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Overcrowding in Oklahoma's Prisons

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OVERCROWDING IN OKLAHOMA'S PRISONS

I. INTRODUCTION

Prison overcrowding is an issue that has many practical ramifications for our already overtaxed criminal justice system. The May 1973 riot at the Oklahoma State Penitentiary, the subsequent rulings of the United States District Court for the Eastern District of Oklahoma, and the recent review by the United States Court of Appeals for the Tenth Circuit in *Battle v. Anderson*,[1] have focused considerable attention upon Oklahoma's prisons and their problems. This note will analyze the background and factual setting of *Battle*, the precedent for the decisions, and the constitutional issues involved regarding prison overcrowding and federal court intervention in the controversy. Finally, the reasons for the overcrowding crisis and alternative means of complying with the court's dramatic order, mandating the reduction of Oklahoma's prison population, will be examined.

II. BACKGROUND OF THE BATTLE DECISION

In July 1972, Bobby Battle, an inmate at the Oklahoma State Penitentiary, filed a complaint in the United States District Court for the Eastern District of Oklahoma on behalf of himself and other inmates at the penitentiary, alleging deprivations of rights secured by the United States Constitution, including the rights to due process and equal protection of the laws, to free speech, to petition for the redress of grievances, to have access to the courts, and to be free from cruel and unusual punishment.[2] The complaint sought injunctive relief on behalf of the members of the plaintiff class, as well as monetary damages for plaintiff Battle.[3] Nine months later, the district court granted the United States' motion to intervene pursuant to Title IX of the Civil

1. 376 F. Supp. 402 (E.D. Okla. 1974), *enforced*, No. 72-95 (E.D. Okla. June 14, 1977), *aff'd*, 564 F.2d 388 (10th Cir. 1977).

2. 376 F. Supp. at 407. The action was brought as a class action pursuant to FED. R. CIV. P. 23.

3. Plaintiff Battle's claim for monetary damages was later "denied because of evidence of contributing fault on the part of inmates." 376 F. Supp. at 420.

Rights Act of 1964.[4]What followed was an extended and complicated series of events. A brief summary of these events is necessary as introductory background.

On July 27, 1973, a riot occurred at the Oklahoma State Penitentiary which resulted in the loss of several lives and property damage in excess of thirty million dollars.[5] In the wake of the riot, the district court granted the United States leave to amend its original complaint in intervention to include numerous other deprivations of constitutional rights.[6] At the conclusion of the trial, the court entered a series of preliminary findings on the numerous unconstitutional conditions and practices which existed and found the plaintiff class entitled to injunctive and mandatory relief to correct the deprivations of rights which had occurred. The court ordered remedial action in several areas:[7] (1) racial segregation and discrimination; (2) procedural due process; (3) conditions of confinement; (4) medical care; (5) correspondence and publications; (6) access to the courts, public officials, and attorneys; (7) religious freedom; and (8) security and staffing. The court retained jurisdiction of the case for all purposes and specifically reserved the power to issue supplemental orders.[8] Following this order of May 1974, a series of hearings were conducted at approximately six month intervals to assess the defendant State Department of Corrections' compli-

4. 42 U.S.C. § 2000h-2 (1976). The complaint in intervention alleged segregation by race in housing assignments and certain other aspects of penitentiary operations. 376 F. Supp. at 407.

5. [1974-1975] OKLA. DEP'T CORRECTIONS ANN. REP. 47 (1975).

6. Alleged was:

> [discrimination] against black inmates in making job assignments and in the operation of the penitentiary disciplinary system; [subjecting all inmates] to disciplinary procedures and taking disciplinary action against them without providing due process of law; [subjecting] those inmates in disciplinary segregation to cruel and unusual punishment by depriving them of food, clothing, bedding, light, and necessary personal hygiene items; [placing] inmates in non-disciplinary administration segregation without providing them with due process of law and [subjecting] them to unreasonable conditions of confinement; [inflicting] upon inmates summary punishment without due process of law and cruel and unusual punishment by the use of chemical agents, including mace and tear gas; [inflicting] upon inmates cruel and unusual punishment by maintaining and operating a medical care delivery system . . . incapable of providing . . . adequate medical care; [imposing] upon inmates arbitrary and unreasonable restrictions on mailing privileges, including censorship and rejection of mail to and from attorneys, courts, government officials, family members, and religious ministers; [refusing] inmates the right to subscribe to or receive personal legal reference materials, as well as certain other periodicals; and [denying] inmates adequate access to the courts by failing to provide an adequate law library or any reasonable and adequate alternative thereto and by specifically refusing to permit inmates to have in their possession any personal legal reference materials or to assist each other on legal problems.

376 F. Supp. at 407-08.

7. *Id.* at 436-37. The court also ordered the defendants to maintain records of inmate housing assignments, by cell block and cell, beginning with each inmate's initial assignment and including all subsequent assignments, in order to provide means of determining whether defendants had complied with certain provisions of the decree.

8. *Id.* at 437.

ance with the order, submission of remedial plans required by the order, and the alleged intransigence of the defendants.[9]

Despite this order, in the ensuing months additional problems at the prisons began to surface, and in a subsequent action, the United States requested an evidentiary hearing on the issues of overcrowding and conditions of confinement and moved for emergency supplemental relief as to overcrowding.[10] At this hearing, it was found that the population levels were intolerable and at an unconstitutional level. The court, therefore, asked for the assistance of the parties in forming a decree which would remedy the situation.[11] Accordingly, in June 1977,

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9. In the October 1974 hearing, the court found that the defendants were not complying with the order and were interfering with the plaintiff and the plaintiff-intervenor's access rights to the institution's records. Similarly, in April 1975, June 1975, and May 1976, the court found that defendants were not obeying. The May 1977 hearing dealt in part with the defendant's intransigency, and only collaterally with compliance. No. 72-95, slip op. at 2 n.2. *See* note 129 *infra.*

10. A hearing on plaintiffs' motion for emergency supplemental relief as to crowding was held on May 23, 1977. The plaintiffs presented three expert witnesses: An environmental health specialist testified concerning the conditions of confinement within the Department of Corrections, the health dangers associated with the facilities, and the problems associated with the water, fire, sewage, and utility infrastructure within the system; An architect and Director of the National Clearinghouse of Criminal Justice Planning and Architecture testifed concerning the architectural and design needs associated with penal institutions and various national standards for space needs and space management within prisons; A former correctional administrator for two states testified regarding the management problems associated with overcrowding.

The United States called the Director of the Oklahoma Department of Corrections and the Warden of the Oklahoma State Penitentiary. The defendant State of Oklahoma put on no substantive case. *Id.* at 2-3.

11. Accordingly, on June 13, 1977, the State of Oklahoma submitted a proposed plan to the court which provided as follows:

1. Within a short time, the Department will open a community treatment center in the Oklahoma City area with a capacity of up to 100;
2. At the beginning of 1978, the Department will open a 400 person Assessment and Reception Center at Lexington;
3. At the beginning of 1978, the Department will establish two additional community treatment centers with a capacity of up to 100 for each center, enabling more than half of the prisoners released from the system to undergo several months of work release programming;
4. In the spring of 1978, the Department will open another 400 person institution at Lexington;
5. In the spring and summer of 1978, the Department will open 450 bed spaces within housing units to be constructed, two at Stringtown, two at Ouchita, and one at McLeod;
6. Early in 1978, the Department will open a 120 person institution at Sulphur for women;
7. Immediate implementation of new procedures for parole docketing and new criteria for parole consideration will enable a large number of qualified inmates to see the Pardon and Parole Board;
8. The Department will continue their plan to upgrade utilities in the prison system. This plan will be accelerated by a $300,000 appropriation currently under consideration by the Legislature;
9. Funds have been appropriated or are committed for new construction and facility acquisition which will result in development of entirely new bed space during the next 18 months as follows:

Oklahoma City Community Treatment Center	100
Two additional community treatment centers	200
Hodgens Housing Units	150

the district court issued an opinion and order regarding the overcrowding dilemma. Although the court found that many improvements had been made in conditions and procedures since its original order in 1974, many conditions had not improved. The total inmate population of the state institutions under the Department of Corrections had reached a threatening level.[12] At the time of the hearing, the Oklahoma prison system contained 4,600 inmates, in a system designed for 2,400, or 191% of its capacity.[13] The court found that the physical facilities[14]

McLeod Housing Units	100
Stringtown Housing Units	200
Lexington Assessment and Reception Center	400
Lexington Correctional Center	400
Hominy Correctional Center	400
Sulphur Women's Facility	120
Total New Bed Space	2,070

10. On or before January 1, 1979, each inmate under the Department of Corrections shall have a minimum of 60 square feet in a room, cell, or dorm. The only exception shall be within the walls at the Penitentiary and the Reformatory where no more than one man will be housed per cell, except in the large cells in the F-cellhouse at the Penitentiary where two inmates will be permitted to occupy each cell.

564 F.2d at 396.

However, since the district court had instructed the parties to work within a time table not to exceed 90 to 180 days, and some of the state's proposals were not scheduled for still another twelve to eighteen months, the court refused to accept this plan. *Id.* at 400.

12. The court found that as of March 1977, the total number of inmates housed by the Department of Corrections was distributed as follows:

CORRECTIONAL FACILITY	DESIGN CAPACITY	CRITICAL CAPACITY	CURRENT POPULATION	PERCENT OF DESIGNED CAPACITY	PERCENT OF CRITICAL
Oklahoma State Penitentiary	874	1,977	1,949	223%	99%
Oklahoma State Reformatory	219	682	629	287%	92%
Lexington	296	449	464	157%	103%
Ouchita	163	246	205	126%	83%
McLeod	156	258	266	171%	103%
Stringtown	246	391	388	158%	99%
CTCs	317	490	324	102%	66%
Women's Treatment Facility	29	77	74	255%	96%

The total inmate population of the Department of Corrections on March 7, 1977, was 4,440. Of this number, 1,020 were confined in areas of less than 20 square feet, 1,098 were confined in areas of from 20 to 39 square feet, and by the time of the May 23, 1977 hearing, the Department of Corrections population total was approximately 200 higher than in March 1977. No. 72-95, slip op. at 6-7.

13. *Id.* In a similar case where the Alabama prison system was found to be overcrowded, the system contained 3,698 inmates in facilities designed for 2,212, or a 140% rate of overcrowding. McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975).

14. The court noted that the State of Oklahoma had not constructed a new correctional facil-

throughout the prison system suffered from numerous inadequacies[15] and that all of the environmental, health, and safety problems which were created by those inadequacies were exacerbated by overcrowding.[16] Additionally, the court regarded the state's lack of cooperation with federal authorities[17] as a willful attempt to hide the truth which led the court to believe that conditions might actually be much worse than the evidence disclosed.[18]Based upon these findings of fact, the court issued its conclusion that the conditions violated the prisoners' constitutional right to be free from cruel and unusual punishment.[19]

Courts have approached prison conditions of confinement in three ways:[20] (1) prison conditions in general have been found unconstitutional per se, (2) conditions as exacerbated by overcrowding have been found unconstitutional, and (3) overcrowding per se has been found unconstitutional. The court in *Battle* concluded that all three of these situations existed and, in a controversial move, ordered the state to make immediate reductions in the population level at the Oklahoma State Penitentiary and Oklahoma State Reformatory. The purpose of this order was to insure that each inmate had a minimum amount of living area and to improve the quality of each institution.[21] On appeal,

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ity, which was operational at the present time, since statehood. Since then, the state had adapted or inherited a number of buildings to serve as correctional facilities, which were not designed for correctional purposes, and were not suitable for penalogical needs. No. 72-95, slip op. at 7-8.

15. The court found that the McAlester Penitentiary cell houses were without a ventilation system and that the plumbing and water systems were inadequate and in violation of existing state and federal standards. *Id.* at 11. The sewage system was overtaxed, and as such, was in violation of the Environmental Protection Act, 42 U.S.C. § 4321 (1976) and was contaminating surrounding water supplies. The kitchen and dining facilities were structurally unsound, infested with vermin and rodents, and the basement had sewage overflow. The complex had inadequate showers, towels, washbowls, and no hot water was provided in the cells.

The east and west cell houses at the Granite Reformatory had problems similar to those at McAlester with regard to showers, toilets, face bowls, and utilities. Because the water storage capacity and the size of the water lines were inadequate, the water system was as deficient as that at McAlester, and further it supplied virtually no firefighting capability. The facilities at Lexington, Ouchita, McLeod, and Stringtown all presented problems similar to those at McAlester and Granite. *Id.* at 8-13.

16. The court found that overcrowding causes many problems in a correctional context: a significant decrease in the per capita food budget; a lesser degree of security; a greater incidence of fighting, assault, extortion, and homosexual behavior; increased escapes; reduced flexibility in shifting inmates between institutions, cell houses, dormitories, or even rooms; increased tension and fear among inmates; and an increased incidence of infectious communicable and stress related diseases. *Id.* at 8-9, 13-14.

17. Experts for the plaintiffs and the plaintiff-intervenor were not allowed to converse directly with wardens, employees, or inmates, but were required to first submit questions to defendant's counsel, who would then determine if the questions were proper before the warden would be allowed to answer. *Id.* at 14.

18. *Id.*

19. *Id.* at 14-15.

20. *Id. See also* notes 60-69 *supra* and accompanying text.

21. The court ordered the following: (1) Commencing in August 1977, the population at

the Tenth Circuit granted a temporary stay of the district court's order pending their disposition of the state's appeal.[22] Subsequently, the court of appeals issued its decision affirming the district court's order and vacated its temporary stay.[23]

III. HISTORY OF JUDICIAL INTERVENTION

The Tenth Circuit's affirmance is significant for two reasons. First, the federal courts have long been hesitant to intervene in state penal problems, and second, the court's conclusion that conditions of overcrowding may be unconstitutional per se is unprecedented.[24] An examination of the history of court adjudication of prisoners' constitutional rights suggests the importance of the decision in *Battle.*

Federal courts have historically been reluctant to intervene in the internal affairs of state or federal prisons. This refusal to intervene, often referred to as the "hands-off" doctrine,[25] has been premised on one or more of several considerations. Courts have claimed that they lack the technical expertise to become involved in the administration of prisons.[26]Other courts have felt that intervening in prison operations would disrupt internal prison discipline and precipitate a flood of litigation.[27] Accordingly, courts have relied upon the doctrine of separation of powers to defer all correctional matters to either the legislative or executive branches. Where federal courts have been asked to deal with state prisons, notions of federalism have also led to restraint.[28]

McAlester was to be reduced by 100 inmates per month until the population was reduced to 800 inmates, and the population at Granite was to be reduced by 50 inmates per month until the population was reduced to 450 inmates; (2) Within 15 months, each inmate was to be given a minimum living area of 60 square feet if he was housed in a cell and 75 square feet if he was assigned to a dormitory. However, at McAlester and Granite the requirement was to be no more than one man per cell, except for the large cells in "F" cell house at McAlester where two inmates would be permitted to occupy each cell; (3) At the end of 15 months, no institution whose water and sewage facilities did not meet the requirements of applicable state and federal law would be operated. No. 72-95, slip op. at 18-19.

22. An appeal and motion for stay were combined for hearing before the Court of Appeals for the Tenth Circuit on August 23, 1977. At that time, the Tenth Circuit entered a temporary stay which was scheduled to expire September 8, 1977, but later was extended indefinitely pending disposition of the appeal. The district court endorsed the stay pending the state's promised compliance.

23. 564 F.2d 388 (10th Cir. 1977).

24. For a discussion of this proposition, see notes 57-69 *infra* and accompanying text.

25. *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).

26. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977).

27. *See* Comment, *Judicial Intervention in Corrections: The California Experience—An Empirical Study*, 20 U.C.L.A. L. REV. 452 (1973).

28. *See* Hatfield v. Bailleaux, 290 F.2d 632, 640 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961) (outside of due process considerations, federal courts have no power to control state prison regulations or practices). *But see* Preiser v. Rodriguez, 411 U.S. 475, 491-93 (1973) (when fact or dura-

These arguments against intervention, however, have lost some of their persuasive force in recent years.[29]

The first step in this direction was in 1944, when the Sixth Circuit held that "[a] prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[30]This foray into the area of prisoners' rights was given support by the United States Supreme Court in *Procunier v. Martinez*,[31] when they held that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[32] The Court appeared to retreat from this position later the same year in *Pell v. Procunier*.[33] There, the Court rejected a free speech challenge and refused to allow broad media access to interview individual prisoners. The Court relied on dicta from *Martinez* to support the proposition that the

> courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.[34]

In its most recent term, the Supreme Court further strengthened the "hands-off" doctrine with its decision in *Jones v. North Carolina Prisoners' Union*.[35] In deciding that prison officials were not prohibited from promulgating and enforcing regulations which barred a prisoners' union from operating within the North Carolina Department of Correction institutions, Mr. Chief Justice Burger said,

> The federal courts, as we have often noted, are not equipped by experience or otherwise to "second guess" the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances. This recogni-

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tion of physical imprisonment is challenged, federal habeas corpus action is prisoner's sole remedy).

29. *See* Milleman, *Protected Inmate Liberties: A Case for Judicial Responsibility*, 53 ORE. L. REV. 29, 38-45 (1973) (discussing the rationales refuting the "hands-off" doctrine).

30. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

31. 416 U.S. 396 (1974) (censorship of prisoners' mail must further substantial governmental interest and be no greater than is essential to the protection of that interest).

32. *Id.* at 405-06.

33. 417 U.S. 817 (1974).

34. Procunier v. Martinez, 416 U.S. 396, 405 (1974).

35. 433 U.S. 119 (1977).

> tion, of course, does not imply that a prisoner is stripped of all constitutional protection as he passes through the prison's gates. . . . Rather, it "reflects no more than a healthy sense of realism" on our part to understand that needed reforms in the area of prison administration must come, not from the federal courts, but from those with the most expertise in this field—prison administrators themselves.[36]

Mr. Chief Justice Burger's conclusion reflected the Court's interpretation of the first and fourteenth amendments, but the Court's opinion indicated that a case involving eighth amendment issues might be treated differently.[37] The eighth amendment's protection against cruel and unusual punishment may amount to the "extraordinary circumstances" referred to by the Chief Justice, and thus constitute an exception to the "hands-off" doctrine. This was the underlying rationale of *Battle*.[38]

Cruel and Unusual Punishment

The eighth and fourteenth amendments have proven to be the most effective means of invoking the federal judicial power to enforce prisoners' rights. The eighth amendment,[39] which prohibits the infliction of cruel and unusual punishment, had its origin in the English Bill of Rights of 1689.[40] Although the purpose of the English provision was to deter severe punishments which were not legally authorized or were not within the jurisdiction of the court to impose, in America, early interpretations extended its prohibitions to torturous or excessively cruel punishments, even if authorized by law.[41] Nevertheless, for many years thereafter, it was felt by many that the eighth amendment was of minor importance.[42]

In 1910 however, the Supreme Court relied upon the amendment to strike down a sentence of fifteen years at hard labor for falsifying public documents in *Weems v. United States*.[43] Though the Court felt

36. *Id.* at 137 (Burger, C.J., concurring).
37. *Id.*
38. *See* Battle v. Anderson, No. 72-95, slip op. at 14-15.
39. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
40. 1 W.&M., Sess. 2, c.2 (1689).
41. *See* Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 844-847 (1969).
42. The eighth amendment's limitation on punishment "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." 2 J. STORY, ON THE CONSTITUTION § 1903 (5th ed. 1891) *cited in* Furman v. Georgia, 408 U.S. 238, 345 (1972) (Marshall, J., concurring).
43. 217 U.S. 349 (1910).

that such punishment was not intrinsically cruel and unusual, in this case it was deemed disproportionate to the offense, and thus improper. More importantly, the Court further expanded the protection afforded by the amendment by indicating that the eighth amendment's meaning was not static, but "may acquire meaning as public opinion becomes enlightened by a humane justice."[44]

The first modern case relying upon the eighth amendment was *Trop v. Dulles*.[45] There the Court invalidated a statute imposing loss of citizenship following a dishonorable discharge from the armed forces for the crime of desertion. Although no physical torture was inherent in loss of citizenship, the Court felt that it was nevertheless, "a form of punishment more primitive than torture, for it [destroyed] for the individual the political existence that was centuries in the development."[46] The Court, in a much quoted observation, concluded: "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[47] Three years later, the Court extended the eighth amendment to the states through the fourteenth amendment's due process clause.[48]

Courts have had little success applying the eighth amendment with consistency, due in part to the evanescent nature of the "evolving standards of decency" test enunciated by the Supreme Court in *Trop*. In the recent case of *Furman v. Georgia*,[49] Mr. Justice Brennan articulated the criteria which have been employed in part or in whole by other courts: (1) is the punishment degrading to the dignity of man? (2) is the punishment severe and arbitrarily inflicted? (3) is the punishment unacceptable to contemporary society? and (4) does the punishment serve a penal purpose which could be served equally well by some less severe punishment?[50]

After *Trop* cleared the way for a more liberal interpretation of the "cruel and unusual" language, courts considering prison problems be-

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44. *Id.* at 378.
45. 356 U.S. 86 (1958).
46. *Id.* at 101.
47. *Id.* at 100-01.
48. Robinson v. California, 370 U.S. 660 (1962).
49. 408 U.S. 238 (1972) (in certain cases, capital punishment may constitute cruel and unusual punishment).
50. *Id.* at 271, 274, 277, 279. In Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., dissenting) (denial of certiorari), three similar tests were propounded: (1) Does the punishment violate society's "evolving standards of decency"? (2) Does the punishment fit the crime? and (3) Can the permissible aims of punishment be as effectively achieved by a less severe alternative?

The "permissible aims of punishment" have been identified by the Supreme Court as deterrence, isolation from society, rehabilitation, and discipline to maintain internal security. Pell v. Procunier, 417 U.S. 817, 822-23 (1974).

gan to use the eighth amendment with greater frequency. In *Jordan v. Fitzharris*,[51] a federal district court held that solitary confinement, while not unconstitutional per se, might become so if the conditions of confinement were "of a shocking and debased nature."[52] Similarly, in *Holt v. Sarver (Holt I)*[53] another district court found the severe and unsanitary conditions in solitary confinement tantamount to cruel and unusual punishment.

These cases marked a significant expansion in the recognition of constitutional challenges raised under the eighth amendment. Though the scope of the eighth amendment had formerly been confined to the issue of whether a punishment was inherently cruel or unusual, *Jordan* and *Holt I* focused not only on the nature of the punishment but the *manner* in which that punishment was inflicted. This development opened the way for attacks upon punishments which were constitutional on their face, but unconstitutional when applied in a particular manner.

Even under this expanded view however, eighth amendment prohibitions were not found to be transgressed unless it could be shown that the punishment complained of was intentionally directed at an individual prisoner.[54] This was easy to demonstrate in the solitary confinement cases, since such confinement was directed toward individuals as a deliberate sanction by prison authorities. But this new focus upon the conditions of confinement led the courts even further afield, and soon that focus was expanded to encompass not only conditions imposed on individuals in retribution for violation of prison regulations, but conditions which existed in the general prison population.

The first case to adopt this expanded view of the eighth amendment was *Holt v. Sarver (Holt II)*.[55] There, a district court was con-

51. 257 F. Supp. 674 (N.D. Cal. 1966).

52. *Id.* at 680.

53. 300 F. Supp. 825 (E.D. Ark. 1969). See the subsequent case, Holt v. Sarver (Holt II) 309 F. Supp. 362 (E.D. Ark. 1970) discussed at note 55 *supra* and accompanying text.

54. *See* notes 43-53 *supra* and accompanying text.

55. 309 F. Supp. 362 (E.D. Ark. 1970). The court noted,

> This case, unlike earlier cases to be mentioned which have involved specific practices and abuses alleged to have been practiced upon Arkansas convicts, amounts to an attack on the system itself. As far as the Court is aware, this is the first time that convicts have attacked an entire penitentiary system in any court, either State or federal. . . . An individual convict may, of course, be subjected to a cruel and unusual punishment actually inflicted on him personally. . . . It appears to the Court, however, that the concept of "cruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual. In the Court's estimation, confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any discipli-

fronted with claims of racial segregation, denial of rehabilitative opportunities, inadequate medical and dental facilities, unsanitary conditions, and failure to provide inmates with sufficient clothing, bedding, and grooming items. In ruling that these conditions, in the aggregate, constituted cruel and unusual punishment, the court went beyond a basic distinction which the Supreme Court had recognized in earlier cases. Until *Holt II*, punishment had been held not to be in violation of the eighth amendment where such action was not taken in specific retribution for criminal conduct.[56]

Until *Battle*, the Tenth Circuit had never decided a case which involved an attack on the conditions existing throughout an entire prison system. In several earlier cases involving eighth amendment challenges, the Tenth Circuit had displayed a reluctance to abandon the traditional "hands-off" doctrine when examining the treatment of prisoners by state authorities.[57] In these cases, the court of appeals applied eighth amendment guarantees only to protect individual prisoners from specific sentences or especially severe methods of enforcing such sentences. In *Battle* however, the Tenth Circuit held that *conditions* which existed in a general prison population might constitute cruel and unusual punishment.[58]

IV. THE BATTLE DECISION

As previously noted, when analyzing the problem of overcrowding, courts have stressed the correlation between overcrowding and the

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nary action. . . . That is certainly the law in the cases of prisoners confined in isolation, . . . and the Court sees no reason why it is not the law in cases of prisoners confined "in population", as it is called.

Id. at 365, 372-73.

56. *See, e.g.*, Bugajewitz v. Adams, 228 U.S. 585 (1913) (deportation); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (deportation); Green v. Board of Elections, 380 F.2d 445 (2d Cir.), *cert. denied*, 389 U.S. 1048 (1968) (deprivation of right to vote); McCloskey v. Patuxent Inst., 243 Md. 497, 226 A.2d 534 (1966) (confinement for mental treatment).

Most courts have been unwilling to invoke the eighth amendment until after conviction and sentence. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). Other means however, have been used to protect pretrial detainees from deplorable treatment. If the restrictions placed upon a pretrial detainee are in excess of what is necessary to insure his presence at trial or maintain internal security, courts have held those restrictions to be violative of due process. *See, e.g.*, Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975). An equal protection argument has also been used to show that detainees who are incarcerated under conditions that are similar to those under which convicts are confined have been subjected to an unreasonable and overinclusive classification. *See* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 947-50 (1970).

57. *See, e.g.*, Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968) (inadequate medical care); Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969) (inadequate discipline measures).

58. 564 F.2d 388, 401 (1977).

resulting deprivations.[59] However, in *Battle*, the trial court concluded that overcrowding, in and of itself, was unconstitutional as cruel and unusual punishment.[60]This holding represents an extension of federal judicial intervention in the operation of state penal institutions.[61]

In support of its conclusion, the district court relied primarily on three factually similar cases.[62] However, these cases are distinguishable in that, in each institution involved, certain conditions were made intolerable by a level of population which overtaxed the available facilities. Unlike *Battle*, none of these courts expressly held that overcrowding alone was a denial of constitutionally protected rights. In one case, *McCray v. Sullivan*,[63] an Alabama federal court addressed several problems including the deprivation of basic hygiene, censorship of mail, punitive isolation, inadequate personnel and overcrowding. The court found all of these problems related to one another, and when so considered, violative of the eighth amendment.[64] Also relied upon was *Finney v. Arkansas Board of Corrections*,[65] where the Court of Appeals for the Eighth Circuit found that prison overcrowding was intensified by the use of barracks which were "inadequate and in a total state of disre-

59. *See, e.g.*, Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977) (unsanitary living conditions); James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976) (understaffing, improper nutrition, inadequate clothing and other supplies, absence of recreational opportunities, and lack of a classification system); Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975) (inadequate medical care, dilapidated physical facilities, and use of trustee-guards); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974) (abuse of solitary confinement); Holt v. Sarver (Holt II), 309 F. Supp. 362 (E.D. Ark. 1970) (lack of rehabilitative programs, lack of protection from inmate violence, and use of trustee-guards).

60. No. 72-95, slip op. at 15-16.

61. In its effort to remedy the conditions of overcrowding at McAlester and Granite, the court stated a conclusion of law—that overcrowding per se was unconstitutional— that was unprecedented and not essential to its ultimate finding of unconstitutional conditions at those institutions. Since the overcrowding at McAlester and Granite was accompanied by inadequate job programs, excessive use of segregative classifications, excessive employee turnover rate, inadequate staffing, inadequate water and sewage systems, and general lack of sanitation, it is arguable that these conditions in the aggregate would justify a finding of unconstitutionality.

62. McCray v. Sullivan, 399 F. Supp. 271 (S.D. Ala. 1975); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974); Gates v. Collier, 407 F. Supp. 1117 (N.D. Miss. 1975). Each of these cases is discussed at notes 63-69 *infra* and accompanying text.

63. 399 F. Supp. 271 (S.D. Ala. 1975); *See also* Pugh v. Locke, 406 F. Supp. 318 (1976).

64. The court noted:

> When such severe overcrowding is coupled with staffing levels grossly below that necessary for providing reasonable security under normal population levels at the design capacity of these institutions, it is obvious that lives and safety of the guards and inmates are in constant danger. While overcrowded conditions undoubtedly increase the tension inherent in a prison atmosphere, the Court eschews any notion that overcrowding causes, in a legal sense, violence to occur between the prisoners. Overcrowding does mean, however, that those prisoners with a bent toward violence and criminality can engage in their heinous conduct with a greater degree of freedom from detection, especially when one considers the insufficient numbers of prison "police" available.

399 F. Supp. at 275.

65. 505 F.2d 194 (8th Cir. 1975).

pair that could only be described as deplorable."[66] These conditions were aggravated by the inability of prison officials to protect inmates from each other, the confinement of juvenile offenders with the general population, the infliction of physical and mental brutality and torture, and the total lack of rehabilitative programs.[67] Similarly distinguishable is *Gates v. Collier*,[68] cited by the court. In *Gates*, the court stated that the primary issue it faced was the poor condition of the facilities involved. The court ordered no reduction of the population, but instead proscribed maximum inmate levels to be observed in the future.[69]

In *Battle*, the court found that crowding allowed inmates little space and the resulting conditions, requiring prisoners to sleep in garages, barber shops, libraries, and stairwells, or dorms without toilet or shower facilities, "passed the constitutional threshold."[70] The court stated that "such crowding offends the contemporary standards of human decency."[71] Noting that Oklahoma had not constructed a new correctional facility since statehood,[72] the court concluded that "[w]ithout the basic minimums prisons are doomed to failure, with both society and the inmates incarcerated therein the losers."[73] The court concluded its opinion with a sweeping order mandating a substantial reduction in the inmate population within a specified period of time, and minimum cell measurements and occupancy levels.[74]

On appeal, the State of Oklahoma contended that the district court's findings were not supported by the evidence and that the order to reduce prison population was an improper remedial order.[75] The Tenth Circuit however, concluded that occupancy at the rate of 191% of capacity amounted to cruel and unusual punishment, and the court refused to stay the order directing inmate reductions.[76]

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66. *Id.* at 201.
67. *Id.*
68. 407 F. Supp. 1117 (N.D. Miss. 1975).
69. The court noted that:
> [The] chief problem with inmate housing . . . is not with the overcrowding of residential camps and accompanying violence, but with the dilapidated condition of many housing units. Though the Mississippi penitentiary is overcrowded, it is not yet alarmingly so, and certainly not to any degree which poses an imminent physical danger to large numbers of inmates and staff.

Id. at 1120.
70. No. 72-95, slip op. at 16.
71. *Id.*
72. *Id.* at 7.
73. *Id.* at 17.
74. *Id.* at 18. *See also* note 21 *supra.*
75. 564 F.2d at 391.
76. *Id.* at 400-03.

Acknowledging the traditional "hands-off" stance of the courts in this area, the circuit court, nevertheless, noted that "[i]t is the obligation of the federal courts to be ever alert not to intrude into the affairs of state prison administration unless there is displayed a clear failure by the State to take cognizance of an inmate's valid federal constitutional rights."[77]The court concluded that there was such a failure in the instant case, and, in reviewing the conditions in the Oklahoma prison system, concluded that the state had violated the rights of prisoners who were "entitled to be confined in an environment which does not result in . . . degeneration or which threatens . . . mental and physical well being."[78]

While noting that an incarcerated prisoner is not entitled to all the rights of one who has not committed a crime, the court emphasized that "still the infliction of cruel and unusual punishment cannot be countenanced in an orderly society. While the rights and privileges necessarily lost—and, in effect, surrendered—by prisoners in punishment for crimes committed are many and varied, they cannot be denied all rights and privileges."[79]

In upholding the trial court's finding that overcrowding amounted to cruel and unusual punishment, the Tenth Circuit relied upon *Gregg v. Georgia*,[80] for the proposition that it is the obligation of federal courts to review state imposed penal sanctions. Also relied upon was *Estelle v. Gamble*,[81] another Supreme Court decision that endorsed the role of federal courts in considering eighth amendment challenges.[82]

While it commended the state for the positive steps set forth in its proposed plan,[83] the appellate court refused to substitute either the defendant state's, or its own judgment, for "that of the resident federal district judge who has given so much of his time, conscience and effort to this ongoing case."[84] In rebutting the state's strenuous objections to the court ordered population reductions, the circuit court emphasized that "in the long run the public interest in [sic] best served by adherence to the Constitution and the protection of the rights of all helpless

77. *Id.* at 403.
78. *Id.*
79. *Id.*
80. 428 U.S. 153 (1976) (Georgia death penalty upheld against eighth amendment challenge).
81. 429 U.S. 97 (1976).
82. Again however, this case is distinguishable from *Battle*, in that here, the deprivations were deliberately directed toward a specific individual, while in *Battle*, the "conditions" were not the result of deliberate acts and had not resulted in harm to any prisoner in particular. *Id.*
83. *See* note 11 *supra.*
84. 564 F.2d at 400.

human beings."[85]

The Overcrowding Challenge in Other Jurisdictions

Of the eleven federal judicial circuits, the Fifth Circuit has witnessed the most cases in which a state was compelled to effect major improvements in its prison system. Although the first successful court attack upon an entire prison system took place in the Eighth Circuit,[86] all but two[87] of those which followed have taken place in the Fifth Circuit.[88]While the Fifth Circuit had consistently affirmed lower courts which had required state officials to make sweeping changes throughout their prisons, their recent decision in *Newman v. Alabama*[89] may signal a new trend away from federal intervention in state prison affairs.

In *Newman*, the District Courts for the Middle and Southern Districts of Alabama had enjoined the Alabama prison system from accepting any new prisoners, except escapees and parole violators. The injunctions were to continue until the inmate population was no greater than the design capacity for each facility. The courts also required the state to house no more than one prisoner in a single cell, of no less than sixty square feet.[90] Addressing these requirements, the Fifth Circuit said:

> Unless intended to apply only to existing facilities we do not discern the constitutional basis for the requirement that Alabama state prisoners shall be housed in individual cells, nor can we agree that "design" standards, *without more*, amount to a *per se* constitutional limitation on the number of prisoners which may be housed in a particular prison facility. Those who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space.[91]

The court of appeals remanded the case to the trial court for re-

85. *Id.* at 399.

86. Holt v. Sarver (Holt II), 309 F. Supp. 362 (E.D. Ark. 1970).

87. Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

88. Four of the six states in the Fifth Circuit have been under federal court order to improve their prisons: Mississippi, Gates v. Collier, 39 F. Supp. 881 (N.D. Miss. 1972); Florida, Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975); Louisiana, Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977); and Alabama, James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976).

89. 559 F.2d 283 (5th Cir. 1977).

90. Order of August 29, 1975, Newman v. Alabama, No. 76-2269 (M.D. Ala.) (joint order for middle and southern districts, *enforcing*, 349 F. Supp. 278 (M.D. Ala. 1972)).

91. 559 F.2d at 288.

consideration in light of *Williams v. Edwards*.[92] In *Williams*, it was held that "[t]he functions and characteristics of each building should be taken into account in arriving at the capacity of each. A simple mathematical calculation of total square feet of space divided by a standard of square feet per man may not necessarily be appropriate or practible."[93]

The Tenth Circuit's ruling in *Battle* represents a significantly broader interpretation of the eighth amendment's prohibition against cruel and unusual punishment than the Fifth Circuit's recent decisions. However, should this conflict be presented to the Supreme Court for resolution, it is likely to be decided in the Fifth Circuit's favor, in light of the recent support given the "hands-off" doctrine in *Jones v. North Carolina Prisoners' Union*,[94] and the reference in *Estelle v. Gamble*[95] to "acts or omissions sufficiently harmful to evidence *deliberate* indifference"[96] to prisoners' needs.

V. OVERCROWDING IN PRISONS

The State of Oklahoma, in its appeal challenging the ordered population reduction, raised a most significant issue.[97] Courts have conceded that the major difficulty they are faced with in cases involving prison conditions is not in determining whether the conditions are in fact "cruel and unusual", but in choosing the proper means to remedy those conditions.[98] In order to understand what options are available to courts and prison officials who face such a task, it is helpful to first examine the causes of prison overcrowding and the remedies for alleviating the problem. This type of analysis can be invaluable to courts making the policy judgments involved in these cases. Although courts have little difficulty in framing the legal issues, they must have the ap-

92. 547 F.2d 1206 (5th Cir. 1977).
93. *Id.* at 1215.
94. 433 U.S. 119 (1977).
95. 429 U.S. 97 (1976).
96. *Id.* at 105-06. (Emphasis added).
97. *See* notes 75 & 76 *supra* and accompanying text.
98. In Holt v. Sarver (Holt I), 300 F. Supp. 825, 833 (E.D. Ark. 1969), the court mentioned this fact:

> The task of the Court in devising a remedy in this case is both difficult and delicate.
>
> Subject to constitutional limitations, Arkansas is a sovereign State. It has a right to make and enforce criminal laws, to imprison persons convicted of serious crimes, and to maintain order and discipline in its prisons. This Court has no intention of entering a decree herein that will disrupt the Penitentiary or leave Respondent and his subordinates helpless to deal with dangerous and unruly convicts.
>
> The Court has recognized heretofore the financial handicaps under which the Penitentiary is laboring, and the Court knows that Respondent cannot make bricks without straw.

propriate facts, drawn from correctional studies, in order to determine the relief to be granted.

Causes

The United States began 1976 with more people in prison than ever before in the nation's history. On January 1, 1976, a quarter of a million Americans were incarcerated in state and federal prisons for adults.[99]This total represents an increase of almost 24,000 inmates since January 1, 1975—the largest one-year jump on record.[100] One factor contributing to the expanding prison population is the increase in the incidence of crime. The incidence of violent crime in the United States doubled between 1961 and 1971[101] and rose 47% from 1969 to 1974.[102] Several theories have been advanced to explain this increasing rate of crime. One theory blames the increase on the depressed state of the economy and rising unemployment, while another theory argues that the growing crime rate merely corresponds to the population growth which this country has experienced in recent years.[103]

Another reason for the growth in the rate of incarceration is the greater efficiency of law enforcement agencies in the United States. This increased efficiency is due in part to funds which have been made available through the Law Enforcement Assistance Administration (LEAA).[104] These funds have helped upgrade police departments and

99. Gettinger, *U.S. Prison Population Hits All-Time High*, 11 CORRECTIONS MAGAZINE 9, 9-20 (March 1976) [hereinafter cited as Gettinger]. This increase can be contrasted with the decline in the number of incarcerates from 1962 (220,000) to 1969 (188,000). This rate remained fairly constant until 1973, when the number of persons sent to prison began to grow at an alarming rate. *Id.*

100. *Id.* at 9.

101. *Id.*

102. *See* Note, *Overcrowding in Prisons: Maryland Faces A Correctional Crisis*, 36 MD. L. REV. 182 n.2 (1976) [hereinafter cited as *Overcrowding in Prisons*].

103. *See* Gettinger *supra* note 99, at 15-16. A related argument points out that in addition to an increase in total population, the number of persons between the ages of 17 and 29 (who make up more than half of the nation's population as well as the group for whom the risks of becoming incarcerated are greatest) has also increased, due to the post-war "baby boom." Young people born in the period from 1947 to 1959 formed 23% of the U.S. population in 1976 as compared to 20% in 1970. This 3% difference can be translated into almost nine million additional people in the "at risk" population. This increase in the number of persons in that age group can be expected to continue until 1985. Even after 1985 there may be no relief, as there are indications that the birth rate in urban centers may be continuing at the same high rate as the early sixties, and a disproportionate number of prisoners come from these areas. *Id.*

104. The Law Enforcement Assistance Administration (LEAA) was created by the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 42 U.S.C. §§ 3701-3795 (1976)). In Oklahoma, the Department of Corrections alone received over five million dollars from LEAA in fiscal 1974 and 1975. [1974-1975] OKLA. DEP'T CORRECTIONS ANN. REP. 7-10.

have enabled district attorneys to gather better evidence in criminal cases.

A further reason for prison population increases is that the length of prison sentences has also increased.[105] This is due in part to the increase in violent crimes,[106] which carry longer minimum and maximum sentences. Also, the contemporary political attitude appears to be drifting toward the right. Public opinion has shifted in favor of punishment and against programs such as probation and work-release, that allows offenders to remain in the community.[107] Judges are consequently faced with mounting public pressure to send more people to prisons for longer periods of time. Some commentators feel there is also a racial basis for the increase in incarceration rates, especially in the south, where the rise has been the most dramatic.[108]

Alternative Remedies to the Overcrowding Dilemma

The most common procedure for securing relief from overcrowded prison conditions is for a prisoner, proceeding either individually or representing a class of prisoners, to assert a cause of action under Section 1983.[109] Such actions may be maintained in law, in equity, or in another proper proceeding. Although damages at law have been sought in most petitions for relief, courts have given them little consideration because any measure of damages would be difficult to determine and seemingly inappropriate for the violation of such intangible rights.[110] The broad powers of equity have proven more appropriate in shaping relief for conditions under which prisoners are being held.[111] Courts have responded in a number of ways in framing decrees aimed at reducing the population levels of prison facilities. Each such case, though common in some respects, turns on its own facts as the variety of approaches to overcrowding will demonstrate.

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105. *See* Gettinger *supra* note 99, at 16.
106. *See* notes 99-103 *supra.*
107. *See* Gettinger *supra* note 99, at 9, 15.
108. *Id.* at 17.
109. 42 U.S.C. § 1983 (1976) provides:
> 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.

110. *See* Note, *Courts, Corrections, and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates,* 44 S. CAL. L. REV. 1060, 1072-76 [hereinafter cited as *Releasing Inmates*].
111. *See* Comment, *Equitable Remedies Available to a Federal Court After Declaring an Entire Prison Violates the Eighth Amendment,* 1 CAP. U.L. REV. 101 (1972).

Just as the causes of overcrowding can be traced to a multitude of sources, there are numerous remedies to overcrowding. The composition of a prison population is a function of many variables operating within the criminal justice system and it is necessary to account for as many of these variables as possible in fashioning an appropriate remedy.

Most courts have displayed sensitivity to the problems faced by prison administrators who must comply with orders aimed at overcrowding.[112] Prison officials have little or no control over the flow of convicts in or out of their custody. Elected officials are notoriously reluctant to spend the funds necessary for the construction or renovation of prison facilities. State judges and parole officials are under pressure from the community to "get tough" with criminals, resulting in more convictions, longer sentences, and fewer paroles.

A federal court order often has more significant impact as an educational device than as a coercive tool.[113] By drawing public attention to the problems which confront prisons, the court can help mobilize public support behind elected officials who bear the responsibility for prison reform. Even if public opinion is adverse to prison reform, the presence of a federal court order can provide a scapegoat for elected officials who privately acknowledge the need for prison reform, but have trouble justifying an increase in prison spending to their constituents.

Notwithstanding the initiative which a federal court order can provide, prison reform is primarily the duty of state officials. In most cases those officials must resolve the conflict between a desire to proceed according to a long range plan which includes comprehensive reform in many areas, and an immediate need to relieve the present conditions under which inmates are incarcerated. Immediate relief which requires a minimum of capital expenditures, combined with an organized long range program directed at reducing the rate of incarceration and improving the conditions in correctional facilities is the most comprehensive solution to prison overcrowding.

In situations where extreme overcrowding calls for an immediate temporary remedy, courts have few options available. The most drastic solution, and the one which is most generally unacceptable, is to order the release of prisoners from confinement until the population is re-

112. *See* note 98 *supra.*

113. *See* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 109-15 (1977).

duced to an acceptable level.[114] Some of the objections to the release of prisoners include: (1) the threat which a sudden influx of convicts into the lawabiding community would create;[115] (2) the possible equal protection arguments which could be raised by releasing some prisoners, but not others;[116] and (3) the dangerous precedent, prison discipline problems, and the corresponding flood of prisoner complaints.[117]

Some of these objections can be effectively rebutted, others cannot. The threat of releasing prisoners into the law-abiding community is minimized by the fact that a high percentage of convicts are presently incarcerated for committing "victimless" or at least nonviolent crimes against property.[118] If eligibility for release were conditioned on some showing that the inmate was unlikely to commit a violent crime,[119] such a release would be based upon a valid, nonarbitrary distinction, and as such, would constitute a defense to the equal protection arguments advanced by prisoners who remain confined.[120] Even if the remedy of immediate release from custody were somehow reserved for only the most exceptional situations, there remains the possibility that the mere presence of such a remedy would produce a massive flood of frivolous complaints. This increase could paralyze the dockets of federal courts which are already burdened by prisoner complaints.[121] However, the fear that recognition of a new right or remedy might create a flood of litigation is commonly voiced whenever advances in the law are achieved, and should not, of itself, present an insurmountable obstacle to the use of release in the proper situation.

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114. *See Releasing Inmates, supra* note 110, at 1060. Although there are isolated instances where courts have ordered the release of prisoners from custody, *see, e.g.*, Johnson v. Dye, 175 F.2d 25 (3rd Cir. 1949), *rev'd per curiam*, 338 U.S. 864 (1949), most courts have refused to consider such a remedy. *See, e.g.*, Owens v. Allridge, 311 F. Supp. 667 (W.D. Okla. 1970); Konisberg v. Cicone, 285 F. Supp. 585 (W.D. Mo. 1968), *aff'd*, 417 F.2d 161 (9th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970). *See also* Note, *Remedies Available to Validly Sentenced Prisoners Who Are Mistreated by State Penal Authorities*, 33 NEB. L. REV. 434, 436 (1953).

115. *See Ex parte* Rickens, 101 F. Supp. 285, 288 (D. Alas. 1951).

116. *See In re* Ellis, 76 Kan. 368, 91 Pac. 81 (1907).

117. *See* Lay, *Post-Conviction Remedies and the Overburdened Judiciary: Solutions Ahead*, 3 CREIGHTON L. REV. 5, 13 (1970).

118. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Tables 2-5 (1968).

119. *See* Koyol, Boucher, & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371 (1972) (asserting that dangerousness can be reliably diagnosed). *But see* Wenk, Robinson, & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQUENCY 393 (1972).

120. A "state is not constrained . . . to ignore experience which marks a class of offenders . . . for special treatment." Skinner v. Oklahoma, 316 U.S. 535, 540 (1942).

121. *See* Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV.178, 189 (1967).

Another type of immediate relief for overcrowding is the transfer of prisoners to other facilities.[122] Although this can be effective in some cases it also presents many other difficulties. When state prisons are overcrowded, it is just as likely that federal, county, and municipal facilities are overcrowded as well, preventing them from accepting new prisoners. Local work-release centers can be utilized to absorb part of the excess population but these centers are often prevented by law from accepting all but first offenders who have been convicted of nonviolent or nonsexual crimes.[123] Another temporary solution is to utilize facilities which are unoccupied or can be erected on short notice.[124]

When faced with prison officials who are reluctant to comply, there is little the court can do to enforce its order. The court can enjoin the state from accepting new prisoners,[125] require present population levels to be decreased,[126] and mandate the implementation of any number of remedial policies, but little can be done when insufficient progress is made. The traditional means used by courts to enforce equitable remedies is their contempt power.[127] By citing state officials for civil contempt, the court can either temporarily imprison the responsible officials or levy a fine against them. As a practical matter however, even these sanctions may prove ineffective. Although the threat of imprisonment might provide some motivation for state officials, the obvious danger in confining correctional officials in a correctional facility would restrain all but the most imprudent judge from imposing such a penalty. A court can also levy fines against state officials in their individual capacities if it appears that they have refused to take the necessary steps to comply with the court's order and this threat might coerce recalcitrant state officials into complying with both the letter and spirit of the court's decree.[128] The danger with this sanction lies in the possi-

122. *See, e.g.*, Bryant v. Hendrick, 444 Pa. 83, 110 A.2d 1280 (1971).

123. Even if statutes or administrative policies do not prevent community treatment centers from accepting such inmates, it is often necessary for corrections officials to agree to restrictive covenants in leases for those facilities. This is the result of considerable public opposition to housing convicts near residential and business areas in minimum security institutions.

124. Examples of such approaches include the "tent city" erected by Florida officials to house their excess population, Costello v. Wainwright, 397 F. Supp. 20, 36 (M.D. Fla. 1975). Another is the conversion of an unused Navy troop carrier ship by Maryland officials as a floating prison. *Overcrowding in Prisons*, *supra* note 102, at 198 n.97.

125. *See, e.g.*, McCray v. Sullivan, 399 F. Supp. 271 (M.D. Ala. 1975).

126. Battle v. Anderson, No. 72-95 (E.D. Okla. June 14, 1977); Anderson v. Redman, 429 F. Supp. 1105 (D. Del. 1977), Costello v. Wainwright, 539 F.2d 547 (5th Cir. 1976).

127. The federal contempt power is codified as 18 U.S.C. § 401 (1976). *See In re* Birdsong, 39 F. 599 (C.C.S.D. Ga. 1889) (jailer held in contempt for mistreating prisoner).

128. *See* Landman v. Royster, 354 F. Supp. 1292, 1301 (D. Va. 1973) ($25,000 fine imposed on prison officials as punishment for civil contempt).

bility that it might be imposed upon either officials who are doing all that is within their power to comply, or officials who are unable to pay such a fine and are faced with the alternative of imprisonment, the dangers of which have already been noted.

One means of coercing state officials to employ corrective measures has been to threaten the withholding of federal funds.[129] While withholding funds is one method by which the LEAA could urge compliance with the court's order, it is not the exclusive or the most rational way. A more positive approach was mentioned in *Gates v. Collier*,[130] where the court noted that the LEAA had offered to make one million dollars available immediately to alleviate the most pressing adverse conditions in Mississippi prisons. It certainly seems that where a state is required to expend large sums in order to comply with a federal court order, the federal government should assume a part of the responsibility for making those funds available.[131]

Unfortunately, some of the most effective means of reducing prison population are those which the court is without authority to command. Prison officials in many states have the statutory authority to shorten the remaining sentences of inmates by allowing good time credits toward the total time served.[132] Maximum utilization of such a program would have the effect of shortening the sentences of many inmates so that they could either be released immediately or receive immediate parole consideration. Increased use of parole to release prisoners from confinement is also a viable solution.[133] However, in many states the parole board is independent of the department of corrections and its members are often more attentive to the deterrent effect

129. The LEAA funds which the state of Oklahoma receives were placed in jeopardy on one occasion by the failure of state officials to comply with the court's order. Battle v. Anderson, No. 72-95, slip op. at 2 n.2 (E.D. Okla. June 14, 1977).

130. 349 F. Supp. 881, 892 (N.D. Miss. 1972).

131. Hopefully, the LEAA will be able to match the increase in correctional appropriations which the Oklahoma legislature has recently approved. Oklahoma's 1972 appropriations for the Department of Corrections totaled $7,028,011; in 1973 the figure was $11,080,193 (an increase of 56%); in 1974, $16,825,090 (an increase of 46.9%); in 1976 $44,000,000 (a 534% increase over 1973). Brief for Appellants at 29, 31, 34, Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977). The Department of Corrections has requested a record $53 million in its fiscal 1978-1979 budget proposal. Tulsa Daily World, Sept. 4, 1977, § B, at 1, col. 1.

132. For example, Florida law allows the Division of Corrections to "allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry." FLA. STAT. ANN. § 944.29 (West 1975). In Oklahoma, the law provides that "each inmate who works, attends school, or participates in a vocational training program shall have one day deducted from his sentence for each day the inmate works, attends school, or participates in such a program." OKLA STAT. tit. 57, § 138 (Supp. 1977).

133. *See* BENTON, OKLAHOMA CORRECTIONS MASTER PLAN, 45 (1974) [hereinafter cited as BENTON].

of imprisonment than to the need to reduce prison populations. This attitude is often unfounded however, since some prison officials feel that nearly half of the inmate population could be returned to free society without any danger to the community.[134]

While these temporary solutions can be utilized to provide immediate relief for overcrowded prisons, they are only stopgap measures. To maintain an acceptable population level, state officials at all levels and branches must cooperate toward that end. Two basic solutions are available: build more institutions and find alternatives to incarceration. However, both solutions are likely to encounter opposition. A massive construction program would be opposed by other state agencies which must compete for available revenue and by taxpayers who feel that new prisons are unnecessary. Alternatives to incarceration are likely to be met by public opposition as present sentiments favor more extreme measures of combating the rising crime rate. The conclusion is inescapable however, that one or both of these approaches must be implemented to reduce the rising number of prisoners in present facilities.

Prison construction is a topic that has just recently generated much attention. As recently as 1973, the National Advisory Commission on Criminal Justice Standards and Goals concluded that, "[w]e already have more prison space than we need . . . there is no need to build additional major institutions . . . for at least ten years."[135] However, that prediction has already proven to be erroneous.[136] Many states are presently debating the need for new capital improvements, but prison construction is quite expensive and the costs continue to rise.[137] There is also disagreement over what types of institutions should be built.[138] Once a decision is reached as to the type of facility to be built, a site must be chosen. That task often proves to be the most difficult one of all, as many communities are vehemently opposed to having a prison located in their proximity.

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134. National Council on Crime and Delinquency, *The Nondangerous Offender Should Not Be Imprisoned*, 19 CRIME & DELINQUENCY 449 (1973). *See also* Costello v. Wainwright, 397 F. Supp. 20, 35 (M.D. Fla. 1975).

135. *See* Gettinger, *supra* note 99, at 17. Florida has five new institutions under construction with a capacity of 2,280 and a price tag of 38 million dollars. Michigan has committed 30 million dollars toward the construction of five new facilities. *Id.*

136. *Id.*

137. Estimates of the cost of a secure institution run from $30,000 to $50,000 per bed. Debt service and equipment expenses can double initial building costs. *Id.*

138. Most administrators favor small institutions of 200 to 800 beds. But other officials tend to feel that intermediate size institutions of 1,500 to 2,000 beds are cheaper to build and cost less to operate. *Id.*

To add to these difficulties, many persons are opposed to prison construction for philosophical reasons. Those persons who take a hard-line punitive approach to corrections often feel that new prisons are not necessary. They feel that although present prison conditions are deplorable, prisoners are "getting what they deserve" and equate new prisons with housing inmates in "country clubs" and the like. Another group which opposes building new prison facilities does so as a result of their general opposition to imprisonment as a counterproductive concept.[139]These opponents of prison construction argue that facilities built to replace older institutions end up merely supplementing them, and contend that as long as more prison cells are available, society will find a way to fill them up.[140] The enormous costs of new prisons are also mentioned as a reason to look for other solutions to overcrowding.[141]Understandably, some question whether the public is willing to bear the cost of massive building programs at the expense of other public needs, such as housing, transportation, and medical care.

The other solution to the long-range problem of overcrowding is to find some alternatives to incarceration. The first and most obvious method of reducing the the rate of incarceration is to reduce the number of persons which the criminal justice system is required to accommodate. Proponents contend that this can be done by decriminalizing certain "victimless" crimes, such as sexual conduct between consenting adults and possession of certain drugs.[142] It should be noted however, that Oregon set a prison population record in 1975 despite being one of the first states to endorse such decriminalization.[143]

Another way to decrease incarceration rates is by pretrial diversion programs.[144] Under such a plan, after a person is arrested they are screened by staff members who determine whether they are proper candidates for the program, based on objective criteria such as age, sex,

139. William Nagel, Director of the American Foundation's Institute of Corrections, says: "If we build more prisons, we don't turn off the tap—we just build bigger buckets to catch the drippings." (Quoted in Gettinger, *supra* note 99, at 20).

140. *Id.*

141. The National Moratorium on Prison Construction has heard of 522 new institutions which are being planned around the country. The projected costs for 274 of them amount to 1.85 billion dollars. *Id.*

142. In 1975, there were 416,000 marijuana arrests in the U.S., 93% of which were for possessing a small amount. *Id.* Nine states have lessened their penalties for possession of less than one ounce of marijuana, generally making it a civil infraction. *See, e.g.*, ALASKA STAT. § 17:12.110(e) (1975); CAL. HEALTH & SAFETY CODE § 11357(b) (West. Supp. 1978); COLO. REV. STAT. § 12-22-412 (Supp. 1976); MINN. STAT. § 152.15 (Supp. 1978); MISS. CODE ANN. § 41-29-139 (Supp. 1977); N.Y. PENAL LAW, § 220; N.C. GEN. STAT. § 90-95(4) (Supp. 1977).

143. *See* Gettinger, *supra* note 99, at 15.

144. *See* Comment, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974).

employment, residence, previous offenses, and the crime charged. If the court and prosecution agree, the trial is waived and the candidate is placed in a program of social services which include counseling, job training, or other educational opportunities. The purpose is to lessen the probability that the candidate will commit future offenses and to help him function as a member of the community. If the candidate successfully completes the program, all charges are dropped; if not, he must stand trial.

By changing sentencing practices, state judges can have an enormous impact upon both the number of commitments to state institutions and the average length of stay in prison, which taken together, have the greatest effect on reducing prison population.[145] By increasing the use of probation in lieu of incarceration, judges can have a great effect upon the number of convicts committed to prison. Before the judiciary can be expected to rely upon probation as a viable alternative to incarceration, they must be convinced that it works. Therefore, before there can be an increase in number of persons placed on probation, there must be a corresponding increase in the number of probation officers available to accomodate this expanded caseload.

Although increased use of parole may be the most feasible means of achieving an immediate reduction in inmate population, sentencing practices must also be revised in order to maintain a lower average length of stay in prison.[146] Judges may often sentence in excess of what they might think is "fair" because of the possibility of parole. One way to remedy this situation is to reform the parole process. Some have suggested that the most needed change is the removal of discretion in the granting or denying of parole.[147] Others have suggested that parole be abolished entirely and replaced with fixed "flat time" sentences, which can be shortened by "good time" credits.[148] The judge could then set the sentence by legislative standards, without the necessity of anticipating the actions of some future parole board. Also, the prisoner would know his release date, and know that the only way to shorten his stay would be to behave properly while in prison, and not by impressing the parole board at some future date.

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145. *See* BENTON, *supra* note 133, at 45.
146. *Id.* at 53.
147. *See* Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. C.R.-C.L. L. REV. 419 (1973).
148. *See Overcrowding in Prisons, supra* note 102, at 188.

The use of fines[149] is a possible means of avoiding incarceration, and along with victim restitution,[150] can be quite effective, especially in cases where the offender has received a pecuniary gain from his crime and the court feels that a fine would serve as an adequate deterrent. The obvious defect regarding fines is that where the offender is too poor to pay the fine, his only alternative may be imprisonment.[151]

These are only some of the alternatives available to officials who are faced with the mandate of a federal judge to reduce the overcrowding in penal facilities. While each idea has some merit, none can be used exclusively to maintain an acceptable population level in the future.

VI. CONCLUSION

Federal courts, in exercising their equitable powers, have been responsible for some of the most far reaching changes that this nation has seen.[152] Given the responsibility of enforcing the rights granted to individuals under the Constitution, it often falls upon the federal district judge to protect minorities which are powerless to effect change through the political process. Since many of these cases proceed as class actions, the courts' decisions have a great impact on large numbers of people, whether they grant or deny the relief sought.[153] When the constitutional rights of individuals or minorities are being systematically denied by state officials, it is the duty of the federal judiciary to grant whatever relief may be proper. The greatest problem that has plagued the courts when prisoners challenge the constitutionality of the conditions of their confinement is not whether prisoners' rights are being violated, but what, if any, relief will be practical, enforceable, and effective.

The courts must face this challenge recognizing the fact that they operate under severe limitations. The operation and supervision of a correctional system, as well as any other agency of government, is a task for which the courts are often ill equipped.[154] The decisions which

149. *See* Note, *The Use of the Fine as a Criminal Sanction in New Jersey: Some Suggested Improvements*, 28 RUTGERS L. REV. 1185 (1975).

150. *See* Galaway & Hudson, *Restitution and Rehabilitation: Some Central Issues*, 18 CRIME & DELINQUENCY 403 (1971).

151. The Supreme Court has held that it is a denial of equal protection to incarcerate a person, where the statute provides that option, because he is an indigent and cannot afford to pay a fine. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

152. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954), *enforced*, 349 U.S. 294 (1955).

153. *See* Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV.903, 906 (1976).

154. *Id.* at 905.

govern the operation of prisons are of a discretionary nature and courts are reluctant to review those decisions unless they are in blatant disregard of the law. The funds and laws which must precede prison reform must come from the legislature and governor whose responsibilities are to the people, not the courts. In *Holt v. Sarver (Holt I)*, the court recognized, "that in a sense, the real Respondents are not limited to those formally before the Court, but include the Governor . . . the . . . Legislature, and ultimately the people of the State as a whole . . . ."[155]

The conditions under which many of the inmates in Oklahoma's prisons are confined are a disgrace to the entire state. These conditions cannot be rectified overnight, but only as a result of a determined cooperative effort by administrators, legislators, and judges alike, along with the support of an informed public. While recognizing the limitations under which state officials operate, it is the duty of federal courts to provide an impetus for reforming our prisons as they have done in other areas of civil rights. It is likewise the responsibility of state officials to discharge their duty to the citizens of the state in accordance with the United States Constitution, while preserving their state autonomy. One judge has commented,

> I look forward to the day when the State and its political subdivisions will again take up their mantle of responsibility, treating all of their citizens equally, and thereby relieve the federal government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it.[156]

The job of improving Oklahoma's prisons has begun, but much work lies ahead. Hopefully, the interest which this case has generated will help to sustain that effort and help the State of Oklahoma to achieve a penal system that will serve the interests of all the citizens of the state.

James W. Tilly

155. 309 F. Supp. at 365.
156. Dent v. Duncan, 360 F.2d 333, 337-38 (5th Cir. 1966) (Rives, J.).