Double-Ceiling in the Prisons: The Shame of the Courts

I. INTRODUCTION

The times of criminal justice are hard: sentences are long\(^1\) and not readily tempered by parole.\(^2\) As a result of these trends, the prisons have become chronically overcrowded.\(^3\) This, in turn, has created an endless retinue of associated problems touching upon every inmate and every facet of life within correctional institutions. Available space per inmate is decreased, scant resources are further diminished, facilities and programs are overtaxed, supervision is reduced, and sanitation and health standards are compromised.\(^4\)

These misfortunes are not the consequence of any practiced cruelty; rather, they are rooted in a tradition of legislative apathy and a protracted period of fiscal neglect.\(^5\) Given these primal causes, it can be expected that the future of prison reform will be in every way as bleak.

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1. The average sentence of the federal prison population on June 30, 1965 was over five years and nine months. Project, Parole Release Decision-Making and the Sentencing Process, 84 YALE L.J. 810, 815 n.7 (1975).

2. In 1973, the underlying concepts of parole shifted away from rehabilitation and moved toward punishment. The primary focus thus became the offender’s past record and the severity of the crime, resulting in longer actual time served per sentence. Curtis, Parole Guidelines and Sentence Reform, in PRISONER’S RIGHTS SOURCEBOOK 91, 92 (I. Robbins ed. 1980).

3. Other factors which have contributed to the mounting prison populations have been an increase in the overall population and increasing crime rates. Rhodes v. Chapman, 452 U.S. 337, 357 n.6 (1981) (Brennan, J., concurring).


5. Rhodes v. Chapman, 452 U.S. at 357 (Brennan, J., concurring). Justice Brennan declared that “[t]he problems of administering prisons are indeed ‘complex and intractable’ . . . but at their core is a lack of resources allocated to prisons.” Id. (citations omitted).
as its past. The present climate of inflation and budget-slashing is likely to inspire even greater economies; and the prisons, longtime orphans in the state capitals, will be the first to feel the pinch.

In order to accommodate their burgeoning populations, prison officials have frequently resorted to double-ceiling—the practice of confining two inmates in a cell originally designed for one. Seen in its proper perspective, however, double-ceiling is simply a symptom of overcrowding and an acquiescence to the one is a tacit assent to the other.

Double-celled prisoners, without exception, fare particularly poorly in their overcrowded environment if only for the reason that their freedom of movement is cut in half as neatly as are the facilities that were once available to them. Beyond this, overcrowding and double-ceiling work in tandem to convert institutional life into the "dark and evil world completely alien to the free world" so reminiscent of institutions past. The two combined have been regularly held responsible for high tension and stress, rampant violence, increased homosexuality, and acknowledged as the eminence grise behind numerous prison riots. Analytically, it is important to emphasize these far-reaching ef-

6. A natural consequence of the doubling of a prison population is a strain on certain fixed accommodations such as gym facilities, dining areas, showers and toilets, dayrooms, and rehabilitative/vocational programs. See, e.g., Chapman v. Rhodes, 434 F. Supp. 1007, 1015 (S.D. Ohio 1977) (court finding evidence that vocational services were reduced due to overcrowding and double-ceiling), rev'd, 452 U.S. 337 (1981); United States ex rel. Wolfish v. United States, 428 F. Supp. 333, 337 (S.D.N.Y. 1977) (double-ceiling compromising the common areas and rendering dining areas insufficient), rev'd sub nom. Bell v. Wolfish, 441 U.S. 520 (1979); Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981) (dayrooms converted into a nine-man dormitory with one toilet provided).


9. See Battle v. Anderson, 564 F.2d at 395; New York Dep't of Correctional Services, Strategic Plan, 1980-1985 (1980) (revealing that overcrowding was pronounced throughout the Attica prison prior to the riot); REPORT OF THE ATTY' GEN. ON THE FEB. 2 & 3, 1980 RIOT AT THE PENITENTIARY OF NEW MExIco, at 1,8 (1980) ("Lack of space, adequate programming and understaffing have all been part of the prison's tradition ... (the) dramatic increase of 200 inmates in the three months prior to the riot ... undoubtedly added to the high level of tension."); AMER. CORRECTIONAL ASSOC., CAUSES, PREVENTIVE MEASURES, & METHODS OF CONTROLLING RIOTS AND DISTURBANCES IN CORRECTIONAL INSTITUTIONS, at 63 (1970) (because "inmates are often emotionally disturbed individuals, overcrowding can lead to riots.")
fects, because it is this pervasive quality which makes overcrowding and double-ceiling the bane of prison administration.

Double-ceiling, both as an issue in itself and as a means of effecting a broad attack on overcrowding, has produced a constant stream of litigation. To date, the Supreme Court has addressed the issue twice, both times upholding the constitutionality of double-ceiling under widely divergent theories. This note examines these recent evolutions in the context of the prison life they so visibly affect. During this examination, the present law is criticized and ultimately condemned in favor of a reform which endeavors to consider both the requirements of the institution and the needs of its inmates.

II. Bell v. Wolfish: The Set-Up

In what was to be one of the most repressive decisions in the history of prisoner's rights, the Supreme Court first treated double-ceiling as it pertained to federal pre-trial detainees in Bell v. Wolfish. Speaking for the majority, Justice Rehnquist noted the long hours the prisoners were permitted out of their cells, the short-term nature of the average stay, and the modern, modular-type design of the institution. On these facts, the Court promptly destroyed the Second Cir-

10. Although there seems to be no tally of the number of double-ceiling and overcrowding cases decided, as of 1979 the federal district courts had decided reported cases in 29 jurisdictions—almost all of these concerning violations of prisoners' constitutional rights. Fair, The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions, 7 Am. J. Crim. L. 119, 124 (1974) [hereinafter cited as Courts as Constitution-Makers]. Furthermore, statistics reveal twenty-six court orders in effect attempting to curb overcrowding as of 1978. Rhodes v. Chapman, 452 U.S. at 356 (Brennan, J., concurring).

11. Bell v. Wolfish, 441 U.S. 520 (1979); Rhodes v. Chapman 452 U.S. 337 (1981). In Hutto v. Finney, 437 U.S. 678 (1978), the Court affirmed a holding that crowding large numbers of prisoners into small cells for disciplinary purposes was cruel and unusual punishment. This holding, while extremely relevant in the later case of Chapman, was not consulted in Wolfish.

12. 441 U.S. 520 (1979). The population of MCC, the jail under attack, also contained a smattering of convicted inmates and the Court hints broadly that its holding is to be applied equally to both pre-trial detainees and convicted inmates. "Neither the Court of Appeals nor the District Court distinguished between pre-trial detainees and convicted inmates in reviewing the challenged security practices, and we see no reason to do so." Id. at 546 n.28.

13. Joining Justice Rehnquist in the opinion were Justices Burger, Stewart, White and Blackmun.

14. 441 U.S. at 541, 543. Detainees were confined to their cells for seven to eight hours per day. Id.

15. Id. at 542 n.3. The average length of stay at MCC was 60 days.

16. Id. at 525.
cuit's due process analysis which would have required the government to show a "compelling necessity for instituting double-celling," and replaced it with the statement that a pre-trial detainee has the constitutional right to be free from punishment. Then in a masterpiece of double-talk, the Court proceeded to give an impossibly broad meaning to the term "punishment" by looking to see if the restriction is imposed for the purpose of punishment or whether it is reasonably related to some other legitimate government objective. After detailing a number of such legitimate government objectives, the Court comes full circle to hold that any measure which passes the "reasonably related" test cannot be described as punishment and therefore, is permissible.

This formula, for what is essentially a nondetermination of punishment, is bolstered by a dedicated recitation of the principle of due deference to prison officials throughout the opinion. The addition of this to the rational basis test is accomplished by the Court's directive that courts should ordinarily defer to the expert judgment of prison officials in order to determine if a restriction is reasonably related to a legitimate government objective. To further expand the scope of due deference, the Court then admonished against the reliance on expert testimony which might be indicative of laudable social goals but was not pertinent to the setting of "constitutional minima."

17. Id. at 532-33.
18. Id. at 534.
19. Id. at 538.
20. Id. 534-40. The Court mentions management of the facility, ensuring the detainees' presence at trial, security and order, inmates security, and prevention of escape as examples of legitimate government objectives, but points out that its list is by no means exhaustive. Id.
21. Id. at 540, 547.
22. According to Justice Marshall's figures, the majority opinion contained no less than twelve references to the principle of due deference. Id. at 568 n.5 (Marshall, J. dissenting).
23. Id. at 540 n.23. But see Boyle, Constitutional Law—Pre-trial Detention—Due Process—Bell v. Wolfish, 26 N.Y.L. Sch. L. Rev. 341, 355 n.118 (1981). The author explains that "it is extremely unlikely that a detention administrator would express a punitive intent . . . knowing that such punitive intent would render the restriction unconstitutional."
24. Bell v. Wolfish, 441 U.S. at 544 n.27. The court of appeals relied on the standards of several prison-oriented organizations in order to determine if the cell-space per inmate at MCC was satisfactory. The roster of consultants and their recommendations were as follows: The National Sheriff's Association (70-80 sq. ft. for single occupancy cells); the American Correctional Association (60 sq. ft.); the U.S. Confinement Systems (55 sq. ft.). These statistics were viewed by the Court as instructive, but constitutionally irrelevant. For a more detailed explanation of the testimony before the circuit court, see Wolfish v. Levi, 573 F.2d 118, 127 n.20, 128 n.22 (2d Cir., 1978).
Its stance clearly defined by these precepts, the Court concluded there is no "one man, one cell principle lurking in the Due Process Clause of the Fifth Amendment." Yet, after having so painstakingly spelled out its relaxed interpretation of punishment, the Court refused to apply it. Rather, through some acrobatic feat, the rational basis punishment standard was apparently jettisoned in midair and a new definition of punishment, that the restriction must cause "genuine privations and hardships over an extended period of time," was inserted in its place. To be sure, the majority did make the axiomatic statement that double-bunking did not constitute punishment, but no where did it indulge in the analysis that double-bunking was reasonably related to a legitimate governmental objective. Instead, the only support allowed this conclusive holding was, that by the facts before the Court, double-bunking did not amount to a genuine privation or hardship. The probable reason for this precipitous abandonment of the rational basis test lies in its inherent permissibility, paradoxically enough, the very quality which attracted the Court to the test in the first place. Thus, if the rational basis standard were applied in an orthodox fashion, administrative burdens and fiscal costs of operating a prison would generally suffice as legitimate government objectives to defeat a prison conditions claim. Indeed, these twin governmental interests are common to most, if not all, double-ceiling cases. Accordingly, the circuit court in Wolfish noted that the government had failed to show any justification for double-ceiling except that of administra-

25. 441 U.S. at 542.
26. Id.
27. The precise wording of this unannounced standard is:
   While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.
   Id. at 542.
28. Id.
29. Id.
30. Id. at 585 n.15 (Stevens, J., dissenting). See also Campbell v. McGruder, 580 F.2d 521, 538 (D.C. Cir. 1978), where double-bunking was invalidated under the 'compelling necessity' standard but the court acknowledged that less fundamental rights would have to be balanced against the governmental interest of sustaining the institution at a feasible cost. Campbell, 580 F.2d at 531.
31. E.g., Lareau v. Manson, 651 F.2d at 104. The court of appeals stated that "the only conceivable purpose overcrowding . . . serves is to further the state's interest in housing more prisoners without creating more prison space. This basically economic motive cannot lawfully excuse the imposition. . . ."
tive convenience. In arguing the case before the Supreme Court the government conceded double-bunking is not necessarily compelled in order "to maintain minimum levels of security." Thus, by its proffered test, the majority would have been put in the position of validating double-bunking as reasonably related to the legitimate government objective of administrative convenience or fiscal conservatism.

It is doubtful that the Court was prepared to adopt such a regressive posture. To have done so would have undermined the foundation of prison condition litigation: that neither inadequate funding nor administrative convenience will excuse unconstitutional conditions. In avoiding this outcome and embracing its new standard of genuine hardship and privation, the Court was, in reality, reaffirming the familiar theme that prison conditions must rise to the level of "adequate" where life sustaining necessities are concerned. Anything falling short of "adequate" in this realm, would, by default, amount to a hardship or privation. The "adequacy doctrine" was perhaps best expressed by the Fifth Circuit in Newman v. Alabama: "[i]f a state furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care and personal safety so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight." Thus, in Wolfish the Court reached a decision that double-

34. The lack of any formidable government interest for the majority to solidify its argument is in large part due to the general feeling that double-bunking is counterproductive to the government interests of security, inmate safety and effective management.
35. This was aptly stated by Judge Henley in his denunciation of the Arkansas prison system:

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

36. It is unclear whether this operates as a limitation on the 'rational basis' test or whether it actually replaces it. See Lareau v. Manson, 651 F.2d at 103.
37. 559 F.2d 283, 291 (5th Cir. 1977) (upholding the district court opinion insofar as it ensured adequate food, clothing, shelter, sanitation, medical attention and safety but declined to endorse a court ordered rehabilitation program), cert. denied, 438 U.S. 781 (1978) (per curiam).
38. 559 F.2d at 291. Although the concept that a state owes its prisoners an 'adequate' measure of these essentials has originated in an eighth amendment context, there is no reason why it should not be applied to pre-trial detainees. Some differences in the cir-
celling is an adequate means of providing shelter.

Two strong dissenting opinions were made by Justices Marshall and Stevens. Both found the majority's broad definition of punishment combined with "due deference" to be a hollow standard.\(^9\) Going to the heart of the problem, Marshall noted that "[c]onspiciously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates."\(^{10}\) Both dissents revolved around this manifest defect and both advocated that a more equitable balancing test be adopted.\(^{41}\)

In addition to these criticisms, the \textit{Wolfish} opinion is flawed in a number of other respects. The dicta underlying the holding is both contradictory and ambiguous. The Court did not resolve whether the "least restrictive means" test is applicable to prison conditions cases.\(^{42}\) Moreover, having found the test relevant to the constitutionality of a government restriction in one part of the opinion, the Court, in a complete about-face, dismissed it as irrelevant in another part.\(^{43}\) More frustrating, however, is that it is impossible to get any sense of the scope of the case. In places the opinion makes broad attacks on prisoners having rights at all\(^{44}\) and insinuates that the holding is applicable circumstantes and needs of convicts and detainees do exist. See \textit{infra} note 181 and accompanying text. This court-imposed duty on a state to provide its prisoners with an adequate measure of life's necessities is equally applicable to both eighth amendment and fifth amendment cases. Some differences in the circumstances and needs of eighth amendment-convicts and fifth amendment-detainees do exist, See \textit{infra} note 181 and accompanying text. There is, however, no reason to believe that either the due process clause or the eighth amendment permit less than adequate food, shelter, etc. for the respective groups. The rule must be that a state is obligated to provide for the basic needs of all its prisoners, whether they are pre-trial detainees or convicts. Related to this is the concept that what is cruel and unusual punishment for convicts must be 'punishment' for detainees. See, e.g., \textit{Lock v. Jenkins} 641 F.2d 488, 492 n.9 (7th Cir. 1981).

39. See \textit{generally} \textit{Bell v. Wolfish}, 441 U.S. at 563 (Marshall, J., dissenting); see \textit{id}. at 579 (Stevens, J., dissenting).


41. \textit{Id}. at 571, 599 (Marshall & Stevens, JJ., dissenting). Justice Marshall once again took the opportunity to argue for his "sliding scale" approach while Justice Stevens made a more general proposition balancing the severity of the "harm to the individual and the demonstrated importance of the nonpunitive objective." \textit{Id}. at 599.

42. Rightly or wrongly, Justice Stevens drew the conclusion that the majority had endorsed the least restrictive means test as relevant to the determination of what is, or what is not, punishment. \textit{Id}. at 586 (Stevens, J., dissenting).

43. \textit{Id}. at 539 n.20, 542 n.25.

44. Specifically, it rejects any right to privacy in regard to inmates as well as a right to a set number of square footage as living space. \textit{Id}. at 542-43. Courts have used the negative overtones of \textit{Wolfish} to dismiss prison-oriented claims in a number of areas aside from overcrowding. \textit{E.g}.\,, \textit{Jordan v. Wolke}, 615 F.2d 749 (7th Cir. 1980) (denial of contact visits to pre-trial detainees does not constitute punishment); \textit{Spain v. Procunier}, 600
to all institutions regardless of size or caliber, while in other places the opinion seems to confine itself to the specific facts in *Wolfish*.

In *Wolfish*, the policy of due deference, the "rational basis" analysis of punishment, and the unknown quantity of "genuine privation or hardship" emerged in an interdependent relationship marked by perplexity and obscurity. These concepts, which were so strained in their creation, were to prove equally difficult in their application. This difficulty can be attributed not only to confusions in the dicta, but also to weaknesses in the holding.

The principle of due deference, premised on the idea that courts are by nature ill-equipped to render intelligent judgment in penal affairs, has been widely regarded as the most tenuous argument in the interventionist's arsenal. Courts have traditionally intervened in other areas thought to be beyond their expertise. Moreover, it is precisely in the realm of prison administration that the need for judicial review is so acute. Nowhere else does the state exercise such unbridled control over its charges as it does in the prisons; nowhere else is the potential for abuse so high. Yet, by exalting its due deference principle to an almost unreviewable height, the Court has reserved the protection of a prisoner's rights to those who have a history of abusing them.

The effect of due deference in the lower courts is difficult to ascertain primarily because *Wolfish*, taken in its entirety, has had a chilling effect

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45. *Bell v. Wolfish*, 441 U.S. at 525. The Court declared that "because our analysis does not turn on the particulars of the MCC concept or design, we need not discuss them further." *Id.*

46. *Id.* at 543, n.27. Here, the Court distinguished *Wolfish* from other holdings which concerned "traditional jails."


48. *Id.* at 213. See also *Haas*, *Judicial Politics and Correctional Reform: An Analysis of the Hands-off Doctrine*, 1977 Dev. C. L. Rev. 795 (1977) [hereinafter cited as *Judicial Politics and Correctional Reform*]. Although judges lack experience in running mental health hospitals, schools, welfare offices, draft boards, or federal agencies . . . they have nonetheless intervened when constitutional rights were at stake (citations omitted); *Judicial Politics and Correctional Reform*, at 810.

on prisoner's rights overall. Nonetheless, some courts have either not complied with the policy or have expressly limited it.

As a corollary to "due deference", the Court directed the lower courts to refrain from intruding in the "minutiae of prison operations" and to confine their scope of review to constitutional violations. This seems to be a parenthetical attack on the entire rationale behind the "totality of the conditions" analysis which assumes judicial review of all aspects of prison life. Any rigid application of the Court's restrictive statement would prohibit review of those conditions not unconstitutional in a vacuum, but which would contribute to the unconstitutionality of the institution as a whole. In Wolfish, the Court did not take the opportunity to directly comment on the partial "totality" approach used by the lower court and instead, utilized the approach to its own ends by picking and choosing those facts about the institution which served its purpose. Specifically, double-bunking was addressed in the

50. Not only does Wolfish permit the double-ceiling of detainees, it also authorizes strip-searches, and some censorship of mailed literature. 441 U.S. at 548-60. As a result, courts have cited Wolfish for authority to impose a wide variety of restrictions and, on occasion, have also used it to dismiss inmate complaints across the board. See, e.g., Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981) (strip-search procedure upheld for misdemeanants); Sistrunk v. Lyons, 646 F.2d 64, 71 (3d Cir. 1980) (pre-trial detainees barred from predating constitutional challenges on presumption of innocence grounds); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980) (denial of contact visitation). See also supra note 44 and accompanying text.

51. Feliciano v. Barcelo, 497 F.Supp. 14 (D.P.R.) (finding abuses so flagrant that a deferential attitude toward state officials could not be considered).

52. E.g., Lightfoot v. Walker, 486 F. Supp. 504 (S.D. Ill. 1980). The district court stated "that a policy of deference to state and prison officials is not required under the circumstances, particularly as prison disciplinary or security procedures are not at issue." Id. at 509.


54. The mainstay of the 'totality' approach is to examine diverse conditions, which in and of themselves may or may not be unconstitutional. These foci are then examined en masse to determine if, in their entirety, they create a cruel and unusual punishment. See Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), aff'd sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 781 (1978); Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977).


56. In its review of the jail's conditions, the district court examined the food service, library, recreational facilities, design and structural aspects of the building, as well as the percentage of prisoners enduring double-bunking and the level of violence. Bell v. Wolfish, 441 U.S. at 528 n.10.
context that it existed in a light, airy, modern facility in which inmates were not confined for long hours in their shared cells. Other facts, however, which highlighted the drawbacks of a modular unit-type jail or which focused on the negligent manner in which double-ceiling occurred were simply ignored.

The result in Wolfish, that double-bunking does not constitute punishment for detainees, is also inherently damning for a "totality of conditions" approach. It is obvious if double-bunking is not punishment for detainees, it is clearly not cruel and unusual punishment for convicted inmates. Yet, double-ceiling and overcrowding are usually the principal evils in a "totality" approach. Given the unfavorable treatment which these conditions received in Wolfish, it can be inferred that other less sweeping and less injurious conditions, such as inadequate food service and rehabilitation programs, insufficient prison personnel and other claims, would almost surely be dismissed.

In fact, these innuendos by the Court have had a diverse impact on the "totality of the conditions" cases in the courts below. Typically, some courts have concluded that the "totality" analysis was not addressed at all in Wolfish, and others have read the opinion to limit judicial intervention to specific constitutional violations.

A final observation must be made on the combined workings of the principle of due deference and the Court's broad definition of punishment. There is a similarity between the "shock the conscience" test

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57. *Id.* at 543.

58. Modular confinement reduces the inmate's range to the boundaries of his unit for 24 hours a day. It is a world in which "there is no room to run or jog or even walk very much." *Wolfish v. Levi*, 438 F. Supp. 114, 125 (S.D.N.Y. 1977), aff'd, 573 F.2d 118 (2d Cir. 1978), *rev'd sub nom.* *Bell v. Wolfish*, 441 U.S. 520 (1979).

59. Inmates at MCC were double-celled without any classification whatsoever. 438 F. Supp. at 125.

60. *See infra* notes 61 and 62.

61. *Lareau v. Manson*, 651 F.2d at 103, 107. *See also* *Smith v. Sullivan*, 611 F.2d 1039 (5th Cir. 1980) (vacating district court order to limit the jail population and remanding with instructions to treat the overcrowding issue in the context of the "totality of the conditions" at the jail).

62. *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981). The court did acknowledge that the effect of a given condition should be considered in the context of the prison environment; however, the remedy must be specifically tailored to the eighth amendment violation and a totality approach cannot justify remedies which are more extensive than are required to correct constitutional violations. *Id.*

63. In broad terms, the shock the conscience test functions exactly as its label suggests—any practice which shocks a judicial conscience is deemed to be cruel and unusual punishment. Overall, a 1979 poll fixes the use of the test in 41% of prison condition cases at the district court level and 45% at the circuit court level. *Courts as Constitution-Makers, supra* note 10, at 137, 139.
and the Wolfish version in that neither turns on the evidence. The emphasis of the "shock the conscience" test is, by definition, on the shocking nature of the restriction, and institutional interests are necessarily downplayed. The Wolfish rationale is a perfect parallel in reverse in that it focuses on the institution at the expense of the interests of the prisoner. Thus, it explains away alleged infractions and underlying facts which are unfavorable to the institution by definitions and deference. Cut off from the facts, courts are left with little to decide cases but an unworkable definition of punishment and a sobering policy of deference to prison officials.

As might be expected, the Wolfish decision was accorded a mixed reception in the lower courts. Several followed it unquestioningly. An extreme example of this occurred in Jordan v. Wolke where the Seventh Circuit applied Wolfish to determine that overcrowding of pre-trial detainees did not amount to punishment. In Jordan the detainees were quadruple-celled in quarters which allowed substantially less square footage per man than in Wolfish and the facility was a "traditional jail with barred cells amid a stark surrounding."

Other courts, rather than applying the processes of Wolfish, have simply refused to treat double-ceiling issues at all. Conversely, some courts have acted to redress complaints of overcrowding but not double-ceiling. In doing so, these courts have declined to acknowledge Wolfish whatsoever.

66. See Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980); accord Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981) (double-ceiling order based on a totality analysis vacated). See also Epps v. Levine, 480 F. Supp. 50, 52 (D.Md. 1979) (double-ceiling of pre-trial detainees).
67. 615 F.2d 749 (7th Cir. 1980).
68. Id. at 754. (Swygert, J., dissenting). The dissent computed that 22.5 square feet was the spatial allotment per inmate as opposed to 37.5 square feet in Wolfish. Id. The case bore some similarity to Wolfish, however, in that the detainees were permitted out of their cells for a substantial part of the day (10 hours).
69. Id. at 754 (Swygert, J., dissenting).
70. E.g., Hummer v. Dalton, 657 F.2d 621 (4th Cir. 1981) (dismissing a suit alleging overcrowded conditions produced by double-ceiling because there is no "one man, one cell" principle). But see Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981) (an overcrowding/understaffing complaint states a claim upon which relief could be granted).
71. See, e.g., Hutchings v. Corum, 501 F. Supp. 1276 (W.D. Mo. 1980) (holding 56 square feet per inmate to be an adequate amount of space after determining that there are no per se tests to compute space allocations, but rather a 'totality' approach must be used). Cf. Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (inmates single-celled at one-half the amount of space required for human habitation violative of eighth amendment),
More often than not, however, the convolutions in *Wolfish* have produced judicially distinguishable cases in the lower courts. To achieve this, a substantial number of courts have applied the *Wolfish* standard of review in form but have recoiled from the harsh results it would produce.\(^7\) There has come to pass then, something of a contradiction: courts are continuing to strike down double-ceiling and overcrowding while at the same time mooring their decisions to *Wolfish*. This is accomplished by concentrating on the "genuine privation or hardship" language as an escape clause or as an alternative to the rational basis standard.\(^7\) The prison conditions at issue in these cases have typically fallen well below the almost showcase conditions before the Court in *Wolfish*.\(^7\) On the basis of this discrepancy, these courts have seized upon any number of factors as a means of distinguishing from *Wolfish*: that longer hours are actually spent in the cells;\(^7\) that the restriction


72. See Chavis v. Rowe, 643 F.2d 1281, 1290 (7th Cir. 1981) (confine men of an inmate in a segregation cell measuring 35 square feet with four other men); Lock v. Jenkins, 641 F.2d 488, 492 (7th Cir. 1981) (placing pre-trial detainees in a maximum security prison and 'safekeeping' them in small cells for upwards of 22 hours a day); Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980) (large numbers of detainees in the cells reduced living space to an unconstitutional degree even though the jail was clean and modern); Jones v. Diamond, 636 F.2d 1364, 1371, 1374 (5th Cir. 1981) (keeping pre-trial detainees in two large pens in such numbers as to allow only six to eight square feet per inmate); Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979) (affirming the district court's order enjoining the double-ceiling and triple-ceiling of inmates); Lareau v. Manson, 651 F.2d 96, 104 (2d Cir. 1981) (double-ceiling detainees and convicts in 60-65 square foot cells with access to relatively small dayrooms); Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980) (detainees housed in antiquated jail in overcrowded conditions); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), stayed, 650 F.2d 555 (5th Cir. 1981) (extreme overcrowding resulting in the placement of two to five inmates in 45 square foot cells). But see Feliciano v. Barcelo, 497 F. Supp. 14 (D.P.R. 1979), where the court noted the unchecked violence, soaring death rates and the absence of medical facilities and struck down the triple-ceiling of inmates as punitive in nature, but allowed double-ceiling to continue for short periods.

A macabre postscript to the court's deferential attempt to overhaul the Puerto Rican prison system can be described in the discovery of the dismembered bodies of three pre-trial detainees at the Bayamon Prison, on November 19, 1981. At that time, the prison was housing precisely double the number it was designed to hold. The Washington Post, Nov. 20, 1981, at A12, col. 5.

73. See supra note 71.

74. The prison population at MCC enjoyed certain amenities (airconditioning, carpeting, adequate lighting) usually not found in other institutions. Benjamin v. Malcolm, 495 F. Supp. at 1384.

75. Chavis v. Rowe, 643 F.2d at 1291 n.11. See also Lock v. Jenkins, 641 F.2d at 493 (prisoners allowed out of cells for 2 hours/day); Campbell v. Cauthron, 623 F.2d at 507 (cell confinement for 24 hours/day); Burks v. Teasdale, 603 F.2d at 63 (long period of time spent in cells made double-ceiling constitutional); Ruiz v. Estelle, 503 F. Supp. at
will be endured for a longer calendar period of time;\textsuperscript{76} that the cells or dayrooms in question are smaller than in \textit{Wolfish};\textsuperscript{77} that \textit{Wolfish} was not intended to apply to traditional jails featuring “barred cells, dank, colorless corridors [and] clanging steel gates”;\textsuperscript{78} and that a totality of the conditions analysis has revealed an unconstitutional degree of overcrowding or double-ceiling despite \textit{Wolfish}.\textsuperscript{79} These cases testify to the efforts of the courts to distinguish overcrowding and double-ceiling cases from \textit{Wolfish}.

The thrust of these opinions has been to define the restrictions in issue as punishment \textit{per se} under \textit{Wolfish}.\textsuperscript{80} To this end, the courts have thwarted the essential message of \textit{Wolfish} by focusing on the effects of double-ceiling rather than the motivations behind it. Again, the vehicle which has been responsible for this shift in focus was the Court’s “genuine privation or hardship” standard. This standard has been met by almost any fact or variable of life within an institution which is harsher than the set of facts in \textit{Wolfish}. Significantly, the lower courts have unanimously rejected fiscal reasons as a possible legitimate government objective and have been unable to recognize any other objectives which would excuse overcrowding and double-ceiling from review under the “genuine privation and hardship” standard.\textsuperscript{81}

These distinctions have passed unnoticed with one important exception, \textit{Capps v. Attiyeh}.\textsuperscript{82} \textit{Capps} deserves special mention if only because it dramatizes the tension between the \textit{Wolfish} opinion and its application by the lower courts.\textsuperscript{83} In \textit{Capps}, the district court held

1287 (10 hours/day spent in cells).

76. Courts which distinguish \textit{Wolfish} on the ground that the detainees in \textit{Wolfish} spent copious hours out of their cells invariably also distinguished on the additional basis that \textit{Wolfish} involved detainees who were incarcerated for a short period of time. For an attenuated example of this distinction, see Lareau v. Manson, 651 F.2d at 102, 104.

77. See, e.g., 651 F.2d at 104; accord Lock v. Jenkins, 641 F.2d at 494.

78. Bell v. \textit{Wolfish}, 441 U.S. at 525. See, e.g., Campbell v. Cauthron, 623 F.2d at 506-507 (prisoners confined in large, barred, dormitory cells around the clock); Benjamin v. Malcolm, 495 F. Supp. at 1364 (outmoded institution featuring long corridors and tiers of depressingly small cells).

79. See Lareau v. Manson, 651 F.2d 96; Feliciano v. Barcelo, 497 F. Supp. 14. But it should be noted that not one of these cases has utilized a full-fledged ‘totality’ approach as outlined in archetypal ‘totality’ cases. See generally supra note 54. (cases cited).

80. See supra note 72 and accompanying text. These cases have not indulged in a \textit{Wolfish}-type rational basis test. Instead, the courts here have simply labeled overcrowding/double-ceiling as punitive—giving only lip service to the \textit{Wolfish} analysis.

81. See, e.g., Lareau v. Manson, 651 F.2d 96; Benjamin v. Malcolm, 495 F. Supp. 1357.


83. The long and circuitous history of the \textit{Capps} case reflects the operation of Rhodes v. Chapman, 452 U.S. 337 (1981), and Bell v. \textit{Wolfish}, 441 U.S. 520 (1979), acting in
double-celling and overcrowding to be unconstitutional under the eighth amendment, noting Wolfish was inapplicable because the case before the court concerned convicted inmates serving long term sentences rather than pretrial detainees.\textsuperscript{64} This logic did not turn on whether the prisoner was labelled detainee or convict; its real import is whether double-celling a prisoner for two years as opposed to two months is unconstitutional.\textsuperscript{65} While pending appeal before the Ninth Circuit, the district court's order to reduce the excess number of prisoners over design capacity was stayed by Justice Rehnquist in his role as circuit judge.\textsuperscript{66} Predictably enough, the Justice found the court's circumvention of Wolfish to be "particularly unpersuasive."\textsuperscript{67}

### III. Rhodes v. Chapman: The Follow-through

In \textit{Rhodes v. Chapman},\textsuperscript{83} the Supreme Court addressed double-celling as it pertained to convicted inmates in a maximum security prison. The institution itself epitomized modern-day penological concepts in design and operation.\textsuperscript{89} In its confines, prisoners were allowed out of tandem to deny relief of double-celled inmates. The first blow was delivered by Justice Rehnquist acting as circuit justice. 449 U.S. 1312 (1981). Staying the district court's order to reduce the prison population until the disposition of \textit{Rhodes}, Justice Rehnquist made the following observations:

\begin{quote}
In short nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression and the like. They have been convicted of a crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.
\end{quote}

449 U.S. at 1315-16.

Subsequent to the Court's decision in \textit{Rhodes}, the Ninth Circuit vacated and remanded. 652 F.2d 823.

\textsuperscript{84} 495 F. Supp. at 814. The court, in an analysis clearly tailored to the lower court opinion in \textit{Rhodes}, considered the duration of confinement, design capacity, room size, number of hours spent in the cells \textit{per diem}, and the permanence of the restriction. \textit{Id.}

\textsuperscript{85} \textit{Id.} The district court in \textit{Capps} did not consider the distinction between pre-trial detainees and convicted prisoners. Where the state seeks to impose punishment without an adjudication of guilt, the pertinent constitutional guarantee is the due process clause of the fourteenth amendment, not the eighth amendment which is applicable to convicted prisoners. Accordingly, the Court explained that "due process requires that a pre-trial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment." Wolfish, 441 U.S. 535, 536 n.16 (1979).

\textsuperscript{86} 449 U.S. 1312 (1981).

\textsuperscript{87} \textit{Id.} at 1315-1316.

\textsuperscript{88} 452 U.S. 337 (1981).

\textsuperscript{89} 434 F. Supp. 1007, 1009 (S.D.Ohio 1977). SOCF effected a modular-unit construction in which groups of cells are linked to an adjoining dayroom. Prisoners are not con-
their cells and given access to their cell-blocks and adjoining dayrooms. The cells in which the inmates were doubled-up were smaller than those in Wolfish, but anomalously enough, neither the double-ceiling nor the general overcrowding could be said to work any ill-effects on the institution as a whole. In short, save for the double-ceiling, the fact-pattern portrayed a life-style which was significantly better than that accorded to the great majority of prisoners nationwide.

The district court selected five indicia on which it based its holding that double-ceiling as practiced at the Southern Ohio Correctional Facility (SOCF) contravened the eighth amendment. Briefly, these focused on the smallness of cells, the extent of the overcrowding, the long nature of the sentences being served, the permanence of the practice, and the number of hours spent in the cells.

The Supreme Court rejected both the district court’s analysis and its

fined to their cells, but are permitted free access to their assigned dayroom and other cells in the module. Id. at 1012.

90. 452 U.S. at 341.

91. The cells in Chapman measured 63 square feet, 452 U.S. at 341, as opposed to 75-77 square feet in Wolfish, 428 F. Supp. at 336.

92. The findings of the district court revealed that despite being 38% over capacity, violence at the prison did not increase disproportionately to the increase in prison population, the dayrooms were still functional and the auxiliary services (medical, dental, food) showed no signs of real strain. Chapman v. Rhodes, 434 F. Supp. at 1014-18.

93. There are no studies which rank the nation’s prisons from best to worst so it is not possible to give exact figures as to the number of prisoners who must serve their sentences in prisons inferior to SOCF. As a general proposition, however, it is a safe assumption that the nation’s prisons, far from being characterized by the modernity of SOCF, are monuments to squalor and antiquity. See President’s Comm’n on Law Enforcement & Admin. Just., Task Force Report: Corrections (1967):

There are today about 400 institutions for adult felons in this country, ranging from some of the oldest and largest prisons in the world to forestry camps for 30 or 40 trusted inmates. Some are grossly understaffed and underequipped—conspicuous products of public indifference. Overcrowding and idleness are the salient features of some, brutality and corruption of a few others. Far too few are well organized and adequately funded.

Id. at 4.


95. Id. at 1020. The court found the population at SOCF to be 38% over rated design capacity.

96. Id. at 1020.

97. As of June, 1977, double-ceiling had been in effect at SOCF for almost two years. Id. at 1021.

98. In concluding that double-ceiling at SOCF was unconstitutional, the district court described its analysis as requiring two steps: first, an ascertainment of the totality of the conditions were shocking to the conscience or repugnant to contemporary standards. Id. at 1019.
Noting that it had never before passed on a cruel and unusual punishment case involving the conditions of confinement, the Court set itself to the task of constructing a proper standard. In doing so, it did not frame its eighth amendment analysis on standards developed by the lower court's treatment of "conditions" cases. Instead, the Court turned to its recently decided line of capital punishment cases and came away with the borrowed notion that cruel and unusual punishment is an unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime.

This leaning tower was then propped up with the "evolving standards of decency" language of *Trop v. Dulles* and brought to bear on the double-ceiling issue at hand. Determining that double-ceiling did not amount to an infliction of pain under the favorable findings of fact, the Court held that double-ceiling at SOCF was permissible under the eighth amendment.

In reaching this conclusion, the Court took care to fortify its opinion with several safeguards. Most importantly, it seemingly recognized the totality of the conditions approach. If this approach is perceived as part of the *Chapman* analysis, then challenges are henceforth limited to situations where the conditions are so restrictive as to deprive the inmates of minimal necessities of life, thereby creating pain "without any penological purpose."

The Court concluded its analysis with a full and approving airing of the *Wolfish* principle of due deference, en-
dorsing it as a judicial presumption of constitutionality regarding the actions of state officials in their function of prison management.109

A separate concurring opinion was filed by Justice Brennan which amassed an impressive array of statistics illustrating the general overcrowding of the nation’s prisons and the importance of the judiciary’s role in prison reform.110 Justice Brennan then embarked on a totality of the conditions analysis to determine if, in light of the overall conditions at SOCF, double-celling caused any serious harm to the inmates. Unable to detect any such harm, Justice Brennan resolved that double-celling at the prison was not cruel and unusual punishment.111

In a long dissent, Justice Marshall rejected the principle of due deference112 and took the unyielding position that the rigors of double-celling and overcrowding caused mental and physical deterioration which violated the eighth and fourteenth amendments.113 Justice Marshall did not, however, offer any alternative solutions to the majority’s reasoning as he had in Wolfish.114 Furthermore, he seemed to have no particular quarrel with the majority’s choice of standards.115

In Chapman, the Court has taken a first step in applying the eighth amendment to the conditions under which a state may confine its convict population. In taking that step, the Court selected standards used to pass on the constitutionality of the death sentence and graft them to the adjudication of a double-celling issue. Yet the sole similarity between capital punishment and double-celling is that both were decided under the same amendment.116 Thus, the Court’s reasoning invites the

109. Id. at 352. The Supreme Court explained that “courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system. . . .” Id.

110. Id. at 353-57. (Brennan, J., concurring). These statistics directly attacked the Court’s presumption of sensitivity which it granted to state officials in regard to penal matters. The figures further provided a springboard from which to refute the Court’s denigration of expert testimony and to reassert the precept that lack of resources cannot excuse the state from its obligation to operate decent prisons. Id.

Justice Blackmun, in addition to joining Justice Brennan’s opinion, wrote a concurring opinion in which he simply pointed to the significance of the judiciary’s role in overseeing the state’s treatment of prisoners. Id. at 368 (Blackmun, J., concurring).

111. Id. at 367-69 (Brennan, J. concurring).

112. Id. at 375-76 (Marshall, J., dissenting). On this point, the dissent also emphasized the importance of expert testimony in prison conditions cases.

113. Id. at 372 (Marshall, J., dissenting).

114. Id. at 376 n.8 (Marshall, J., dissenting). See supra notes 39-41.

115. Id. at 369 (Marshall, J., dissenting).

116. In other cases, the Court has commented on the inapplicability of death sentence standards to other situations: “[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of
observation that a comparison between apples and oranges has somehow taken place. The question is whether the same standards should be used to review prison practices and conditions\(^{117}\) as is used in taking a man's life.

Basic to an understanding of the Court's standards is the realization that the purpose is to define a level of punishment which will trigger the intervention of the eighth amendment.\(^{118}\) Nevertheless, the standards of "unnecessary and wanton infliction of pain" and grossly disproportionate to the severity of the crime" are rooted in the methods of the sentencing process, not in the manner by which the sentence is carried out.\(^{119}\) Thus, their application is problematical.

The imposition of a criminal sentence serves as punishment,\(^{120}\) attended by the societal goals of discipline, deterrence and rehabilitation. In contrast, inadequate prison conditions are not the consequence of any defined policies,\(^{121}\) nor do they pursue any. Furthermore, the se-
verity of the crime which the inmate committed has little to do with the question of whether he is double-celled. Therefore, while the severity of the crime is a crucial issue in the context of capital punishment, it has no relevance to the conditions of confinement.

The importance of this divorce of the inmate's crime from the restriction imposed cannot be be understated for it addresses the Court's somewhat misguided transposition of the meaning of cruel and unusual punishment. Since being adopted in this country, the term cruel and unusual has been construed as having the dual purpose of prohibiting both disproportionate sentences and barbarous methods of punishment. Ironically, Justice Powell noted this dichotomous function in Rummel v. Estelle:

The scope of the Cruel and Unusual Punishments Clause extends not only to barbarous methods of punishments but also to punishments that are grossly disproportionate. Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted on the offender.

In Chapman, the Court has blithely taken capital punishment stan-

122. Several possible exceptions exist to this statement. Obviously, prisoners on death row are placed in a restrictive environment precisely because of the severity of their crimes, while other convicts may similarly be sentenced to medium or low security prisons due to the relative pettiness of their offenses. States have also deemed it necessary to confine juvenile and women offenders in less restrictive institutions. Resnik & Shaw, Prisoner's or Their Sex: Health Problems of Incarcerated Women in PRISONER'S RIGHTS SOURCEBOOK at 319, 321-25 (I. Robbins, 1980). However, there is no reason why maximum security prisons should provide less liveable conditions than do their medium security counterparts. And, in fact, conditions are often better in maximum security. See The Washington Post, Nov. 28, 1981 at A1, col.2 (medium security inmates housed in less desirable dormitories while in maximum security, inmates are single-celled). Further contesting the idea that the severity of the crime gives rise to the restrictive condition imposed is that insofar as security is concerned, pre-trial detainees must endure the harshest conditions of all. Bell v. Wolfish, 441 U.S. 520, 546 n.28; Vasquez v. Gray, 523 F. Supp. 1359 (S.D.N.Y. 1981).

It is presumed that the severity of the crime, the sex and youthfulness of the offender are indicative of the security measures which will be required for confinement. It would be inaccurate, however, to say that there is a conscious judicial decision to punish perpetrators of heinous crimes with inadequate or poor prison conditions.

124. See The Original Meaning, supra note 117, at 839.
126. Id. at 288 (Powell, J., dissenting). See also Hutto v. Finney, 437 U.S. 678, 685 (1978) ("The Eighth Amendment's ban on inflicting Cruel and Unusual Punishments . . . proscribes more than just physically barbarous punishments (citations omitted). It prohibits penalties that are grossly disproportionate to the offense").
ards which are clearly related to disproportionality and applied them to a prison conditions case which is just as clearly related to the barbarous methods of punishment purpose of the eighth amendment. As a result, Chapman asks the wrong question. The proper inquiry should be whether the penal restriction is disproportionate to the judicial punishment which has been imposed, not whether it is disproportionate to the severity of the crime.

A second difficulty which can be traced to this conceptual error is that disproportionality standards are only cognizant of penalties which go beyond normal sentencing practices. Therefore, the wording of these standards is such that they are triggered only by flagrant deviations.27 The ill-effects of inadequate prison conditions, however, are more subtle and are not amenable to exact definition. While all inmates may share in the general misery of an overcrowded prison, only a set number will fall victim to observable injuries generated by trauma and violence. The Court's standards are simply not equal to the task of identifying and treating punishments at this level.

By focusing on only visible sufferings, the Court in Chapman determined that where double-ceiling existed, but was not accompanied by increased violence and substandard conditions overall, there was no pain inflicted which was wanton and unnecessary or without penological purpose. Thus, the Court is not prepared to find an eighth amendment violation in deprivation of space alone. While a man who is deprived of living space may not be in pain, he might well be in a continual state of distress.28 It is not suggested that the Court's standards recognize pain at such high thresholds that mental anguish is completely disregarded.29 Nevertheless, these standards do indicate, to some degree, that mental suffering as a consequence of a prison condition is irrelevant.

The absence of the customary ill-effects of double-ceiling and other penal malpractices at SOCF, such as lack of sanitation or use of a trusty system, naturally raises the question of how such cases are to be

127. To illustrate, a punishment which is disproportionate is insufficient. It must be 'grossly disproportionate'. Similarly, pain without more is also insufficient, unless it is 'unnecessary and wanton'. Rhodes v. Chapman, 452 U.S. 337 (1981).
128. In Bell v. Wolfish where detainees were double-celled in cells larger than those in Chapman, the prison architect stated "there is an absoluteness of a room which is designed for one person and to try to convert it into a two-person room, it's a clear violation of the capability of that space." Petitioner's Brief for Certiorari at 9 app., Bell v. Wolfish, 441 U.S. 520 (1979).
129. The Court has never defined 'pain' so it is perhaps unwarranted to assign a narrow definition to its usage at this stage. It is generally agreed, however, that pain is an identifiable or imaginable quantity which includes both mental and physical suffering. Courts as Constitution-Makers, supra note 16, at 135.
resolved. To provide for this eventuality, the Court turned to the case of *Hutto v. Finney.* In that case, inmates in segregation eked out an existence in an institution which featured filthy overcrowded cells, inadequate diet, rampant violence, and a complement of guards euphemistically described as "unprofessional." In *Chapman,* the Court reviewed these conditions and found them to be exclusively representative of a category of conditions which unquestionably deprived inmates of basic human needs and were, therefore, cruel and unusual. The Court also gave separate mention to its decision in *Estelle v. Gamble* that a state may not be deliberately indifferent to an inmate's medical needs. Challenges to less drastic conditions, however, must overcome additional hurdles. The constitutionality of these less drastic conditions is first tested by determining if they amount to a "deprivation of the civilized measure of life's necessities." This test of the condition's effect is then followed by a second hurdle which focuses on causality: does it manifest deliberate indifference or an intent to wantonly inflict unnecessary pain on the part of prison officials, or is there an underlying total lack of penological purpose? Should this two-tiered test be overcome, there could be an eighth amendment violation.

The Court's treatment of *Hutto-type* conditions as distinguished from other conditions of confinement is both confusing and cumbersome. Particularly incomprehensible is the Court's different wording of the two "adequacy" standards involved. Both ostensibly measure the deprivation to determine if an intolerable level has been reached, but the Court uses "unquestioned and serious deprivations of human needs" for one set of conditions and "[deprivation] of the minimal civi-

131. Id. at 682, 687.
132. In *Hutto,* the inmates were crowded as many as eleven to a cell. Since the Court in *Chapman* did not follow its own rule and determine if double-ceiling deprived inmates of basic human needs it is a likely inference that anything less than the inhuman overcrowding in *Hutto* is not meant to be construed as a *Hutto-type* condition.
134. Id. at 104-105.
136. The deliberate indifference standard which was culled from *Gamble* has been roundly criticized as not encompassing medical negligence or other medical situations which might arise. The standards require a showing of the subjective intent of prison officials—an impossible burden which falls on the prisoner. See Adams, *Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment,* 27 Am. U. L. Rev. 92, 119 (1977).
138. 437 U.S. at 679.
lized measure of life's necessities" for the other set.139 Possibly they are synonymous since no explanation for the difference is offered by the opinion.

Although it is still too early to accurately gauge the extent of the significance of Chapman, at least one lower court has indicated that it will employ the Court's double-standard of review.140 Otherwise, however, this laborious process has been studiously ignored whether the secondary effects of double-ceiling and overcrowding are present or not.141 Thus, courts have followed Chapman where the conditions were equal to or better than those at SOCF142 or have distinguished it on the familiar basis that the ideal conditions present in Chapman are not present in other institutions.143 These cases reveal that the Court's efforts to have its decision applied to situations where double-ceiling exists with other deleterious side-effects has not generally been observed.

Even though the Court's analysis has not seen extensive use, the proinstitutional bias of Chapman has manifested itself in several respects.144 One conspicuous barometer of changing times is indicated by the setbacks suffered by a number of inmate-responsive holdings immediately after Chapman was decided.145 Thus, the Capps case, al-

139. These two standards are progeny of the adequate doctrine of Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 781 (1978). See supra note 35 and accompanying text. A problem which is related to the interpretation of the two standards is that they find themselves in a section of the opinion where the Court appears to have loaded up both barrels full of Eighth Amendment standards and pulled the trigger. In the short space of this one paragraph, some six standards are jumbled together. See Rhodes v. Chapman, 49 U.S.L.W. at 4679.


141. For post-Chapman cases which have not utilized the suggested process, see infra notes 142 and 143.

142. See Nelson v. Collins, 655 F.2d 420 (4th Cir. 1981). In an action which consolidated a number of overcrowding cases arising from Maryland institutions, the court reversed lower court holdings that double-ceiling was per se unconstitutional. To this effect, Wolfish, was relied upon for the proposition that double-ceiling itself was not impermissible and Chapman was asserted to detail the conditions in which it was permissible.

143. See Smith v. Fairman, 528 F. Supp. 186 (M.D.Ill. 1981) (finding that the ideal conditions in Chapman were not present).


Although the Fifth Circuit has yet to rule in Ruiz, the significance lies in the event
ready shaken by Justice Rehnquist's stay, was summarily vacated by the Ninth Circuit even though the overpopulating of the Oregon Penitentiary system had fomented violence, increased health risks and generally "had a negative effect on nearly every aspect of the inmate's lives."148

The Court's detailed instructions concerning the treatment of cases with a multiplicity of conditions can also be interpreted as a direct reference to the "totality" approach which the lower court's had used to devastate the Wolfish decision. Unfortunately, the discussion of this issue is so ambivalent as to be self-defeating. In one breath, the Court recognizes that a combination of conditions may deprive inmates of the necessities of life while in another, it specifically bars judicial intervention insofar as constitutional, albeit harsh, conditions are involved. These conditions, the constitutionality of which will presumably be determined under the newly-fashioned, insensitive standards of Chapman, are in the Court's view a part of the penalty which society exacts from those who transgress its laws. Here then, is the fulcrum of the opinion. For this logic, if viable, goes far in relating the commission of the crime to the restrictive prison condition and also explains the "hands-off" policy regarding conditions which are not, in and of themselves, cruel and unusual. This line of reasoning has as its cornerstone the popular myth that at the bottom of every prisoner's claim is a demand for easy living and not a clamor for survival. Yet, certain conditions in particular can unquestionably produce death, sickness, rape and violence despite the fact that they may pass muster under the Court's high standards of review. Thus, the absence of a classification system, the use of trusties and "constitutional" levels of overcrowding and unsanitation cannot be dismissed as a simple desire to live as comfortably as possible—an accusation which resounds throughout the opinion. By use of such abstract terms, the Court has effectuated a

that Chapman could disturb the lower court decision at all in view of the horrendous overcrowding and brutality in those prisons—factors which combined to form a violent atmosphere which was regularly punctuated by individual clashes and large-scale riots. The latest example of the latter occurred on November 22, 1981 when prisoners at Huntsville, having been housed in tents, staged a riot which left some fifty injured. The Washington Post, Nov. 22, 1981 at A4, col. 2.

146. See supra note 74.
147. 652 F.2d 823 (9th Cir. 1981).
149. See supra note 71.
151. Id. at 4679-80.
152. See supra note 107 and accompanying text.
153. The list of sufferings from penal malpractices is endless; the following is meant...
distortion which has already been echoed in the lower courts.\textsuperscript{154}

In the final analysis, the management of a "totality" approach as seen in \textit{Pugh v. Lock}\textsuperscript{155} can only be squared with \textit{Chapman} by first reckoning with the Court's categorization of conditions into serious \textit{Hutto}-type conditions and other less serious conditions.\textsuperscript{156} Yet, even if a court divided the conditions along these lines, it is difficult to understand how the cumulative effect could be weighed after the conditions have been compartmentalized.

Despite the Court's language in \textit{Chapman} which if taken literally would prove to be the undoing of the "totality" approach, the initial reaction of the lower courts has been to reach \textit{Chapman} as legitimatizing the methodology.\textsuperscript{157} This reading, however, has not hardened into fact since in the post-\textit{Chapman} era no court has undertaken a complete "totality" analysis as of yet.

In addition to distinguishing on the basis of conditions or methodology, most courts are declining to apply \textit{Chapman} to cases involving pre-trial detainees and have taken the view that the case directs itself only to the suits of convicted prisoners.\textsuperscript{158} This has been taken one step further by holding that where there is a mixed population of convicts and detainees, the ready solution is to accord both groups detainee status.\textsuperscript{159} In the long term, it is likely that this reticence to apply \textit{Chapman} to detainees will endure due to the general rule that restrictions imposed on detainees are governed by the due process clause while convicts must bear the lesser protection of the eighth amendment.

\textbf{IV. \textit{Wolfish} and \textit{Chapman} Compared}

The most basic analysis of the two cases, and undoubtedly the one


\textsuperscript{156} Out of the eleven foci in \textit{Pugh}, seven are present in \textit{Hutto} and \textit{Gamble}. They are overcrowding, food service, violence, segregation cells, sanitation, prison personnel and medical attention.


which has attracted the largest following, is to treat them as distinct entities: *Wolfish* operating to mandate the constitutional constraints on conditions of confinement for pre-trial detainees, and *Chapman* performing the same task for convicted inmates. Seen from this perspective, the *Chapman* decision acts as a limitation on *Wolfish* since, in the interval between the two, *Wolfish* was applied with equal vehemence to both pre-trial detainees and convicted inmates.

A second possible interpretation which has not as yet been endorsed by any court could be to perceive *Chapman* as a natural extension of *Wolfish*. Under this hierarchy, the application of *Wolfish* to both detainees and convicts would be preserved and *Chapman* would be relegated to the purpose of blocking attempts to distinguish from *Wolfish* on the basis of long-term sentences, long-term double-ceiling, smaller cells and traditional jails. Although this construction has not been utilized thus far, a close approximation of it has been seen in *Nelson v. Collins* where the court combined *Wolfish* and *Chapman* into a two-fisted blow against convicted inmates.

The justification for this continued application of *Wolfish* to convicted inmates is founded in the logic that since double-ceiling is not "punishment" for pre-trial detainees, it cannot amount to cruel and unusual punishment for convicted inmates. Despite a surface plausibility, this deduction is a faulty one. It first assumes that a duplication of the facts in *Wolfish* has taken place in *Chapman*, when in reality, double-ceiling in *Chapman* was endured for longer periods of time in more restrictive conditions than in *Wolfish*. Secondly, the immediate and obvious consequence of the reasoning in *Nelson* is that it renders *Chapman* superfluous since the outcome of the case was, in effect, predetermined by *Wolfish*. The final flaw in this approach, and surely the most telling one, is that application of *Wolfish* to convicted inmates is an expedient which intrudes on traditional eighth amendment operations.

The factual distinction that *Wolfish* was premised on double-ceiling in the short-term, whereas *Chapman* concerned the condition as a permanent fact of life for both inmate and institution, is sufficient to es-

160. See supra note 140 and accompanying text.
161. See supra note 78 and accompanying text.
162. See supra notes 66-70 and accompanying text.
165. 659 F.2d at 428.
tablish a division along detainee and convict lines. Nonetheless, it cannot be overlooked that the Court has only encountered double-ceiling unaccompanied by any tangible ill-effects and has only examined model institutions. In short, the Court has painstakingly treated the exception and avoided the rule. This evasion signifies that both decisions are vulnerable to the same limiting tactics in the lower courts—they will not be applied to cases involving inferior conditions. The upshot is that the Court has created standards fitted to ideal circumstances which, if applied to the prison norm, will only exacerbate the crisis of overcrowding now besetting the prisons. To this effect, the Court has simply created bad law.

These criticisms, however valid, are perhaps outweighed by several distinct advantages which the Court has realized as a result of Wolfsch and Chapman. In practical terms, the upholding of double-ceiling in model prisons will effectively foredoom all similar prisoner's claims which the Court obviously deems to be frivolous. Thus, inmates imprisoned in institutions rivaling SOCF or MCC must now bear a heavy burden in an unsympathetic climate. Additionally, the Court has now had ample opportunity to define both the eighth amendment and the due process clause as it pertains to prison conditions and, in the process, has been able to inject a dosage of its conservatism along the entire range of prisoner's rights. Finally, the relatively non-threatening conditions involved in the Court's selection of cases provides a secure power base for what would otherwise be indefensible holdings.

These factors not only lend a certain sensibility to the two cases but also serve to spell out the probability that the Court's purpose in Chapman was simply to create a parallel to Wolfsch along eighth amendment lines. This is not to maintain that Chapman is a mirror-image of its predecessor cast in eighth amendment terminology. Indeed, certain contradistinctions exist between the cases which suggest that the Court has modified some of its concepts rather than simply repeated them. One example of this is evidenced by the Court's treatment of the effects which double-ceiling wreaks on its victims. In Wolfsch, the Court adopted a standard of review which totally eliminated any injury suffered by the inmate from consideration. The standards in Chapman also seem to be possessed of the same purpose-oriented construction since, by their terms, they define cruel and unusual punishment as pain which is unnecessary and wanton or without

166. See supra notes 57, 93 and accompanying text.
167. See infra notes 157-58 and accompanying text.
168. See infra notes 169, 170.
169. See supra note 38 and accompanying text.
penological purpose.\textsuperscript{170} In spite of this wording, the standards in Chapman probably give some weight to the effect of the restriction on the inmate since disproportionality standards generally include a scrutiny of the pain inflicted on the offender.\textsuperscript{171} Furthermore, the Court’s emphasis on the lack of harmful side-effects of double-ceiling at SOCF\textsuperscript{172} gives the reverse implication that had they been present they would have been entered into the constitutional equation.

The Court has also utilized Chapman to undertake some much needed fence-mending concerning the due deference principle. Notwithstanding its tireless repetition by the majority in Wolfish,\textsuperscript{173} the principle was fated to become an early casualty in the lower courts. In practice, most courts duly cited the due deference principle only to then contradict it with a detailed examination of the prison in question.\textsuperscript{174} Other courts disregarded the principle entirely and went so far as to cite Wolfish as authority for their intervention.\textsuperscript{175} Given this background, the Court’s addition of a ‘state presumption of constitutionality’ to the due deference principle in Wolfish is probably most correctly viewed as a salvaging action.\textsuperscript{176}

In sum, the two cases, linked by the common bond of due deference and containing somewhat parallel standards, will most likely work the same effects on their respective groups of prisoners. Thus, the surest indicator of how Chapman will develop is the examination of how Wolfish was received in the lower courts.

V. CONCLUSION

The Court has attempted to rub its capital punishment standards like an Aladdin’s lamp in the hope that the problems besieging prisons will somehow disappear. The problems, however, are steadily worsen-
ing. Already dangerously overcrowded, the prisons are being asked to accommodate some 1200 more inmates than are released each month and statistics point to a rise in prison population of 12.4% by the year's end.

As the problem of overcrowding compounds itself and the need for reform becomes ever more pressing, the Court's policies of avoidance are falling further into disrepute. The inadequacy of the Court's efforts is marked by the fact that just as its decisions have never addressed any of the true problems of overcrowding, neither do they now offer any real solutions. Yet, it is doubtful that the actual results reached in Wolfish and Chapman—that double-ceiling is permissible where no discernible hardship is worked on the inmate population—do not constitute a departure from today's standards of decency. That offense lies in the sweeping language which the Court uses to stress institutional interests at the expense of prisoner's rights. To this end, the Court has never once engaged itself in a meaningful balance of institutional versus prisoner's interests. Nor are these interests so incompatible that the presence of one set must necessarily entail the exclusion of the other; due to the forced co-existence of prisoner and prison, the penal interests of security, order and sanitation are positively related to the inmate's desires of safety, health, adequate food, and shelter.

Of the several due process balancing tests, only the intermediate standard of review attempts to give equal weight to both sides of an issue. The suggested method by which it would be applied to the issue of prison conditions is to combine it with the "adequacy" test found in Wolfish. Thus, the first question: is the restriction generating a genuine privation or hardship upon those who must endure it? In the cases of overcrowding or double-ceiling, a showing of such hardship could be occasioned by an increase in violence, a breakdown of fundamental services, or an inadequacy of cell space. This would then raise the inquiry of whether the restriction is substantially related to an important governmental interest. This level of review, while higher than any proposed by the Court, would still allow the more vital governmental interests of security and order to prevail if they were promoted by the restriction involved. By the same token, other less important inter-

180. See supra notes 35-36 and accompanying text.
ests, such as administrative or fiscal convenience, would be screened out. This logic, applied to the double-ceiling issue, would permit the prisoners to prevail since neither double-ceiling nor overcrowding is substantially related to any important governmental interest, providing, of course, that a hardship or deprivation had already been shown.

The obvious shortcomings of this balancing test, and one which has already been leveled at the reasoning in *Wolfish*, is that it is inapplicable to convicted inmates by reason of its due process origins. This distinction must be acknowledged both for constitutional purposes and because certain conditions register different effects on long-term inmates as opposed to short-term detainees. This difference, however, is somewhat amorphous since, in many circumstances, the impact of the restriction transcends the mere label which the prisoner bears.\(^{181}\) Moreover, there is nothing in the eighth amendment which prohibits the balancing of institution and inmate interests. Thus, the standard remains fundamentally intact, even if modified to reflect the dissimilarities between convicted inmate and pre-trial detainees. The issue is still the conditions of confinement under which a state may incarcerate an individual and, the question, rid of its due process features, still remains the same: has a hardship or privation occurred and is it justified by any substantial penal interest?

A partial exception to this balancing standard must be recognized for the "totality" approach. Institutions running afoul of this approach create a hardship or deprivation by the cumulative effect of their conditions and the integrity of the analysis does not permit these conditions to be singled out and balanced against associated penal interests. Thus, for "totality" purposes, a showing of hardship or deprivation, without more, would be sufficient for a determination of cruel and unusual punishment.\(^{182}\) This less rigorous standard is somewhat justified in that the "totality" approach is calibrated to disclose a system-wide level of abuse which commonly reaches a much more violative extreme than found in the adjudication of a single condition.

The continued neglect of prisoners in the prisons followed by a non-observance of their rights in the courts does a disservice not only to the inmate but also to the institution and, in the long run, to society as a whole. Within a week of the Supreme Court's ruling in *Chapman* allowing double-ceiling in the Ohio prisons, the *Akron Beacon Journal*

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\(^{181}\) It is, therefore, not possible to say with any conviction that the plight of the detainee is any better than that of the convicted inmate. Detainees, as a general proposition, are provided with less facilities than most inmates and are double-celled without first undergoing a classification process.

\(^{182}\) For a concrete example of how this might be applied, see Justice Brennan's concurrence in *Rhodes v. Chapman*, 49 U.S.L.W. at 4681.
editorialized the sad truism that, far from being the end, the Court's decision was just the beginning of Ohio's prison woes.\textsuperscript{183}

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