DEATH ROW CONDITIONS: PROGRESSION TOWARD CONSTITUTIONAL PROTECTIONS

In July of 1983, George Clayton graduated from an Ohio community college with a degree in business administration. Clayton, a native of Cleveland's East Side, might neatly fall into the vast demographic pool of young, midwestern business graduates were it not for one unique item on his curriculum vitae: Clayton spent twenty-eight months on Ohio's death row. Sentenced to death at nineteen for the killing of a Bedford Heights police officer, Clayton's sentence was ultimately reduced to serving time with the general prison population at Lucasville.1

At present, thirty seven states retain a statutory death penalty.2 Twenty eight states operate prisons containing a separate death row for capitally-sentenced inmates. Over 1500 individuals await sentence modification or execution in these designated units for the condemned.3 The national rate of reversal of death sentences is as high as forty-five percent for those death row inmates pursuing appeal and federal habeas corpus with the assistance of counsel.4 Yet, post-conviction review is a time-consuming process: the average death row inmate spends six to ten years on death row.5 Lamentably, the rate of sentence reversal and the length-of-stay statistics are lowered by the acute shortage of attorney representation for the capitally-sentenced inmate's pursuit of sentence review.6 Still more appalling is the human rights crisis that is epitomized by the conditions of confinement and the circumstances of waiting on death row.7

Beginning with recapitulation of the quest for the meaning and scope of

3Id.
4Id. See also, Brief for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. at 17-18, Groseclose v. Dutton, No. 85-5525 (6th Cir. 1985) [hereinafter cited as brief for Amicus Curiae] "The Fund" compiles period death row statistics indicating the number, race, geographic location and judicial disposition of death row inmates. In a Fund study conducted in Texas, eighty out of 206 capital appeals (38.8%) in the Texas Court of Criminal Appeals were reversed. In Kentucky, six out of thirteen capital appeals (46%) decided to date have produced reversals. In Tennessee, fifteen out of thirty-nine capital appeals (38.5%) have resulted in reversal. The Fund's studies also indicate that, since 1978, sixty-four of the 143 capital federal habeas corpus appeals filed nationally have produced favorable results for the petitioner. See also, Greenburg, Capital Punishment as a System, 91 YALE L.J. 908, 918 (1982) (Greenburg gauged the capital sentence reversal rate as of 1980 to sixty percent, exclusive of Texas and Georgia death row inmates removed from the row under prior sentencing statutes subsequently deemed unconstitutional.)
5Groseclose v. Dutton, 609 F. Supp. 1432, 1447 (M.D. Tenn. 1985). See also, Brief for Amicus Curiae, supra note 4, at 15-16. (Fund statistical data corroborating the District Court's finding as to length-of-stay on death row).
6*Panel Remarks, supra note 2.
7Joel Berger, NAACP Legal Defense and Educational Fund, Remarks at the Meeting of the Ohio Death Penalty Task Force's Death Row Conditions Committee (Oct. 11, 1985).
the eighth amendment, this comment will review both the evolution of judicial scrutiny and the constitutional limitations of criminal incarceration and will also analyze the narrow body of case law affecting the quality of life on America's death rows.

THE EIGHTH AMENDMENT

The United States Supreme Court provided a somber, if elusive, standard for measuring the humanity of punishment in its 1958 ruling that "the basic concept underlying the eighth amendment is nothing less than the dignity of man.") While concise words or evidence explaining the purpose and meaning of the Bill of Rights proscription against cruel and unusual punishment is absent from the records of Congress, the bill's adoption of the pertinent language of the English Bill of Rights of 1689 suggests consideration of English penal history as a means of deducing the eighth amendment's mission.

Commentators suggest that England's 1689 prohibition against cruel and unusual punishment responded to the Crown's arbitrary imposition of barbaric penalties for a vast range of offenses, many of which would be considered petty by contemporary standards. Acknowledging the fact that burning, drawing and quartering penalties accompanied the colonists to America, any early concern that punishment must fit the crime was obviated when the crime was deemed heinous.

While these practices had virtually disappeared in America by 1789, the authoring of a Bill of Rights prohibition against cruelty in punishment reflected the framers' intent to finally forbid the extreme cruelty evident in "aggravations attendant upon execution." Further expansion upon the purpose and intent of the eighth amendment's draftsmen would be a piece-meal progression, beginning with the 1878 Supreme Court consideration of whether one mode of execution was humane, and therefore more constitutional than another, and continuing to the present.

U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")
1 ANNALS OF CONG. 754 (1789).
"Id. at 852-60. But see, H. BEDAU. THE DEATH PENALTY IN AMERICA. 3-7 (1976) [hereinafter cited as Bedau] (A law enacted in 1565 which made pocket-picking a capital offense was not repealed until 1810; as late as 1812, individuals convicted of high treason were punished by "drawing, hanging, disemboweling and then beheading, followed by quartering.").
BEDAU. supra note 12, at 16 (Witchcraft and slave rebellion, by colonial standards, were acts punishable by "aggravated" execution.)
"Id.
Wilkerson v. Utah, 99 U.S. 130 (1878) (finding the death penalty not per se unconstitutional).
THE HANDS OFF DOCTRINE AND JUDICIAL RECOGNITION OF THE RIGHT TO HUMANE PRISON CONDITIONS

While American courts have traditionally expressed reluctance to interfere with the operations of prisons and the expert judgment of prison administrators, the propriety of applying an eighth amendment scrutiny to prison conditions is a well-settled issue. The 1962 decision which made the eighth amendment applicable to the states through the fourteenth amendment, and the subsequent flood of litigation have, however, indicated that the concept of judicial abstention still retains some vitality in the area of prison conditions. In the past, judicial “intrusion” into state corrections operations has sparked controversy concerning federalism and separation of powers. The lingering effect of this controversy has been judicial reluctance to reach the merits of prison conditions claims.

The most common means of bringing a claim of cruel and unusual conditions of confinement is in federal court in a 42 U.S.C. § 1983 suit for deprivation of a federally-protected right (based on the eighth amendment) under color of state law. Habeas corpus is also available for challenging prison conditions.

While judicial abstention, or the “hands-off doctrine,” suggests a jurisdictional bar to federal court review of an issue, in the context of prison conditions litigation it “has nothing to do with jurisdiction or justiciability; at most it reflects a conservative judicial approach to review of prison practices on the merits.” The problematic effect of judicial unwillingness to delve into a constitutional examination of conditions of confinement is profound. Court reluctance to provide a test or judicially-fashioned standards of prison conditions maintains a vicious cycle where the concept of “cruel and unusual punishment” remains an elusive and abstract concept, and legislators and administrators are left without guidelines for constitutional prison administration.

Further, so long as state laws giving corrections officials undefined con-

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19See, e.g., Holt v. Sarver, 442 F.2d 304, 306 (1971) (Respondent corrections officials unsuccessfully claimed that a suit against the Corrections Agency of the State of Arkansas was barred by the eleventh amendment).
control of prison management receive such implicit judicial immunity, both the judiciary and the legislature are rendered impotent to respond to human rights abrogations. To the prisoner, and especially the death row inmate, judicial abstinence from cases not rising to the level of egregiousness established by precedent represents a practical absence of avenues for redress of what may be a valid claim of constitutional violation.25

Evolving Standards of Decency

Until the 1981 Supreme Court case, Rhodes v. Chapman,26 federal courts lacked High Court determination of the constitutional method or measure of eighth amendment application to prison conditions27 upon which to base their decisions. Arguably, Chapman did not provide such a judicial key. Instead, a totality of the conditions approach was apparently employed,28 but the steps in the adopted totality test were not clearly set forth.29

In holding the practice of an Ohio maximum security prison whereby prisoners were double-celled to be constitutional, the Chapman majority’s “totality” standard largely rested upon concepts distilled from the Court’s rulings on capital punishment, rather than adoption of lower court prison conditions approaches.30 A focused concurring opinion,31 penned by Justice Brennan and joined by Justices Blackmun and Stevens, embraced the more defined prison conditions stance of one lower court32 and acknowledged the abundance of lower court litigation33 on the issue, as well as the consequent mass of “unpleasant” reading on the matter.34 Although the Chapman majority opinion unquestionably approves the often-used “totality” theory, it is the concurring opinion that courageously wades through analogous, albeit lower court, facts and holdings in search of the acceptable mid-point between “comfortable prisons on the model of country clubs”35 and “soul-chilling inhumanity of conditions.”36

Although Chapman has been interpreted as the Court’s adoption of a “totality of the conditions” theory by the fourth, fifth, seventh and eighth cir-

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25 But see, Rubin, Section 1983: A Limited Access Highway, 52 AM. L. REV. 977, 978 (1983) (Rubin suggests that some prisoners’ civil rights claims are meritless attacks, generally filed pro se, by inmates venting hostility toward the system.)
27 Id. at 346.
28 Id. at 347. (Conditions “alone or in combination may deprive inmates of the minimal civilized measure of life’s basic necessities.”)
29 Id. at 337-52 (Justice Powell authored the majority’s opinion.)
30 Id.
31 Id. at 352-68.
32 Id. at 364 (citing Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977)).
33 Id. at 354 n. 2.
34 Id. at 354.
35 Id.
36 Id. (citing Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (Mass. 1973)).
cuits, the subtle difference between the Chapman majority and concurring opinions must be articulated in order to understand the meaning of the Chapman totality test. In brief, the Chapman majority speaks in the abstract and declines the opportunity for judicial activism in prison reform. In contrast, the concurring justices edge closer to complete judicial abandonment of the hands-off doctrine and would guide future litigation with a practical checklist and the admonishment that “cases are not decided in the abstract.”

A. Abstract Cruelty

In Weems v. United States, the Court reviewed the decision of the Supreme Court of the Philippine Islands, affirming the conviction of a public official for falsifying an official document. Petitioner had been sentenced to “hard and painful labor for a period ranging from twelve years and one day to twenty years and . . . carrying during his imprisonment a chain at the ankle hanging from the wrist . . .”, as well as deprivation of his civil rights during confinement, termination of all post-confinement political rights and surveillance by the authorities for the rest of his life. In holding this penalty to be unconstitutionally cruel and unusual, the Court’s prescient opinion not only dismissed interpretive confinement of eighth amendment prohibitions to physical torture like that imposed under the English reign of the Stuarts, but also framed the theory that a sentence may be disproportionate to the crime.

A trilogy of death penalty cases would, years later, revive the “proportionality” theory of Weems. This theory was ultimately adopted by the Court as forbidding “unnecessary and wanton infliction of pain,” including that which is “totally without penological justification.” Denial of medical care to prison-

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1See e.g., Nelson v. Collins, 659 F.2d 420, 428 (4th Cir. 1981); Ruiz v. Estelle, 650 F.2d 555, 568 (5th Cir. 1981); Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981); Villanueva v. George, 659 F.2d 851, 854 (8th Cir. 1981).
2Chapman, 452 U.S. at 353 (Brennan, J., concurring).
3Id. at 364.
4Id. at 367.
5217 U.S. 349 (1910).
6Id. at 357.
7Id. at 383 (White, J., dissenting).
8Id.
9See supra, note 11; but see, Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971) (punishment that is “shocking to the conscience” is eighth amendment threshold).
10Weems, 217 U.S. at 379. (The Court invalidated Weems’ sentence after weighing the “mischief” [alteration of a ledger] and the “remedy.”)
12Gregg, 428 U.S. at 173.
13Id. at 183.
ers and deprivations of basic human needs of inmates have been held unconstitutional on this ground, where the deprivations were found to be cruel and unusual, aimless and overly-severe. However, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."

An off-shoot of the proportionality argument is the evaluative approach that considers the relationship between prison conditions and "governmental interests" in maintaining prison order, security and rehabilitation of prisoners. The rule that prisoners' rights may be abridged if necessary to further penal objectives of order, security and rehabilitation has permitted impingement of prisoners' first and fourth amendment rights. Depending on the meaning of "cruel and unusual," eighth amendment rights may be subject to abridgement under this theory.

The missing piece in the abstract approach to eighth amendment scrutiny is the very element the Chapman majority refused to provide: there is "no static 'test' . . . by which courts determine whether conditions of confinement are cruel and unusual." In explanation of the omission of this key component to a judicial litmus test, the majority referred to the oft-quoted Trop v. Dulles direction that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

B. **Toward Concrete Standards**

Although the Chapman majority's espousal of a totality of the circumstances theory failed to fully explain the theory, the Chapman opinion, and especially the detailed explanation of the totality approach provided by

83Procunier v. Martinez, 416 U.S. 396, 413-14 (1974). (The Court held that censorship of prisoner mail is constitutional if the practice furthers the important or substantial governmental interest of prison security, order or prisoner rehabilitation, and if such restriction of first amendment freedoms is no greater than necessary to protect the government interest.)
84Id.; See also, Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) (A prison is not a public forum; prisoners' right to free speech and assembly curtailed by security interests); Pell v. Procunier, 417 U.S. 817, 822 (1974) (Prison officials may regulate prisoners' communications with media by reasonable time, place and manner restrictions if necessary to further government interests.)
85Hudson v. Palmer, 104 S. Ct. 3194, 3202 (1984) (Inmates held not to have reasonable expectation of privacy in their cells entitling them to protection against searches and deprivation of property by prison guards.)
86Chapman, 452 U.S. at 346.
87356 U.S. 86 (1958) (plurality opinion).
88Id. at 101.
concurring Justice Brennan,\(^5\) provided lower courts with significant guidance as to ruling on the merits of prison conditions claims. The *Chapman* majority’s recognition that “[c]onditions . . . alone or in combination, may deprive inmates of the minimum civilized measure of life’s necessities”\(^6\) suggested lower court definition of both “combination” claims and “necessities.” Cases following *Chapman* have acknowledged the Court’s reference to the totality of conditions analysis to varying degrees,\(^6\) but have predictably followed the Court’s confinement of scrutiny to basic needs only.\(^6\)

In *Ruiz v. Estelle*,\(^6\) the Fifth Circuit applied a totality test to the vastly over-crowded Texas prison systems. Noting that the *Chapman* Court had, in its assessment of the lower courts’ findings of fact, considered that essential food, medical care or sanitation were not compromised, conditions had not caused an increase in violence or created other conditions intolerable for prison confinement and conditions had not greatly diminished job and educational opportunities,\(^6\) the court of appeals incorporated such considerations in its review of *Ruiz*.

Affirming the district court’s finding that the conditions in various Texas institutions violated the eighth amendment, the Fifth Circuit Court of Appeals approved the district court’s acceptance of, and weighting of, the type of

\(^{39}\) *Chapman*, 452 U.S. at 364 (Brennan, J., concurring) citing Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977). The concurring decision’s adoption of the eighth amendment scrutiny used in the district court rule of Laaman also provides guidance to the prison conditions litigant: “When ‘the cumulative impact of the conditions of incarceration threatens the physical, mental and emotional health and well-being of the inmate(s) and/or creates a probability of recidivism and future incarceration’, the court must conclude that the conditions violate the Constitution.” The concurring Justices also implicitly expand on the majority’s reference to “minimal necessities” by urging courts to examine the elements of prison conditions enumerated in Laaman and their effect upon the inmates, including:

[1.] The condition of the physical plant (lighting, heat, plumbing, ventilation, living space, noise levels, recreation space);

[2.] Sanitation (control of vermin and insects, food preparation, medical facilities, laboratories and showers, clean places for eating, sleeping and working);

[3.] Safety (protection from violent, deranged or diseased inmates, fire protection and emergency evacuation);

[4.] Inmate needs and services (clothing, nutrition, bedding, medical, dental and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and

[5.] Staffing (trained and adequate guards and other staff, avoidance of placing inmates in position of authority over inmates).

\(^{61}\) See generally, Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). (Natural-

\(^{62}\) ly, “basic” and “needs” are subjective terms, subject to court definitions.)


\(^{64}\) See generally, Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). (Natural-

\(^{65}\) ly, “basic” and “needs” are subjective terms, subject to court definitions.)

\(^{66}\) 679 F.2d 1115 (5th Cir. 1982).

\(^{67}\) *Id.* at 1138, citing Rhodes, 452 U.S. at 346. (the quoted considerations were reviewed, as part of the record of the lower court proceedings by the majority).
evidence reviewed. The circuit court accepted the district court's weighting of expert testimony and empirical data under the rationale of *Chapman*. Most importantly, the *Ruiz* appeal confirmed the systemic application of a totality test of prison conditions for the Fifth Circuit and permitted specific standards regarding space per inmate and provision of regular exercise to be imposed by decree of the district court.

By comparison, the Ninth Circuit has attempted to narrow the *Chapman* totality test to only those cases where each component condition would separately constitute a violation of the eighth amendment. Similarly, the Ninth Circuit would limit court-imposed remedies to only those which are necessary to correct the specific violation.

The product of post-*Chapman* prison conditions litigation has clearly been a growing division among the circuit courts as to whether combined conditions, not separately rising to an unconstitutional level, can, in the aggregate, become unconstitutional by virtue of their combined impact on the inmate. The second level of inquiry raised by the differing constructions of *Chapman* is the extent to which a court may order a comprehensive remedy to correct the violative conditions.

In those jurisdictions where the totality analysis permits consideration of the aggregate of confinement conditions, and where detailed, intensive remedies may be ordered by the court, a set of model standards are being judicially created. Jurisdictions avoiding aggregate impact analysis and "intrusive remedies" remain locked into the abstract, hands-off eighth amendment approach that precludes correction of all but the most shocking of confinement environments, without identifying specific standards or establishing thresholds of constitutionality.

**TOTALITY ON DEATH ROW**

For the inmate condemned to death, the evolution of a practical eighth
amendment scrutiny of the constitutionality of prison conditions has become increasingly relevant. The construction of Chapman has recently arisen in the Second and Sixth Circuits, with landmark implications for the death row inmate.

In the Second Circuit case, Smith v. Coughlin, plaintiff, a prisoner confined to a segregated unit for condemned prisoners, challenged the conditions of his confinement under a totality of the circumstances theory. Specifically, Smith claimed that segregation from other inmates, limitation of contact visitation rights to one weekly meeting with an authorized clergyman and general prohibitions against human contact constituted a threat to his physical and mental health which could cause him to lose his will to fight his conviction through appeal.

The New York district court, in ruling against Smith, found that Smith's cell was adequate in size, lighting, heating and cooling. Smith had access to an exercise area seven hours each day. Further, Smith had been provided with regular psychiatric care for two years, with no discovery of any psychological debilitation. Beyond these facts, the court noted its inability to overcome an unambiguous state statute specifically requiring segregation of condemned prisoners. More than just an enabling statute giving regulation, promulgation and general discretionary power to prison administrators, the statute was a clear, direct expression of the legislature that could not be overturned absent a showing that the corrections officials' interpretation of the statute was clearly erroneous. Smith prevailed, however, in his claim that denial of contact with legal counsel and inability to keep legal papers violated his sixth amendment

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13See Robbins, Prisoners' Rights Sourcebook, 309-310 (1980). (Prof. Robbins includes, in his general coverage of prisoners' mental health, an observation that death-sentenced inmates, by virtue of the fact that their penalty is qualitatively different from others, and the existence of state statutory provisions prohibiting execution of the presently insane, may be entitled to more careful consideration of conditions of confinement impact on mental health than that afforded the general prison population.) (Author's Note: Robbins' assessment of mental health needs of the condemned as "special" suggests the potential for a more magnified totality scrutiny of death row conditions, with emphasis on emotional and mental health, than that applied to general population claim(s.)


17Id.

18Id. at 1059.

19Id. at 1060-61.

20Id. at 1058.

21Id. at 1061.

22Id. at 1059-60, citing New York Correct. Law § 650 (Consol. 1974). (Statutory provision calls for segregation of condemned inmates and restriction of contact visitation to clergy, prison officials and family members.)

23Id. at 1060; 748 F.2d at 787. (Statute expressly prohibiting condemned inmate's confinement in general prison population precluded any protected liberty interest in remaining in the general population; statute was designed to further prison security objectives).
right of access to the courts.\textsuperscript{84}

In \textit{Groseclose v. Dutton},\textsuperscript{85} an action was brought, originating as a claim by next friend, that death row inmate Ronald Harries' announcement that he would forego his appeals of right was an involuntary waiver of appellate review produced by the conditions of confinement on death row.\textsuperscript{86} The voluntariness of Harries' waiver decision and the constitutionality of death row conditions were bifurcated into two claims.\textsuperscript{87} The court noted that the facility housing the death row at issue had been adjudged as unconstitutional by virtue of overcrowding, inadequate sanitation, medical care, excessive violence, idleness and improper prisoner classification in \textit{Grubbs v. Bradley}.\textsuperscript{88}

While the \textit{Grubbs} court found unconstitutionally violative conditions, it also held, using rationale akin to that employed by the Ninth Circuit, that only those conditions which individually or together rise to a "severe" or shocking level will be actionable; interrelationship of conditions and/or failure to rehabilitate a prisoner will not necessarily present a meritorious claim.\textsuperscript{89} Like the Ninth Circuit, the \textit{Grubbs} court embraced a judicial application of remedy to prison conditions that would be the least intrusive means to amelioration.\textsuperscript{90} The \textit{Grubbs} court did, however, acknowledge the potential for an interrelated totality claim where, for example, there was shown to be a sufficient connection between a prisoner classification system and excessive violence.\textsuperscript{91} Thus, while not embracing a Tenth Circuit-type totality approach\textsuperscript{92} that would incorporate consideration of psychological or emotional impact, the \textit{Grubbs} court did not expressly reject such an approach.

Tying its construction of the \textit{Chapman} totality test to the (need to accord) "wide-ranging deference [to the] decisions of prison administrators,"\textsuperscript{93} the \textit{Grubbs} court avoided reinforcement of judicial abstention by confining its decision to the single and aggregate unconstitutionality of the conditions at issue.\textsuperscript{94} In sum, the Tennessee district court did not believe the facts presented in \textit{Grubbs} required subtle aggregate impact scrutiny or "intrusive" remedy.\textsuperscript{95}

\textsuperscript{84}Id. at 1062.
\textsuperscript{85}609 F. Supp. 1432 (M.D. Tenn. 1985); See also, Groseclose v. Dutton, 594 F. Supp. 949, 962 (M.D. Tenn. 1984) (District court held Harries' waiver involuntary and induced by unconstitutional conditions.)
\textsuperscript{86}Groseclose, 594 F. Supp. at 962.
\textsuperscript{87}Id. at 1434.
\textsuperscript{88}552 F. Supp. 1052 (M.D. Tenn. 1982).
\textsuperscript{89}Id. at 1122-24.
\textsuperscript{90}Id. at 1124.
\textsuperscript{91}Id.
\textsuperscript{92}See, e.g., Ramos, 639 F.2d 559, 566.
\textsuperscript{94}Id.
\textsuperscript{95}Id.
The effect of the Grubbs holding on the Groseclose claim was to narrow examination of the prison system to death row, as a “separate prison within a prison,” since the Grubbs remedial order had been broad and non-specific, and because subsequent death row administrative policy changes had not been addressed. Thus, the District Court for the Middle District of Tennessee certified a class of present and future death row inmates.

Plaintiffs presented a claim that the totality of the conditions on death row violated their eighth amendment rights, to wit: poor ventilation, heating, cooling and lighting of cells; inadequate provision of out-of-cell exercise; inadequate inmate classification; and poor psychological services. Expert testimony tending to show that death row “inmates face unique psychological crises that inmates in the general population do not face” was presented to the court to support the argument that “the factors that go to a determination of whether the totality of conditions on death row constitutes cruel and unusual punishment should receive different weights than the factors that are examined in a non-death row conditions case.”

In responding to this argument in the affirmative, the Groseclose court stands out as a compassionate Sixth Circuit pioneer. Phrasing its “principal concern” as inmate idleness and prison officials’ neglect of the condemned prisoners’ emotional well-being, the Groseclose court set forth a plan, under the supervision of a court-appointed “special master,” to remedy the unhealthy sanitation, lighting and exercise factors, inadequate provision for inmate interaction with other people, lack of spiritual and psychological counseling and the arbitrary segregation of all death row inmates.

*Grubbs*, 609 F. Supp. at 1441.

*Id.* at 1434.

*Id.* at 1435-38. The Court ultimately found that the cells, on the average, afforded only enough space to take three paces, turn around, and take three paces back. The temperatures in the cells varied from extremely high (mid-eighties) in the summer, to winter lows sufficient to make a visiting psychiatric expert “shiver.” Absence of natural light in most of death row and single low wattage bulbs light the cells, adversely impacting on sleep cycles and causing many inmates to remain in bed twenty hours a day or more.

The cells are without windows or ventilation, so paint fumes, poorly-functioning in-cell toilets and cigarette smoke odors permeate the air. Due to poor ventilation, inmates avoid using insect sprays to reduce the rampant insect infestation in the cells. Inmates are not classified for special treatment or for security purposes; all death row inmates are considered high risk security problems. Inmates receive one hour of outside exercise per day, with no access to the gym, work programs, congregate religious services or law library visitation (though they “order” law books). Similarly, education programs and in-cell work are not provided by the state. Fire safety provision and sanitary eating facilities are suspect.

The “special” emotional needs of condemned inmates are not met: rare visits by a counselor are conducted without privacy. Visitation is restricted to one or two visitors per week for one or two hours, depending on the distance traveled, and two telephones for collect calls are available for daily use. Officers are trained by the State’s Department of Corrections, but receive no special training for death row. Selected death row inmates are used for collecting meal trays and cleaning catwalks; they are the only inmates permitted out of their cells for more than the exercise or shower period.

*Id.* at 1446.

*Id.*

*Id.* at 1148. (Special masters act as enforcement supervisors and are generally selected for their knowledge of the legal and corrections systems.)
The *Groseclose* court particularly emphasized the propriety of prison implementation of inmate evaluation and classification plans for death row inmates as being "logical, economic and effective." However, the court avoided full-blown intrusion into prison administration by couching its emphatic suggestion of classification in deferential terms and stating that "nothing in this decision should be interpreted as requiring that [death row inmates] should be integrated into the general population."

The rationale underlying the *Groseclose* suggestion of individualized treatment of the death row prisoner reflects the court's view that death row conditions cases do require different factual weighting from that applied under a totality analysis to a general population conditions claim. The court notes both the condemned person's right to die a dignified death and the death-sentenced individual's keen interest in maintaining a record of good behavior as constituting a hearty countervailant to security fears:

The average death row inmate spends six to ten years pursuing appeals. Death sentenced inmates are aware that their institutional record while on death row could influence their chances for clemency; but, perhaps more significantly, the presence of a classification system could have the effect of improving the mental and physical health of the inmates. Specifically, inmates could be classified to identify death row inmates with serious emotional problems.

It is clear from *Groseclose* that beyond the potential for Sixth Circuit adoption of either an aggregate impact/intrusive remedy construction of *Chapman* or a conservative interpretation styled after the Ninth Circuit, *Groseclose* may create a third category of prison conditions analysis that proceeds on the theory that death row inmates and their conditions of confinement command a very special application of eighth amendment totality. Such an application would include an analytical approach that acknowledges the reversibility of capital sentencing, the right of the prisoner to await clemency or execution with dignity and peace, and the need of the condemned to come to terms with

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103 Id.
104 Id.
105 *Id.* at 1440, citing *Autry v. McKaskle*, 727 F.2d 358, 363 (5th Cir.), cert. denied, 104 S. Ct. 1458 (1984) (The Fifth Circuit held that allowing the condemned plaintiff to be strapped to a gurney, intravenous tubes inserted into his arm in preparation for lethal injection, for 63 minutes during which time, the angry crowd assembled outside, chanting, "kill him! Kill him!") until his execution was stayed, did not constitute cruel and unusual punishment.) See also, *Executions: New Rules of Etiquette*, Newsweek, January 23, 1984 at 27. (Subsequent to James David Autry's ordeal, the Texas Board of Corrections adopted "some more humane rules of execution etiquette." Henceforth, the condemned Texas inmate will not be intravenously intubated until after midnight on the date of the execution. the death chamber will be air-conditioned and enlarged and outside barricades will keep demonstrators out of earshot. *Newsweek* notes ironically that "[A]fter these niceties, of course, the outcome remains the same.")
The Principal Concern: Idleness

The Groseclose district court decision avoided the potential for conflict with the Second Circuit's *Smith v. Coughlin* ruling by distinguishing the facts of *Smith*. The Groseclose court noted the adequacy of Smith's cell, the provision of good ventilation, lighting, heating and cooling on New York's death row and Smith's access to regular outdoor exercise, medical care and legal assistance.

Implicitly holding that the constitutional minimum for conditions of confinement includes adequate sanitation and medical care provision, the District Court for the Middle District of Tennessee broke new ground when it phrased as "the principal concern of the Court," the idleness and extended in-cell confinement of death row inmates. Citing expert testimony that tended to show that round-the-clock in-cell confinement, unnecessary limitation on human contact, absence of natural light and lack of recreational or vocational programs for death row inmates would compound condemned inmate despair and possibly lead to anti-social behavior, the court obviously viewed the ostensible prison security objective of these practices as being ironically, if inadvertently, compromised. While this evaluation was certainly progressive, it rests on a theory that is neither new nor innovative. In 1969, Tom Murton, Professor of Criminology, accepted the position of superintendent of the Arkansas State penitentiary, Tucker Prison Farm. Murton's appointment was part of a "demonstration project which would convince the decision-makers that a prison can be operated without brutality and torture."

By expanding condemned inmate privileges and responsibilities, Professor Murton observed renewed hope in the death row inmates. Inmates were permitted out of their cells for contact with other inmates, physical exercise, and

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107See generally E. KUBLER-ROSS, ON DEATH AND DYING (1973) (Physician, humanist and student of the terminally ill, Dr. Kbler-Ross' widely accepted principles depict the stages through which patients, by receiving a grim diagnosis, come to terms with the real possibility of their own death, and the indefinite length and circumstances of their remaining lifetime, while retaining hope for eventual "reprieve.")
108748 F.2d 784 (2d Cir. 1984).
110Id. at 1441 citing Hutto v. Finney, 437 U.S. 678 (1978). (The district court notes the Hutto Court's emphasis on the heightened violation created when denial of proper health care takes place over an extended period of time.)
111Id. at 1446.
112Id. See also Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971) (Regular outdoor exercise for death row inmates required, where it was found, economically and from a security standpoint, to be feasible).
113Groseclose, 609 F. Supp. at 1446.
114Murton, Treatment of Condemned Prisoners, 15 CRIME & DELINQUENCY 94 (1969) [hereinafter cited as Murton].
115Id. at 96.
work projects including painting and repairs of the cell-block and kitchen and janitorial assignment in the general population facilities. Ultimately, total reclassification of all the death row inmates to minimum security status, with the single exception of housing, was successfully implemented.\(^6\)

Murton's hypothesis underlying his renaissance in corrections was that "a person will generally tend to respond in the same fashion in which he is addressed. An inmate treated like an animal is most likely to respond like an animal, . . .\(^7\) Murton’s trust and liberalization of the death row inmates were rewarded; the condemned inmates “became the model prisoners of the institution.”\(^8\)

The probability of a relationship between a deprivational death row environment and inmate violence finds support in both media coverage of prison outbursts\(^9\) and in scientific principles of human behavior. Corrections experts, prison employees and civil libertarians posit that violence occurs in response to frustration, depression,\(^10\) and inhumanity of prison conditions.\(^11\) Lengthy confinement on death row has been linked to hypochondriasis,\(^12\) with any improved ego strength during the course of confinement found to be linked to opportunity for and development of group identification.\(^13\)

Unfounded physical complaints are generally related to hidden anxiety and depression.\(^14\) Depersonalization neurosis, a painful depression-linked syndrome, may be caused by sensory deprivation.\(^15\) While no scientific studies have emerged which specifically focus on death row inmate psychodynamics, the dangerous implications of exacerbating depression and anxiety already produced by capital sentencing are readily apparent.

Undoubtedly, the diminishment of inmate ego strength, energy and hope via unnecessarily harsh penal restrictions does little to deter recidivism and much to provoke prison violence ranging from self-mutilation to rioting.\(^16\)
Judicial recognition of the special needs of the condemned and the psychological impact of unnecessarily harsh conditions of death row is evidenced in federal court orders in Texas, California, Georgia and Kentucky requiring expansion of out-of-cell time and stimulating activity for condemned prisoners. Psychological treatment opportunities are expanding for prisoners, as well.

In Kentucky, death row inmates presently receive approximately five and three-fourths hours of out-of-cell time per day, seven days a week, with outdoor and gymnasium exercise regularly available. Kentucky's condemned are also permitted to dine in the prison's general population dining room. Similarly, twenty of Arizona's sixty-three death row inmates have been classified for housing outside of death row and are able to dine with the general population and enjoy daily one-hour outdoor exercise.

The *Ruiz v. Estelle* consent decree making like provision for death row recreation opportunities withstood state challenge and remains a model remedial plan. Subsequent modification of the *Ruiz* decree provided for work capability evaluation and integration of condemned prisoners into the freedoms and facilities of the general prison population, over a three-month experimental period. By definition, the consent decree did not perpetually bind the defendants to compliance, but the success of the experimental program has led to a prison administration plan to provide death row inmates with meaningful employment opportunities, though the inmates are no longer housed with general population prisoners. Currently, all Texas death row inmates are guaranteed at least fifteen hours a week of out-of-cell recreation. Upon completion of construction of a garment factory adjacent to death row, capable prisoners will be given employment.

In California, those death row inmates classified as "Grade A" are entitled

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127 Access to unpublished consent decrees was gained via the NAACP Legal Defense and Educational Fund.


130 Id.

131 Id.

132 Ruiz v. Estelle, 679 F.2d 1115, 1164 (5th Cir. 1982).

133 See *supra* note 4, Brief for Amicus Curiae, at 6.


135 See *supra* note 4, Brief for Amicus Curiae, at 8-9 citing Stipulation Regarding Death Row Conditions and Death Row Activity Plan (February 26, 1985).

136 Id.

137 Id.
to six hours of out-of-cell activity per day, seven days a week. Grade A prisoners may also dine outside of their cells together and may attend group religious services. Death row inmates not classified as “Grade A” are still afforded twelve hours of outdoor exercise per week.

Under a similar decree ordered in Georgia, condemned “H-House” residents receive at least thirty-two hours of out-of-cell time per week, at least six of which are designated as outdoor exercise time. Sports equipment must be provided, and inmates classified as eligible receive group religious service access and various hobby opportunities.

The successful implementation of court orders either urging or requiring death row inmate evaluation for classification and directing minimum levels of out-of-cell time belie administrative fears that such actions will compromise prison security. Indeed, the NAACP Legal Defense and Educational Fund’s lengthy investigations as to death row conditions and the practicality of remedial provisions for inmate stimulation indicate quite the contrary. The fund, in its amicus curiae brief in the Groseclose appeal, asserts that the conditions of Tennessee’s death row, and especially the unnecessary restriction placed on inmate’s exercise, lag far behind contemporary eighth amendment standards.

IMPACT ON OHIO

Should the Sixth Circuit affirm the district court holding in Groseclose, Ohio’s corrections system will be forced to upgrade considerably the conditions of death row at the Marysville and Lucasville State Correctional Facilities. Pursuant to statutory authority, the Ohio Department of Corrections has promulgated rules limiting Lucasville’s condemned men to two hours of out-of-cell time per week, with outdoor exercise provided at guard discretion once every three weeks. Death row inmates are locked in screened cages during visitation, thus causing many Lucasville condemned men to forego visitation out of sheer humiliation. A new death row facility constructed to house up to eighty inmates is described as not being a significant improvement over the

1Id.
2Id.
3Id.
4Id.
5See supra note 7.
6Id.
7Id.
9Remarks of the members, Meeting of the Ohio Death Penalty Task Force Committee on Death Row Conditions (Oct. 11, 1985) [hereinafter cited as Remarks of the members]. (Ohio characterized as “behind the times” in corrections.) See also, Baird, Death Row Unjust. Johnston Claims, Cleve. Plain Dealer, July 8, 1984, § 2 at 3, col. 1 (Death row inmate Dale N. Johnston describes a typical day on death row, including arbitrary ten minute shower limit and the requirement that twenty men share one razor).
10Remarks of the members; see also, Baird, Death Row Unjust. Johnston Claims, supra note 146.
former arrangement which housed death row inmates with those prisoners segregated for disciplinary purposes.¹⁴⁸

A recent fire on Marysville's antiquated death row for women has elevated the already great concern for Ohio's three female death row residents.¹⁴⁹ Marysville's death row is a misnomer, as the three condemned prisoners are housed in the "administrative control unit" for problem inmates.¹⁵⁰ The Marysville death row inmates' manual suggests the possibility of work assignment; though, practically, such opportunity does not exist.¹⁵¹ Educational programs are subject to the approval of the prison's superintendent and may only be entered into by correspondence and at the inmate's expense.¹⁵² Marysville prisoners are permitted out of their cells even less frequently than their Lucasville counterparts.¹⁵³ Group religious services are off-limits to Marysville's condemned, and psychological services are provided only once every four months, unless a greater need is evident to the supervising staff.¹⁵⁴

At least one civil rights action challenging Ohio death row conditions has been filed,¹⁵⁵ with more likely to follow. Sixth Circuit determination of Groseclose should spark executive or legislative action to improve Ohio's conditions of confinement for its growing death row population.¹⁵⁶

CONCLUSION

Eighth amendment scrutiny of condemned prisoner treatment has steadily progressed from a narrow finding of a constitutional prohibition against physical torture to the present inquiry: whether death row conditions under some administrations may constitute unconstitutional mental torture. As judicial remedies erode the previously-absolute discretion of corrections officials, and more death row inmates are revealed by the media as being more

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¹⁴⁸ Remarks of the members. supra note 146.
¹⁴⁹ Id.
¹⁵⁰ Id.
¹⁵¹ Id. This practice, and others attributable to Ohio's female death row facility at the state's Reformatory for women at Marysville, Ohio, were observed by this author during inmate assistance visits sponsored by the University of Akron School of Law, during the summer of 1984.
¹⁵² Id.
¹⁵³ Id. Marysville's policies for the treatment of death row inmates are reflected in numerous memoranda ("post orders") issued to prison staff, developed and distributed by the superintendent of the facility, and also set forth in the orientation booklet ("inmate manual") given to inmates upon arrival at the prison. Copies of these policy documents were obtained by the author.
¹⁵⁴ See supra note 150.
¹⁵⁵ Williams v. Ohio, C 2-84-1707 (E.D Ohio 1984) Pro se complaint filed by death row inmate Lewis Williams, Jr. on lined yellow paper, without the knowledge of his counsel. The complaint's "certificate of service" made reference to the use of institutional "kite" (intra-prison mail) to give notice to the defendant. Williams' complaint was ultimately dismissed without prejudice, thereby leaving open the possibility of a death row class action.
¹⁵⁶ Report of David Stebbins, Assistant Ohio State Public Defender, to the Ohio Death Penalty Task Force (June 4, 1984). (As of June of 1984, there has been 273 indictments under Ohio's capital punishment law, with 27 Ohioans under sentence of death.)
than "depraved animals . . . out of George Raft movies with long fangs," courts applying the *Trop v. Dulles* "evolving standards of decency" will undoubtedly adopt the view of Nobel laureate Albert Camus in his *Reflections on the Guillotine*: "When justice, which is supposed to protect the honest man, sickens him instead, it is difficult to believe that it can bring order and peace in the city."

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157 See *supra* note 1 (Assistant Superintendent of Lucasville, Steve Dillon proceeds to describe some of death row's long-time residents as "rather likeable, well-adjusted, soft-spoken, graying men who collect stamps.") *See also*, LEVINE, *DEATH ROW: AN AFFIRMATION OF LIFE* (1972). (Compilation of literary works authored by death row inmates.)


159 *Id.* at 101.


161 *Id.*