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Eighth Amendment Rights of Prisoners: Adequate Medical Care and Protection from the Violence of Fellow Inmates

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EIGHTH AMENDMENT RIGHTS OF PRISONERS: ADEQUATE MEDICAL CARE AND PROTECTION FROM THE VIOLENCE OF FELLOW INMATES

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[1]

The eighth amendment's proscription of cruel and unusual punishment has been an elusive concept since the adoption of the Bill of Rights due in large part to the indefinite language within the clause itself. The broad phrase has lent itself to constantly wider interpretations, resulting in several discrete doctrines sometimes difficult to distinguish.[2] The oldest and clearest of these doctrines is the prohibition of inherently cruel methods of punishment. Although this doctrine began as forbidding torture,[3] it has since been expanded to prohibit methods of punishment which, although less severe, are condemned by society's "evolving standards of decency."[4]

Recent developments in this particular area of the law have given indication of an offshoot to this doctrine. The eighth amendment, in addition to prohibiting actions, may require certain other affirmative actions. Specifically at issue are the existence of eighth amendment protected rights to adequate medical care facilities in prisons and to protection from the physical violence of other inmates. The nature and scope of these rights are the subject of this note.

I. History: Inherently Cruel Punishments

A. *The Original Meaning*

The words of the eighth amendment first appeared in the United States in the Virginia Declaration of Rights in 1776:[5] "9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6] That language was taken from the English Declaration of Rights of 1688,[7] in large part directed against the abuses prevalent during the Stuart reign

1 U.S. CONST. amend. VIII.

2 *See generally* Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court,* 16 STAN. L. REV. 996 (1964); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law,* 79 HARV. L. REV. 635 (1966). The eighth amendment proscribes punishments which are inherently cruel in their method (discussed in this Note); those which are excessive in relation to the offense (*see* Weems v. United States, 217 U.S. 349 (1910) and O'Neil v. Vermont. 144 U.S. 323 (1892)); those which punish mere status (Robinson v. California, 370 U.S. 660 (1962)); and those which go beyond legitimate penal aims (*see* Furman v. Georgia, 408 U.S. 238, 257-306 (1973) (Brennan, J., concurring).

3 See discussion in text corresponding to notes 13-19 *infra.*

4 *See* Trop v. Dulles, 356 U.S. 86 (1958).

5 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 231-36 (1971).

6 *Id.* at 235. As early as 1641, however, the Body of the Liberties of the Massachusetts Colony of New England had expressed the same basic concept: "For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel." *Id.* at 77.

7 1 WM. & MARY, 2d Sess. c.2 (1689).

in England.[8] The earlier background can be traced to the Magna Carta[9] or earlier.[10]

The prohibition was proposed in its present form by Madison at the first Congress in April, 1789, as part of his Bill of Rights.[11] The proposal passed with little debate, giving only slight evidence of its intended meaning.[12] Something of its early meaning, however, can be learned from the feelings at the state ratifying conventions where fears of abuses by an unchecked federal government were expressed. In Massachusetts Abraham Holmes feared that "[t]hey [Congress] are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."[13] In Virginia Patrick Henry expressed fear of adopting a constitution without a Bill of Rights similar to Virginia's declaration: "What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of . . . torturing to extort a confession of the crime . . . in order to punish with still more relentless severity."[14]

The early Supreme Court cases recognized an intention in the eighth amendment to proscribe cruelty in methods of punishment.[15] In *Wilkerson v. Utah*[16] the Court said, "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden. . ."[17] The death penalty, although constitutional in itself, would become unconstitutional if inflicted with "torture or a lingering death"[18] or "unnecessary pain."[19] Thus the cruel and unusual punishment clause may well have seemed meaningless because the methods of punishment it prohibited were no longer in use.[20]

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8 *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, supra* note 2.

9 The Magna Carta seems to have been directed more specifically at the practice of exacting excessive amercements. Chapter twenty reads: "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude. . . ." A. HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 40 (1964).

10 *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning,* 57 Calif. L. Rev. 839 (1969).

11 2 B. SCHWARTZ, *supra* note 5, at 983, 1023-27.

12 One objection was raised by Mr. Livermore: "[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we . . . to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be prudent of the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind." *Id.* at 1112.

13 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (1836).

14 3 *id.* at 447-48.

15 *See* Weems v. United States, 217 U.S. 349, 389-400 (1910) (White, J., dissenting).

16 99 U.S. 130 (1878).

17 *Id.* at 136 (dictum).

18 In re Kemmler, 136 U.S. 436, 447 (1890).

19 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947).

20 *See* Hobbs v. State, 133 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893).

B. *The Expanded Meaning*

It became clear that the eighth amendment was not obsolete, however, in *Weems v. United States*:[21]

> With power in a legislature great, if not unlimited . . . to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. . . . Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth.[22]

This concept led the court to conclude that the eighth amendment prohibited punishments which were excessive as well as those which were inherently cruel,[23] but it had a secondary and far-reaching effect. The seed was planted for a broader conceptual expansion: the principle that the cruel and unusual punishment clause is not a static concept, but a progressive one capable of acquiring wider meaning as *public opinion* becomes more enlightened by humane justice.[24]

The importance of this theory was recognized by the Supreme Court in *Trop v. Dulles*.[25] In 1944 a private in the United States Army was convicted by court-martial of wartime desertion, sentenced to three years at hard labor, given a dishonorable discharge, and by operation of law[26] was denied his citizenship. The Court held that the denial of citizenship was unconstitutional as prescribing a cruel and unusual punishment. The language used by Chief Justice Warren rearranged the entire thinking in the area of inherently cruel punishments. Carrying on from the *Weems* decision, he said that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. . . . There may be involved no physical mistreatment, no primitive torture. There is instead a total destruction of the individual's status in organized society."[27] Significantly, Chief Justice Warren avoided an attempt to put strict standards on the thrust of the prohibition saying, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[28] A punishment may thus be inherently cruel in the absence of physical suffering and despite its recognition in the past. The eighth amendment requires that the particular method of punishment be evaluated in terms of the effect upon the individual's dignity according to contemporary standards of society.

21 217 U.S. 349 (1910).
22 *Id.* at 372-73.
23 The Court held that a 15-year sentence of *cadena temporal*—a punishment involving hard labor and shackling in chains—was cruelly disproportionate to the offense of falsifying a public record.
24 217 U.S. 349, 378 (1910).
25 356 U.S. 86 (1958).
26 Nationality Act of 1940, § 401(g), 8 U.S.C. § 1481(a)(8) (1970).
27 356 U.S. at 101.
28 *Id.* at 100. In the Court of Appeals Chief Judge Clark had said, in his dissenting opinion, "In my faith, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless' . . ." 239 F.2d 527, 530 (2d Cir. 1956).

C. *The Basic Prohibitions Today*

At the present time inherently cruel methods of punishment are being attacked primarily in the context of the treatment of prisoners where prison authorities are subject to limitations imposed by the "evolving standards of decency" concept of *Trop* and are prevented from inflicting punishment which is "barbarous" or "shocking to the conscience."[29] The conscience referred to here is the collective conscience of society as a whole,[30] changing as humane justice affects public opinion.[31]

1. Direct Physical Mistreatment

One area demonstrating the principles above is the way in which prisons both treat and discipline their inmates physically. While the earlier cases seemed to recognize as cruel and unusual only those methods that smacked of torture,[32] the language in *Trop* has given recent courts the opportunity to intervene more frequently in the interests of the prisoner. This policy represents both a recognition of society's newer standards of decency and a new willingness to look into matters previously seen as committed to prison administration.[33]

In *Jackson v. Bishop*[34] the court, recognizing that the eighth amendment's "standards are flexible . . . and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and useable,"[35] went on to hold that the use of a strap for corporal punishment in Arkansas prisons was cruel and unusual. In addition to finding the practice too easily subject to abuse at the lower levels of administration despite the safeguards of written rules,[36] Judge Blackmun pointed to corporal punishment's proclivity to generate "hate toward the keepers who punish and toward the system which permits it,"[37] and he concluded that "[p]ublic opinion is obviously adverse. . . . Thus almost uniformly it has been abolished."[38]

Beyond the abuses of some standard disciplinary procedures, courts have found isolated incidents to have violated a prisoner's rights under the eighth amendment. A particularly poignant example is the case of *Martinez v. Mancusi*,[39] involving an inmate who had been hospitalized for leg surgery related to his infantile paralysis. Under orders from the prison warden, without a medical discharge from the surgeon and over the objections of hospital staff, two guards came to the hospital, took custody of Martinez, and brought him back to the prison by making him *walk* out of the hospital. He was placed in the prison

29 Church v. Hegstrom, 416 F.2d 449, 451 (2d Cir. 1969).
30 Trop v. Dulles, 356 U.S. 86, 101 (1958).
31 Weems v. United States, 217 U.S. 349, 378 (1910).
32 *See, e.g.*, In re Birdsong, 39 Fed. 599 (S.D. Ga. 1889).
33 *See*, Comment, *Prisoner's Rights: Restrictions on Religious Practices*, 42 U. COLO. L. REV. 387, 389-91 (1970).
34 404 F.2d 571 (8th Cir. 1968).
35 *Id.* at 579.
36 An earlier case, Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965), had held that corporal punishment was cruel and unusual in the absence of appropriate safeguards.
37 404 F.2d at 580.
38 *Id. See also* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).
39 443 F.2d 921 (2d Cir. 1970).

hospital for one day before being released to the general prison population with no care facilities in his cell and no medication provided for pain. The court, applying standards set out in the earlier case of *Church v. Hegstrom*,[40] found a violation of Martinez's eighth amendment rights sufficient for an action for damages against the authorities.[41]

2. Solitary Confinement

A common practice often challenged by prisoners is the disciplinary measure of solitary confinement. Isolation cells and maximum security areas are employed for administrative as well as disciplinary purposes; the conditions of such confinement may well be unobjectionable. Indeed, the cases have been virtually unanimous in the view that solitary confinement is not, in itself, cruel and unusual;[42] and litigation has been primarily concerned with the so-called "strip cell,"[43] with decisions turning on precisely how inhuman the particular conditions are.

An early example is *Jordan v. Fitzharris*[44] where the prisoner complained that his solitary confinement violated the eighth amendment because of the primitive conditions in which he was forced to live. The court agreed and found the conditions shocking and debased and violative of elemental concepts of decency. The court placed its emphasis upon "the essentials for survival . . . [including] . . . the elements of water and food and requirements for basic sanitation . . . . [and] requirements as may be necessary to maintain a degree of cleanliness compatible with elemental decency in accord with the standards of a civilized community."[45]

Later cases dealing with strip cells have attempted to set out standards by which each instance may be judged. The courts have had much difficulty in this area, however, and the cases have been inconsistent.[46] It is clear, nevertheless, that the principles announced in *Trop* are influential. These principles can be seen at work in *LaReau v. MacDougall*,[47] finding the prisoner's solitary confinement "below the irreducible minimum of decency required by the Eighth Amendment."[48] The court drew attention to the tendency of the conditions to debase and degrade the individual in violation of his humanity and dignity according to standards embraced by contemporary society. Violative of these standards,

40 416 F.2d 449 (2d Cir. 1969): There must be 1) severe and obvious injuries, 2) indication that defendant was aware of plaintiff's condition and needs, 3) conduct shocking to the conscience or barbarous, and 4) more than mere negligence. *Id.* at 450-51.

41 *See also* Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); United States v. Grimes, 413 F.2d 1376 (7th Cir. 1969) (defendant-prisoner justified in using force against a prison guard in order to protect fellow inmate); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

42 *E.g.*, Sostre v. McGinnis, 442 F.2d 178, 192 (2d Cir. 1971) (violation of eighth amendment); Ford v. Board of Managers of New Jersey State Prison, 407 F.2d 937, 940 (3d Cir. 1969) (no violation); Wright v. McMann, 387 F.2d 519, 526 n.17 (2d Cir. 1967) (violation).

43 For a description of a typical "strip cell" see LaReau v. MacDougall, 473 F.2d 974, 977 (2d Cir. 1972).

44 257 F. Supp. 674 (N.D. Cal. 1966).

45 *Id.* at 682-83.

46 *See* Comment, *Prisoners' Rights: Personal Security*, 42 U. COLO. L. REV. 305, 371-72 (1970).

47 473 F.2d 974 (2d Cir. 1972).

48 *Id.* at 978.

according to the court, were the conditions of constant darkness (threatening to the sanity of the inmate), poor sanitation, and lack of opportunity for personal cleanliness. Other cases have found similar assaults to human dignity and attempts to break the spirit of the prisoner forbidden by the eighth amendment where a combination of conditions such as forced nudity, lack of exercise, insufficient bedding, lack of general sanitation and personal cleanliness, and harsh temperatures have been found.[49]

3. General Conditions

In addition to punishment in the way of disciplinary measures, some courts have found that the conditions in an entire prison, taken as a whole, may be so dreadful as to render incarceration therein unconstitutional as cruel and unusual punishment. The most noted of these cases is *Holt v. Sarver*,[50] condemning the entire Arkansas Penitentiary System as shocking to the conscience of reasonably civilized people. The court considered the cases condemning poor conditions in solitary confinement and reasoned that the general prison population had rights at least as complete. The court based its finding of cruel and unusual punishment upon the combined effects of the trusty guard system, the bad conditions in isolation, the absence of a meaningful rehabilitation program, the barracks system of sleeping, the lack of safety for the inmates, the inadequacy of the medical facilities, poor sanitary conditions, and other factors.[51]

In two cases[52] incarceration in county jails was declared unconstitutional under the eighth amendment because of overcrowding, inadequate bathing facilities, and generally deplorable sanitation. A common touchstone in many of these cases, as with the solitary confinement cases, is the unsanitary nature of the facilities. Insufficient inmate protection and frequent sexual and violent assaults have also been factors weighing heavily in favor of unconstitutionality.[53]

The courts have been generally unwilling to hold many of these factors unconstitutional by themselves.[54] Even in the solitary confinement cases the courts appear to be applying a totality of circumstances test, avoiding a decision that any one of the poor conditions by itself reaches constitutional dimensions. Yet, perhaps even under such a test, a single condition could be found to be so pervasively cruel as to render incarceration unconstitutional.

II. The Right to Medical Treatment

The early cases in the area of medical treatment of prisoners were primarily

49 *E.g.*, Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970); Wright v. McMann, 387 F.2d 519 (2nd Cir. 1967); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

50 309 F. Supp. 362 (E.D. Ark. 1970).

51 *Id.* at 373-81.

52 Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971).

53 *See* Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971).

54 *E.g.*, Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970): "Given an otherwise unexceptional penal institution, the Court is not willing to hold that confinement in it is unconstitutional simply because the institution does not . . . provide vocational training, or other rehabilitative facilities and services which many institutions now offer."

suits for damages using the tort theory of negligence.[55] This form of action, continuing up to the present, is fraught with issues of capacity to sue, waiver of immunity, and specific state statutory language defining the scope of duty of care owed to the prisoner. This entire area is beyond the scope of this note which limits itself to a constitutionally mandated right to medical treatment.

In terms of the eighth amendment, this right, if enforceable, is claimed primarily under the Civil Rights Act[56] with an allegation that denial or inadequacy of medical treatment constitutes cruel and unusual punishment. Theoretically a state prisoner may enforce this right since the Supreme Court decided in *Robinson v. California*[57] that the eighth amendment is applicable to the states. This theory, however, has faced some significant restrictions.

A. *"Some Medical Care"*

Perhaps the strongest restriction on the right to medical treatment has been the view taken by a large number of courts that when a prisoner is receiving some medical care, his complaint of inadequacy is in the nature of a mere disagreement with the medical personnel charged with his care. To begin with, such a charge sounds in negligence, and the courts have generally held that to reach constitutional proportions there must be present elements of willful, wanton, or reckless conduct.[58] This principle led the court in *Ramsey v. Ciccone*[59] to conclude that the denial or inadequacy of medical treatment is not cruel and unusual unless unsupported by any recognized field of medical authority and unless continuous beyond an isolated incident. The prisoner in such a case will be limited to his tort remedies within the state. Secondly, the courts have usually followed the "hands-off" approach to prisoners' complaints, feeling that they lacked the requisite expertise in what was seen as internal prison administration. The approach was compounded where the courts felt themselves inadequate for medical judgment as well.[60]

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55. Hunt v. Rowton, 288 P. 342 (Okla. 1930); Spicer v. Williamson, 191 N.C. 487, 132 S.E. 291 (1926).

56 Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1970):

> "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."

Jurisdiction to enforce this right is given in 28 U.S.C. § 1343 (1970):

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

For a more complete treatment of the Civil Rights Act see Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 Notre Dame Lawyer 70 (1964); Note, *Prisoners Rights under Section 1983*, 57 Geo. L.J. 1270 (1969).

57 370 U.S. 660 (1962).

58 *E.g.*, Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970); Church v. Hegstrom, 416 F.2d 449 (2d Cir. 1969).

59 310 F. Supp. 600 (W.D. Mo. 1970).

60 *E.g.*, Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968).

Two principles can be deduced from these cases. First, a complete denial to one in present need of medical care is a violation of the eighth amendment.[61] Secondly, given some medical care, even if only the existence of a retained physician, the denial or inadequacy must be intentional[62] in order to reach constitutional dimensions. The courts have on occasion granted some relief under these doctrines. In *Talley v. Stephens*[63] prisoners were forced to work beyond their strength and then denied medical attention. The court decreed that the prison in such a case must provide "reasonable medical attention for injuries and disabilities, at all reasonable times, and to permit attendance at sick call at reasonable times."[64] But this appears to be nothing more than a declaration that the prisoners are entitled to *some* medical care. Still remaining is the attitude that the prisoner will not be heard to complain of the adequacy of the medical treatment.

B. *Prescribed Medical Care Denied*

A line of cases has made significant inroads into the two-pronged hands-off doctrine taken by courts in the area of medical treatment. The result has been that the courts will still adhere to the view that it is not their place (nor the prisoners') to base cruel and unusual punishment claims upon the disagreement with some medical treatment being received. However, the courts will now look into the practices of the prison administration to see if the medical care already prescribed by a physician is being given its proper effect. That is, while the prison may be supplying some program for medical care, it must also see to it that a prisoner receives the treatment prescribed for him by a physician.

In *Beckett v. Kearney*[65] a prisoner complained that he had been ordered to "light duty" by the prison physician and that the administrators had failed to give effect to that order. The court did not find a violation of the eighth amendment because the issue had been rendered moot by the prisoner's transfer to light duty. The court did recognize, however, that "[t]here is . . . in between the constitutional rights of a prisoner on the one hand and the disciplinary rights of the authorities on the other hand, a vast no-man's land."[66]

In 1970 there were three cases that took steps to fill this gap left by *Beckett*. In *Reynolds v. Swenson*[67] the facts of the case were insufficient for a finding of cruel and unusual punishment, but the court recognized that in a case where medication had been directed by a physician, a cause of action would arise if the administrators could show "an intentional, reckless, or callous denial . . . of med-

61 *E.g.*, Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966); Elsberry v. Haynes, 256 F. Supp. 738 (W.D. Okla. 1966); *see also* Paniaqua v. Mosley, 451 F.2d 228, 230 (10th Cir. 1971); Mayfield v. Craven, 299 F. Supp. 1111, 1113 (E.D. Cal. 1969).

62 *E.g.*, Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). Other cases have enunciated similar standards: Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972) (deprivation of basic elements of medical care); Gittlemaker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970) ("egregious").

63 247 F. Supp. 683 (E.D. Ark. 1965).

64 *Id.* at 687.

65 247 F. Supp. 219 (N.D. Ga. 1965).

66 *Id.* at 220.

67 313 F. Supp. 328 (W.D. Mo. 1970).

ical treatment."[68] Relief was granted on this theory in *Tolbert v. Eyman*[69] when a diabetic was prevented from receiving prescribed medication from home. It was noted that the "gravamen of his claim is not that he was erroneously diagnosed by the prison doctor, but that the warden refused to allow him authorized medicine that he needed. . . ."[70]

The strongest of these cases is *Sawyer v. Sigler*[71] dealing with a warden's direct interference with the judgment of a physician. In the interest of drug safety within the prison, the warden had required all pills to be taken in crushed form to prevent hoarding of narcotics. The court respected the right of prison authorities to prescribe reasonable rules in this area, but found the particular regulation improper in the face of the physician's indication that the medicine was to be taken in pill form. In the same case the court broke through the old "some medical care" barrier with respect to another inmate. This prisoner was being treated only symptomatically at the prison for a malignancy where medical indications were such that further tests and treatment (available only outside the prison) were needed. Despite the fact that the prisoner was receiving some care, the court said "it is clear that the proper standard of *adequate medical treatment* has not been accorded"[72] and ordered that he be given an examination, including tests and treatments as needed, by a specialist. Later the court struck down a prison regulation requiring the forfeiture of "good time" for time spent in hospitalization or cell lay-in from sickness. The regulation itself was invalidated upon equal protection grounds due to the chilling effect it had on the prisoners' procurement of the "constitutional right to medical treatment."[73]

The thrust of these decisions in *Sawyer* makes the law clear in this one area of prisoners' rights to medical treatment. Once a medical treatment has been ordered by the physician, the prison will not be allowed to violate the order, ignore the order, or deny its aid to the prisoner through punitive measures. In short, the prisoner has a constitutional right under the eighth and fourteenth amendments to the medical treatment prescribed by a physician.

C. *Right to General Adequacy of Medical Facilities and Treatment*

All of the cases above deal with an individual inmate who has been denied a specifically needed medical treatment either because he is in such obvious need of care or because a physician has already prescribed some treatment or medication. A principle more difficult to establish has been the duty of a prison administration to take affirmative steps to improve substandard medical programs or facilities on eighth amendment grounds. The distinction is one between an isolated occurrence and an ongoing condition.

The first sign of a change in attitude by the courts came in the line of cases finding incarceration itself to be cruel and unusual where the general conditions,

68 *Id.* at 329.
69 434 F.2d 625 (9th Cir. 1970).
70 *Id.* at 626.
71 320 F. Supp. 690 (D. Neb. 1970).
72 *Id.* at 695 (emphasis added).
73 *Id.* at 699.

taken as a whole, violated the eighth amendment.[74] Some of those decisions were based in part on the presence of inadequate medical treatment and facilities. For example, the court in *Jones v. Wittenberg*[75] evaluated an entire county jail, finding among other things that:

> Health facilities are primitive. A nurse is on duty in the daytime, who supervises the prisoners' medication. There is a jail physician who comes two or three afternoons a week, and is on call at other times, but often cannot be reached. A dentist comes sometimes, but only does extractions. There is no infirmary for prisoners who are ill, and only two small offices or examining rooms, with little or no equipment for use by nurse, doctor and dentist.[76]

Combining this with other conditions, the court held that incarceration was cruel and unusual punishment.

In the unreported case of *Jackson v. Hendrick*[77] the court found the entire Philadelphia prison system constitutionally inadequate. It described the system as a cruel, degrading and disgusting place, likely to bring out the worst in a man. "The health of the prisoners is likewise in jeopardy. . . . Upon being committed to the prisons, the prisoners do not receive a prompt or adequate medical examination. . . . Once committed prisoners receive medical and psychiatric care below minimum acceptable standards."[78] The court concluded that this inadequacy, when considered with other unacceptable conditions, violated both the eighth amendment and the corresponding provision of the state constitution.

A similar result was reached under the eighth amendment in the famous case of *Holt v. Sarver.*[79] In finding incarceration itself unconstitutional, one of the factors given consideration was the general unavailability of medical care. The court noted that due to the "trusty" guard system it was difficult for an inmate to get to see the doctor, and even if he did, the doctor was rarely in.[80]

In each of these cases cruel and unusual punishment was found in the totality of the circumstances; no cases found independent constitutional dimensions in the inadequacy of medical care facilities alone. In fact, in the earlier *Holt v. Sarver,*[81] the district court had expressly refused to so rule: "While those [medical and dental] facilities leave a good deal to be desired, the Court does not consider that the deficiencies are such as to raise a constitutional problem."[82]

The major breakthrough in the area of an eighth amendment protected right to treatment came in the case of *Newman v. Alabama.*[83] Inmates of the Alabama Penal System filed a class action seeking declaratory and injunctive relief from deprivation of proper and adequate medical treatment. In line with preceding case law the court recognized that the eighth amendment had been violated in

74 See discussion in text accompanying notes 50-54, *supra.*
75 323 F. Supp. 93 (N.D. Ohio 1971).
76 *Id.* at 97.
77 40 U.S.L.W. 2710 (C.P. Philadelphia County, April 7, 1972).
78 *Id.*
79 309 F. Supp. 362 (E.D. Ark. 1970) (Holt II).
80 *Id.* at 380.
81 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I).
82 *Id.* at 828.
83 349 F. Supp. 278 (M.D. Ala. 1972).

this case by instances of denying prisoners access to needed medical treatment and by intentional refusal to provide prescribed medication. However, the court also went on to make this unprecedented decision:

> It is the holding of this Court that failure of the Board of Corrections to provide sufficient medical facilities and staff to afford inmates basic elements of adequate medical care constitutes a willful and intentional violation of the rights of prisoners guaranteed under the Eighth and Fourteenth Amendments.[84]

Chief Judge Johnson characterized the usual refusal of the courts to inquire into the adequacy or sufficiency of prison medical care as a recognition of the broad discretion possessed by prison officials. It thus appears that this discretion is abused by a failure to provide adequate medical care and facilities.

In deciding the case, all facets of medical care were examined. The court placed great emphasis on the inadequate and unqualified nature of the staff. With no full-time physician and only three registered nurses, much of the care was provided by the medical technical assistants (armed services-trained personnel acting as licensed practical nurses but who were not registered in the state). The result was that patients were neglected and doctors' orders were rarely carried out. Procedures as important as x-rays, suturing, and the giving of injections were performed by untrained personnel. The court also found a chronic shortage of basic medical supplies and a general medical program grossly outdated. For example, there were no standard procedures for sanitation; no fire or disaster plans; no outside inspection for health, fire, safety, or adequacy of care; and no standard medical records. "The result is a degree of neglect of basic medical needs of prisoners that could be justly called 'barbarous' and 'shocking to the conscience.' "[85]

This characterization by the court puts the issue into perspective; *neglect* is an inherently cruel method of punishment. The case stands up logically under a traditional eighth amendment analysis such as that in the *Weems-Trop* decisions. A method of punishment whereby individuals are imprisoned in an institution with grossly inadequate medical care facilities is shocking to the conscience of contemporary society. This is especially true where the inadequacies are so readily apparent to society and where the inadequacies are threatening to life and limb. The enforcement of this eighth amendment right through the class action falls in line with the reasoning found in *Trop*: "It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear . . . The threat makes the punishment obnoxious."[86] The issue is broader than the physical harm done to a single prisoner. Even if no serious consequences befall a particular inmate, the quality of life is debasing and degrading for the lack of general health care; and it runs counter to the dignity of man.

The implications for other prisons under *Newman* are not clear. To begin with, there is the uncertainty inherent in eighth amendment analysis, which is

84 *Id.* at 285-86.
85 *Id.* at 281.
86 356 U.S. at 102.

extremely subjective in itself; it is clear that the inadequacies complained of must be very bad, *i.e.*, shocking to the conscience. As in other eighth amendment cases the courts will have to find standards by which to judge the medical conditions in each prison or prison system under attack. When *Weems* spoke of public opinion becoming more enlightened by humane justice[87] and *Trop* spoke of evolving standards of decency,[88] it was clear that standards from outside the confines of the prison were applicable.

It was noted that the use of a strap for corporal punishment in prisons was universally condemned by the public;[89] *Trop* pointed out that the "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime";[90] in both of these cases the court went on to hold the punishment cruel and unusual. In the area of medical care and facilities, society's standards are observable in the medical programs within the communities. This is not to say that the courts will or should demand construction of modern medical centers on prison grounds, but there are some basic elements recognized by society (through the medical profession) that are seen as requirements for medical care. A reasonably good system of medical records is universally recognized as essential to accurate diagnosis and treatment; surgical instruments must be sterilized; there are certain medical prerequisites to an adequate emergency care unit (oxygen, for example); means of both isolation and restraint of patients are seen today as standard necessities; and most importantly, medicine is a profession, not to be practiced by untrained employees, guards, or even prisoners who may be called upon to make the decision to treat.

A medical expert would, no doubt, find other necessities. Furthermore, each prison or jail would not have the same requirements. The crux of the matter is that the needs must be met according to accepted standards, and the primary abuse in terms of the eighth amendment is the failure to make an evaluation and act on the results.

III. The Right to the Protection from the Violence of Other Prisoners

One of the most horrifying aspects of prison life is the threat of physical abuse and assault from other prisoners. It would seem axiomatic that every person, in or out of prison, has the right to bodily integrity and freedom from personal violence. The source, nature, and enforceability of that right are not clear, however. The purpose here is to examine an eighth amendment theory for imposing upon prisons the affirmative duty to protect inmates from this type of abuse.

A. *The Dangers*

The types of abuse being considered are all of those which involve physical violence. Knifings, beatings, and rapes growing out of the racial, sexual, psycho-

87 217 U.S. 349, 378 (1910).
88 356 U.S. 86, 101 (1958).
89 Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968).
90 386 U.S. 86, 102 (1958).

logical, and other tensions endemic to incarceration are all prevalent at many penal institutions.

Perhaps the most shocking aspect of violence is the existence, and even the frequency, of homosexual rape. In 1968 a study was begun of sexual assaults in Philadelphia prisons.[91] The study included interviews, personal inspections, polygraph examinations, and examination of prison records. It was found:

> that sexual assaults in the Philadelphia prison system are epidemic. As Superintendent Hendrick and three of the wardens admitted, virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are repeatedly raped by gangs of inmates. Others, because of the threat of gang rape, seek protection by entering into a homosexual relationship with an individual tormentor. . . . After a young man has been raped, he is marked as a sexual victim for the duration of his confinement. . . . Many of these young men return to their communities ashamed, and full of hatred.[92]

Contacting only 3,304 out of 60,000 inmates, the investigators found 156 sexual assaults capable of documentation, and estimated the actual total at 2,000. Only 96 of the 156 occurrences were reported: 64 were in prison records, 40 resulted in some discipline, and 26 were reported to the police for prosecution.[93]

The Philadelphia prisons are not alone in the occurrence of violent assaults. In *Holt v. Sarver*[94] the court found that the layout of the barracks in the prison and the use of hardened criminals for guards ("trusties") allowed violence to run unchecked. The prisoners slept in close proximity. Many possessed weapons, and ineffective security led to 17 stabbings in 18 months—four of them fatal. The court described the problem:

> At times deadly feuds arise between particular inmates, and if one of them can catch his enemy asleep it is easy to crawl over and stab him. Inmates who commit such assaults are known as "crawlers" and "creepers," and other inmates live in fear of them.[95]

The "floor-walkers"—inmates whose duty it is to report incidents to the guards—are often afraid of or in league with the assailants. This type of fear and violence is known to prisoners throughout the country.[96]

B. *The Courts*

As with the right to medical treatment, the early cases of inmate suits for failure of the prison to provide adequate protection were negligence actions for money damages. Recoveries were rare under such actions although there were

91 Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANSACTION 8 (Dec., 1968).
92 *Id.* at 9.
93 *Id.* at 13.
94 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I).
95 *Id.* at 830.
96 *See* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 187 (1970).

some exceptions.[97] An attempt to seek help through action (a suit or disciplinary complaint within the prison) directly against the assaulting prisoner(s), could be very difficult, primarily because of the very real threat of reprisal.[98]

It was and is possible to recover damages from administrators for negligence in protecting inmates, but there are serious limitations. Foreseeability and reasonableness of conduct have greatly isolated wardens from liability. Thus a warden has been held not liable for an assault by a group of known homosexuals, because there was no duty to isolate or protect in the absence of actual knowledge of the violent character of the assailants.[99] This appears to be the prevailing mood of the courts, perhaps mostly out of sympathy for a warden who would be held liable for damage which he is virtually powerless to prevent.

There are, however, duties which a warden must meet. The most important of these is the duty of reasonable classification. This was recognized in *Cohen v. United States*[100] where prison officials were held to be negligent in their classification and safekeeping of a prisoner known to be mentally unstable and violent.[101]

The prisoner remains with a twofold problem. First, if he is violently assaulted, it may have occurred despite the reasonable care exercised by the warden; and the inmate will be unable to recover damages. Secondly, even if the warden is negligent, money damages will probably neither reflect the horror of the violence nor effectively insure against future assaults. The most viable approach appears to be a suit under the Civil Rights Act[102] with its broad available remedies. The action still has characteristics of negligence,[103] and where damages are sought under the Act it appears that a strict standard is to be applied.[104] So for the administrator who has insufficient resources to work with, he need only act in good faith with reasonable attempts to properly classify and isolate the inmates. It is not clear, however, that there is justification for the strict standards when injunctive relief is sought under § 1983. There is no injustice done to an administrator who is ordered to carry out remedial measures for the safety of the inmates. The focus can and should be upon the nature of the right of the prisoners and whether a certain type and amount of violence has invaded that right.

The injunctive approach was taken in two cases discussed earlier.[105] In both of these cases it was a totality of circumstances that led the court to the finding of an eighth amendment violation, and in both there was a prevalence of violent

97 *Id.*

98 *See* Davis, *supra* note 91, at 11.

99 Muniz v. United States, 280 F. Supp. 542 (N.D. N.Y. 1968); *accord,* State v. Ferling, 220 Md. 109, 151 A.2d 137 (1959) (warden's good faith, no malice).

100 252 F. Supp. 679 (N.D. Ga. 1966).

101 *Accord,* Bartlett v. Commonwealth, 418 S.W.2d 225 (Ky. 1967) (assailant known to be violent); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940) (cellmate known to be violently insane); Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940) (administrator's knowledge of prisoners' violent kangaroo court); People v. Gunther, 105 Colo. 37, 94 P.2d 699 (1939) (juvenile placed with hardened criminals).

102 42 U.S.C. § 1983 (1970).

103 Monroe v. Pape, 365 U.S. 167, 187 (1961).

104 Church v. Hegstrom, 416 F.2d 449, 451 (2d Cir. 1969) (more than mere negligence); Parker v. McKeithen, 330 F. Supp. 435 (E.D. La. 1971) (more than an isolated incident); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971) (no punitive damages without willful violation of rights).

105 Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

assaults throughout the institution. In *Holt* the court noted that "[s]exual assaults, fights, and stabbings in the barracks put some inmates in such fear that it is not unusual for them to come to the front of the barracks and cling to the bars all night."[106] But the court gave this condition no independent constitutional significance, and no court has yet done so.

Perhaps the answer is that no court has been called upon to do so. Even under a totality of circumstances approach, with the only complaint being the general prevalence of violent assaults, the court's condemnation in *Holt* indicates that in the proper case a violation of the eighth amendment could be found.

Some parallels to other eighth amendment areas can help to make the issue clearer. The strip cell cases are good examples. The primary factor in many of those cases was the general unsanitariness of the cells and their debasing and degrading effect upon the dignity of the prisoner.[107] It is not clear that punishment is less cruel when a man is placed in a cell where he is subjected to repeated homosexual rapes. It is even less clear in consideration of the fact that an inmate is placed in solitary as an additional punishment beyond his original incarceration in the institution.

Furthermore, a "contemporary standards of society" test, in the *Weems-Trop* line, would surely militate even more strongly in favor of a finding of cruel and unusual punishment for subjecting an inmate to violent (sexual) assaults. Such suffering is clearly shocking to the conscience and universally condemned by society. It is no answer that the authorities have not planned for the prisoners to be punished in this way. *Trop, Newman,* and the line of cases finding general conditions violative of the eighth amendment all stand opposed to this view. If an individual receives cruel and unusual treatment *while* he is being punished, a failure to relieve this condition violates the eighth amendment.

It appears, therefore, that the difficulties facing the courts are not substantive but procedural. A court may face an insurmountable obstacle in trying to shape an injunctive remedy. The prevalence of assaults by other prisoners is not the type of condition that can be easily monitored through periodic inspection or the appointment of a master. The assault happens, and it is over; the victim is still left with the fear of reprisals should he choose to bring the matter to the authorities.

Private cells and an increase in the number of guards are two possible approaches to be coupled with an effective classification system. It is doubtful, however, that the prisoners are to spend all of their time in their cells, and keeping an eye on all of the prisoners seems simply impossible.

An overriding procedural problem in this whole area is the inability of the courts to compel the spending of tax dollars. Much of the injunctive relief granted to prisoners by the courts depends on a cooperation between the judicial and administrative branches. To foster this cooperation the courts must be able to fashion relief which the administrators will see as both effective to improve the conditions complained of and reasonably practicable from an economic point of view.

106 309 F. Supp. 362, 377 (E.D. Ark. 1970).
107 *See* discussion in text accompanying notes 44-49, *supra.*

At present, the remedy which lends itself best to both of these criteria appears to be effective classification. Where the courts are still unwilling to condemn a particular warden or jailor, the administration may be ordered to devise a new system of classification. This is most critical for sleeping arrangements and separation during the idle hours of the day. Additionally, the courts have their own role to play when choosing to sentence an obviously susceptible defendant. But beyond this lies an area of uncertainty and radical penal reform into which the courts are understandably unwilling to chance.

Tal Young