has recently criticized the

70. Ruiz v. Estelle, 679 F.2d 1115, 1141 (5th Cir. 1982), cert. denied, — U.S. —, 103 S. Ct. 1438 (1983) ("overcrowding, combined with a relative small number of security guards results in a constant threat to the inmate's personal safety"); Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974). See also Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (Every prisoner "has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates").


72. Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977). The court also remanded for further consideration of the district court's requirement that all new prison construction should provide 60 square feet of space per prisoner. Id.

73. Prison Reform, supra note 6, at 112 & 112 n.82. See, e.g., Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) (adopting American Public Health Association standard of 60 square feet per cell and 75 square feet for a person in a dormitory); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 396 (2d Cir. 1975) (50 square feet); Ambrose v. Malcolm, 414 F. Supp. 485, 492-93, 495 (S.D.N.Y. 1976) (adopting American Correctional Ass'n standard of 75 square feet per inmate). But see Ruiz v. Estelle, 679 F.2d 1115, 1164 (5th Cir. 1982), cert. denied, 103 S. Ct. 1438 (1983) (vacating a district court decision that required each inmate confined in a dormitory to be provided with 60 square feet of space); Williams v. Edwards, 547 F.2d 1206, 1215 (5th Cir. 1977) (remanding a district court decision requiring 80 square feet per inmate).

74. Bell v. Wolfish, 441 U.S. 520, 543 n.27 (1979) (pretrial detainee case). Bell held that double-celling did not deprive pretrial detainees of their constitutional rights. It distinguished other lower court decisions concerning minimum space requirements by stating that the other cases involved traditional jails and cells in which inmates were locked during most of the day. In Bell, the pre-trial detainees were required to spend only seven or eight hours each day in their cells for generally a maximum period of sixty days. Even, assuming arguendo, that this is a valid distinction, the Court further stated that given this factual disparity, it did not need to decide whether it agreed with the reasoning and conclusions of cases requiring a minimum space for each prisoner. Although the recommendations of various groups are instructive, the Court stated, they simply do not establish the constitutional minima. Rather, they establish goals recommended by the organization in question. See also Hutto v. Finney, 437 U.S. 678, 686 (1977), wherein the
practice of establishing a constitutional right to a minimum number of square feet per prisoner.\textsuperscript{75} However, the Court has recognized that at some point overcrowding does state an eighth amendment violation.\textsuperscript{76}

Most recently, the United States Supreme Court in \textit{Rhodes v. Chapman}\textsuperscript{77} addressed the issue of overcrowding when double-celling, the institutional practice of housing two prisoners in a single cell, was made necessary by an unanticipated increase in prison population.\textsuperscript{78} The Court held that the confinement of two persons in one cell \textit{is not per se} cruel and unusual when, all prison conditions having been considered “alone or in combination,” inmates are not deprived of the “minimal civilized measure of life’s necessities.”\textsuperscript{79} The Court went on to explain that the totality of conditions does not offend the Constitution unless prison conditions are cruel and unusual, and not merely

Court stated that the length of confinement is a vital consideration in deciding whether the circumstances of the confinement meet constitutional standards. Conditions of what might be tolerable for a short period of time may become intolerable and cruel if extended over long periods of time.

\textsuperscript{75} In Finney v. Hutto, 410 F. Supp. 251, 254 (E.D. Ark. 1976), the district court stated:

The question of whether a prison is overcrowded to the point of unconstitutionality involves more than determining how many square feet of living space are allocated to individual inmates. Regard must be had to the quality of the living quarters and to length of times which inmates must spend in their living quarters each day, further some small housing units although cramped may be more comfortable and liveable than more spacious quarters.

\textit{See also} Ruiz v. Estelle, 679 F.2d 1115, 1164 (5th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 1438 (1983) (vacating a district court decision that required each inmate confined in a dormitory to be provided with 60 square feet of space); Hoptowit v. Ray, 682 F.2d 1237, 1249 (9th Cir. 1982) (It is error to rely exclusively on per capita square footage recommendations).

\textsuperscript{76} For example, in Hutto v. Finney, 437 U.S. 678 (1978) the Court affirmed a finding by the district court that conditions of confinement were unconstitutional. In \textit{Finney} confinement in punitive isolation was for an indefinite amount of time. An average of four prisoners were crowded into windowless 8 x 10 foot cells containing no furniture other than a source of water and a toilet that could only be flushed from the outside of the cell. At night prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and comingled together each morning, then returned to the cells at random in the evening. \textit{Id.} at 682. Prisoners in isolation received fewer than one thousand calories a day. Their meals consisted primarily of four-inch squares of “grue”, a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan. \textit{Id.} at 683.

\textsuperscript{77} 452 U.S. 337 (1981).

\textsuperscript{78} At the time of trial, the prison in \textit{Rhodes} housed 38\% more inmates than its “design capacity,” approximately fourteen hundred prisoners of the twenty-three hundred housed were double-celled in cells sixty-three square feet. Approximately seventy-five percent of the double-celled prisoners had the choice of spending much of their working hours outside their cells, in the day rooms, school, workshop, library, visiting rooms, meals and showers. \textit{Id.} at 341.

\textsuperscript{79} \textit{Id.} at 348. (Generalities about overcrowding fall short in themselves of proving cruel and unusual punishment, for there is no evidence that double ceiling inflicts unnecessary or wanton pain or is grossly disproportionate to the crimes warranting imprisonment). \textit{Accord} Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 1438 (1983); Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981).
harsh or restrictive.  

**Smith v. Fairman**

*The District Court Finds a Violation of the Eighth Amendment*

Plaintiff, Johnny Smith, brought a class action on behalf of himself and other similarly situated inmates incarcerated at Pontiac. The essence of Smith's claim was that he had been deprived of his rights under the eighth amendment to the Constitution as it applies to the States through the fourteenth amendment by being subjected to cruel and unusual punishment arising out of the overcrowded conditions or "double-ceiling" practices at Pontiac.

Pontiac is a maximum security state penitentiary located in Pontiac, Illinois. It houses inmates who have been convicted of felonies involving violence and threat to human life. All inmates are committed for extended periods of time. The prison was constructed to accommodate twelve hundred prisoners. At the time of the district court's decision, the total population of the prison was nineteen hundred and eighteen prisoners. Approximately fifty-six percent of the inmates were double-celled, with the remaining prisoners being in segregation or protective custody.

80. In Rhodes v. Chapman, the district court found that the prison food was adequate, the air ventilation system was adequate, the cells were substantially free of offensive odor, the temperature in the cell blocks was well controlled, and the noise in the cell blocks was not excessive. Double-celling had not reduced significantly the availability of space in the day rooms or visitation facilities, nor had it rendered inadequate the resources of the library or school rooms. Further, inmates' medical and dental needs were met and violence had only increased in proportion to the increase in prison population. Rhodes v. Chapman, 452 U.S. 337 (1981).

81. This case began as eight separate actions by indigent Pontiac inmates for equitable and declaratory relief and for money damages. The cases were consolidated for ease of handling and judicial economy. A preliminary injunction was issued by the court on August 14, 1980, instructing defendants to place the eight individual plaintiffs in single occupancy cells in the general prison population. Thereafter, on October 30, 1980, the court allowed the plaintiffs motion to proceed as a class identified as "[a]ll present and future inmates of the Pontiac Correctional Center who are, have been, or will be punished for refusing to accept a double cell." Smith v. Fairman, 528 F. Supp. 186, 187 (D.C. Ill. 1981), rev'd, 690 F.2d 122 (7th Cir. 1982).

82. "Double-ceiling" refers to the institutional practice of housing two prisoners in a single cell.

83. Smith also claimed that the defendants, by ordering his confinement in a double occupancy cell, had deliberately refused him medical treatment thereby subjecting him to cruel and unusual punishment. *Id.* The trial court concluded that Smith had failed to carry his burden of proof that he had been deliberately refused necessary medical treatment. *Id.* at 201.

84. *Id.* at 187.

85. One thousand six hundred twenty-two inmates were inside the walls of the maximum security unit and two hundred ninety-six were single celled in the medium security unit outside the prison walls. Of the one thousand six hundred twenty-two inmates inside the walls of the maximum security unit, six hundred thirty-nine of the inmates were single-celled for segregation or protective custody reasons, leaving nine hundred eighty-three inmates to be housed in five hundred eighty-one cells. *Id.* at 188.
Pontiac has three cellblocks. They are the north, south, and west cellblocks. Each cell in the west cellblock is approximately 64.5 square feet. Prisoners shower a minimum of three times a week, each cell contains a sink, a sanitary stool, two fixed beds, and a chest of drawers. In addition, prisoners are permitted to possess twenty-five books, twelve records, and electronic equipment such as a television set. The equipment in a cell generally leaves 9 square feet for standing room. The cells in the south and north cellhouses are similar except they are slightly smaller, measuring approximately 55.3 and 55.5 square feet, respectively. Hot water is available intermittently, lighting is provided by a single fluorescent bulb, and vents are often covered to cut off the spread of dust and roaches. The district court concluded that the conditions of confinement at Pontiac whereby inmates were confined in double occupancy cells constituted cruel and unusual punishment and violated the eighth amendment to the Constitution of the United States.

The district court began its analysis by examining the testimony of five inmates concerning their daily routines at Pontiac. From their testimony it appears that sharing a cell with another inmate is difficult due to differences in moral standards, religious beliefs, opposing gang affiliations, lack of privacy and the danger of being sexually attacked. Next, the district court recounted the testimony of four persons who were experienced in the management of correctional institutions. The
court discredited defendants' expert witnesses, who were unsympathetic to the living conditions of Pontiac prisoners, stating that due to their occupations with state prison administration, they were biased. Plaintiff's expert witnesses, on the other hand, were given great weight. Both plaintiff's witnesses testified that the cells at Pontiac were too small for two people. Double-celling at Pontiac, they agreed, denigrates the inmates and destroys their potential for correction and in consequence damages society even further. However, other court appointed expert witnesses disagreed with plaintiff's witnesses as to the effects of overcrowding.

Next, the court distinguished two recent United States Supreme Court cases where the Court did not find overcrowding rising to the level of cruel and unusual punishment. The court distinguished these cases based upon the differing facts in Smith. In contrast to the Supreme Court cases, prisoners at Pontiac were in smaller cells, serving research and evaluations in the Illinois Department of Corrections, and Laurel Rands, Deputy Director for Policy Development of the Illinois Department of Corrections. Id. at 194-97.

Mr. Phelps and Mr. Brown both testified that Pontiac was administered well, the prison was clean, and they did not notice any undue tension among the prisoners. Id. at 194. Mr. Phelps also testified that he did not believe institutions should be single-celled. He did, however, testify that when inmates are double-celled there should be enough space in the cell for both inmates to move about without the necessity of one inmate being on a bunk. The district court found, from the testimony of other witnesses and its own observation of the cells at Pontiac, that Pontiac did not even measure up to that minimum standard. Id.

The trial judge gave no further reason for having formed the opinion that defendant's expert witnesses were sympathetic with their fellow prison administrators because of their occupations within the prison system.

Overcrowding, Dr. Fogell testified, promotes stealing, tension, fights and animosities among the inmates and these in turn lead to loss of "good time" and longer stays in prison and substantially lessen the likelihood of any corrective effect in incarceration. In addition, emotional problems accompany double-celling because of the absence of privacy. Id. at 196.

Dr. Fogel visited Pontiac and testified that there were odors in the halls arising from the cell toilets shared by two people and the problems of personal hygiene that accompany such close proximity. Showers were available infrequently, the noise level was very high, and the security of an inmate's property was very low. Id.

For example, Dr. Steven Christianson, a court appointed expert witness, found that frustration, tension, and violent activities had increased in the institution since double-celling had been instituted. He based his opinion on his interviews with inmates and also on the report of the Illinois Correctional System which described the conditions at Pontiac in 1977. He also reported a general consensus of professional thought that overcrowding in a prison leads to increased death and illness rates, increased psychiatric and commitment rates, and increased institutional violence. Id. at 197-98.

Terry Brelje, a medical psychologist, and Dr. Cavanaugh, a psychiatrist, on the other hand, were of the opinion that the literature on crowding did not have scientific validity. Further, after Dr. Cavanaugh examined Smith, he concluded that Smith did not need a single cell for medical or psychiatric reasons. Id. at 198.

Further, Dr. Gerald Foley, the medical director at Pontiac, volunteered to the court during an earlier hearing that the celling conditions at Pontiac were cruel and unusual. Id. at 199.

longer sentences, their confinement in the double-cells were for longer periods of time, air ventilation was inferior, and double-ceiling at Pontiac had rendered inadequate the resources of the library.  

Further, the district court noted that an indication of the public’s attitude or standard as to what is cruel and unusual can be found in the enactments of state legislatures. The court observed that Illinois recognizes that the ceiling conditions at Pontiac are contrary to current standards of decency because Illinois provides that new or remodeled prisons shall have cells with 50 square feet per inmate.

The court concluded that Pontiac is overcrowded, antiquated, and has inadequate facilities to provide significant and constructive correctional programs to the inmates. The confinement for years of two inmates for periods of eighteen to twenty hours a day in a "cramped, ill ventilated, noisy, space designed a century ago for one person" is a cruel and unusual punishment and violates the eighth amendment.

The district court ordered the elimination of double occupancy cells at Pontiac.

97. More specifically, the district court distinguished Bell v. Wolfish, 441 U.S. 520 (1979), wherein the Supreme Court held that double-bunking of pre-trial detainees did not deny them liberty without due process of law, on the ground that Bell did not involve punishment of convicted prisoners. Moreover, in Bell, each cell was approximately 75 square feet whereas the cells in Smith were 55 square feet. Further, in Bell, inmates were free during most of the day to move freely between their rooms and the common areas. In Smith, confinement was for eighteen to twenty hours a day. In Bell, the confinement of detainees was generally for a maximum period of sixty days. In Smith, the confinement was for years. Smith v. Fairman, 528 F. Supp. 186, 199 (D.C. Ill. 1981).

The district court distinguished Rhodes v. Chapman, 452 U.S. 337 (1981), wherein the court held that double-ceiling was not violative of inmates eighth amendment rights, in that the prison described in Rhodes was almost the antithesis of the conditions at Pontiac. In Rhodes, the prison was a "top-flight, first class facility." Id. at 200 (quoting Chapman v Rhodes, 434 F. Supp. 1007, 1009 (S.D. Ohio 1977)). A large number of the cells had a window that the inmates could open and close. Day rooms were open to inmates between 6:30 a.m. and 9:30 p.m., and inmates were free to pass between cells and dayrooms during a ten minute period in each hour. The air ventilation was adequate and the cells were substantially free of offensive odors. The temperature in the cells was well controlled, the noise was not excessive, and double-ceiling in Rhodes did not render inadequate the resources of the library. Smith v. Fairman, 528 F. Supp. 186, 199-200 (D.C. Ill. 1981).

98. Smith v. Fairman, 528 F. Supp. 186, 200 (D.C. Ill. 1981), rev'd, 690 F.2d 122 (7th Cir. 1982) (citing Coker v. Georgia, 433 U.S. 584, 592 (1977)) (when making eighth amendment judgments, courts should look at objective factors such as "legislative attitudes").


100. ILL. REV. STAT. ch. 38, § 1003-7-3(b) (1977) provides that "All new, remodeled and newly designated institutions or facilities shall provide at least fifty square feet of cell room or dormitory space per each person."

101. Smith v. Fairman, 528 F. Supp. 186, 201 (D.C. Ill. 1981). The court also stated that the increase in prison population, inadequacy of existing facilities, and the expense of providing additional facilities are constitutionally inadequate to justify the maintenance of the overcrowding at Pontiac. Id. (citing Preston v. Thompson, 589 F.2d 300, 303 (7th Cir. 1978)).

Defendants-appellants, various officers of the Illinois Department of Corrections (IDOC), appealed the trial court’s holding, contending that prison conditions at Pontiac did not rise to the level of cruel and unusual punishment. The appellate court agreed with defendants, reversed the trial court’s opinion, and concluded that conditions at Pontiac, “taken as a whole”, do not violate the Eighth Amendment.103

The appellate court’s decision was divided into two parts. In the first part of its opinion, the court recounted the district court’s findings of fact and conclusions. Inmates at Pontiac were crowded, uncomfortable, and spent long hours in their cells.104 The appellate court, however, noted that although numerous experts and prisoners testified that crowding had caused tension among the prisoners, the topic of institutional safety was barely discussed in the lower court’s opinion, except for a few references to prisoners’ remarks that they felt unsafe or were afraid of homosexual assaults. In contrast, Pontiac Warden, James W. Fairman, had “demonstrated”105 that the total number of incidents of physical violence, force, or assault had been reduced by nearly fifty percent since his administration took office in 1978. Warden Fairman also testified that no inmate had killed another inmate during his two year tenure, nor had any guards been killed or seriously injured.106

Further, the district court failed to note that Pontiac inmates received satisfactory medical and dental attention.107 Finally, their food was nutritious, the kitchen and dining facilities were clean, and the food was at least palatable, if not good, according to one expert.108

The second part of the appellate court’s opinion109 was devoted to a discussion of recent case law, with a particularly strong emphasis on Rhodes v. Chapman.110 Whereas the trial court had distinguished Rhodes on the basis of the dissimilarity between the prison conditions

103. Smith v. Fairman, 690 F.2d 122 (7th Cir. 1982).
104. Id. at 123-24.
105. Warden Fairman apparently brought to court figures indicating the total number of incidents of physical violence, force, or assault at Pontiac since 1978. His figures were unchallenged on cross-examination. Id. at 124.
106. Id.
107. Id. A licensed physician is staffed at Pontiac seven days a week, twenty-four hours a day. Pontiac employed a full time dentist, dental assistants, a full time x-ray technician, and a full time pharmacist to meet the inmates’ health needs. Id.
108. Id.
109. Id. at 125-26.
in *Rhodes* and the prison conditions in Pontiac, the appellate court focused on the principles derived from *Rhodes*. The appellate court noted that the *Rhodes* Court refused to hold that double ceiling by itself inflicts pain that amounts to a violation of the Constitution. For a constitutional violation, the *Rhodes* Court stated, prison conditions must involve the “wanton and unnecessary infliction of pain” or be “grossly disproportionate to the severity of the crime warranting imprisonment.” The Court emphasized that the eighth amendment’s prohibition against cruel and unusual punishment is a fluid concept that “must draw its meaning from evolving standards of decency that mark the progress of a maturing society.” Further, judgments must be formed on the basis of “objective factors” to the maximum extent possible.

The appellate court expressed its view that *Rhodes* mandated a “totality of the conditions of confinement” approach to cruel and unusual punishment issues. Therefore, the court’s role was to decide whether the prisoner’s proof, “considered as a whole,” was sufficient to trigger an eighth amendment violation.

Reviewing the prison conditions at Pontiac, the court restated that Pontiac inmates receive adequate food and medical care and the sanitary conditions at the prison were reasonable. Therefore, prisoners were not subjected to wanton and unnecessary inflictions of pain.

The crux of the appellate court opinion, however, was its observation that the facts of *Smith v. Fairman* failed to support the experts’ dire projections as to the effects of double ceiling. The “stark reality,” the court stated, was that physical violence in the institution had declined markedly in the last few years. Undoubtedly, the evidence revealed that life in a two-man cell at Pontiac was unpleasant, but “to the extent

111. *See supra* text accompanying note 95.
112. 690 F.2d at 125 (citing Rhodes v. Chapman, 452 U.S. 337, 348-49 (1981)).
113. *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).
114. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
115. *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).
117. 690 F.2d at 125.
118. *Id.* The court also noted that the crowding problem was at least partly due to the large amount of personal belongings and food that officials allow prisoners to keep in their cells. The appellate court stated that this practice is solely within the discretion of the prison administrators who are best equipped to know what is good for prisoners. *Id.*
119. *Id.* Moreover, the court noted, experts opinions as to what constitutes contemporary standards of decency are merely helpful, not binding. *Id.* (citing Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981)).
that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders [must] pay for their offenses against society."120

**Analysis of Smith v. Fairman**

The appellate court properly gave strong emphasis to the recent Supreme Court case of *Rhodes v. Chapman*.121 The *Rhodes* Court held that double-ceiling, by itself, does not inflict pain that amounts to a violation of the eighth amendment. For a constitutional violation, prison conditions, viewed in their totality,122 must involve "wanton and unnecessary infliction of pain" or be "grossly disproportionate to the severity of the crime warranting imprisonment."123

In viewing the conditions at Pontiac as a whole, the *Smith* court was also correct in trying to form its opinion on the basis of "objective factors" to the maximum extent possible.124 As did the *Rhodes* Court, the *Smith* court placed a premium on objective statistics.125 Of particular importance was the "effect" that double-ceiling had on Pontiac inmates,126 because the court's decision turned largely on the concrete showing made by Warden Fairman that prison violence had decreased by nearly fifty percent since he took office in 1978.127 Although the court conceded that experts' opinions as to what constitutes contempo-

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120. *Id.* at 126 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).
122. *Id.* at 347 (conditions "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities").
123. *Id.* at 347.
124. 690 F.2d at 125.
125. In *Rhodes v. Chapman*, 452 U.S. 337 (1981) plaintiffs-inmates failed to produce evidence establishing that double-ceiling itself caused greater violence. The court found that the number of acts of violence had increased with the prison population, but only in proportion to the increase in population. Justice Powell stated:

... [T]he dissent emphasizes the testimony of experts as to psychological problems that "may be expected" from double ceiling; it also relies on similar testimony as to an increase in tension and aggression. ... The dissent fails to mention, however, that the District Court also referred to the testimony by the prison superintendent and physician that "there has been no increase [in violence] other than what one would expect from increased numbers [of inmates]." ... More telling is the fact—ignored by the dissent—that the District Court resolved this conflict in the testimony by holding "that there had been no increase in violence or criminal activity increase due to double ceiling; there has been [an increase] due to increased population." ... This holding was based on uncontroverted prison records, required to be maintained by the Ohio Department of Corrections and described by the District Court as being "detail[ed] and bespeak[ing] credibility." ...

*Id.* at 349-51 n.15.
rary standards of decency are merely helpful, and not binding, the unchallenged "stark reality" was that prison violence was on the decline. Thus, although the inmates at Pontiac produced numerous experts and prisoners who testified in the abstract that the "effects" of crowding were to increase tension, violent activities, and fear in prisoners of violence and homosexual assaults, the appellate court gave overriding weight to Warden Fairman's objective "uncontroverted" demonstration.

As previously stated, the appellate court properly emphasized the role of objective statistical data. The critical question, however, is whether Warden Fairman's demonstration really was objective and "uncontroverted." The Warden's data was no doubt self-serving, not only for purposes of this particular suit, but because of the Warden's original purpose in collecting the data—to study the overall effectiveness of his leadership since 1978. Further, it is possible that much violence and homosexual assaults were not reported to prison officials and thus escaped recordation and compilation. Therefore, abstract data or testimony by experts, who had observed and talked to inmates as to an increase in violent activity at Pontiac, may have been statistically more relevant than the Warden's own data.

It is also important to note that there is a lack of facts, data, and documentation as to the effects of confinement in cells measuring different dimensions. As a consequence, the appellate court may have

128. Id. at 125 (citing Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981)).
129. Id.
130. The expert witnesses in Smith testified as to their opinions without the use of data or documentation. For example, plaintiff's expert witness, Dr. Fogel, testified that he was of the "opinion" that emotional problems accompany double-ceiling because of the absence of privacy. Smith v. Fairman, 528 F. Supp. 186, 196 (D.C. Ill. 1981). Further, Dr. Christianson, a court appointed witness, found that frustration, tension, and violent activities had increased at Pontiac since double-ceiling was instituted. He based his opinion, however, on interviews with inmates (undocumented) and on the report of the Illinois Correctional System which described the conditions at Pontiac in 1977. Id. at 197.
131. 690 F.2d at 124. See supra text accompanying note 103.
132. Id.
133. See Toch, The Role of the Expert on Prison Conditions: The Battle of Footnotes in Rhodes v. Chapman, 18 CRIM. L. BULL. 38 [hereinafter cited as Toch] (There is a lack of serious, firsthand studies of the impact of prison conditions that are at issue in eighth amendment cases).

One study, which examined the effects of prison crowding on inmate health and behavior, collected data from 1400 inmates serving prison terms in six different federal prisons. All inmates studied, however, were confined to their living quarters only during sleeping hours. Inmates were tested for: 1) blood pressure; 2) affective state; 3) crowding (tolerance); 4) evaluation of their living quarters; 5) perceived control of their environment; and 6) biographical data. Data was also collected from institution records on inmate demographic characteristics, illness complaints, and disciplinary records. Inmates were analysed from two perspectives; spacial density (square feet per person) and social density (number of occupants per living unit).

The basic finding was that there is a progressive and measurable increase in negative effects
given more credence to Warden Fairman's demonstration than was warranted, simply because it was available.

Further, in utilizing the totality of the conditions approach, emphasis was necessarily placed by the appellate court, as well as the district court, on findings of facts and circumstances as to the conditions at Pontiac. In reviewing, however, the totality of the conditions at Pontiac the appellate court, at times, stretched to find explanations for the findings of experts who had visited Pontiac. In this stretching process, the appellate court also relied on facts that were contradictory.

For example, although the appellate court acknowledged that testimony by inmates and a court appointed expert revealed that Pontiac was "cramped, dimly lit, poorly ventilated, and occasionally without hot tap water," it noted that the poor ventilation "might" have been explained by the fact that the ventilation system "could" have been shut off. To bolster its notion that the ventilation system was adequate, the court further stated that there was evidence that cell airflow with an increase in housing density. Although a decrease in square feet per individual was an important factor, it was the increase in social density that was most significant. Findings indicated that once space per person exceeded 50 square feet, the number of people that one is living with and how that space is arranged (single-celling, cubicles, etc.) may be more important factors in determining reactions to housing than mere space per person. Further confirmation of the importance of social density was the finding that providing 50 square feet in single cells or cubicles was superior to more spacious multiple occupant housing. The picture, however, was less clear regarding adequate space parameters for single occupant housing. There were no measurable differences between 50 and 60 square feet.

The findings also supported the following principal conclusions:

1) High degrees of sustained crowding have a wide variety of negative psychological and physiological effects including increased illness complaint rates, higher death and suicide rates, and higher disciplinary rates.

2) Large institutions produce much more severe psychological and physiological effects than small institutions, as expressed in higher death, suicide, and psychiatric commitment rates.

3) There are substantial individual differences in responses to crowding as well as racial and ethnic group differences.

The study suggested that a design for an ideal prison, solely from the perspective of reducing crowding effects, and independent of other prison management considerations, would be a relatively small prison (less than 1000 and preferably 500) that consisted of single rooms or cubicles. The amount of space required for these inmates was harder to pinpoint. No evidence was found to indicate that a 50 square foot cell is psychologically inadequate. The researchers, however, found no single cells smaller than that so they did not know whether 50 square feet represents the minimally adequate size for a single room. Further, it is possible that space may be a more important factor in prisons where inmates are confined for large parts of the day to their housing units. In all samples in this project, inmates were confined to their housing units only during sleeping hours. In the one study that was done where inmates were confined for large parts of the day in their cells, stronger effects of space than of social density was found. Clearly, additional research needs to be done regarding time and space related crowding effects. U.S. Dept. of Justice, National Institute of Justice, The Effect of Prison Crowding on Inmate Behavior, (Dec. 1980). See also Bukstel & Kilman, Psychological Effects of Imprisonment on Confined Individuals, 88 Psychological Bulletin, No. 2, 246-93 (1980).
was deliberately obstructed when prisoners covered their vents to block the invasion of roaches. However, the court soon contradicted itself by giving weight to a correctional expert (witness for defendant) who testified that there was no vermin (small pests) problem at Pontiac. Thus, from the appellate court's recount of the facts and conclusions developed at the trial level, it is obvious that facts pertaining to the ventilation system and roach or vermin problem at Pontiac were in dispute. In short, it is not very clear what some of the conditions at Pontiac were like. The appellate court also gave no justification for giving greater weight to the testimony of the correctional expert than the testimony of the court appointed expert.

At the heart of the court's opinion is the notion that, absent "tales of horror" in eighth amendment cases, the totality of conditions approach will be utilized whereby prisoners will have the burden of coming forward with hard core data on the substantial long term effects of double-celling. Further, in the absence of such evidence, inmates must clearly show that conditions of confinement are not within the limits of today's civilized standards. In light of evidence as to the many satisfactory conditions of confinement at Pontiac, even if the inmates had

136. Id.
137. Correctional expert, C. Paul Phelps testified that the units in the west and south cellhouses were unusually clean. He believed that no vermin problems existed based on the manner in which inmates stored food and their failure to mention such pests. Id. The court appears to have used the words "roach" and "vermin" interchangeably. Id.
138. This is particularly true in light of the fact that the trial judge heard the testimony of the witnesses, observed their demeanor, and visited a Pontiac Correctional Center himself. 528 F. Supp. at 187. These are additional reasons why more deference should have been accorded to the careful conclusions of the trier of fact.
139. The factors that convince the courts that confinement in a particular institution violates the eighth amendment vary from case to case, but certain themes emerge. As the court stated in Laaman v. Helgemoe, 437 F. Supp. 269 (D. N.H. 1977):

The Physical plant must be minimally adequate: lighting, heating, plumbing, ventilation, cell size and recreation space are all examined. The institution, and especially the food preparation and medical facilities, must be sanitary, and inmates must be provided with clean places to eat, sleep, work and play and the wherewithal to keep themselves and their cells clean. Their environment must be minimally safe: dangers are presented by the presence of the mentally deranged, the violent and the diseased; by the presence of rats, insects and other vermin; by the absence of fire fighting equipment and adequate emergency exits and plans. The administration must provide adequate clothing, nutrition, bedding, medical, dental and mental health care, visitation time, exercise and recreation. Each prisoner is entitled to a minimal amount of either private or semiprivate space. Idleness and obstructions to self-improvement are not tolerable. And, finally, inmates may not occupy positions of power with authority over other prisoners or fulfill functions for which they are not qualified. The prison must have, both in quality and quantity, sufficient staff to maintain minimal control over the institution.

Id. at 323.
140. Pontiac prisoners receive adequate medical attention and nutritious food. 690 F.2d at 124. Each double cell has a sink, a sanitary stool, two beds, a chest of drawers, books, records, and electronic equipment. Id.
established that the ventilation system was inadequate and there was a vermin problem at Pontiac, they would not have been able to show that conditions at Pontiac, in their totality, were outside the limits of today's civilized standards.

**SIGNIFICANCE OF THE SMITH DECISION**

*Smith v. Fairman* should not be construed as a retreat from careful judicial scrutiny of prison conditions.\(^{141}\) Federal courts have emerged as a critical force behind efforts to ameliorate inhumane prison conditions,\(^{142}\) even at significant financial costs.\(^{143}\) Courts considering an eighth amendment challenge to conditions of confinement now examine the totality of the circumstances and apply realistic and humane standards to the conditions observed.\(^{144}\) The approach is unavoidably a subjective application of judges' views on concepts of dignity, humanity, and decency.\(^{145}\)

As a practical matter, in utilizing the totality of the conditions approach, courts are balancing those conditions that are satisfactory (e.g., medical attention and nutritious food) against those that are not (e.g., overcrowding, inadequate ventilation, vermin) and to the extent that

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\(^{141}\) Accord *Rhodes v. Chapman*, 452 U.S. 337, 353 (1981) (Brennan, J. concurring) (emphasizing that the decision in *Rhodes* should not be construed as a retreat from judicial scrutiny of prison conditions). *But see id.* at 375-76. (Marshall, J. dissenting) (The majority, in stating that courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution, added dicta that may be read as a warning to federal courts against interference with a State's operation of its prisons).

\(^{142}\) See, e.g., *Ruiz v. Estelle*, 679 F.2d 1115, 1141 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983) (Overcrowding combined with the relatively small number of security guards, resulting in a constant threat to inmate's personal safety, a lack of privacy, an increase in tension, and a possible spread of disease, imposes cruel and unusual punishment on inmates); *Battle v. Anderson*, 447 F. Supp. 510, 525 (E.D. Okla.), *aff'd*, 564 F.2d 388 (10th Cir. 1977) (“Certainly where prisoners are forced to sleep in garages, barber shops, libraries, and stairwells, and where they are placed in dormitories without any toilet and shower facilities the crowding has passed the constitutional threshold.”). *See also Williams v. Edwards*, 547 F.2d 1206, 1214-15 (5th Cir. 1977); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974); *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976), *aff'd in relevant part sub. nom.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977).

\(^{143}\) Although the courts cannot require the legislature to appropriate monies for prison reform, courts hold that if a state chooses to run a prison, it must do so without depriving inmates of their constitutional rights. Thus, inadequacy of funds is not a legitimate non-compliance defense. *Gates v. Collier*, 501 F.2d 1291, 1319-20 (5th Cir. 1974). *See also Ruiz v Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982) *cert. denied*, 103 S. Ct. 1438 (1983) (Constitutional rights are not confined to those available at modest cost); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974) (“Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration”) *Accord*, *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979 (D.R.I. 1977), *aff'd* 616 F.2d 598 (1st Cir. 1980); *Rodriquez v. Jimenez*, 409 F. Supp. 582, 595 (D.P.R. 1976), *aff'd* 551 F.2d 877 (1st Cir. 1977); *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd in relevant part sub. nom.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977).


\(^{145}\) *Id.* at 363-64 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).
the totality of prison conditions are merely harsh and restrictive, "they are part of the penalty that criminal offenders must pay for their offenses against society."

Evidence of "design capacity" and recommended studies are not controlling. They do not establish the constitutional minima, rather they establish aspirational goals by the organization in question. The touchstone of the eighth amendment inquiry will be the "cumulative impact" of the conditions of incarceration on inmates.

*Smith v. Fairman* illustrates the way in which courts emphasize the need for evidence pertaining to the "actual effects" of challenged conditions on the well-being of the prisoners. In *Smith*, uncontroverted data (violence rates) provided by Warden Fairman triumphed over the extrapolations of expert witnesses who had visited Pontiac. Similarly, in the recent case of *Rhodes v. Chapman*, data pertaining to incidence rates triumphed over the abstract expert testimony as to the possible effects of overcrowding.

In determining whether the totality of conditions violates the eighth amendment's prohibition against cruel and unusual punishment, judges are asking questions of fact and cases will not be decided based on experts' undocumented opinions on the effects of overcrowding. An experts' recitation of standards, generalities, and opinions are considered unresponsive and inadequate. Only well-documented, researched facts will withstand the scrutiny of judicial decision-making in this area.

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146. *Id.* at 347.
147. *Id.* at 348 n.13. The footnote applies to design capacity as well as to expert opinion. See *supra* note 70, 72 and accompanying text.
152. In *Rhodes*, prison records, required to be maintained by the Ohio Department of Corrections, revealed that the number of acts of violence had increased only in proportion to the increase in prison population. Inmates had failed to establish that double-ceiling caused greater violence. The Court did not find a constitutional violation. *Id.* at 342-43.
154. *Id.* at 47-48. Toch states that the consequence of this trend will be to (1) upgrade expertise, (2) provide portraits of the impact of overcrowding, and (3) concretize thresholds of inmate suffering so that everyone can face them. *Id.*
The consequence of the trend to emphasize facts, data, and documentation will be to increase the role of the expert in eighth amendment inquiries. 155 Although the Supreme Court has stated that the generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction, 156 experts in future litigation will play a crucial role in providing courts with the objective criteria that courts now require to find a constitutional violation.

The Smith court sends a clear message that future litigants will be wise to provide courts with documented portraits of the impact of overcrowding on inmates. Courts, faced with such evidence, may continue to find that the totality of conditions at many prisons, due to severe overcrowding, is in fact violative of the eighth amendment. 157

**CONCLUSION**

Courts considering an eighth amendment challenge to conditions of confinement must examine the totality of conditions of confinement and apply realistic and humane standards to the conditions observed. An emphasis will be placed on objective factors to the maximum extent possible.

Although the Smith court may have placed too much emphasis on the prison Warden's statistical data, the court properly emphasized the needs for documented, researched facts pertaining to the actual effects of overcrowding at Pontiac. In addition, even assuming there is improper ventilation and a roach problem, overall conditions at Pontiac (a maximum security prison) do not appear to rise to the level of cruel and unusual punishment. Although conditions at Pontiac may be re-

155. When the horrors of prison conditions are overwhelmingly offensive, expertise seems superfluous. Any layman can tell that conditions under which inmates are imprisoned are unfit for human habitation. *Id.* at 40. Absent tales of horror, however, it is exceedingly important that experts provide the court with documented evidence that prison conditions, as a whole, rise to the level of unconstitutionality.


157. *See, e.g.*, Rhodes v. Chapman, 452 U.S. at 376 (Marshall, J. dissenting). Justice Marshall, in his dissent, wrote that federal intervention is needed to protect the rights of prisoners. He stated:

> With the rising crime rates of recent years, there has been an alarming tendency toward a simplistic penological philosophy that if we lock the prison doors and throw away the keys, our streets will somehow be safe. In the current climate, it is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health. It is at that point—when conditions are deplorable and the political process offers no redress—that the federal courts are required by the Constitution to play a role.

*Id.* at 376-77.
strictive and harsh, they do not appear to be shocking nor are punishments disproportionate to the inmate's precipitating offenses.

Future eighth amendment litigants, subject to severe overcrowding and double-celling, may be able to prevail if they can show data as to the actual effects of long-term confinement in less than ideal sized cell arrangements. Smith makes clear that absent tales of horror in prison institutions, the need for extensive and explicit data is crucial.