Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights

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The problems of America's prisons are multifaceted, encompassing, at the least, the emotions and convictions of judges, legislators, prison administrators and employees, taxpaying citizens, and, of course, inmates. They involve issues as narrow as the number of square feet of living space per inmate and the number of calories per inmate per day, and as broad as the doctrine of federalism and the proper role of the judiciary—particularly the federal judiciary—in a democratic society. Because the problems are complex and intractable, it is not surprising that most people agree that the solutions will never be simple or easy, much less susceptible of resolution by decree. But this is where the consensus ends and the divisiveness begins, focusing predominantly on three questions: (1) What are the problems?, (2) what should be done about them?, and (3) who should decide these questions?

The social and behavioral sciences have addressed an abundance of literature to the first two questions, testing and refining diverse hypotheses and recommendations over time. In the constitutional sense, though, the problems are more immediate, for it is the task of courts to decide the issues when raised, however rudimentary or incomplete the state of knowledge may be at the time. Thus, once the problems...
are defined, the issues then concern what must be done about them, and by whom. The following assertion appropriately joins the debate: "[A] federal judge rearranging a State's penal ... system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results." Contrast this statement with one by another federal judge: "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication ... ."

These conflicting positions are especially significant when one realizes, for example, that in the last two years there has been federal court litigation challenging conditions in prisons in more than thirty-five states, and, further, that extensive reform has been ordered in more than a dozen of these cases. The United States Supreme Court has yet to deal comprehensively and definitively with the conditions of inmate confinement in the many state prisons. But, even when it does, substantial tension will remain regarding federal judicial involvement in state prison reform. This Article surveys the primary issues and potential solutions, focusing on the perspective and theoretical foundations necessary to the recognition of any federal judicial responsibility in this critical area of state administration.

I. Historical Perspective

Traditionally, a prisoner was considered a "slave of the State," who had no rights for the sovereign to violate. This view was the precursor of the "hands-off" doctrine that precluded federal courts from entertaining state prisoners' allegations of unconstitutional treatment. The vitality of the doctrine was based upon two factors. First, there was a widespread belief that the sensitivity to local nuance, the opportunity for daily perseverance, and the requisite human and monetary resources rested not with a remote federal court, but rather with legislators, executives, and citizens in their communities. Second, there was a natural reluctance on the part of the judiciary to intervene in the affairs of internal prison administration that constitutional matters, the courts do occasionally refer to social science literature, if appropriate. Compare Beaulaharnis v. Illinois, 343 U.S. 250, 263 (1952) with Brown v. Board of Educ., 347 U.S. 483, 494-95 n.11 (1954).


Of course, the Supreme Court recently has dealt with various aspects of prison conditions, such as adequacy of medical treatment, see Estelle v. Gamble, 429 U.S. 97 (1976), access to the courts, see Bounds v. Smith, 430 U.S. 817 (1977), and regulations concerning a prisoners' labor union, see Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977). But the Court has yet to consider a case raising a broad variety of challenges to confinement conditions. An opportunity to hold prison conditions unconstitutional was declined in Burrell v. McCray, 426 U.S. 471 (1976). Cf. Alabama v. Pugh, 46 U.S.L.W. 3802 (July 3, 1978) (leaving undisturbed lower court's finding of eighth amendment violations); Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978) (30-day limitation on sentences to punitive isolation).


peared to involve a high degree of expertise and discretion.\(^{14}\) Directly opposed to the hands-off doctrine, however, is the eighth amendment to the United States Constitution, which, in pertinent part, provides that "cruel and unusual punishments [shall not be] inflicted."\(^{15}\) This amendment embodies the intent of the framers to proscribe torture and other barbarous punishment. The language of the amendment is general, however, and the problem soon arose of the application of this broad prohibition to specific punishments. The most enduring principle was formulated in 1958, in *Trop v. Dulles*:\(^{18}\)

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.\(^{17}\)

Two crucial questions were addressed under this pliant standard: first, what conduct is punishment?, and second, what punishment is cruel and unusual?

In answer to the first question, it has been held that punishment includes not only statutorily imposed sentences, but also ad hoc sentences meted out by prison officials.\(^{18}\) Chief Justice Burger has noted, in fact, that "[j]udicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments devised without specific authority by prison officials, not by legislatures."\(^{19}\) Further, primarily because *Trop v. Dulles* incorporated nonphysical punishment in the eighth amendment's proscription,\(^{20}\) the term "punishments" has been held to embrace conditions of incarceration that affect an entire prison population simply as a consequence of confinement.\(^{21}\) Because of the inherent flexibility of the *Trop* standard, its application to individual cases has been difficult to circumscribe.

The answer to the second question has, as recognized by the *Trop* standard, evolved over the years. At common law, some particularly brutal sanctions were


\(^{15}\) *U.S. Const. amend. VIII.*

\(^{16}\) 356 U.S. 86 (1958).

\(^{17}\) *Id.* at 100-01 (opinion of Warren, C.J.). Although the Chief Justice was speaking only for a plurality (with justices Black, Douglas, and Whittaker), a majority of the Court referred approvingly to these words in *Farman v. Georgia*, 408 U.S. 238 (1972). See *id.* at 242 (opinion of Douglas, J.); *id.* at 269-70 (opinion of Brennan, J.); *id.* at 306 n.1 (opinion of Stewart, J.); *id.* at 327 (opinion of Marshall, J.); *id.* at 409 (opinion of Blackmun, J.).


\(^{20}\) "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture . . . ." 356 U.S. at 101 (denationalization).

allowed for heinous crimes. Blackstone catalogued among the permissible punishments, for example, hanging, being drawn or dragged to the place of execution, disemboweling alive, beheading, quartering, public dissection, dismemberment of the hands or ears, and mutilation by slitting the nostrils or branding the hand or cheek. More recently, the courts predominantly have employed the “shock the conscience” test in reviewing abject prison conditions to determine the presence vel non of cruel and unusual punishment. Pursuant to this approach, a court bases its holding of unconstitutionality on a “cry of horror” at punishment that is “so foul, so inhuman and so violative of basic concepts of decency” that it shocks or disgusts people of reasonable sensitivity, and offends more than some mere “fastidious squeamishness or private sentimentalism.” This approach is indicative of an evolutionary theory of cruel and unusual punishment, without which the eighth amendment would provide little modern protection. It is clear, however, that the disposition is a subjective one, and arguably is effective only when the conditions of prison confinement are so readily discernible as to evoke predictable human affects. The value of the test diminishes critically, for example, when subtle penalties are involved—such as prison conditions that may affect inmates over long periods of time.

The subjectivity of this flexible standard of judicial review creates difficulties that are exacerbated by potential federal court intervention. The approach provides no guidelines by which state prison authorities might anticipate litigation and voluntarily conform to federal constitutional standards that are binding on the states. Mere moral outrage by a federal judge does little to provide prison officials with any basis for establishing prison policies and criteria of confinement. Consequently, one severe criticism leveled at the test is that it allows federal judges improvidently to roam at will in the limitless area of their beliefs, while leaving state officials to

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26 See Weems v. United States, 217 U.S. 349, 378 (1910) (The amendment “may be... progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”).
27 See, e.g., Sostre v. McGinnis, 442 F.2d 178, 208 (2d Cir. 1971) (en banc) (Feinberg, J., dissenting and concurring), cert. denied, 404 U.S. 1049, 405 U.S. 978 (1972) (“true inhumanity seeks to destroy the psyche rather than merely the body”).

The “shock the conscience” test is not the only test that has been employed. Others include a comparison of the sanction imposed with the act perpetrated in order to determine whether the punishment is excessive, see, e.g., O’Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting); Note, Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court, 16 Stan. L. Rev. 596, 1003-15 (1964); cf. Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 480 (1866) (“we perceive nothing excessive, cruel, or unusual in this [punishment]”); but see Gregg v. Georgia, 428 U.S. 153, 175 (1976) and determination of whether the punishment imposed is in excess of a legitimate penal aim, see, e.g., Weems v. United States, 217 U.S. 349, 371 (1910); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). See generally Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071 (1964); Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966). The former approach, which was developed in cases involving the trial judge’s
speculate on how the Constitution will be interpreted. Another criticism of the test is that it eliminates the deference traditionally accorded to state penological experts. Contrariwise, proponents of federal intervention argue that in light of changing conceptions of humane treatment, it is beneficial to provide for oversight of those who make the transitory determinations in the individual states. At its base, then, the question becomes whether, in our sullen state of less-than-perfect knowledge, it is to be federal or state officials who do the guessing on the desirability and constitutionality of conditions of prison confinement.

II. Totality of Prison Conditions: The Emerging Concept

If the standard for adjudging eighth amendment violations in prison is inexact, at least one thing is clear—many prisons have generally deplorable conditions, and certain conditions are universally viewed as inhumane. The classic example is Holt v. Sarver, which chronicled a multitude of substandard prison conditions that stand as a sordid shrine in American correctional history. Highlighting the unconstitutional situation were a brutal trusty system and open-barrack sleeping or prison official's discretionary power in imposing specific sanctions, which generally increased those already meted out at sentencing, see, e.g., Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), enforced, 354 F. Supp. 1302 (E.D. Va. 1973); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970), aff'd in part and rev'd in part, cert. denied, 409 U.S. 885 (1972); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); see generally Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841, 852-55 (1971), arguably is particularly inappropriate in evaluating ongoing conditions of confinement for the general prison population. The latter approach is even more amorphous and subjective, for it balances two imponderables—the judge's shocked conscience and the penological justification for imprisonment. With individual punishments, the question of state justification is a matter subject to expertise and objective data. But in cases involving a challenge to widespread prison conditions, the state's penological justification necessarily broadens, and the debate rarely will stop short of questioning the very concept of prison itself. See, e.g., Morales v. Schmidt, 340 F. Supp. 544, 548-49 (W.D. Wis. 1972) ("I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational.").


See generally President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 4 (1967): There are today about 400 institutions for adult felons in this country, ranging from some of the oldest and largest prisons in the world to forestry camps for 30 or 40 trusted inmates. Some are grossly understaffed and underequipped—conspicuous products of public indifference. Overcrowding and idleness are the salient features of some, brutality and corruption of a few others. Far too few are well organized and adequately funded. Juvenile institutions tend to be better, but also vary greatly. The local jails and workhouses that handle most misdemeanants are generally the most inadequate in every way.

See also Wolfish v. Levi, 573 F.2d 118, 120 (2d Cir. 1978) (opinion of Kaufman, C.J.): When the history of our criminal justice system is chronicled, no doubt one of its most sobering pages will describe the sad state of this nation's prisons and jails. Whether it be in filthy, narrow cells of an Alabama penitentiary or in overcrowded dormitories in a Bronx house of detention, we have quartered individuals . . . under conditions that shock the conscience of civilized men.

A separate but related question is, of course, whether such conditions are justified. In order to determine this, however, we first must determine the principal aims of the "correctional" system. See generally Robbins, Book Review, 77 Colum. L. Rev. 153 (1977); Robbins, Book Review, 62 Va. L. Rev. 462, 464-65, 468 & n.36 (1976).

arrangements. Because of inadequate staffing, the Arkansas prison system depended primarily on armed inmate trustees for prison discipline as well as for controlling most aspects of the prisoners' lives. Among other abuses, this led to an unhealthy prison atmosphere, bred fear and hatred between the guards, on the one hand, and those guarded, on the other hand, and tended to be brutal and to endanger the lives of inmates who lived and worked under the guns of other convicts. The open barracks were found to encourage sexual attacks and other forms of violence, for although one purpose of locked cells is to keep certain persons in, another not insignificant objective is to keep others out. In an eighteen month period, there were seventeen stabbings at one Arkansas prison, four of them fatal, all but one of them taking place in the barracks. In addition, the cumulation of undesirable conditions included overcrowding, inadequate medical and dental facilities, unsanitary kitchen facilities, churlish policies regarding personal hygiene, and an absence of meaningful rehabilitation programs.

A more recent and renowned example is that of the Alabama prison system, the living conditions of which, in Pugh v. Locke, were held to constitute cruel and unusual punishment. Foremost among the determinants was severe overcrowding, which the court found to be primarily responsible for all the other ills of Alabama's penal system appears in Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978). See also note 39 infra.

See 309 F. Supp. at 373-76.


309 F. Supp. at 373.

Id. at 380.

Id.

Id.

Id. at 378-79. In no uncertain terms, the Holt court declared that Arkansas was not at liberty to afford its inmates only those constitutional rights that fit comfortably within its budget:

Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalties does not depend upon what the Legislature may do, ... or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

Id. at 385. Accord, Pugh v. Locke, 406 F. Supp. 318, 330-31 (M.D. Ala. 1976), aff'd and remanded sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), remanded with instructions sub nom. Alabama v. Pugh, 46 U.S.L.W. 3802 (July 3, 1978). It is interesting to note, therefore, that the entire Arkansas prison system, whose scandal (along with the 1971 Attica riot) was an impetus to world-wide attention on America's prisons, remains in federal court custody eight years after the initial ruling. According to Professor Thomas Murton, a former superintendent of the Arkansas system until March 1968. The latest judicial word on the Arkansas penal system appears in Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978). See also note 39 infra.
penal system.\(^4^1\) For example, the lack of adequate facilities mandated the total abnegation of a prison classification system,\(^4^2\) so that the ten percent of the prison population known to be psychotic,\(^4^3\) as well as many others known to be violently disposed, was dispersed throughout the several prisons.\(^4^4\) The physical plants, electrical wiring, heating, plumbing, and ventilation were in disrepair, and the decrepit facilities promoted the gross infestation of vermin.\(^4^5\) Food service equipment and storage and preparation techniques were unsanitary, and personal hygiene among the inmates presented an insurmountable problem.\(^4^6\) Moreover, overworked prison personnel contributed considerably to "the rampant violence and jungle atmosphere."\(^4^7\) Indeed, a United States public health officer toured the four main Alabama prisons and found them to be "wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors."\(^4^8\) The officer further testified that, if such facilities were under his jurisdiction, he would recommend that they be closed and condemned as an imminent danger to the health of the individuals exposed to them.\(^4^9\) Finally, the court characterized the vocational, educational, work, and recreational programs available to the inmates as "totally inadequate to provide reasonable opportunities for rehabilitation—or even to prevent physical and mental deterioration—of most of the inmate population."\(^5^0\)

If \textit{Pugh v. Locke} is a prime example of the type of prison conditions that might constitute cruel and unusual punishment, it is also valuable as an example of federal judicial intervention in a state prison system for the purpose of eradicating those unconstitutional conditions. In response to the ubiquitous ills that plagued the Alabama prisons, the court devised an equally all-encompassing remedy. First, it promulgated a detailed set of "Minimum Constitutional Standards for Inmates of [the] Alabama Penal System,"\(^5^1\) and ordered the defendants to report six months later concerning the progress made in the implementation of each and every standard.\(^5^2\) The court also ordered the State to form a thirty-nine member "Human Rights Committee" to monitor the implementation of the standards.\(^5^3\) Finally, the defendant state officials were placed on notice that their failure to comply with the minimum constitutional standards would necessitate the closing of the prison facilities.\(^5^4\)

Taken together, these requirements constituted the most ambitious federal judicial intervention in the field of state corrections. Prior to \textit{Pugh v. Locke}, the federal courts had drawn upon venerable forms of equitable relief. The availability of class actions and the need to respond to specific unconstitutional prison conditions had

\(^{41}\) See 406 F. Supp. at 323. The court noted that at the time of trial some 3550 inmates were housed in institutions designed to hold no more than 2307 inmates. \textit{Id.} at 322. Accord, \textit{McCray v. Sullivan}, 399 F. Supp. 271 (S.D. Ala. 1975).

\(^{42}\) 406 F. Supp. at 324-25.

\(^{43}\) \textit{Id.} at 324.

\(^{44}\) \textit{Id.}

\(^{45}\) \textit{Id.} at 323.

\(^{46}\) \textit{Id.}

\(^{47}\) \textit{Id.} at 325.

\(^{48}\) \textit{Id.} at 323-24.

\(^{49}\) \textit{Id.} at 324.

\(^{50}\) \textit{Id.} at 326.

\(^{51}\) \textit{Id.} at 332. See notes 59-67 and accompanying text infra.

\(^{52}\) \textit{Id.} See M. Harris \& D. Spiller, \textit{After Decision: Implementation of Judicial Decrees in Correctional Settings} (1977).

\(^{53}\) \textit{Id.} at 331. See notes 68-72 and accompanying text infra.

\(^{54}\) \textit{Id.}
prompted a wide range of acceptable responses from the courts, including the common injunctive requirement of presenting the court with a plan for correcting the constitutional infirmities,\(^6\) using mediation to achieve a compromise between stand-ards desired by the inmates and the feasibility of their implementation by prison administrators and personnel,\(^6\) threatening to close various institutions,\(^7\) and retaining jurisdiction over the case while requiring periodic progress reports.\(^8\) In *Pugh*, however, in congruence with the wide range of factors contributing to the holding of unconstitutionality, the federal court interpreted its powers broadly to establish both minimum constitutional standards and a citizen's panel to monitor and supervise all penal reform in the State of Alabama.

Of crucial import to this exposition is that in assessing the court's minimum standards, it is immediately apparent that many lack specific constitutional foundation. Furthermore, as a policy matter, the desirability of the measures proposed is not clear. One example is the requirement that every inmate be furnished with a storage locker and lock.\(^5\) On the one hand, such a practice might alleviate the perennial problems of thievery among inmates and illegal confiscation or destruction of inmate property by prison officials.\(^6\) In addition, the lockers might enhance an inmate's sense of personal dignity by providing a secure area for private possessions.\(^6\) On the other hand, prison authorities might argue that such a policy would

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\(^{3}\)See generally Brennerman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972) (regular reports on efforts to comply with district court's order). In *Pugh v. Locke*, the district court expressly retained jurisdiction. 406 F. Supp. at 332. For a recent review of implementation alternatives see Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977), describing institutional reform litigation as a "cheap method of pricking powerful consciences," so that the suffering of people who inhabit these "unsettling places" does not fade from the public eye. *Id.* at 463.

\(^{2}\)See 406 F. Supp. at 334.

\(^{1}\)See generally Robbins & Herman, *Litigating Without a Counsel*: Faretta or for Worse, 42 BROOKLYN L. REV. 629, 656-57 n.162 (1976).


When visitors did come, the experience was degrading for both visitors and inmate. Before enter-ing and after leaving the visiting room, the inmate was subjected to a strip search designed to uncover contraband. All possible places of concealment were investigated, including "his mouth, ears, hair, the bottom of his feet, under his arms, around the testicles, and in the rectum." For judicial commentary on the inmate's privacy right see Hedges v. Klein, 412 F. Supp. 896 (D.N.J. 1976) (strip searches); Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966) (media at parole hearing).
encourage the possession of contraband.62 Regardless of the relative strength of these policy arguments, however, in this one arguably minor but typical instance the court clearly moved from conventional notions of alleviation of cruel and unusual punishment to what typically has qualified as the nonconstitutional and extra-judicial realm of prison reform.68

Other examples of the Pugh court’s reform emphasis are the requirements that every inmate, prior to release, be afforded the opportunity to participate in some transitional program designed to aid in his or her re-entry into society,64 and that, in order to avoid “dehabilitation,”65 prison officials assign every inmate to a meaningful job66 and provide the opportunity for every inmate to receive a basic education and to participate in vocational training programs designed to teach a marketable skill.67 Again, the outline and details of such programs, although perhaps desirable, have no firm root in the Constitution.

The establishment of the Human Rights Committee also lends itself to serious debate, for arguably the court adopted an intermediate approach that formulated specific guidelines yet still left much of the supervision and implementation of the decree in the hands of local officials.68 This imaginative and workable accommodation between the principle of federalism and the need for protection of constitutional rights also helps to answer the related objection to federal courts’ lack of expertise in prison affairs, for the Committee was ensured both a qualified staff69 and the authority to engage and consult appropriate, independent specialists.70 To be sure, the formation and functioning of such a panel could prove to be unwieldy and expensive in practice. But when the situation requires continued oversight to guarantee compliance with the court order,71 an expert committee composed of members of the local community would be preferable to a lone federal judge with little or no experience in prison administration.72
In any event, as with most controversial decisions, the district court’s interpretation of the Constitution was not the final one. On appeal to the United States Court of Appeals, the lower court order was modified in several important respects. First, the Fifth Circuit held that a state has no obligation to provide prisoners with opportunities to obtain a basic education, to attend vocational school, or to participate in a transitional program prior to release. Second, the court held that the state’s failure to provide a rehabilitation program for inmates, in and of itself, was not cruel and unusual punishment. Next, the court determined that the lower court overstepped its bounds when, in order to reduce overcrowding and eliminate its concomitant problems, it had ordered the state to furnish each prisoner with at least sixty square feet of living space. Finally, the court disapproved the establishment of the Human Rights Committee. Instead, one monitor was to be delegated to oversee each institution, but with no authority to intervene in daily prison operations.

In essence, the [District] Court was faced with the alternative either of issuing an order which detailed minimum standards for the prison system and which ensured, through the establishment of a Human Rights Committee, that these standards would be implemented, or of acknowledging that gross constitutional violations existed in the prison system but declaring that there was no judicial remedy for ameliorating them. To have [chosen the latter course] would have been an abdication of the Court’s judicial and constitutional responsibilities.

In one sense, this aspect of the appellate court's decision was merely a further indication of the mercurial nature of applicable eighth amendment standards. The opinion showed that not only must state officials divine federal judicial interpretations, but, to a certain extent, district court judges also must conjecture not only about the boundaries of their authority as ultimately determined by the higher courts, but also about the borders of their own interpretations of the Constitution—for in the law some theory is always at hand to achieve what any court perceives to be the ends of justice. In another sense, however, the appellate decision in the Alabama case secured a new doctrine for the application of the cruel and unusual punishment clause in the prison context—the totality of conditions of confinement. The court stated that

the steps taken by the District Court to ensure reasonably adequate food, clothing, shelter, sanitation, necessary medical attention, and personal safety for the prisoners were within its sound discretion . . . . Some of the steps in regard to these matters, if considered in isolation, may have gone beyond constitutional mandates but they were justifiably invoked for the eradication of Eighth Amendment conditions.

The "totality of conditions" approach bases the right to relief on a synergistic multiplicity of considerations, and forces the court to adopt a remedy that responds

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79 This is intended to be a description of reality, rather than a statement of pessimism. See, e.g., Traynor, The Limits of Judicial Creativity, 63 Iowa L. Rev. 1, 13 (1977): [W]ell-tempered judges will do the best they can, within the constraints of their responsibility, to stabilize the explosive forces of the day. They are not miracle workers, but it will be miracle enough if they do everything within their power of reasoning to make each day in court something more than a mere day of judgment. See also notes 107-12 and accompanying text infra.

80 See, e.g., Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978): "We find no error in the court's conclusion . . . . conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishments." Id. at 4819 (emphasis supplied).

81 The foci include the physical facilities, see, e.g., Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974) (exposed and frayed wiring, lack of adequate fire fighting equipment, defective water system, sewage system condemned by state health and pollution agencies); overcrowding, see, e.g., Pugh v. Locke, 406 F. Supp. 318, 323 (M.D. Ala. 1976), aff'd and remanded sub nom., Newman v. Alabama, 359 F.2d 283 (5th Cir. 1977), remanded with instructions sub nom., Alabama v. Pugh, 46 U.S.L.W. 3802 (July 3, 1978) (overcrowding exacerbated all other ills of the state prison system); absence of a classification system, see, e.g., Jones v. Wittenberg, 330 F. Supp. 707, 717 (N.D. Ohio 1971), aff'd sub nom., Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (pretrial detainees not properly separated from convicted offenders); isolation and segregation cells, see, e.g., Holt v. Sarver, 309 F. Supp. 362, 378 (E.D. Ark. 1970), aff'd and remanded, 442 F.2d 304 (8th Cir. 1971); medical facilities and treatment, see, e.g., Estelle v. Gamble, 429 U.S. 97 (1976); Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974) (inadequate attention to physical health); Neiser, Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care, 63 Va. L. Rev. 921 (1977); food service, see, e.g., Miller v. Carson, 401 F. Supp. 835, 880 (M.D. Fla. 1975) (food served and handled by uncertified corrections officers and trustees); personal hygiene and sanitation, see, e.g., Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. 83, 94, 280 A.2d 110, 115 (1971) (cells infested with cockroaches and rats); protection from violence, see, e.g., Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (prisoner need not wait until he is actually assaulted to obtain relief); prison personnel, see, e.g., Pugh v. Locke, 406 F. Supp. at 325 (minimum of 692 guards needed, but only 385 employed); rehabilitation programs, see, e.g., id. at 325-27; and other plagues—freedom from racial segregation, see, e.g., Toles v. Katzenbach, 332 F.2d 107 (9th Cir. 1966); protection against unreasonable searches and seizures, see, e.g., Lanza v. New York, 370 U.S. 139 (1962); preservation of first amendment freedoms, see, e.g., Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); but cf. Houchins v. KQED, Inc., 46 U.S.L.W. 4830 (June 26, 1978) (news media has no right of access to governmental information
to each of them—a remedy that inevitably would be far-ranging. It may seem ironic, nonetheless, that inmate-plaintiffs who are unable to make out a constitutional cause of action on any one prison condition in effect may receive the same relief as if they had made out and succeeded on many such claims. It only adds to the irony that such inmates also might be entitled to a plethora of remedies that require significantly more intensive and constitutionally less obvious federal court supervision over state agencies than the remedies available under any one such claim would require.

Nevertheless, this approach seems logical when one considers that insofar as the eighth amendment's ban on cruel and unusual punishment covers the totality of prison conditions, the remedy for violations of that ban necessarily must intrude in that same totality. Moreover, for several reasons, the remedy is unlikely to be successful unless it attempts significantly and quite specifically to cure each of the offending conditions, even if, theoretically, a slight improvement of each offending element would have removed the constitutional infirmity of the overall conditions of confinement. First, an effort at piecemeal or modest improvement in conditions is not likely to result in comprehensive reformation; for example, ordering a shift of resources to repair the leaking plumbing in one cellblock simply may result in the neglect of plumbing problems in other cellblocks. Further, in an effort to avoid detailed guidelines, a court order often may succumb to vague and overly broad principles of conduct that are easily ignored, evaded, or misconstrued. In addition, by addressing unconstitutional conditions of confinement cumulatively, the federal courts could function without unduly encumbering their time and energies. Traditionally, the courts have relied on case by case adjudication of individual prisoner complaints, and on remedies limited to a particular plaintiff and very specific constitutional imperfections, in order to accomplish eighth amendment goals. But recently these complaints have increased in number beyond easily manageable levels. By following a comprehensive approach, however, courts can prescribe an extensive program for remediying the totality of unconstitutional conditions. Finally, an activist trend of judicial supervision may induce legislative and administrative action to remedy undesirable conditions of prison confinement.


"See note 39 supra.


The Governor of Missouri, for example, recently signed into law legislation increasing state payments
Thus, despite the precariousness of its constitutional bases and the enormity of its federal judicial involvement in state penal affairs, the totality of conditions approach represents a well-conceived and minimally intrusive means of effectively bringing a modicum of order, sanitation, rehabilitation, and basic livability to state prisons. It must never be forgotten that, for tens of thousands of inmates, the conditions of prison confinement are the very conditions of their existence. Thus we are dealing not merely with constitutional rights, but with human rights as well.60 Therefore, because the totality of conditions doctrine provides the only viable analytical approach to assuring that prison confinement—the most common punishment meted out to serious offenders by the states' criminal justice systems—is not cruel and unusual, its widespread application may follow inexorably from a commitment to pursue seriously the eighth amendment's mandate of humane and decent treatment in the prison setting.

III. THE THEORETICAL FOUNDATION FOR FEDERAL JUDICIAL INVOLVEMENT IN STATE PRISON REFORM

To a great extent, the ultimate question presented by this Article is: Who will take the initiative in charting the perimeters of a maturing society? The answer to this question concerns one's view of the legal system itself, and civil rights more extensive than only in the prison setting. That is to say, our society relies upon the judiciary to play a critical role in preserving the equilibrium between governmental powers and immunities, on the one hand, and individual rights, privileges, and disabilities, on the other hand.87 Thus, we must confront the principles that the powers of government should be separate and distinct88 and that the federal judiciary is not empowered to participate in what are essentially political affairs.89 But we also must squarely face the reality of intransigent opposition among state officials to county jail facilities, because "[f]ederal court decisions in Missouri have made it clear that under our United States Constitution certain jail standards must be met; otherwise, the courts may order necessary changes." Kansas City Star, June 23, 1976, § A, at 3, col. 3. See also id., May 31, 1976, at 18, col. 1 (discussing Pugh v. Locke).

Of course, federal court instigation of state penal reform provides no guarantee that changes will be either substantive or permanent. For example, five years after the original Holt v. Sarver case, 300 F. Supp. 825 (E.D. Ark. 1969), supplemented, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971), the Eighth Circuit Court of Appeals unanimously reversed in part a lower court ruling releasing the Arkansas prison system from active judicial supervision, stating:

Based on the overall record before us, it is our firm conviction that the Arkansas correctional system is still unconstitutional. We are fully cognizant of the considerable progress which has been made by the Board of Corrections with the minimal resources at hand. However, we confront a record and factual history of sub-human environment in which individuals have been confined under the color of state law. The effort to make some amelioration of those conditions will simply not suffice. Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 215 (8th Cir. 1974) (emphasis in original). See also Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978); note 39 supra.

87 See, e.g., Joint Committee on Legal Status of Prisoners, Tentative Draft on Standards Relating to the Legal Status of Prisoners, 14 Am. Crim. L. Rev. 377, 378 (1977): "For the most part these standards define the essentials of human liberty and dignity as it should exist—not only for part but for all of society." See generally M. Foucault, Discipline and Punish: The Birth of the Prison (1977).

86 For the relationships among these concepts see Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917); Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913). See also Cook, Hohfeld's Contributions to the Science of Law, 28 Yale L.J. 721 (1919).

85 See The Federalist Nos. 47, 48 (J. Madison).

84 See U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).
who have neglected or refused to correct unconstitutional or unlawful state policies and practices.

Put differently, the fourteenth amendment—which, by incorporating the eighth amendment and applying it to the states, engenders most of the litigation addressed in this Article—forbids a state to “deprive any person of life, liberty, or property, without due process of law.”90 The Supreme Court has interpreted this phrase to require that the states fulfill most of the obligations toward citizens that the Bill of Rights imposes on the federal government.91 Thus, each state, in all of its relations with its people, must descry and defend their federally-guaranteed freedoms. Yet state officials frequently have preferred the tenth amendment’s residuum of state powers as a defense to the exercise of federal jurisdiction over actions alleging state violations of federal constitutional rights.92 This amendment, however, does not relieve the states of any obligation imposed upon them by the Constitution, nor permit them to frustrate or ignore its mandates. Thus, whether through the ineptitude of state officials, their lack of sensitivity, or their attitude that politically unpopular decisions such as comprehensive prison reform should be avoided93 it is the role of the federal courts, as the Supreme Court has noted, “not to supervise prisons but to enforce the constitutional rights of all ‘persons,’ including prisoners.”94

An analogous situation concerns the protracted litigation that has been brought to compel local school officials to conform to a rule of law first announced by the Supreme Court some twenty-four years ago in Brown v. Board of Education.95 Those cases have set ample precedent for federal intervention in activities traditionally left

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90 U.S. Const. amend. XIV.
91 See Duncan v. Louisiana, 391 U.S. 145 (1968). This includes the cruel and unusual punishment clause of the eighth amendment, Robinson v. California, 370 U.S. 660 (1962), but not the fifth amendment requirement that criminal prosecutions be initiated by presentment or indictment of a grand jury. See Hurtado v. California, 110 U.S. 516 (1884).
93 See McCormack, supra note 84, at 536: “The Alabama Federal Intervention Syndrome . . . is the tendency of many state officials to punt their problems to the federal courts. Many federal judges have grown accustomed to allowing state officials to make political speeches as a prelude to receiving the order of the district court. This role raises the familiar criticism that state officials rely upon the federal courts to impose needed reforms rather than accomplishing them themselves. See also Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049, 405 U.S. 978 (1972); Traynor, The Limits of Judicial Creativity, 63 Iowa L. Rev. 1, 4 (1977).
within the province of the states when there was a history of noncompliance with constitutional dictates. Because there was no obviously less intrusive measure to cure the situation, the Supreme Court not only had permitted but also had mandated imaginative expansion of federal equity powers to deal with deprivations of constitutional rights.

What is primarily at issue in these circumstances is the function of the federal judiciary in a free society. Justice Harlan neatly put the problem in perspective:

From the beginning . . . two views as to the proper role of the [federal judiciary] in our governmental system have existed . . . .

The one [view] is that the [courts] should stand ready to bring about needed basic changes in our society which for one reason or another have failed or lagged in their accomplishment by other means.

The other [view] is that such changes are best left to the political process and should not be undertaken by judges who, as they should be because of their office, are beyond the reach of political considerations . . . .

The admonition of the latter view comes too late, however, for constitutional courts have been firmly entrenched in the "political thicket" since Marbury v. Madison. The debate is enlivened by Chief Justice Marshall himself, who did not want to be remembered either for having sought "to enlarge the judicial power beyond its proper bounds," or for having "feared to carry it to the fullest extent duty required."

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97 "[T]he remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to [correct constitutional infirmities]." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Id. at 15. But see Rizzo v. Goode, 423 U.S. 362, 377 (1976), discussed in Punitive Conditions, supra note 3. See generally Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978); Comment, Equitable Remedies Available to a Federal Court After Declaring an Entire Prison System Violates the Eighth Amendment, 1 Cap. U. L. Rev. 191 (1972). See also Hutto v. Finney, 46 U.S.L.W. 4817, 4819 (June 23, 1978) ("taking the long and unhappy history of the [Arkansas prison] litigation into account, the [district court] was justified in entering a comprehensive order to insure against the risk of inadequate compliance").
99 See U.S. News & World Report, Dec. 18, 1967, at 36. Rather dolefully, Justice Harlan's speech at Princeton University concluded that "[t]here can be little doubt but that the former, broader role of the [federal courts] is the one currently in vogue, and that it is resulting in the accomplishment of basic changes in governmental relationships." Id.
100 See Colgrove v. Green, 328 U.S. 549, 566 (1946) (Frankfurter, J., concurring). For Justice Frankfurter, the "political thicket" sign prompted total judicial abstinence. For another eminent jurist, it means a "caution to walk carefully in the work of interpreting and determining the validity of the legislature's efforts to structure the political process," such as reapportionment and ballot access cases, without encompassing the demise that some constitutional questions are "political questions" that are nonjusticiable in the federal courts. Leventhal, Courts and Political Thickets, 77 Colum. L. Rev. 345, 346 (1977). Nevertheless, Judge Leventhal's conclusion applies equally well to the thicket ensnared by Frankfurter and Marshall:

It is the genius of the American system that it makes changes incrementally, rather than in response to some grand philosophical overhaul. The changes that have been made and will be made must be tested for constitutional soundness . . . . The courts should not shrink from entering political thickets when necessary to correct injustice, and they will not. But they should [proceed carefully and pragmatically].
101 Id. at 387.
This paradox of judicial activism\textsuperscript{104} arises because, although the legislative branch of government is charged with making political decisions,\textsuperscript{105} every power by which one organ of government is enabled to control another is inescapably political.\textsuperscript{106} Whatever positions judges take on controversial issues are merely reflective of similar positions held in the citizenry at large.\textsuperscript{107} In short, the judiciary is not "a unique

\textsuperscript{104}See Mason, supra note 98, at 411:

Whatever the values involved, judicial activism results in a paradox at the heart of constitutional interpretation. While wearing the magical habiliments of the law, the Justices take sides on controversial issues. The Court must face up to the political implications of judicial review and at the same time keep alive the mystery that it is merely declaring the law.

\textsuperscript{105}U.S. CONST. art. I, § 1: "All legislative Powers herein granted shall be vested in the Congress of the United States ... ."

\textsuperscript{106}See Eakin v. Raub, 12 Serg. & Rawl. 330, 348 (Pa. 1825) (Gibson, J., dissenting). See also 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (P. Bradley ed. 1945): "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." The ramifications of this observation are masterfully explored in Aldiert, The Role of the Courts in Contemporary Society, 38 U. PITT. L. REV. 437 (1977). Ironically, the ostensible occasion of de Tocqueville's journey to the United States was to report to the French government on American penitentiaries, yet his prison report nowhere mentioned a role for the courts in the reform or supervision of the penitentiaries. See G. De BEAUMONT & A. DE TOCQUEVILLE, PENTITENTIARY SYSTEM IN THE UNITED STATES (1833). Democracy in America, however, did add the topic of prison reform:

While the new penitentiaries were being erected and the will of the majority was hastening the work, the old prisons still existed and contained a great number of offenders. These jails became more unwholesome and corrupt in proportion as the new establishments were reformed and improved, forming a contrast that may readily be understood. The majority was so eagerly employed in founding the new prisons that those which already existed were forgotten; and as the general attention was diverted to a novel object, the care which had hitherto been bestowed upon the others ceased. . . . [J]n the immediate neighborhood of a prison that bore witness to the mild and enlightened spirit of our times, dungeons existed that reminded one of the barbarism of the Middle Ages.


\textsuperscript{107}This is not to say, of course, that this aspect of the courts' decision-making is free of criticism. One interesting source of commentary on judicial activism is the judiciary itself (usually in dissenting opinions), even though "[e]very Justice has been accused of legislating and every one has joined in that accusation of others." R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 80 (Harper Torchbook ed. 1963). See, e.g., Vermont Yankee Nuclear Corp. v. National Resources Defense Council, 46 U.S.L.W. 4301, 4310 (1978) (accusing lower court of "judicial intervention run riot"); Teleprompter Corp. v. Columbia Broadcasting Sys., Inc, 415 U.S. 394, 419 (1974) (Douglas, J., dissenting) ("The Court's result reads the Copyright Act out of existence . . . . That may or may not be desirable public policy. But it is a legislative decision that not even a rampant judicial activism should entertain."); United States v. Wade, 388 U.S. 218, 250 (Black, J., dissenting in part and concurring in part) ("I . . . feel that we are deciding what the Constitution is, not from what it says, but from what we think would have been put into it by the Framers were they to put it in. That to me is 'judicial activism' at its worst."); Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 895 (3d Cir. 1976) (Gibbons, J., dissenting); Burquez v. Immigration & Naturalization Serv., 513 F.2d 751, 755 (10th Cir. 1975) ("To hold otherwise would involve judicial activism into a political, legislative and/or executive arena."); Citizens Comm. v. Lindsay, 507 F.2d 1065, 1072 (2d Cir. 1974) (Oakes, J., dissenting); Morales v. Schmidt, 489 F.2d 1335, 1339 n.5 (7th Cir. 1973); Associated Indus. v. United States Dept of Labor, 487 F.2d 342, 354 (2d Cir. 1973) ("Courts may well end up doing much less than Congress intended or a more likely and graver threat in these days of judicial activism, much more than Congress had wished."); Von Steichter v. United States, 472 F.2d 1244, 1252-53 (D.C. Cir. 1972) (Wright, J., dissenting) ("I have never been one who believed that judges should check in their common sense when they assume the bench or that studied myopia is a good substitute for judgment and wisdom. But neither do I think the case for judicial activism need rest on the obviously false premise that judges are omniscient and omnipotent.""); Bredhoff v. Government of Virgin Islands, 415 F. Supp. 1218, 1231 (D.V.I. 1976) (holding prison conditions unconstitutional) ("This Court will not shy away in the face of judicial activism when it acts to protect the fundamental constitutional rights of the persons protected thereby."); Pearson v. Townsend, 362 F. Supp. 207, 215-16 (D.S.C. 1973) (refusing to hold prison conditions unconstitutional); Acanfora v. Board of Educ., 359 F. Supp. 843, 850 (D. Md. 1973) ("While a court must necessarily bear a sense of proportion, with respect to precedent and social mores, a rigidly restrictive theory of interpretation, avoiding the dangers of judicial activism, is open to criticism for abdication of the duty to expound the Constitution."); Terry v. Elmwood Cemetery, 269 F. Supp. 60, 64 (E.D. La. 1967); Carroll v. Kittle, 203 Kan. 841, 852, 457 P.2d 21, 30 (1969) (Price, C.J., dissenting) ("This decision is another example of the wave of 'judicial activism' that has been sweeping this country in recent years."). It is ironic that, in Teleprompter Corp., superactivist Justice Douglas would criticize any mode of judicial
body of impervious legal technicians [who are] above and beyond the political struggle. 108 Whether they are strongly political or wrongly political, judges are in fact creators as well as curators of our nation's laws, 109 for "[c]ourts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values." 110 Because the law ultimately deals with human conduct, 111 it must meet changing and changeable human needs, attitudes, and expectations. 112 Thus, whether it is seen in a positive sense, enlarging human freedom, or in a negative sense, restricting it, 113 judicial activism, by insuring a never-ending dialogue, is a dedication to free government, 114 and a guarantor of the integrity of our legal system. 115

IV. Conclusion

Axiomatically, resolution of the questions presented by this Article is not an untroubled one, for although it may be helpful to speak in terms of equilibrium, duty, obligations, rights, responsibilities, power, and proper bounds, it is an entirely different process to determine their meanings. This is precisely one reason for having a judicial branch of government. 116 There are no absolutes in a dynamic activism. See generally B. Wolfman, J. Silver & M. Silver, Dissent Without Opinion (1975). For other commentary on judicial activism see e.g., Wyzanski, An Activist Judge: Mea Maxima Culpa. Apologia, Pro Vita Mea., 7 GA. L. REV. 202, 221-24 (1973); Comment, Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence, 21 U.C.L.A. L. REV. 1566 (1974); Comment, Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone?, 56 Va. L. REV. 295 (1970). See also Bickel, Is the Warren Court Too "Political"? N.Y. TIMES, Sept. 25, 1966, § 6 (Magazine), at 30; Cummerford, Judicial Jumble: Activism as a Threat to "Government of Laws and Not of Men", Wall St. J., Apr. 22, 1968, at 18, col. 4.

For a thoughtful and not despairing defense of an activist judicial role in systemic prison reform see Developments in the Law—Section 1983 and Federalism, 90 HARV. L. REV. 1133, 1227-36, 1240-50 (1977). "[A]n active mind is not to be confused with the misbegotten catch phrase, judicial activism, as it has too frequently been confused by the slovenly of speech." Traylor, The Limits of Judicial Creativity, 63 IOWA L. REV. 1, 5 (1977).


109 In Weems v. United States, 217 U.S. 349 (1910), an eighth amendment cruel and unusual punishment case, the Supreme Court stated: "The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation . . . but constitutional ones, and what those are the judiciary must judge." Id. at 379.


113 See Mason, supra note 98, at 387. Indeed, the framers of the Constitution enacted the Bill of Rights to insulate the delicate balance between liberty and security from passing emergencies and from political might. They looked to "independent tribunals of justice" to provide, in the words of James Madison, "an impenetrable bulwark against every assumption of power" by the branches of government that were closer to the political process. See Address by James Madison, House of Representatives (June 8, 1879), reprinted in 2 B. Schwartz, The Bill of Rights: A Documentary History 1031 (1971).

114 Mason, supra note 98, at 426. See also H. Baldwin, A General View of the Origin and Nature of the Constitution and Government of the United States 3 (1837): The history and spirit of the times, past and present, admonish us that new versions of the constitution will be promulgated, to meet the ever varying course of political events, or aspirations of power; and that if we suffer our judgments to be influenced by what has been pressed upon us as authority for present adjudication, we must pay the same respect to the same kind of authority when future opinions shall be formed, and new expostions be announced.


society, in which realizing the mutability of seemingly immutable truths is a common occurrence. Writing that "[t]ime works changes, [and] brings into existence new conditions and purposes," the Supreme Court has elaborated upon this principle of fluidity in the context of the cruel and unusual punishment clause with the prototype of evolving standards of human decency.

Without any doubt, there are problems in surmising federal judges' expositions of statutory, constitutional, and case law in advance of a verisimilar controversy. But this process is an integral of a viable legal system—which exists not to perfect society, but instead to order, control, protect, and preserve it—for only through anticipation, deliberation, reasoned compromise, and the common pursuit of truth (the law is "[t]he prophecies of what the courts will do in fact, and nothing more pretentious . . . "); Speech by Chief Justice Hughes, Elmira Chamber of Commerce, Elmira, N.Y. (May 3, 1970), reprinted in C. HUGHES, ADDRESSES OF CHARLES EVANS HUGHES 1906-1916, at 179, 185 (2d ed. 1961) ("the Constitution is what the judges say it is"); See also United States v. Nixon, 418 U.S. 683, 703-05 (1974).

See e.g., Dennis v. United States, 341 U.S. 583, 508 (1951) ("Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature."); Towne v. Eisner, 245 U.S. 418, 425 (1918) (opinion of Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."); Weems v. United States, 217 U.S. 349, 373 (1910) ("Rights declared in words might be lost in reality."); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28 (1921) ("Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming'."); Robbins, The Admissibility of Social Science Evidence in Person-Oriented Legal Adjudication, 50 IND. L.J. 493, 508-16 (1975). "In an evolving democratic society, there are, inevitably, no final answers." Time, July 10, 1978, at 16, col. 3, discussing Regents of the Univ. of Calif. v. Bakke, 46 U.S.L.W. 4896 (June 28, 1978) (reverse discrimination). In the context of the Soviet prison system, Solzhenitsyn writes that "[a]ll classifications in this world lack sharp boundaries, and all transitions are gradual." A. SOLZHENITSYN, 2 THE GULAG ARCHIPELAGO 1918-1956: AN EXPERIMENT IN LITERARY INVESTIGATION 252 (1973). A particularly appropriate example in the American setting is whether prison rehabilitation programs should be constitutionally mandated. See note 75 and accompanying text supra. "[T]his Court knows that a sociological theory or idea may ripen into constitutional law; many such theories and ideas have done so. But, this Court is not prepared to say that such a ripening has occurred as yet as far as rehabilitation of convicts is concerned." Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971). See generally Holen, Emerging Prisoners' Rights, 33 OHIO SR. L.J. 1 (1972). A more mundane but equally insightful instance was addressed in Osborne v. Manson, 359 F. Supp. 1107, 1111 (D. Conn. 1973): "As for toilet facilities, my constitutional calipers are not sufficiently refined to distinguish between a hole in the floor, controlled by a flush mechanism outside the cell, and a bucket in the cell that the prisoner cannot empty as required." See also Ex parte Pickens, 101 F. Supp. 285, 290 (D. Alas. 1951) ("If, as written by one of the most eminent, the life of the law has not been in logic but in experience, the punishment now suffered by the petitioner, while excusable and shocking to the sensibilities of all civilized persons, is not of such nature as to come properly within the scope of the Eighth Amendment...") (emphasis supplied). In the desegregation context, see notes 95-96 and accompanying text supra, Professor Mason tersely stated this jurisprudential issue: "In 1896 seven Supreme Court Justices put 'separate but equal' into the Constitution. In 1954 nine Justices took it out." Mason, supra note 98, at 387 (footnote omitted), referring to Plessy v. Ferguson, 163 U.S. 537 (1896) and Brown v. Board of Educ., 347 U.S. 483 (1954).

Weems v. United States, 217 U.S. 349, 373 (1910). See also Gideon v. Wainwright, 372 U.S. 335, 346 (1963) ("all constitutional questions are always open"); Brown v. Allen, 344 U.S. 443, 540 (1943) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible because we are final."). The Weems Court further stated that "a principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. at 373. See generally Bazelon, Civil Liberties—Protecting Old Values in the New Century, 51 N.Y.U. L. REV. 505 (1976). See also Regents of the Univ. of Calif. v. Bakke, 46 U.S.L.W. 4896, 4914 (June 28, 1978) (opinion of Brennan, J.) (reverse discrimination) (Congress, in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, avoided any "static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine").


The question is not whether the courts ought to intervene—they will continue to do so anyway, in some degree—but how correction[s] can strengthen its position against undesirable expansion.
and justice can the various segments of our state and federal governments function in harmony. This custom is in the American tradition, and, barring profound changes in our underlying ideology, will continue to be the cornerstone of our democratic society.

of court supervision. If the profession evaluates itself candidly, shapes its practices to accord with the highest standards of fairness in its own tradition, and succeeds in communicating the reasons for its practices and the constructive approach being taken, the chances are great that courts will generally leave to correction[s] the freedom of action that has always been its hallmark.