(10)

No. 89-7376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PEARLY WILSON,

Petitioner,

—vs.—

RICHARD SEITER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[redacted] BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE

The American Public Health Association ("APHA") moves pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief amicus curiae in support of petitioner. The written consents of petitioner and of respondent have been filed with the Court.

APHA is a national non-governmental

organization established in 1872 for the purpose of improving public health and the quality of health care. Together with its affiliated associations, APHA is the largest public health association in the world, with a combined multidisciplinary membership of approximately 50,000 health care professionals and consumers. APHA has appeared before this Court on numerous occasions as amicus curiae in cases with serious implications for the public health. See, e.g., West v. Atkins, 487 U.S. 40 (1988); Hardwick v. Bowers, 478 U.S. 186 (1986); Roe v. Wade, 410 U.S. 113 (1973).

APHA has a special interest in assuring adequate health care and healthful living conditions for underserved segments of society, including prisoners. In the early 1970's, APHA appointed a task force to devise a set of standards--the first of

its kind--for the delivery and maintenance of health care in correctional facilities. See Standards for Health Services in Correctional Institutions (1976). A second, revised edition of the standards was issued a decade later. See Standards for Health Services in Correctional Institutions (1986).[1]

Both editions of these standards contained extensive chapters on environmental conditions because the APHA is committed to the public health view that acceptable living conditions are as important to health as are effective medical services. The current standards' chapter "Environmental Health" directly addresses such matters as temperature control, space requirements, noise, sanitation, food

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[1] The 1986 standards are herewith lodged with the Clerk of Court.

service, and vermin control--the same issues involved in this case. Id. at 61-89.

Because of its professional expertise and multi-disciplinary focus in addressing health problems in prison, APHA believes it will present to the Court a valuable perspective on the issues concerning prison conditions litigation that this case presents. Consistent with its purpose of advancing the public health and in the hope of decreasing the human suffering caused by health-threatening prison conditions, APHA requests leave to file this brief.

Respectfully submitted,

/S/
John Boston

Dated: November 12, 1990
New York, New York

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INTEREST OF AMICUS CURIAE AMERICAN PUBLIC HEALTH ASSOCIATION

The interests of the American Public Health Association (APHA) are set forth in its motion for leave to file this brief as amicus curiae, which is bound herewith pursuant to Rule 36.3 of the Rules of this Court.

SUMMARY OF ARGUMENT

A claim that conditions of prison confinement constitute cruel and unusual punishment must be decided based on actual conditions in the prison. The standard of malicious and sadistic intent, applied by Whitley v. Albers, 475 U.S. 312 (1986), to certain kinds of constitutional torts by prison officials, is not applicable or helpful where the issue is continuing conditions of confinement and not a discrete incident or an emergency response. The proper standard is that stated in Rhodes v. Chapman, 452 U.S. 337 (1981): conditions are cruel and unusual if "they result[] in unquestioned and serious deprivations of basic human needs" or "deprive inmates of the minimal civilized measure of life's necessities." Id. at 347. This objective test is compelled by

the realities of prison life, in which foul and inhumane conditions are rarely imposed for evil motives, but more frequently arise from lack of resources or facilities, incompetence, or disorganization.

The existence of reform efforts by prison officials cannot be dispositive of the existence of an Eighth Amendment violation. Prison officials almost always make improvements when they are sued, but these changes are not always fully implemented, and do not always eliminate the constitutional violations when they are carried out. The significance of these improvements should be assessed by the district court as part of its remedial discretion. If the constitutional violation has been entirely eliminated, the court may withhold injunctive relief. If the violation remains, in whole or in

part, the extent and nature of changes made by the defendants should be considered in formulating injunctive relief. But the touchstone must always be the actual conditions in the prison and their effect on those imprisoned.

ARGUMENT

THE EIGHTH AMENDMENT ANALYSIS ADOPTED BY THE COURT OF APPEALS MISAPPLIES THIS COURT'S PRECEDENTS AND UNDERMINES THE JUDICIARY'S ABILITY TO ENSURE MINIMAL STANDARDS OF DECENCY IN CONDITIONS OF PRISON CONFINEMENT.

This case poses the question whether the Eighth Amendment requires that the lawfulness of prison living conditions be measured by the good intentions of prison officials or by actual conditions in the prison.

The prisoner-plaintiffs alleged conditions that have previously been acknowledged to violate the Eighth Amendment if proven to be sufficiently severe: unsanitary eating conditions, inadequate heating, housing of physically and mentally ill prisoners in general population dormitories, inadequate ventilation, excessive noise, and vermin infestation.[1]

Prison officials responded that they had made "affirmative efforts to maintain habitable conditions" such as servicing heaters, providing extra blankets, installing exhaust fans, and hiring an exterminator. A. 72. The actual effects

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[1] See, e.g., Tillery v. Owens, 907 F.2d 418, 422-24 (3d Cir. 1990) (inadequate ventilation, insect infestation); French v. Owens, 777 F.2d 1250 (7th Cir. 1985), cert. denied, 479 U.S. 817 (1986) (unsanitary eating conditions, inadequate ventilation); LaReau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (failure to screen inmates for communicable diseases); Ramos v. Lamm, 639 F.2d 559, 570-72 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (unclean food, inadequate heating and ventilation, insect infestation); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (failure to segregate inmates with communicable diseases); Toussaint v. McCarthy, 597 F.Supp. 1388, 1395-96, 1409-12 (N.D.Cal. 1984), aff'd in part and rev'd in part on other grounds, 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) (lack of food sanitation, inadequate heating and ventilation, excessive noise).

of their efforts remain disputed.[2] The court of appeals observed:

> Importantly, the appellants do not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions. Rather, appellants' complaints are aimed at the results of those efforts. . . . The appellants' position, apparently, is that despite these actions, prison conditions remain unacceptable.
>
> A. 73.

The court did not purport to resolve the disputed factual question of what the prison conditions actually were. Instead, it held that there was no indication that the prison officials "used confinement conditions to punish" the prisoners, and that there was no evidence of "behavior marked by persistent malicious cruelty." Hence, it held that there was no genuine issue of material fact, and the prison

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[2] The factual disputes are set out in the brief of Petitioner herein.

officials were entitled to summary judgment. A. 73-74.

A. The court below misapplied this Court's decision in Whitley v. Albers and ignored the governing standard of Rhodes v. Chapman.

The appeals court relied on this Court's decision in Whitley v. Albers, 475 U.S. 312 (1986), which held that damages could not be recovered for the use of force in quelling a prison disturbance unless prison personnel acted "maliciously and sadistically for the very purpose of causing harm." Id. at 320-21.

This case is not governed by Whitley v. Albers. Whitley was a constitutional tort case arising from a single discrete incident requiring split-second decisions and action by prison officials. The Whitley plaintiff's interest in avoiding forcible injury had to be balanced against prison officials' strong interest in

quickly ending the disturbance and the threats it posed to other inmates and staff. The Court therefore concluded that the "deliberate indifference" standard advocated by the plaintiff and used in prison medical care cases did not "adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Id. at 320. Hence a showing of malicious and sadistic intent was required.

This case is more like Rhodes v. Chapman, 452 U.S. 337 (1981), because it involves continuing "conditions of confinement." Id. at 345.[3] The Rhodes

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[3] This phrase, the word "conditions," and variations of them are used repeatedly throughout the Rhodes opinion.

plaintiffs alleged persistently overcrowded conditions resulting in double-celling in an Ohio penitentiary. The Court noted that the core of modern Eighth Amendment jurisprudence is the ban on punishments that "'involve the unnecessary and wanton infliction of pain,'" including those that are "totally without penological justification."[4] It concluded that conditions are cruel and unusual if "they result[] in unquestioned and serious deprivations of basic human needs" or "deprive inmates of the minimal civilized measure of life's necessities." Id. at 347 (emphasis supplied).

The Rhodes standard speaks to conditions in the prisons and not in the minds of prison officials. So did its analysis

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[4] Id. at 346, quoting Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976).

of the plaintiffs' challenge to double-celling. The Court stated:

> Virtually every one of the [district] court's findings tends to refute [the prisoners'] claim. The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement. . . . Although job and educational opportunities diminished marginally as a result of double celling, limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain. . . .
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> Id. at 347-48 (emphasis in original).[5]

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[5] The Court also was unconvinced by the district court's reliance on factors like the length of the prisoners' sentences, the degree to which the prison's population exceeded its "design capacity," the large amount of time spent in-cell, and the fact that double-celling was not a temporary condition. Id. at 348. But the focus remained on the facts of prison life and not the prison officials' mental state.

Conspicuous by its absence from Rhodes is any discussion of prison officials' state of mind. The focus is on the actual conditions of confinement and their effect on the people who live under them.[6] And there is no discussion in Rhodes of whether prison officials "used confinement to punish" the prisoners. A. 73. Rather, the Court held that basic Eighth Amendment principles apply "when the conditions of confinement compose the punishment at issue." Rhodes, 452 U.S. at 347 (emphasis supplied).

Nothing in Whitley purports to over-

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6 "The first aspect of judicial decision-making in this area is scrutiny of the actual conditions under challenge. . . . In determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the 'touchstone is the effect upon the imprisoned.'" Rhodes, 452 U.S. at 362, 364 (Brennan, J., concurring), quoting Laaman v. Helgemoe, 437 F.Supp. 269, 323 (D.N.H. 1977).

rule or modify Rhodes. Rather, Whitley deals with an entirely different problem for which the analysis of Rhodes simply is not helpful.[7] Nor is the Whitley analysis helpful in addressing the Rhodes overcrowding issue or the conditions presented in this case--conditions that are ongoing, that do not arise from short-term exigencies, that do not require rapid decision-making, and that are not justified by any substantial countervailing penological interest.[8]

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[7] In Whitley, four Justices dissented. Significantly, the dissent does not criticize the majority for departing from Rhodes; indeed, it does not mention Rhodes at all. The Whitley majority cited Rhodes only in support of the most general propositions of Eighth Amendment jurisprudence. Whitley, 475 U.S. at 319, 321. Taken together, these opinions show convincingly that no Justice viewed Whitley as limiting, qualifying, or indeed having much to do with what had been decided in Rhodes.

[8] The respondent prison officials herein did not assert any legitimate penological interest in unhealthy food, lack of heat,

B. The Eighth Amendment analysis applied by the court of appeals would place the most inhumane prison conditions beyond the federal courts' injunctive powers.

The Sixth Circuit's misapplication of Whitley v. Albers would effectively immunize even the worst prison conditions from federal judicial correction. A few examples will show how.

In Gates v. Collier, 349 F.Supp. 881 (N.D.Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974),[9] the district court condemned the confinement of prisoners in "barracks unfit for human habitation and in conditions that threaten their physical

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(footnote cont'd)

the spread of communicable disease, excessive noise, and infestation with insects.

[9] Gates is one of several Eighth Amendment prison conditions cases cited with approval in Rhodes. See 452 U.S. at 352 n. 17.

health and safety, by reason of gross deficiencies in plant and equipment and lack of adequate medical staff and facilities. . . ." Defendants had "failed to provide adequate protection against physical assaults, abuses, indignities and cruelties of other inmates," by giving authority and weapons to "trusty" inmates and by failing to separate serious violent offenders from nonviolent or first offenders. 349 F.Supp. at 888-89, 894.

The court noted that the state legislature had authorized and directed the penitentiary board to prepare a plan directed at improving inmates' security and eliminating the trusty system. A consultant committee engaged jointly by state officials, the federal Law Enforcement Assistance Administration (LEAA), and the American Correctional Association had made recommendations for one million dollars in

emergency reform steps, and LEAA had committed itself to provide the funds. The Governor assured the court during pretrial conferences that he would "strongly advocate to the Mississippi Legislature that it provide adequate legislation and funds not only to eliminate the undesirable conditions at Parchman but to make it an exemplary penal institution." Id. 891-92. Nonetheless, the court entered judgment finding an Eighth Amendment violation, and the court of appeals affirmed, observing: "While recognizing that steps have been taken, since the filing of this suit, to improve conditions at Parchman, it is evident that much is left to be done before Parchman is operated in accord with [] constitutional requirements. . . ." 501 F.2d at 1321.

Under the approach of the Sixth Circuit in this case, the Mississippi dis-

trict court would have been required to dismiss Gates. It made no findings that the conditions had been imposed because of the defendants' malicious or sadistic motivations. And the Gates plaintiffs, like the present petitioner, did "not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions." A. 73. In fact, they had made substantial efforts; but the key fact, as stated by the court of appeals, was that "much is left to be done."[10] The Gates court,

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[10] Just how much was left is made clear by the district court's subsequent opinion, issued three years after its initial injunction, finding a continuing Eighth Amendment violation in defendants' "continuing failure to provide for the physical health and well being of inmates" by their noncompliance with medical care requirements, the "appalling, deplorable condition" of many housing units, and the continued overcrowding. Gates v. Collier, 390 F.Supp. 482, 488-89 (N.D.Miss. 1975), affirmed on other grounds, 525 F.2d 965 (5th Cir. 1976), affirmed and remanded with directions, 548 F.2d 1241 (5th Cir.

unlike the court below, recognized that "the results of these efforts," A. 73, were of prime importance.[11]

Similarly, in Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977), the district court condemned housing units with "severe environmental and fire hazards"; crowding so extreme that prisoners were forced to sleep in garages, barber shops, libraries and stairwells, and held in dormitories without toilet and shower facilities; overtaxed kitchen, water and sewer systems; and dining facilities pre-

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(footnote cont'd)

1977); see also Gates v. Collier, 423 F.Supp. 732 (N.D.Miss. 1976) (granting further relief with respect to crowding and the closing of dilapidated camps).

[11] Ultimately, it appears, those results were acceptable. The last reported opinion on the merits of the Gates litigation was in 1977. Gates v. Collier, 548 F.2d 1241 (5th Cir. 1977).

senting "immediate health dangers."

This case, too, would have been dismissed under the Sixth Circuit's approach in this case. There were no findings of malicious or sadistic intent on defendants' part. To the contrary, the court of appeals was constrained to hold that "the good will shown by the Defendants cannot serve as a defense." Id. at 396. Nor could plaintiffs claim that defendants had made "no efforts" to improve conditions; the state prison budget had been increased fivefold in three years and the defendants had submitted a comprehensive reform plan approved by all parties. Yet the court of appeals upheld the district court's finding "that the presently existing overcrowding . . ., when considered with other circumstances, constitutes cruel and unusual punishment. . . ." Id. at 400 (emphasis in original). Like the present

petitioner, the Battle plaintiffs argued that "despite [defendants'] actions, prison conditions remain unacceptable," A. 73, and the court of appeals properly affirmed on that basis.[12]

More recently, a Pennsylvania district court condemned the State Correctional Institution at P ttsburgh as an "overcrowded, unsanitary, and understaffed firetrap." Tillery v. Owens, 719 F.Supp. 1256, 1259 (W.D.Pa. 1989), aff'd, 907 F.2d 418 (3d Cir. 1990). The appellate court agreed that "almost every element of the physical plant and provision of services at SCIP falls below constitutional norms." 907 F.2d at 427. Indeed, conditions

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[12] In 1986, the court of appeals affirmed the district court's findings that conditions of confinement met Eighth Amendment standards; the action was dismissed except for claims concerning racial discrimination. Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986).

appear fully as bad as in Mississippi in 1972. The risk of assault was so great that many inmates feared to leave their cells for recreation or to enter the shower area; inmate housing was infested with vermin and festooned with bird droppings; ventilation was grossly inadequate; defective plumbing resulted in leaks, puddles and odors, and showers were encrusted with dirt and slime; the danger of fire was enormous and preparation for it virtually nonexistent; and medical and psychiatric treatment were "shockingly deficient," with the psychiatric care area "in shambles." 907 F.2d at 422-24. The psychiatric observation area, in which inmates were "abandon[ed] . . . to vegetate and fester in despicable confinement," emitted such an "overpowering stench" that the district judge did not get close enough to see it. 719 F.Supp.

at 1304.

Under the court of appeals' approach in this case, no Eighth Amendment violation could have been found. The district court's lengthy opinion contains no findings of malice or sadism on the part of any defendant; indeed, at one point, it "hasten[ed] to add that we do not question the integrity of the officials at SCIP. They are merely jerry-rigging with a severe staff and supply shortage owing to budget constraints." 719 F.Supp. at 1276. Although there are numerous references to deliberate indifference, that is precisely the showing that Whitley, relied on by the court below, held inadequate to establish an Eighth Amendment violation. 475 U.S. at 320.

The foregoing cases[13] illustrate two

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[13] The list could be extended at length. See, e.g., Wellman v. Faulkner, 715 F.2d 269, 273 (7th Cir. 1983), cert. denied,

central points.

First, the focus on prison officials'

(footnote cont'd)

468 U.S. 1217 (1984) ("Despite the apparent good intentions of prison officials, there seems no foreseeable cure for this serious systemic deficiency" of lack of medical staff); Fisher v. Koehler, 692 F.Supp. 1519, 1562, 1566-68 (S.D.N.Y. 1988), aff'd, 902 F.2d 2 (2d Cir. 1990) (citing "obvious sincerity and competence" of Commissioner and Warden while finding "systematic deficiencies" in failure to control violence); Ramos v. Lamm, 485 F.Supp. 122, 168 (D.Colo. 1979), aff'd in part and vacated and remanded in part on other grounds, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (defendants had spent "significant sums" to build new prisons; their failure to remedy intolerable conditions represented a "utilitarian calculus to obtain maximum results from limited resources"; no malice found); Johnson v. Levine, 450 F.Supp. 648, 655 (D.Md. 1978), aff'd in pertinent part, 588 F.2d 1378 (4th Cir. 1978) (per curiam) (officials had "conscientiously attempted" to improve facilities with physical improvements and new programs and services); Todaro v. Ward, 431 F.Supp. 1129, 1160 (S.D.N.Y.), aff'd, 565 F.2d 48 (2d Cir. 1977) (medical staff appeared "truly concerned with [inmates'] well-being," but the medical care system was constitutionally deficient).

state of mind misses the point. Filthy food, flies and cockroaches, and exposure to disease rarely result from the warden's malicious and sadistic propensities. More often, such conditions result from disorganization, incompetence,[14] or fiscal or political difficulties,[15] usually stemming

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[14] See, e.g., Morales Feliciano v. Romero Barcelo, 672 F.Supp. 591, 605, 607, 613-14, 619, 620-21 (D.P.R. 1986) (repeated references to chaos, disorganization and incompetence in numerous aspects of prison administration); Palmigiano v. Garrahy, 443 F.Supp. 956, 977 (D.R.I. 1977) ("complete absence of effective leadership or management capability on the part of the responsible officials").

[15] For an extreme example, see Grubbs v. Bradley, 552 F.Supp. 1032, 1082 (M.D.Tenn. 1982) (licensed practical nurse directed to perform surgery on a hemorrhaging prisoner because the year's hospital budget was exhausted).

In a more typical case, the district judge observed:

> We take judicial notice of the fact that for years Allegheny County officials have proposed, rejected, discussed and haggled over new jail facilities; plans for new buildings have been drawn up; proposals for renovating already existing facilities

at least in part from "[p]ublic apathy and the political powerlessness of inmates."[16]

(footnote cont'd)

> have been made and rejected; other plans have been delayed in the hope that outside financial sources of assistance will be uncovered. As a result, the jail remains with us--old, dilapidated, and unconstitutionally overcrowded. An economic motive can no longer excuse or be used to justify the conditions imposed on the inmates at ACJ.
>
> Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1296-97 (W.D.Pa. 1983),

Five years later little had changed. The district court concluded that constitutional conditions of confinement could not be provided in the old jail. Inmates of the Allegheny County Jail v. Wecht, 699 F.Supp. 1137 (W.D.Pa. 1988), aff'd, 874 F.2d 147 (3d Cir.), vacated and remanded on other grounds, 110 S.Ct. 355 (1989), vacated as moot, 893 F.2d 147 (3d Cir. 1990). A few months ago the court of appeals upheld coercive sanctions for continued violation of crowding limits, citing the county's "consistent failure to meet its meager Eighth Amendment obligations." Inmates of the Allegheny County Jail v. Wecht, 901 F.2d 1191, 1200 (3d Cir. 1990).

[16] Rhodes, 452 U.S. at 358 (Brennan, J., concurring). Accord, Harris and Spiller,

Even overtly vicious conduct by lower-level staff may ultimately find its roots in neglect or ineptitude, rather than malice, on the part of responsible officials.[17]

Thus, in prisons, all that is necessary for the triumph of evil is that good

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(footnote cont'd)

After Decision at 5-8 (1976) (noting lack of support for prison reform until publicized via litigation).

[17] Thus, widespread brutality by Texas prison staff, as well as tolerance of the exploitative "building tender" trusty system, were closely related to state officials' failure to provide enough security staff to keep order in a humane fashion. Ruiz v. Estelle, 503 F.Supp. 1265, 1299, 1303 (S.D.Tex. 1980), aff'd in part and modified in part on other grounds, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). Judge Johnson made similar observations about the inmate trusty system in Alabama. Pugh v. Locke, 406 F.Supp. 318, 325 (N.D.Ala. 1976), aff'd in part and remanded, Newman v. Alabama, 559 F.2d 283, 291 (5th Cir.), cert. denied sub nom. Alabama v. Pugh, 438 U.S. 915 (1978).

men and women have other priorities. Consequently, an Eighth Amendment analysis that turns on the ill will of prison functionaries simply misunderstands the problem and will be wholly ineffectual in guaranteeing minimal standards of decency.

Second, the court of appeals' apparent view that if prison officials take any action, however ineffectual, to improve conditions, no violation can be found,[18] would effectively abolish Eighth Amendment injunctive jurisprudence. Prison officials almost always do something when confronted with litigation; it would be astonishing if they did not.[19]

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[18] In the court's own words: "Importantly, the appellants do not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions. Rather, appellants' complaints are aimed at the results of those efforts." A. 73.

[19] See, e.g., Gilland v. Owens, 718 F.Supp. 665, 689-90 (W.D.Tenn. 1989); Fisher v. Koehler, 692 F.Supp. at 1565-67

And as one commentator put it, "a prison is most in need of systemic reform when pervasive violations persist despite good faith efforts of reasonable individuals."[20]

This Court has sagely warned, "It is the duty of courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952);

(footnote cont'd)

("a case of better late than never"); LaMarca v. Turner, 662 F.Supp. 647, 716 (S.D.Fla. 1987), appeal dismissed, 861 F.2d 724 (11th Cir. 1988); Ramos v. Lamm, 485 F.Supp. at 178 ("commendable" improvements begun during litigation); and cases discussed at 14-23, above.

[20] Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv.L.Rev. 626, 641 (1981).

see also City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289 (1982); Allee v. Medrano, 416 U.S. 802, 810-11 (1974); U.S. v. W.T. Grant Co., 345 U.S. 629 (1953) (reforms undertaken under threat of litigation do not moot injunctive claims). The law books are replete with accounts of internal reform efforts that either were not adequate or were not completed.[21] If the mere existence of some reform effort is enough to defeat an Eighth Amendment claim, then prison conditions jurisprudence is at an end.

This is not to say that district courts should ignore prison officials' constructive efforts. In some cases,

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21 See, e.g., Inmates of Occoquan v. Barry, 717 F.Supp. 854, 865-66 (D.D.C. 1989); Fisher v. Koehler, 692 F.Supp. at 1564-68; Reece v. Gragg, 650 F.Supp. 1297, 1299 (D.Kan. 1986) (court tour showed severe problems remained despite substantial improvements).

these efforts may be sufficient to eliminate the Eighth Amendment violation by the time of trial, obviating the need for injunctive relief.[22] In others, they may affect the scope and nature of the injunctive relief granted.[23] Certainly, where prison officials adopt or propose

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22 See, e.g., Lovell v. Brennan, 728 F.2d 560 (1st Cir. 1984) (relief denied where Eighth Amendment violations had been eliminated by time of trial); DeGidio v. Pung, 704 F.Supp. 922 (D.Minn. 1989) (same).

23 Davenport v. DeRobertis, 844 F.2d 1310, 1314 (7th Cir. 1988), cert. denied sub nom. Lane v. Davenport, 109 S.Ct. 260 (1988) (injunctive relief must be tailored to improved circumstances); Morrow v. Harwell, 768 F.2d 619, 627 (5th Cir. 1985) (where officials have shown their readiness to meet constitutional requirements by changing policies, initial response should be limited to declaratory relief); Fisher v. Koehler, 692 F.Supp. at 1566-67; Balla v. Idaho State Board of Corrections, 595 F.Supp. 1558, 1578-80 (D.Idaho 1984) (relief regarding personal security limited to those housing units where defendants' remedial efforts had not solved the problem).

substantial reforms, the court should use them as the basis of its remedy unless they are shown to be plainly inadequate to end the constitutional violation.[24] But in all such cases, these are matters of the courts' remedial discretion; they do not negate the existence of an Eighth Amendment violation.

For the past two decades the federal courts have been the primary force in maintaining minimal standards of decency in prisons. ". . . [J]udicial intervention has been responsible, not only for remedying some of the worst abuses by direct order, but also for 'forcing the legislative branch of government to reevaluate correction policies and to appropriate funds for upgrading penal

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24 See Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986); Hoptowit v. Ray, 682 F.Supp. 1237, 1247 (9th Cir. 1982).

systems.'"[25] At the same time, judicial intervention under the Eighth Amendment has been kept within proper bounds by the decisions of this Court[26] and of the courts of appeals,[27] as well as by the often-expressed reluctance of district courts to become more involved in prison operations than constitutional standards require.[28]

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25 Rhodes, 452 U.S. at 359-60 (Brennan, J., concurring) (citation omitted).

26 Rhodes v. Chapman, supra; see also Turner v. Safley, 482 U.S. 78, 89 (1987).

27 Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986); Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982); Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), cert. denied, 460 U.S. 1042 (1983); Ramos v. Lamm, 639 F.2d 559, 567 n. 10 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir.), cert. denied sub nom. Alabama v. Pugh, 438 U.S. 915 (1978).

28 See, e.g., Tillery v. Owens, 719 F.Supp. at 1309; Coniglio v. Thomas, 756 F.Supp. 409, 414 (S.D.N.Y. 1987); Wooden v. Norris, 637 F.Supp. 543, 555 (M.D.Tenn.

The courts' task under the Eighth Amendment is far from over and it is doubtful it will ever be. It is tempting to believe that the "deplorable" and "sordid" conditions revealed by many of the prison cases of the 1970s are now ancient history. That is not the case. While some unconstitutional prisons have reached and remained at constitutionally acceptable levels,[29] others have not.[30] Worse,

(footnote cont'd)

1986); Miles v. Bell, 621 F.Supp. 51, 57 (D.Conn. 1985); Ramos v. Lamm, 485 F.Supp. at 132; Pugh v. Locke, 406 F.Supp. at 328.

[29] There have been no reported opinions on the merits in the Mississippi prison litigation for thirteen years. See Gates v. Collier, 548 F.2d 1241 (5th Cir. 1977). In Alabama, the district court entered an order finding the system constitutional and dismissing the case in 1988. Status Report: The Courts and Prisons (January 1, 1990), in 2 Prisoners and the Law at App. B-23, B-24 (Robbins ed. 1990) ("Status Report"). In Oklahoma, conditions were found to meet Eighth Amendment standards in 1986 and the action was dismissed except for the racial discrimination claims. Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986). The Arkansas

constitutional prisons are constantly

(footnote cont'd)

prison litigation was ended in 1982 after a finding of continuing compliance. Finney v. Mabry, 546 F.Supp. 628 (E.D.Ark. 1982). Other states with prisons subject to long-standing injunctive orders in which there have been no recent substantial findings of unconstitutionality or noncompliance include Arizona, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, North Carolina, and Wyoming. Status Report, supra.

30 Tillery v. Owens, discussed above at 20-22; Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986) ("rampant" violence); Gilland v. Owens, 718 F.Supp. 665, 686-88 (W.D.Tenn. 1989) ("pervasive and constant threat of personal harm" from violence); Inmates of Occoquan v. Barry, 717 F.Supp. 854, 866-68 (D.D.C. 1989) ("dilapidated and filthy" living conditions, life-threatening fire hazards, and "systemic failures" in medical services); Fambro v. Fulton County, 713 F.Supp. 1426, 1429-31 (N.D.Ga. 1989) (health-threatening defects in medical care system, unsanitary conditions); Morales Feliciano v. Hernandez Colon, 697 F.Supp. 37, 45 (D.P.R. 1988) ("structurally unsound and vermin infested" facilities, life-threatening fire hazards, uncontrolled violence, denial of and interference with medical care).

threatened, and the gains of past years are always at risk, from the pressures of increasing populations[31] and limited budgets.[32] Indeed, it is well worth

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31 The national prison population grew by 6 percent in the first half of 1990. U.S. Department of Justice, Prison Population Grows 6 Percent During First Half of Year (October 7, 1990). The National Council on Crime and Delinquency has estimated that in the twelve states that use its projection methodology, prison populations will increase by over 68 per cent by 1994. Austin and McVey, The 1989 NCCD Prison Population Forecast: The Impact of the War on Drugs, NCCD Focus (December 1989).

32 Thus, in Duran v. Anaya, 642 F.Supp. 510 (D.N.M. 1986), a statewide class action previously resolved by consent judgment, the district court was constrained several years later to enjoin proposed budget and staff cuts directed at medical care, mental health care, and security staffing. In Palmigiano v. Garrahy, C.A. No. 74-172, Order (D.R.I., January 25, 1984), the defendants sought to be released from injunctive obligations based on a Special Master's report showing substantial improvement in their compliance with a 1977 injunction. The court denied the motion, citing the lack of complete compliance and the dangers posed by overcrowding. Now the defendants have lost the ground they had gained. They have been held in contempt and in "continuing contempt" based on a "record of

remembering that the dreadful conditions in the Alabama prisons arose from a historical background of failed reform. The end of the "convict lease" system in the early 20th Century was followed by the construction of numerous new facilities from the 1920s through the 1960s, but financial pressures and population growth undermined the "enlightened objectives" of state officials, leading to the

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(footnote cont'd)

sordid and explosively dangerous conditions" brought about largely by worsening overcrowding. Palmigiano v. DiPrete, 737 F.Supp. 1257, 1261 (D.R.I. 1990). Other states in which significant noncompliance has been alleged or proved after a lapse of years without controversy include Kansas (1980 decree reopened in 1988, injunctive relief granted, new decree in 1989), Louisiana (case reopened in 1989, investigations pending), Michigan (contempt found in 1989), New Hampshire (contempt motion pending), and Utah (new litigation filed, restraining order issued, contempt proceedings filed in 1989). Status Report, supra n. 29.

"degenerat[ion] into unrelieved squalor" later documented in federal court litigation. L. Yackle, Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System at 10-11 (1980); see also Pugh v. Locke, supra. The Texas prisons, too, had been the beneficiaries of several decades of reform efforts at the time that they were found unconstitutional. S. Martin and S. Ekland-Olson, Texas Prisons: The Walls Came Tumbling Down at 15-25 (1987); see also Ruiz v. Estelle, supra.

For these reasons, it is essential to the maintenance of public health and human decency under our Constitution that the Court reaffirm the holding of Rhodes v. Chapman that Eighth Amendment rights are to be measured by facts in the prisons and not intentions in prison officials' minds. If the Eighth Amendment requires no more

than good intentions--or, worse, the mere absence of bad ones--it might as well not exist.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the matter remanded for further proceedings consistent with the decision in Rhodes v. Chapman.

Respectfully submitted,

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