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Bolding v. Holshauser: What Remedy for Violation of Prisoner's Eighth Amendment Rights?

In *Holshauser v. Bolding*,¹ the Fourth Circuit Court of Appeals held that allegations of "severe over crowding, inadequate administration of hearing procedures, improper classification of inmates, inadequate and restricted programs for education, recreation, and work release, improper treatment of prisoners in solitary, and improper interference with the transmittal of prisoner mail"² were sufficient to state a cause of action.³

Bolding and twenty-eight other inmates of thirteen North Carolina prisons filed a class action suit in the Western District of North Carolina against the entire North Carolina prison system alleging a violation of their constitutional rights under the First, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as article I, Section 27 of the North Carolina Constitution.⁴ The inmates sought injunctions against new prisoners entering the North Carolina prison system until minimum constitutional standards were fixed and met; injunctions to reduce prison populations through release or parole; enjoinder of further prison construction until constitutionally acceptable minimum guidelines were developed and met; provision of basic sanitary, hygienic, and medical facilities; development and implementation of inmate protection plans; enjoinder of unjustified mail censorship; and protection of due process rights in administrative hearings.⁵

The District Court commented that the relief sought by the inmates was of a sweeping, reformatory nature. The court considered that it had been asked "to

1. *Bolding v. Holshauser*, 575 F.2d 461 (4th Cir. 1978) (order reversing dismissal), *cert. denied*, 99 S.Ct. 121 (1978).

2. *Bolding v. Holshauser*, (No. A-C-76-74 W.D. N.C. Mem. and Order dismissing Aug. 4, 1976).

3. In discussing the sufficiency of the allegations, the Fourth Circuit noted that the underlying policy of the Federal Rules of Civil Procedure was to liberalize procedure and that under Rule 8, plaintiffs only need to make a short, plain statement of a claim showing that they are entitled to relief and further that detailed factual averments are no longer necessary in order to avoid dismissal under Rule 12(b) (6). The test of sufficiency that the court used to establish compliance with Rule 8 when a section 12(b) (6) motion has been filed was the test in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The Fourth Circuit found that four of the five basic allegations made by plaintiffs survived this test and on the fifth, with regard to procedural due process, plaintiffs must be granted leave to amend. The court noted that similar allegations had been deemed a sufficient basis for a claim in other prisoners' rights suits. *Procunier v. Martinez*, 416 U.S. 396 (1974); *Sweet v. S.C. Dept. of Corrections*, 529 F.2d 854 (4th Cir. 1975); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), and *Newman v. Ala.*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). If necessary, the District court might delineate issues and sever and/or transfer claims.

A lengthy dissent would, however, follow the District Court decision and allow only individual actions based on individual claims.

4. *Bolding v. Holshauser*, No. A-C-76-74 (W.D. N.C. Mem. and Order dismissing Aug. 4, 1976). The District Court had dismissed, finding that Plaintiffs merely asserted legal conclusions without supporting factual allegations.

usurp the power of the North Carolina Department of Correction and to take under its control and management the prison system of this sovereign State."⁶ The District Court, relying on *Rizzo v. Goode*,⁷ said it had "no authority to follow such a course of conduct and would refuse to do so under [the] circumstances if the power did exist."⁸ "[P]rinciples of equity, comity, and federalism" called for "judicial restraint by the federal courts into matters concerning the internal affairs of a governmental agency."⁹ The District Court would have allowed redress for the alleged wrongs, if proven, only upon a pleading of individual facts by each respective plaintiff.

The Fourth Circuit felt compelled to remind the District Court "of the scope of a proper exercise of its jurisdiction in an appropriate case."¹⁰ The court noted that while *Rizzo v. Goode*,¹¹ cautioned against sweeping injunctions directed at state executive officials, it did "not preclude recourse to broad injunctions when a clear pattern of unconstitutional conduct has been established."¹² *Rizzo* did not overrule *Procunier v. Martinez*,¹³ where the Court, after stating that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform,"¹⁴ nevertheless added:

But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. *Johnson v. Avery*, 393 U.S. 483, 486 (1969). 416 U.S. at 405-06.¹⁵

The Fourth Circuit agreed with the holding in *Newman v. Alabama*,¹⁶ and said: "notwithstanding *Rizzo*, class relief requiring sweeping changes in a state prison system may still be mandated when the proof requires such relief."¹⁷

The Fourth Circuit reversed the dismissal¹⁸ and remanded for proceedings

6. *Id.* at 4.

7. 423 U.S. 362 (1976).

8. See notes 2 and 4 *supra*, at 4.

9. *Id.*

10. See note 1 *supra*, at 466.

11. See note 7 *supra*.

12. See note 1 *supra*, at 466.

13. 416 U.S. 396 (1974).

14. *Id.* at 405.

15. See note 1 *supra*, at 466.

16. 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

17. See note 1 *supra*, at 466.

18. When urged by defendants that venue was lacking since all but one of the defendants resided outside of the Western District of North Carolina (28 U.S.C. § 1391 (b) nondiversity cases "may be brought only in the judicial district, where all defendants reside, or in which the claim arose, except as otherwise provided by law,") the court noted that a special provision of 28 U.S.C. § 1393 (a) is applicable here: a civil action "not of a local nature, against defendants residing in different districts in the same state, may be brought in any of such districts."

consistent with its opinion. After circulation of the opinion and dissent,¹⁹ a suggestion for an *en banc* hearing failed for lack of a majority.²⁰

On October 2, 1978, the Supreme Court denied review on a petition for certiorari by defendants.²¹

The prohibition against cruel and unusual punishment exists not only in the Eighth Amendment to the federal constitution, but also in virtually all the state constitutions. However, the United States Supreme Court has rarely attempted to review or define cruel and unusual punishment. The constitutionality of the death penalty was not considered until 1972 in *Furman v. Georgia*,²² although the Court had previously considered the means to be used in executing a sentence of death.²³ While the relative harshness of a sentence has occasionally been challenged,²⁴ the Court has infrequently found individual sentences cruel and unusual punishment,²⁵ although it did reverse a particularly harsh sentence in *Weems v. United States*.²⁶

Cruel and unusual punishment has been imprecisely defined and a variety of tests have been applied to various factual patterns. A primary test is whether under all circumstances the punishment in question is "of such character or consequences as to shock general conscience or be intolerable in fundamental fairness."²⁷ Underlying the Eighth Amendment prohibition is the basic concept of "the dignity of man." "The Amendment must draw its mean-

19. In his dissent, Judge Bryan finds any entertainment of this complaint a "bald, bold and entire usurpation of an official state function." He also feels that the complaint has an "integral and facial insufficiency in law." See note 1 *supra*, at 468. The dissent further states that "[a] more sweeping obtrusion upon the sovereignty of a State is not readily even to be conjectured." See note 1 *supra*, at 469. Judge Bryan takes severe exception to the all encompassing nature of the allegations and relief prayed for and notes that he follows a prior Fourth Circuit case which severely curtails federal court invasion of a state's operation of its correctional system.

The dissent also finds it onerous that each of the 29 purported class representatives is not simultaneously present in all of the 77 North Carolina prisons. Since the 29 prisoners bringing this action are incarcerated in only 13 of these prisons, and these units are "separated by miles and each is in a different county," Judge Bryan questions "how . . . can they be heard to speak for conditions throughout the State or even in another unit?" The dissent contends that this case "fails on its facts [and] it fails on its face," the "infirmity is not of form but in substance." 575 F.2d at 470. Judge Bryan would leave plaintiffs free to bring separate actions for themselves and others similarly deprived in the same prison.

20. From addendum comments one justice not entitled to vote re *en banc* hearing agrees with the dissent and three of the eight justices entitled to vote re *en banc* hearing dissent from the failure to rehear *en banc* for reasons stated in the dissent. Apparently the vote for *en banc* was 4-4 with one judge not entitled to vote.

21. See note 1 *supra*.

22. 408 U.S. 238 (1972).

23. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130 (1878) (death by firing squad upheld).

24. *Trop v. Dulles*, 356 U.S. 86 (1958). The Supreme Court held here that the loss of nationality due to conviction of desertion during wartime was cruel and unusual punishment.

25. See, e.g., *Badders v. U.S.*, 240 U.S. 391 (1916).

26. 217 U.S. 349 (1910). A 12-20 year sentence at hard labor with ankle and wrist chains, and loss of civil rights was found to be excessive for the crime of accessory in falsification of a public document.

27. *Lee v. Tahash*, 352 F.2d 970, 972 (8th Cir. 1965).

ing from the evolving standards of decency that mark the progress of a maturing society,"²⁸ The Court, in *Weems v. United States*,²⁹ held that 1) a punishment may be considered cruel and unusual if it is greatly disproportionate to the offense for which it has been imposed, and 2) a punishment may be cruel and unusual when, although it is applied in pursuit of a legitimate penal aim, the punishment goes far beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used. Many conditions of prison life violate these imprecise tests—particularly in view of "our evolving standards of decency."³⁰ The court in *Wright v. McMann*³¹ held that conditions have to be "shocking", "barbarous," "disgusting," or "debasing" before a violation of the Eighth Amendment is found.

All force has not been condemned. The courts have been reluctant to find violations of the Eighth Amendment where the force was used to quell disturbances such as riots, even where the force was excessive. "The amount of force used cannot be measured by a micrometer, nor can it be considered separate and apart from the circumstance [at hand]. . . ."³²

In *Holt v. Sarver*,³³ the court was also reluctant to impose liability on prison officials for failure to protect inmates from assault (physical and sexual) by other inmates. While, theoretically, there may be a constitutional right to some degree of protection from attacks by fellow inmates, that right is rarely upheld in individual cases.

*Penn v. Oliver*³⁴ gave both a rationale for the failure to uphold the freedom from bodily harm in all cases, and a formula to be used in determining when those rights will be upheld.

It would be fantasy to believe that even the most enlightened prison officials operating with unlimited resources could prevent all acts of violence within the prison. Moreover, even if a prison official fails through his negligence to prevent an act of violence, a violation of constitutional right is not of necessity stated. To the contrary, there must be a showing either of a pattern of undisputed and unchecked violence or, on a different level, of an egregious failure to provide security to a particular inmate, before a deprivation of constitutional right is stated.³⁵

Originally, the courts held that a prisoner had the status of "a slave of the state" and therefore had no rights.³⁶ Almost sixty years later in *Siegel v. Ragen*,³⁷

28. 356 U.S. at 101.

29. 217 U.S. 349 (1910).

30. See note 28 *supra*.

31. 387 F.2d 519 (2d Cir. 1967). Subhuman conditions in a strip cell violated civilized standards of human decency where the prisoner was naked, exposed to winter cold and deprived of the basic elements of hygiene, soap and toilet paper.

32. *In re Riddle*, 57 Cal. 2d 848, 858, 372 P.2d 304, 310 (1962).

33. 309 F. Supp. 362 (E.D. Ark. 1970).

34. 351 F. Supp. 1292 (E.D. Va. 1972).

35. *Id.* at 1294.

36. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

37. 88 F. Supp. 996 (N.D. Ill. 1949).

the court said:

This court is prepared to protect state prisoners from death or serious bodily harm in the hands of prison authorities, but it is not prepared to establish itself as a "co-administrator" of State prisons along with the duly appointed State officials. All the remaining matters alleged in the amended complaint are strictly matters of internal administration and discipline, and it is not the function of a Federal Court to assume the status of an appellate tribunal for the purpose of reviewing each and every act and decision of a State official.³⁸

Five years earlier, however, in *Coffin v. Reichard*,³⁹ the Sixth Circuit Court of Appeals had held that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." By recognizing that a retraction of those rights is justified by certain underlying considerations, *Price v. Johnston*⁴⁰ allowed, indeed promoted, the interpretation that constitutional rights invariably had to give way to expressed (but rarely documented) corrections problems in administering a prison system.

It was not until the late 1960's and early 1970's that courts began serious reviews of prisoners' claims and intervention on their behalf. The federal district courts (under the Federal Civil Rights Act—42 U.S.C. §1983) began to consistently find violations of prisoners' rights under the First,⁴¹ Eighth,⁴² and Fourteenth⁴³ Amendments.

In *Sostre v. Rockefeller*,⁴⁴ the District Court held that 1) placing a prisoner in punitive segregation without certain procedural safeguards (notice, impartial hearing examiner, right of cross-examination, right to present witnesses, right to counsel/counsel substitute, written decision with reasons for finding and disposition) violated due process; and 2) holding a prisoner in punitive segregation for over one year constituted cruel and unusual punishment. To ensure appropriate correctional measures, the court retained jurisdiction over the corrections officials until they complied with its orders. Other cases had similar holdings⁴⁵ and in each case the federal court determined 1) that certain constitutional rights were fundamental to prisoners; 2) that existing practices and procedures or facilities and resources abridged those rights; 3) that corrections officials did not make an adequate showing that valid correctional con-

38. *Id.* at 999.

39. 143 F.2d 443 (6th Cir. 1944) A later court however, did recognize that "lawful incarceration brings about a necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266 (1948).

40. 334 U.S. 266 (1948).

41. First Amendment—access to courts, freedom of expression and freedom of religion.

42. Eighth Amendment—freedom from cruel and unusual punishment.

43. Fourteenth Amendment—due process in disciplinary and other institutional matters.

44. 312 F. Supp. 863 (S.D.N.Y. 1970), *modified*, *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971).

45. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (cruel and unusual punishment); *Palmigiano v. Travisono*, 317 F. Supp. 776 (D.R.I. 1970) (censorship of mail); *Cluchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971) (disciplinary due process).

cerns justified such abridgements; and 4) that changes had to be made in accordance with the mandate of the court's opinion.

This bold new intervention, however, was sharply curtailed in the Second Circuit Court of Appeals' review of *Sostre v. Rockefeller*.⁴⁶ In *Sostre v. McGinnis*,⁴⁷ the Second Circuit Court of Appeals flatly rejected the District Court's approach on the cruel and unusual punishment and the procedural due process issues. "For a federal court . . . to place a punishment beyond the power of a state . . . is a drastic interference with the state's free political and administrative processes."⁴⁸ The Second Circuit reversed the District Court formulation for procedural due process. Although the court did hold that minimum protections were necessary, "[they] would not presume to fashion a constitutional harness of nothing more than [their] guesses. . . . This is a judgment entrusted to state officials, not federal judges."⁴⁹

In *Wolff v. McDonnell*,⁵⁰ the Court adopted an extremely narrow view of the procedural safeguards which were constitutionally required for a disciplinary hearing (no less than twenty four hour advance notice, right to receive a written statement of the evidence and reasons for the decision, and right to call witnesses, if institutional safety or correctional goals are not jeopardized). The Court stated that adversary proceedings typical of a criminal trial might increase staff/inmate confrontation and make the use of the disciplinary process ineffective in advancing the rehabilitative goals of the penal institution.

In the landmark cases, *Holt v. Sarver*,⁵¹ the issue was whether the conditions of certain penal institutions, as a whole, were so shocking they constituted cruel and unusual punishment. The court found that the Arkansas prison system violated the Eighth Amendment rights of its prisoners. The court found 1) the prison was, for the most part, run by inmate trusty guards who bred hatred and mistrust; 2) open barracks within the prison invited widespread physical and sexual assaults; 3) the isolation cells were overcrowded, filthy and unsanitary; and 4) there was a total absence of any program of rehabilitation and training. The court held that these conditions, as a whole, amounted to cruel and unusual punishment and that the state may not delegate the control of a prisoner to other convicts and "do nothing meaningful for his safety, well being, and possible rehabilitation. . . . However constitutionally tolerable the Arkansas system may have been in former years, it simply will not do today. . . ."⁵² Elimination of unconstitutional conditions does not depend on what legislatures or governors may do or even what prison administrations may be able to accomplish. "If Arkansas is going to operate a Penitentiary System, it is

46. See note 44 *supra*.

47. 442 F.2d 178 (2d Cir. 1971).

48. *Id.* at 191.

49. *Id.*

50. 418 U.S. 539 (1974).

51. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969).

52. *Id.* at 381.

going to have to be a system that is countenanced by the Constitution of the United States.”⁵³

The conditions in some prisons have been found to be so disgusting that they violate the Eighth Amendment,⁵⁴ while in other prisons the conditions have only been found unpleasant, but not unconstitutional.⁵⁵

Since *Holt v. Sarver*⁵⁶ (hereinafter referred to as *Holt I*) in 1969, a prisoner's rights case seeking declaratory and injunctive relief from alleged deprivation of constitutional rights by persons in charge of the prisons, there have been similar cases requesting broad relief from the federal courts. In *Holt I* the court found sufficient evidence to establish that the state which operated the prison where inmates slept on cots in open barracks with no guard in the actual area failed to discharge its constitutional duty to protect inmates. The court held that confinement in isolation cells which were overcrowded, dirty, unsanitary and pervaded by bad odors from toilets constituted cruel and unusual punishment. The court noted that it was not concerned in general with prison policies, administration or discipline. However, if the state, acting through its penal authorities, is depriving convicts of rights which the constitution protects, including the right to be free from cruel and unusual punishment, the court may and should intervene to protect those rights and to put an end to unconstitutional practices.⁵⁷ The government owes that duty to federal prisoners,⁵⁸ and the court thought that a state prisoner was entitled to the same measure of care from the state.

While recognizing the difficulty and delicacy involved in devising a remedy for the conditions it finds in violation of the Eighth Amendment prohibition against cruel and unusual punishment, the court required that improvements be made at the two units involved here, despite financial handicaps. The court ordered respondents to suggest a plan to correct conditions and retained jurisdiction in order to oversee the development of that plan.

In *Holt v. Sarver* (hereinafter referred to as *Holt. II*),⁵⁹ the District Court found that there were conditions and practices that constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The court recognized that not all reforms could be accomplished overnight; however, it required that improvements be made in months, not years. The changes required would not depend on the legislature, the governor, or even what the respondents might actually be able to accomplish, but rather

53. *Id.* at 385.

54. *See*, Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Johnson v. Lark, 365 F. Supp. 289 (E.D. Mo. 1973).

55. State *ex rel* Pingley v. Coiner, 155 W. Va. 591, 186 S.E.2d 220 (1972); Lake v. Lee, 329 F. Supp. 196 (S.D. Ala. 1971).

56. 300 F. Supp. 825 (E.D. Ark. 1969).

57. *Id.* at 827.

58. Johnson v. U.S., 258 F. Supp. 372 (E.D. Va. 1966), and Cohen v. U.S. 252 F. Supp. 679 (N.D. Ga. 1966).

59. 309 F. Supp. 362 (E.D. Ark. 1970).

"[i]f 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."⁶⁰

In 1971 the Eighth Circuit Court of Appeals affirmed *Holt II*,⁶¹ but stated that the District Court was to retain jurisdiction no longer "than necessary to provide reasonable assurance that incarceration therein will not constitute cruel and inhuman punishment . . ."⁶² and required an up-to-date report on progress in eliminating constitutional violations.

In January of 1973, the District Court found that it was no longer necessary to retain jurisdiction, and seven suits were brought appealing that decision. Those suits were consolidated into *Finney v. Arkansas Board of Corrections*.⁶³ The Eighth Circuit in *Finney* found that the Arkansas system still violated constitutional rights and directed certain corrective action regarding, *inter alia*, housing, racial discrimination, physical abuse, and rehabilitation programs.

Other major cases in this area are Fifth Circuit cases: *Gates v. Collier*,⁶⁴ Mississippi, and three Alabama cases, *Pugh v. Locke*⁶⁵ and companion cases *James v. Wallace* and *Newman v. Alabama*.⁶⁶ The three Alabama cases were consolidated on an appeal to the Fifth Circuit in 1977.⁶⁷ In all of these cases, the respective courts found violations of prisoners Eighth Amendment rights and granted injunctions requiring broad reform in prison administration policies.

The Fifth Circuit, in *Newman*⁶⁸ considered the effect of *Rizzo v. Goode*⁶⁹ on prisoner's rights cases. *Rizzo* was cited by the district court in *Bolding v. Holshauser*⁷⁰ for the proposition that the court had no authority to usurp the power of the North Carolina Department of Correction and to take over the control and management of the North Carolina Prison System as the court thought it was being requested to do. The District Court in *Bolding*, relying on *Rizzo*, commented that "only in a limited fashion and only upon the most extreme circumstances"⁷¹ was the extraordinary remedy of an injunction to be used on a state agency.⁷²

The Fourth Circuit in its majority opinion in *Bolding* simply states that "[w]hile *Rizzo* states that the principles of federalism militate against injunctive relief under 42 U.S.C. §1983 against the executive branch of state or local

60. See notes 51 and 53 *supra*.

61. See note 51 *supra*.

62. *Id.* at 309.

63. 505 F.2d 194 (8th Cir. 1974).

64. 349 F. Supp. 881 (N.D. Miss. 1972); see also *Gates v. Collier*, 371 F. Supp. 1368 (N.D. Miss. 1973), (*re* attorney's fees award), *vacated*, 522 F.2d 81 (5th Cir. 1975).

65. 406 F. Supp. 318 (M.D. Ala. 1976).

66. 522 F.2d 71 (5th Cir. 1975).

67. *Newman v. Ala.* 559 F.2d 283 (5th Cir. 1977), *modifying*, 406 F. Supp. 318 (M.D. Ala. 1976, *cert. denied*, 98 S.Ct. 3144 (1978)).

68. *Id.*

69. 423 U.S. 362 (1976).

70. See notes 2 and 4 *supra*.

71. *Id.* at 5.

72. The Fourth Circuit dissent in *Bolding* also relied on *Rizzo*.

governments, *Rizzo* does not preclude recourse to broad injunctions when a clear pattern of unconstitutional conduct has been established.”⁷³ The court specifically agreed with the holding in *Newman v. Alabama* “that, notwithstanding *Rizzo*, class relief requiring sweeping changes in a state prison system may still be mandated when the proof requires such relief.”⁷⁴

The *Newman* court, in discussing *Rizzo*, found that *Rizzo* did not mean that constitutional standards were not to be scrupulously observed or that the statutes designed to enforce that objective are to be denied full effect. It [did] mean in the prison context that federal courts should keep their eyes on the main objective, the Eighth Amendment command for the eradication of cruel and unusual punishment. The remedy must be designed to accomplish that goal, not to exercise judicial power for the attainment of what we as individuals might like to see accomplished in the way of ideal prison conditions. . . . The Amendment . . . recognizes the right to punish for criminal conduct as long as that punishment does not escalate to the cruel and unusual.⁷⁵

*Rizzo v. Goode*⁷⁶ was a civil rights action against Philadelphia, its Mayor, and other city and police officials which asked for sweeping equitable relief, including a receiver to supervise the police department and a civilian committee to review police activity. The District Court granted limited relief and attorney’s fees⁷⁷ and the Third Circuit affirmed as to the injunctive relief.⁷⁸ The Supreme Court granted certiorari to consider petitioner’s claims that the judgment of the District Court was an unwarranted intrusion by the federal judiciary into the discretionary authority of state and local law officials to perform their official functions. The Supreme Court was substantially in agreement with petitioner’s claims and therefore reversed the Court of Appeals judgment.

In *Rizzo*, the District Court found that the evidence had not established any policy on the part of named parties to violate the constitutional rights of plaintiffs. All that the court found was a tendency of the departmental procedure to discourage the filing of citizens complaints and to minimize consequences of police misconduct, and the court emphasized that respondents “had no constitutional *right* to improve police procedures for handling civilian complaints.”⁷⁹ Individuals found to have violated the constitutional rights of particular persons were not named as parties to the action. There was no affirmative link between the incidents and any plan or policy by petitioners—express or otherwise.

Clearly the only way to find *Rizzo* applicable or inapplicable in the present case is on the particular facts of *Bolding*. Until there is a finding of fact by a

73. See note 1 *supra*, at 466.

74. *Id.*

75. See note 67 *supra*, at 287.

76. See note 7 *supra*.

77. 357 F. Supp. 1239 (E.D. Pa. 1973).

78. 506 F.2d 542 (3rd Cir. 1974).

79. See note 7 *supra*, at 370.

trial court this will be impossible. The Supreme Court in *Rizzo* further doubted that there was even a case or controversy as required by article III of the United States Constitution between the individually named respondents and petitioners. It appeared that the requisite "personal stake in the outcome was lacking."⁸⁰ *i.e.*, the order overhauling the police disciplinary procedures.

The Court held further that there must be a pervasive pattern of intimidation, not just some problem typical to administrative procedures found to have some statistical significance. The Court primarily discusses federalism principles in the context of criminal proceedings and concludes that "the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun."⁸¹

It is unclear how this conclusion relates to police disciplinary proceedings that may or may not be undertaken sometime, but it is even less clear how the District Court in *Bolding* and the Fourth Circuit's dissent interpret this to have anything to do with administratively condoned substandard conditions in a state prison, unless they consider all of the events after final sentencing in a criminal proceeding to be part of the "Criminal proceeding—including what a prisoner eats, where he uses the toilet, etc."⁸²

In February, 1977, the Final Report of the North Carolina Legislative Commission on Correctional Programs (hereinafter referred to as CCP) examined the needs of correctional facilities in North Carolina; studied rehabilitative programs in North Carolina; and attempted to develop a comprehensive long-range policy recommendation for a coordinated policy on correctional programs. Among others, CCP made findings and/or recommendations in the following areas:

1. Cleanliness and Management—

The Commission recommended that the Secretary of Correction require inmates to assume responsibility for maintaining the sanitary standards of their units, and for their own personal hygiene, and that the General Assembly appropriate such additional funds as may be necessary for these purposes.⁸²

2. Recreational Facilities—

The Commission recommended daily job assignments, upgrading recreational facilities, improved hygiene, and strong leadership to encourage maximum participation by inmates in daily activity.⁸³

3. Mental Health Services for Inmates—

The Commission recommended that 1) the current provision in N.C.G.S. §148-22 (b) which prohibits the Secretary of Correction from contracting for services with the provision of Mental Health Services, Department of Human Resources, be repealed; 2) that the Commission for Mental Health Services

80. *Baker v. Carr*, 369 U.S. 186 (1962).

81. See note 7 *supra*, at 380.

82. FINAL REPORT OF THE NORTH CAROLINA LEGISLATIVE COMMISSION ON CORRECTIONAL PROGRAMS 50 (1977).

83. *Id.* at 50

establish standards for the provision of mental health services to inmates in the custody of the Department of Correction, and that the responsibility for implementing these standards be vested with the Secretary of Correction.⁸⁴

4. Prison Facilities—Overcrowding—

The Commission found that North Carolina's prisons are now critically overcrowded, that inmate unrest is increasing and that unless immediate action is taken it is likely that the federal courts will intervene in the operations of North Carolina's prisons.⁸⁵ The Commission also recommended the construction of new units consisting of single cells⁸⁶ in order to control inmate violence. The Commission made short-run suggestions to use modular construction and additions to existing facilities in order to achieve an immediate reduction of present severe overcrowding.⁸⁷

In an August 1, 1976, survey of capacity and inmate population in the southeastern states,⁸⁸ North Carolina's prison population exceeded its prison capacity by 29.4 percent, the highest overcapacity of any of the southeastern states. CCP included in their report a chart on Inmates Housing in the North Carolina Correctional System which gave a unit breakdown of net square footage for housing, inmate capacity, actual capacity (12/31/76), original design capacity for housing in square feet per inmate, and actual square footage for housing inmates. Only six units in the North Carolina prison system in their current design capacity met the minimum of sixty square feet for housing required in *Pugh v. Locke*,⁸⁹ and one other unit comes close. The average design capacity square footage throughout the North Carolina system was thirty-seven square feet; actual square footage was only thirty-one square feet, and this was achieved only after an accelerated Christmas release program.⁹⁰

The CCP took note of the eight states, as of March 1, 1976, operating under orders affecting the administration of their correctional programs.⁹¹ The Commission was realistically concerned that the federal government might intervene in the operation of North Carolina's prison system unless immediate efforts were made to improve conditions, particularly overcrowding.

84. *Id.* at 54 and Appendix H

85. *Id.* at 54, 56, and Appendix I.

86. *Id.* at 60-62.

87. *Id.* at 62.

88. Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

89. See note 65 *supra*.

90. See note 82 *supra*, at 57.

91. (1) Alabama—law libraries, due process, medical care, isolation cells, overcrowding and understaffing.

(2) Arkansas—basic conditions in each operational area.

(3) Kentucky—mail censorship.

(4) Mississippi—inadequate housing and staffing.

(5) Oklahoma—racial segregation, discrimination, and conditions of confinement.

(6) Texas—treatment conditions for certain plaintiffs while their cases are pending in courts.

(7) Louisiana—conditions of confinement.

(8) Florida under appeal to Fifth Circuit for overcrowding, medical treatment *Id.* at 54-65.

The CCP prepared a comparison of North Carolina prison conditions with the standards set forth in *Pugh v. Locke*, as the most rigorous standards yet issued by a federal court,⁹² which indicated a staggering cost if the federal courts controlled. The Commission likened the prison problem to the mental health system situation five years earlier in North Carolina where only "immediate and drastic legislative and executive intervention" produced sufficient funds and programs to avoid a federal takeover.

The allegations in *Bolding*, if proven, might be remedied in the following ways:

Mail

It has generally been held that control of inmate mail is an administrative matter in which the courts will not interfere, unless it is shown that some independent constitutional right is being infringed by that control.⁹³ The reason most often advanced for this holding is that courts will not become involved in the normal management of a prison system. Where the court has interfered with prison mail rules, another constitutional right was involved.⁹⁴ However, today a new approach to the general right to control an inmate's use of the mail system seems to be evolving. Administrators' refusal to mail correspondence which does not contain contraband or details of illegal schemes is attracting judicial criticism in several courts.⁹⁵ The transmittal of very few letters can be refused by prison officials under the apparently emerging standard that only a threat to the security of the institution will justify interference with inmate mail.⁹⁶

Solitary Confinement

The assertion that solitary confinement is *per se* unconstitutional has been rejected by the federal courts.⁹⁷ However, the conditions of solitary can be

92. See note 82 *supra*, at Appendix I.

93. E.g., *Brown v. Wainwright*, 419 F.2d 1308 (5th Cir. 1969); *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954); *Medlock v. Burke*, 285 F. Supp. 67 (E.D. Wis. 1968).

94. E.g., *Ex parte Hull*, 312 U.S. 546 (1941) In this case a prison official refused to mail prisoner's petition for writ of habeas corpus; *Meola v. Fitzpatrick*, 322 F. Supp. 878 (D. Mass. 1971) A federal court struck down a state prison regulation which permitted officials to refuse to mail legal matter for inmates if the prison superintendent felt the language "improper"; *Coleman v. Peyton*, 362 F. 2d 905 (4th Cir. 1966) This court flatly prohibited prison official censorship of material sent to and received from a court by an inmate; cf. *Palmigiano v. Travisono*, 317 F. Supp. 776 (D.R.I. 1970) Prison officials were enjoined from opening or inspecting correspondence between inmates awaiting trial in federal or Rhode Island courts; *but see Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) *cert. denied*, 405 U.S. 578 (1972) The Second Circuit expressly allowed New York officials to read communications where "it can be demonstrated that a prisoner has clearly abused his rights of access." *Id.* at 200.

95. See *Caruthers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970) A federal district court judge here castigated prison officials for refusing to mail a letter from the inmate—plaintiff to his parents. The letter contained derogatory remarks about prison conditions. The record disclosed no "plausible basis for defendant's action." *Id.* at 1024.

96. *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972).

97. E.g., *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970); *Krist v. Smith*, 309 F.Supp. 497 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971).

disproportionate to the offense involved or used for an improper purpose, and therefore violate the Eighth Amendment.⁹⁸ Further, the procedure used to enforce the isolation may violate "due process of law."

Legal Service

*Johnson v. Avery*⁹⁹ was a bold departure from the traditional view that state authorities had no obligation under the Constitution to provide legal facilities for inmates.¹⁰⁰ Prison officials must allow the jail house lawyer¹⁰¹/inmate writ writer to practice or provide a reasonable alternative, e.g., implementation of an effective legal services program.¹⁰² The Supreme Court has assured inmates a supply of adequate legal material so that they might have access to courts.¹⁰³

Prison Disciplinary Proceedings

Some courts have taken the position that due process in prison disciplinary hearings requires the same safeguards as those imposed on administrative agencies.¹⁰⁴ Generally, the emerging requirements of procedural due process in disciplinary proceedings are: 1) reasonable notice of the nature of the complaint,¹⁰⁵ 2) a fair hearing before an impartial official or panel,¹⁰⁶ 3) administrative review of the decision,¹⁰⁷ 4) confrontation of witnesses,¹⁰⁸ and 5) right to counsel or counsel substitutes.¹⁰⁹

It is clear that prison disciplinary proceedings must accord inmates a procedurally fair hearing. Reasonable notice and an opportunity to be heard before an impartial tribunal would seem basic in order to avoid the violation of an inmate's constitutional rights to procedural due process.

98. E.g., *Wright v. McMann*, 387 F.2d 519 (5th Cir. 1967); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *Landman v. Royster*, 333 F.Supp. 621 (E.D. Va. 1971); *Holt v. Sarver*, 300 F.Supp. 825 (E.D. Ark. 1969); *Lake v. Lee*, 329 Supp. 196 (S.D. Ala. 1971).

99. 393 U.S. 483 (1969).

100. *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir. 1961).

101. An inmate who, through self education, has acquired minimum legal skills and notwithstanding prison restriction, offers legal advice and counselling to fellow inmates, with or without compensation.

102. See note 99 *supra*.

103. See *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.*, *Younger v. Gilmore*, 404 U.S. 15, (1971).

104. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) The issue presented by this case was the procedure for terminating welfare benefits; see also *Landman v. Royster*, 333 F.Supp. 621 (E.D. Va. 1971) and *Clutchette v. Proconier*, 328 F.Supp. 767 (N.D. Cal. 1971) (prisoner's rights cases).

105. *Landman v. Royster*, 333 F.Supp. 621 (E.D. Va. 1971); *Clutchette v. Proconier*, 328 F.Supp. 767 (N.D. Cal. 1971).

106. *Braxton v. Carlson*, 340 F.Supp. 999 (M.D. Pa. 1972); *Kristsky v. McGinnis*, 313 F.Supp. 1247 (N.D.N.Y. 1970); *Landman v. Royster*, 333 F.Supp. 621 (E.D. Va. 1971).

107. See *Beishir v. Swenson*, 331 F.Supp. 1227 (W.D. Mo. 1971); *Morris v. Travisono*, 310 F.Supp. 857 (D.R.I. 1970) The right to review was not interpreted as a constitutional due process requirement in prison disciplinary proceedings, but rather an appellate procedure was encouraged by the court.

108. *Landman v. Royster*, 333 F.Supp. 621 (E.D. Va. 1971) In this case it was held that there must be a resolution of questions of fact.

109. *Id.*

Rehabilitation

While in *Holt v. Sarver*¹¹⁰ a federal district court stated that in the examination of the totality of conditions within a penal institution a federal court should consider the lack of a meaningful rehabilitation program as a factor "in the overall constitutional equation before the court,"¹¹¹ generally, there is no constitutional right to rehabilitation.¹¹²

Right to Medical Treatment

Generally, the federal courts have not been sympathetic to general inmate complaints regarding medical treatment unless violation of a federally protected right was alleged. The right to due process of law under the Fifth or Fourteenth Amendment is such a right and includes the inmate's right to protection from unconstitutional administrative action;¹¹³ protection of an inmate's life and health from administrative action;¹¹⁴ and lack of administrative review of claims concerning denial of medical attention.¹¹⁵ There is also a right to be free from the infliction of cruel and unusual punishment as guaranteed by the Eighth Amendment. This Eighth Amendment right has been found to be violated when there is an intentional denial of needed medical care, or when a prison official's conduct is such as to indicate a deliberate indifference to medical needs of inmates.¹¹⁶

If a federally protected right to medical treatment is evolving, the exact nature of that right, and the proper remedy for its enforcement are not clear.

Remedies effectively available to prisoners are the federal habeas corpus, which requires the exhaustion of other available remedies, and the Federal Civil Rights Act (42 U.S.C. § 1983), which is simpler and easier to use and potentially covers a multitude of prison conditions and procedures, and offers a wide range of possible remedies.¹¹⁷ Most states have inadequate remedies and,

110. 309 F.Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

111. *Id.* at 379.

112. See *Wilson v. Kelly*, 294 F.Supp. 1005 (N.D. Ga. 1968), *aff'd per curiam*, 393 U.S. 266 (1969). However, one court has ordered specific rehabilitation programs, see *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971). See also 330 F.Supp. 707 (N.D. Ohio 1971) (This court required the establishment of work or study release programs, inmate counselling programs, and educational programs). See also *Taylor v. Sterrett*, 344 F.Supp. 411 (N.D. Tex. 1972) This court stated that "rehabilitation must be the overriding goal of our correctional institutions." See also *James v. Wallace*, 382 F.Supp. 1177 (N.D. Ala. 1974).

113. *Talley v. Stephens*, 247 F.Supp. 683 (E.D. Ark. 1967).

114. *Hirons v. Director, Patuxent Institution*, 351 F.2d 613 (4th Cir. 1965); *McCullum v. Mayfield*, 130 F.Supp. 112 (N.D. Cal. 1955).

115. *Edwards v. Duncan*, 355 F.2d 993 (4th Cir. 1966).

116. *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970).

117. Although the Supreme Court has held that any time a prisoner "is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973)". Since federal habeas corpus is only available after the state judicial remedies have been exhausted, the case was held to be improperly before the federal courts.

where remedies are available, the state courts are generally less receptive to prisoners' suits than are the federal courts. Prisoners have found support in attacking prison conditions in some state courts,¹¹⁸ however. The lack of success in bringing damage actions in state courts is due to 1) the doctrine of sovereign immunity; 2) the doctrine of executive immunity for discretionary acts; and 3) the doctrine of respondeat superior.

Under 42 U.S.C. § 1983, the potential range of remedies is virtually all-encompassing; an injured party may recover "in an action at law, suit in equity, or other proper proceeding for redress."¹¹⁹ During the past decade, several major forms of relief have been ordered by the courts:

1. Administrative policy reform or injunctions against administrative actions;¹²⁰
2. Improvements in institutions and/or their services;¹²¹

118. See, e.g., *Wayne Co. Jail Inmates v. Wayne Co. Bd. of Comm'rs.*, Civ. Action #173217 (Cir. Ct. for Wayne City, Mich. 1972).

119. 42 U.S.C. § 1983.

120. *Sostre v. Rockefeller*, 312 F.Supp. 863 (S.D.N.Y. 1970); *Morris v. Travisono*, 310 F.Supp. 857 (D.R.I. 1970) the existing policies were invalidated and new ones fashioned or ordered fashioned under court supervision. *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D. Cal. 1971), *aff'd*, 510 F.2d 613 (9th Cir. 1975) This case presents a notable exception to reluctance by Supreme Court and most appellate courts to intervene aggressively in administrative policy making, absent flagrant abuses. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974) The Supreme Court has invalidated certain regulations relating to mail censorship and disciplinary due process, but the constitutional safeguards required for the future are extremely cautious ones.

121. *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970) (orders for substantial improvements); *Jones v. Wittenberg*, 323 F.Supp. 93 (N.D. Ohio 1971) (involving a wide range of improvements); *Newman v. Ala.*, 349 F.Supp. 278 (M.D. Ala. 1972) (involving comprehensive improvements in medical services); *Gates v. Collier*, 349 F.Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974). When necessary extreme measures will be taken in prisoners' rights cases. Defendants argued that the federal district court exceeded its jurisdiction since the state lacked the financial ability to implement the order. The Fifth Circuit Court of Appeals rejected that argument and held that the Constitution requires an overhaul of Mississippi State Penitentiary and it must be accomplished even if it meant spending money that the state did not then have. See also *Wayne Co. Jail Inmates v. Wayne Co. Bd. of Comm'rs.*, Civ. Action #173217 (Cir. Ct. for Wayne City, Mich. 1972) A Michigan State Court rejected the view that a judicial order requiring appropriation of funds violated the separation of powers doctrine by stating:

We have only ordered such relief as is necessary to secure for the prisoners that which they are minimally guaranteed by the Constitution and laws of State and Nation. With respect to the appropriation of funds, we have merely said that the Commissioners will be required to appropriate and expend such funds as may be necessary to secure such rights of the inmates. We are satisfied that where County government has by action or inaction inflicted legal wrongs upon inmates, as in the instant case, the Court may require the County to correct and redress such wrongs, even though to do so will require the expenditure of public funds.

3. Closing of all¹²² or part of¹²³ institutions; refusal to send prisoners to institutions¹²⁴ and release or transfer;¹²⁵
4. Release from solitary,¹²⁶ change from transferred status, or restoration of good time;¹²⁷
5. Damages under the Federal Civil Rights Act¹²⁸ and state and federal tort law;
6. Attorney's fees.¹²⁹

122. *Inmates of Suffolk Co. Jail v. Eisenstadt*, 360 F.Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974); *Rhem v. Malcolm*, 377 F.Supp. 995 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 333 (2d Cir. 1974).

123. *Inmates of Boy's Training School v. Affleck*, 346 F.Supp. 1354 (D.R.I. 1972).

124. *U.S. v. Alsbrook*, 336 F.Supp. 973 (D.D.C. 1971).

125. *Commonwealth ex rel. Bryant v. Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971) The court ordered that two pretrial detainees either be transferred to more appropriate facilities or discharged from custody.

126. *Krist v. Ricketts*, 504 F.2d 887 (5th Cir. 1974) Habeas corpus, not § 1983, was held to be the proper remedy for seeking release from solitary confinement.

127. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) Federal habeas corpus is the only appropriate remedy for the restoration of good time. Which leaves the question of whether this rationale can be extended to cover release from solitary confinement and change from transferred status?

128. *Landman v. Royster*, 354 F.Supp. 1302 (E.D. Va. 1973); *Lareau v. Manson*, 383 F.Supp. 214 (D. Conn. 1974) Punitive damages are not often awarded in § 1983 actions; they "are not a favorite of law and are to be allowed only with caution and within narrow limits." *Davidson v. Dixon*, 386 F.Supp. 482 (D. Del. 1974) Punitive damages can be awarded in cases of malicious action in gross disregard of plaintiff's rights in cases where such an award would have a deterrent effect on a defendant and others similarly situated. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) Damage awards here were held to be against individuals only and therefore may not be passed on to successors. *Landman v. Royster*, 354 F.Supp. 1302 (E.D. Va. 1973) An estate is not liable for damages flowing from actions of a person since deceased. A government is not liable under § 1983 for actions of employees. *But see Monell v. Dept. of Soc. Serv. N.Y.*, 98 S.Ct. 2018 (1978). Respondeat superior does not apply in a § 1983 suit (*i.e.* an official is not liable for acts of subordinates without some personal involvement in those acts on the part of party sought to be charged. The personal involvement requirement may be met, not only when a superior personally directs his subordinates to do acts, but also when he has actual knowledge of their acts and acquiesces in them.

129. *Gates v. Collier*, 371 F.Supp. 1368 (N.D. Miss. 1973), *sustained*, 489 F.2d 298 (5th Cir. 1973) Attorney's fees of \$65,000 were awarded here on a bad faith exception. Awarding of attorney's fees against a governmental unit was not barred by the Eleventh Amendment, even though funds for payment of costs may come from state appropriations. *See also Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974); *Incarcerated Men of Allen Co. Jail v. Fair*, 376 F.Supp. 483 (N.D. Ohio 1973), *aff'd*, 507 F.2d 281 (6th Cir. 1974) The general rule as outlined by this case is that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore; but there are three exceptions:

1) "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons;

2) party reimbursed when litigation confers "a substantial benefit on the members of an ascertainable class and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among [the members of the class] . . .";

3) attorney fees may be awarded when a party has acted as a "private attorney general" where private litigants vindicate a strong public policy and provide widespread public benefit through their efforts. *Id.* at 284-285.

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With the wide range of remedies available for prisoners under section 1983, the problem is not finding a remedy, but enforcing it. The two principal methods of enforcement are: 1) the use of the contempt power, and 2) the appointment of special judicial officers.

Civil contempt ensures that the victorious party receives the full relief that the court granted.¹³⁰ Under contempt the court can impose a fine in order to secure future compliance as well as a fine if actual losses occurred because of failure to comply. A few courts have used the contempt power although the fines were then suspended and defendants were given additional time to comply. Judges appear extremely reluctant to fine defendants even when defendants are found in contempt. Government units should be subject to fines for failure to comply with orders for equitable relief¹³¹ although previously they have not been held liable as they were not considered "persons" for the purposes of 42 U.S.C. § 1983.¹³² However, since *Monell v. Department of Social Services New York*,¹³³ municipalities are subject to liability under section 1983 and therefore not wholly immune from section 1983 suits. Further, as "persons" subject to liability under section 1983, local governing bodies could be sued directly for monetary, declaratory or injunctive relief where the action that was alleged to be unconstitutional implemented a policy statement, ordinance, regulations, or decision officially adopted by that body's officers, or where constitutional deprivations were due to governmental "custom," even though such custom had not received formal approval through the body's decision-making channels.

A few judges¹³⁴ have appointed special judicial officers to assist in enforcing

It should be noted that attorney fees were awarded on the "private attorney general" exception here—\$2000.00 against sheriff. *But see* *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U.S. 240, (1975) Attorney's fees were not awarded against defendants here on the "private attorney general" exception in the absence of Congressional action. *See also* *Adams v. Carlson*, 521 F.2d 168 (7th Cir. 1975) (*Alyeska* used to deny recovery); *Gates v. Collier*, 522 F.2d 81 (5th Cir. 1975) (*Alyeska* should have no impact on the "bad faith" exception, but here remanded for reconsideration in light of).

130. *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973) (good faith is irrelevant since civil contempt is used to correct not to punish; "if the plaintiffs have been deprived of that which the court ordered, . . . then the role of the courts is not to fix blame on the defendants, but rather to prevent a recurrence and to repair any damage that has been done. This duty devolves upon the court regardless whether the defendants tried in good faith to carry out the terms of the injunction." *Id.* at 1300-1301; there was a \$2,500 fine because defendants failed, among other things, to implement minimum due process safeguards for disciplinary procedures); *see also* *Hamilton v. Love*, 358 F. Supp. 696 (E.D. Ark. 1973) and *Jones v. Wittenberg*, 357 F. Supp. 696 (N.D. Ohio 1973).

131. *C.f.*, *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973).

132. A municipality has been held not to be a "person" for purposes of § 1983 and can not be a defendant in a § 1983 action for equitable relief. *See* *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 467 (1961).

133. On June 6, 1978, in a 7-2 decision, the U.S. Supreme Court overruled *Monroe v. Pape* and held that local governments, municipal corporations and school boards were "persons" subject to § 1983. *Monell v. Dept. of Soc. Serv. of the City of N.Y.* 98 S.Ct. 2018 (1978).

134. *Hamilton v. Schiro*, 338 F.Supp. 1016 (E.D. La. 1970); *Jackson v. Hendrick*, 457 Pa. 405, 321 A.2d 603 (1974); *Wayne Co. Jail inmates v. Wayne Co. Bd. of Comm'rs. Civ. Action # 173217* (Cir. Ct. for Wayne City, Mich. 1972); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973).

court orders. F.R.C.P. section 53 empowers a federal court to appoint a master in cases which are "complicated" or in which there are "exceptional circumstances." F.R.C.P. section 70 allows a court to enforce compliance with an existing court order by directing the "act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has a like effect as if done by the party."

Using their inherent power and F.R.C.P. sections 53 and 70, federal courts in several jurisdictions (and some state courts) have appointed masters,¹³⁵ monitors,¹³⁶ and ombudsmen¹³⁷ to perform a wide range of tasks in prisoners' rights litigation.¹³⁸

On remand, if the District Court finds the inmates' allegations in *Bolding v. Holshouser* true, then the court must grant relief and they may consider relief that is broad and reformatory in nature. Some of the remedies requested by the North Carolina prisoners are far short of sweeping and reformatory. Basic sanitary, hygienic, and medical facilities; inmate protection; untampered mail unless justified; and due process in administrative hearings are well defined rights, and where violations have occurred, relief has been granted. There would not appear to be any undue burden on the prison system to ensure such rights. The relief requested by North Carolina inmates regarding overcrowding might, however, be considered reformatory and radical although such relief has been requested before. Although prisons have been threatened with closure, no on-the-spot shutdown has been ordered. The request for injunctions against new prisoners entering the North Carolina prison system is probably an unworkable solution, although the influx could be slowed by courts willing to try novel non-jail punishment. Sentencing, generally, might be reviewed. Halting prison construction hardly seems to answer the overcrowding problem. In some situations, mobile units might be a temporary solution. Reducing prison population through early release or parole might have some positive effect, also.

It seems clear that action is needed in several areas and a lack of funds should not be allowed to dictate whether Eighth Amendment rights are protected or not protected. The District Court might consider appointing a special commission to study the problem and make recommendations. The court might also consider setting deadlines for certain events to take place and appoint a special monitor to oversee the carrying out of any solutions.

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135. *Hamilton v. Schiro*, 338 F.Supp. 1016 (E.D. La. 1970); *Jackson v. Hendrick*, 457 Pa. 321 A.2d 603 (1974).

136. *Wayne Co. Jail Inmates v. Wayne Co. Bd. of Comm'rs.*, Civ. Action # 173217 (Cir. Ct. for Wayne City, Mich. 1972).

137. *Morales v. Turman*, 364 F.Supp. 166 (E.D. Tex. 1973).

138. Special officers have been defined as follows: Masters—primarily fact finders for the court; Receivers—primarily hold, manage, or liquidate property; "Special" Masters—responsible for multiple functions such as fashioning a plan and assisting with implementation; Monitors—responsible for observing the implementation process and reporting to the courts; and Ombudsmen—responsible for hearing inmate complaints and grievances, conducting investigations and making recommendations to the courts. Comment, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).