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PRISON OVERCROWDING: STANDARDS IN DETERMINING EIGHTH AMENDMENT VIOLATIONS

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INTRODUCTION

> It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones . . . .[1]

At the end of 1998, the total number of inmates behind bars in the United States reached over 1.8 million, comprising the world's largest overall prison population.[2] This statistic reflects an imprisonment rate of approximately 668 per 100,000 residents.[3] The nation's inmate population grew by 60,000 from the previous year, and since 1990, the sentenced prisoner population has grown by 106% in federal prisons and 65% in state prisons.[4] As a result, in 1998, federal prisons operated at 27% above capacity and state prisons at 13%-22% above capacity.[5] Thirty-three states operated at 100% capacity or higher.[6]

Prison overpopulation in the United States has directly affected inmates' living conditions.[7] Rising inmate populations have produced

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* Special thanks to Professor Martin Flaherty for his valuable insight and guidance.

1. Nelson Mandela, Long Walk to Freedom 201 (1994).

2. *See* Human Rights Watch, Human Rights Watch World Report 2000, at 392 (1999) [hereinafter Human Rights Watch 2000]; Allen J. Beck & Christopher J. Mumola, *Bureau of Justice Statistics Bulletin: Prisoners in 1998* 1 (1999). This statistic includes the 1,302,019 inmates in federal and state prisons, as well as the 592,462 inmates in local jails. *See id.* Inmates in federal and state prisons generally serve sentences longer than one year. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Correctional Populations 1980-1996* (visited Feb. 12, 2000) <http://www.ojp.usdoj.gov/bjs/glance/corr2.htm>. Inmates in local jails generally are awaiting trial or sentencing, awaiting transfer to other facilities after conviction, or serving sentences of less than one year. *See id.*

3. *See* Human Rights Watch 2000, *supra* note 2, at 392. In 1998, the United States incarcerated a greater percentage of its population than any country except Russia. *See* Human Rights Watch, Human Rights Watch World Report 1999, at 387 (1998) [hereinafter Human Rights Watch 1999].

4. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *The Nation's Prison Population Grew by 60,000 Inmates Last Year[:] The Largest Increase Since 1995* 1 (Aug. 15, 1999) <http://www.ojp.usdoj.gov/bjs/pub/press/p98.pr>.

5. *See id.* at 2.

6. *See id.*

7. *See* Human Rights Watch & American Civil Liberties Union, Human Rights Violations in the United States 101-03 (1993) (arguing that prison overcrowding is the

overcrowded prisons, as cells originally designed for one inmate now accommodate two or three prisoners each.[8] Prison overcrowding has also resulted in a lack of privacy, deleterious physical conditions, inadequate sanitation, and decreased availability of basic necessities such as staff supervision and medical services.[9] Because of these declining conditions, inmates have increasingly brought suits against prisons, claiming that prison overcrowding violates the Eighth Amendment's prohibition against cruel and unusual punishment.[10] These claims have focused on overcrowding itself, as well as the effects stemming from prison overpopulation, such as lack of sanitation and appropriate food and recreation.[11] Courts have reached conflicting conclusions about the merits and worthiness of these inmates' claims.[12]

This Note examines the different standards federal courts use in determining whether prison overcrowding constitutes cruel and unusual punishment. These analyses include the totality-of-conditions, core-conditions, and *per se* approaches. A totality analysis considers a broad range of conditions, such as prison overcrowding, availability of basic necessities, and sufficient staff supervision, in determining whether the prison conditions violate the Eighth Amendment.[13] The core conditions method examines specifically the deprivation of food, clothing, shelter, sanitation, medical care, and personal safety in determining the existence of cruel and unusual punishment.[14] Under this analysis, overall confinement conditions cannot rise to the level of cruel and unusual punishment when there is no specific deprivation of a single core condition.[15] The *per se* approach, on the other hand, considers prison overcrowding itself to be a violation of the Constitution.[16] Courts, however, consider the *per*

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most significant cause of human rights abuses in the U.S. prison system).

8. *See* Mark Andrew Sherman, *Indirect Incorporation of Human Rights Treaty Provisions in Criminal Cases in United States Courts*, 3 ILSA J. Int'l & Comp. L. 719, 730 (1997).

9. *See id.*

10. *See* U.S. Const. amend VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); Eric G. Woodbury, Note, *Prison Overcrowding and* Rhodes v. Chapman: *Double-Celling by What Standard?*, 23 B.C. L. Rev. 713, 715-22 (1982).

11. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 339 (1981) (alleging that the housing of two prisoners in a single cell is cruel and unusual punishment); Nami v. Fauver, 82 F.3d 63, 65-66 (3d Cir. 1996) (alleging that the housing of two inmates in single cell, together with inadequate medical care, recreation, access to bathrooms, and rehabilitation programs, violates the Constitution); Ingalls v. Florio, 968 F. Supp. 193, 197 (D.N.J. 1997) (alleging that insufficient housing space, together with inadequate sanitation, recreation, and food, violates the Eighth Amendment).

12. *See infra* Part II.

13. *See infra* notes 110-12 and accompanying text.

14. *See infra* notes 156-57 and accompanying text.

15. *See infra* notes 161-63 and accompanying text.

16. *See infra* notes 180-83 and accompanying text.

se approach, where it defines overcrowding as housing inmates in excess of design capacity, to have been rejected by the Supreme Court in *Rhodes v. Chapman*.[17]

International norms can assist the courts in gaining a more comprehensive understanding of the contemporary standard of decency, an essential element in assessing Eighth Amendment claims.[18] International human rights standards apply for the most part either a *per se* or totality approach in addressing prison overcrowding cases.[19] By analyzing the various approaches and the international law standards relating to prison overcrowding cases, this Note proposes that courts revisit the application of the *per se* approach, or employ the totality analysis in assessing Eighth Amendment violations. The *per se* approach provides a clear judicial guideline that allows a measure of certainty and foreseeability in prisoners' litigation of Eighth Amendment claims. This approach also grants judges the most objectivity in evaluating suits over confinement conditions. The totality approach, on the other hand, considers the cumulative impact of prison conditions on inmates, including overcrowding, and extends the Eighth Amendment's protection "to the whole person as a human being."[20] Both approaches are better than the core conditions analysis because they cover a broader range of factors that affect inmates' well-being, such as conditions that cause psychological harm. Moreover, the *per se* and the totality approaches best reflect the contemporary decency standard.

Part I discusses the historical application of the Eighth Amendment to claims involving prison conditions, focusing on the Supreme Court's decisions in *Rhodes v. Chapman* and *Wilson v. Seiter*.[21] Part II describes the lack of uniformity among the federal courts as to the appropriate standard for determining Eighth Amendment violations, which includes the application of the totality of circumstances, core-conditions, and *per se* analyses. Part III presents the standards relating to prison overcrowding that are used under international human rights law, comprising for the most part the totality and the *per se* approaches. Finally, Part IV argues that in light of international law standards, courts should apply either the *per se* or the totality-of-conditions approach to an inmate's Eighth Amendment claim in determining the existence of cruel and unusual punishment.

17. 452 U.S. 337, 352 (1981); *see infra* notes 200-02 and accompanying text.

18. *See infra* notes 205, 421-23 and accompanying text.

19. *See infra* Part III.B.

20. Laaman v. Helgemoe, 437 F. Supp. 269, 307 (D.N.H. 1977); *see* Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. Rev. 373, 389-90 (1995).

21. 501 U.S. 294 (1991).

I. EIGHTH AMENDMENT JURISPRUDENCE

In addressing inmates' claims of deficient prison conditions, courts have historically focused on factors such as sanitation, safety, and medical care provided by the correctional facility.[22] Since the 1980s, however, courts have increasingly analyzed the constitutionality of prison overpopulation itself, as well as the effects of overcrowding on inmates.[23] This part examines prison systems and their regulation, as well as the traditional application of the Eighth Amendment to claims of cruel and unusual punishment based on poor prison conditions.

A. *Prison Systems and Their Regulation*

Most prisoners serve their sentences in state institutions, as state prisons confine approximately 90% of all inmates.[24] States operate their own correctional facilities and overcrowding conditions vary from state to state.[25] When inmates are sentenced for federal crimes, however, they are placed under the custody of the Federal Bureau of Prisons.[26] The Bureau then determines the place of imprisonment for the inmates.[27]

From 1980 to 1995, the total prison population in the United States grew by approximately 242%,[28] due to criminal justice policies that mandated incarceration for growing numbers of offenses, lengthened prison sentences, and decreased the possibility of parole.[29] As a

22. *See* Alan J. Kessel, *Prisoners' Rights: Unconstitutional Prison Overcrowding*, 1986 Ann. Surv. Am. L. 737, 737.

23. *See id.*

24. *See* Human Rights Watch, *Prison Conditions in the United States: A Human Rights Watch Report* 33, 71 (1991) [hereinafter Human Rights Watch, *Prison Conditions*].

25. *See id.* at 33. As of December 31, 1998, California maintained the most crowded prison system, with an inmate population at double capacity. *See* Beck & Mumola, *supra* note 2, at 8. Utah, on the other hand, had the least crowded system, operating at 84% of capacity. *See id.*

26. *See* Human Rights Watch, *Prison Conditions*, *supra* note 24, at 71.

27. *See id.*

28. *See* General Accounting Office, General Government Division, *Federal and State Prisons: Inmate Populations, Costs, and Projection Models* GAO/GGD-97-15, 1 (Nov. 25, 1996) <http://www.access.gpo.gov/cgibin/getdoc.cgi?dbname=gao&docid=f:gg97015.txt>. During this time, the prison population increased from approximately 329,800 to 1.1 million inmates. *See id.* The federal prison population grew by approximately 311% and the state inmate population by approximately 237%. *See id.* As of 1999, the federal system has operated 95 institutions, housing 135,092 inmates. *See* Federal Bureau of Prisons, *Federal Bureau of Prisons Quick Facts* 1 (last modified Dec. 31, 1999) <http://www.bop.gov/fact0598.html>. In 1998, state prisons held 1,178,978 inmates, about 113% of capacity, and federal prisons housed inmates at about 127% of capacity. *See* Beck & Mumola, *supra* note 2, at 1.

29. Human Rights Watch 2000, *supra* note 2, at 392. For example, criminal justice policies increased the length of sentences for drug offenses. Drug offenders constituted 59% of the federal prison inmates in 1999, compared to 10% in 1983. *See* Federal Bureau of Prisons, *supra* note 28, at 4; The Sentencing Project Publications, *Facts About Prisons and Prisoners* 2 (June 1997) <wysiwyg://19/http://www.

consequence, the majority of federal and state prisons operated at above capacity.[30] Prison overcrowding has led to double-celling of inmates, and in some cases, random assignment of prisoners to the same cells without use of classification information and without assessing inmate compatibility.[31] Moreover, overcrowding has resulted in deteriorating physical prison plants, inadequate medical care, lack of staffing, and unsanitary conditions.[32] For example, prison overpopulation has forced inmates to sleep on the floor,[33] has "increased stress, anxiety... and 'the opportunity for predatory activities and [has] facilitated the spread of disease, already extant due to the unsanitary conditions.'"[34] It has also heightened the level of tension and violence among prisoners within correctional facilities, as evidenced by increased accounts of sexual assaults.[35] Furthermore, as a result of overcrowding, inmates are often denied rehabilitation and recreational programs, as some prisoners spend almost twenty-four hours each day in their cells.[36]

Although specific court orders, such as consent decrees, can regulate confinement conditions,[37] professional organizations also provide guidelines for prison conditions.[38] The American Correctional Association ("ACA"), for example, an organization whose membership consists of corrections administrators, has

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sentencingproject.org/pubs/tsppubs/1035bs.html>. In 1997, 53% of inmates were serving sentences in state prisons for non-violent offenses. *See* Beck & Mumola, *supra* note 2, at 11.

30. *See supra* notes 5-6 and accompanying text.

31. *See* El Tabech v. Gunter, 922 F. Supp. 244, 247-49 (D. Neb. 1996), *aff'd sub nom.* Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996). The practice of random assignment of inmates in same cells prompted the district judge to write:

> Imagine you committed a crime and are entering the Nebraska State Penitentiary for the first time as a convicted felon....
>
> In the cell you find a monster in the form of a man.... Imagine further that this creature has a well-documented history of taking his recreation by sodomizing any available prey. If the prey resists, the monster may use a razor to slice the victim from the "shoulder down to the ass."
>
> Imagine also that your keepers... have consciously decided that efficiently packing the available cells is more important than... reasonably provid[ing] for your safety. Space is valuable, and you, as a prisoner, are not.

El Tabech, 922 F. Supp. at 245-46.

32. *See* Tillery v. Owens, 907 F.2d 418, 427-28 (3rd Cir. 1990).

33. *See* Nami v. Fauver, 82 F.3d 63, 65-66 (3rd Cir. 1996).

34. *Tillery*, 907 F.2d at 428.

35. *See Nami*, 82 F.3d at 67.

36. *See* Allen v. Sakai, 48 F.3d 1082, 1087 (9th Cir. 1994).

37. *See, e.g.*, Small v. Hunt, 98 F.3d 789, 792 (4th Cir. 1996) (discussing a consent decree that required the state to provide each inmate with 50 square feet of living space).

38. *See* Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. Pa. L. Rev. 639, 693-94 (1993) (discussing the American Correctional Association guidelines).

established a set of model standards for confinement conditions.[39] The ACA requires that each inmate be provided with a minimum floor area of sixty square feet.[40] For dormitory accommodations, the guidelines call for a floor area of at least fifty square feet.[41] The ACA also audits correctional facilities, evaluates their compliance with ACA standards, and accredits those prisons that meet its requirements.[42] The ACA, however, does not serve as an effective monitoring mechanism for jails and prisons because facilities that do not comply with the guidelines are not sanctioned for lack of accreditation.[43] Nevertheless, many prison administrators concur that the ACA standards have been "accepted as the prevailing norm."[44] As of 1994, the ACA reviewed prisons in all fifty states, and approved and produced sets of standards for various correctional facilities.[45]

In addition to the ACA, some states have established authoritative bodies that create minimum standards for confinement conditions of inmates in prisons and jails located within the state, such as the New York State Commission of Corrections ("Commission").[46] As an example of a state approach to prison regulation, the Commission requires living space of at least fifty to seventy square feet per prisoner.[47] It calls for a minimum of sixty square feet per inmate for an individual housing unit, and fifty square feet per prisoner in cases of multiple housing, such as areas in which individual cells are clustered around a common living area.[48] The Commission also requires that each prisoner living in an individual cell be provided with a bed, mattress, toilet, and sink.[49] For prisoners in a multiple housing unit, the Commission requires at least one toilet, shower, and

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39. *See id.*; Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 370 (1998). In addition to the ACA, the American Public Health Association has established Standards for Health Services in Correctional Institutions, which also propose that prisons provide each inmate with 60 square feet of space. *See* Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980).

40. *See Lareau*, 507 F. Supp. at 1187 n.9.

41. *See id.*

42. *See* Feeley & Rubin, *supra* note 39, at 370-71; Sturm, *supra* note 38, at 694.

43. *See* Sturm, *supra* note 38, at 694.

44. Feeley & Rubin, *supra* note 39, at 371.

45. *See id.*

46. *See* Zolnowski v. County of Erie, 944 F. Supp. 1096, 1101 (W.D.N.Y. 1996). Other states have also established commissions to investigate specific confinement conditions or to analyze incarceration trends and formulate plans to address prison overcrowding. For example, in the 1970s, Colorado state commissions were formed to investigate conditions in the "Old Max" Correctional Facility. *See* Feeley & Rubin, *supra* note 39, at 98-99. Also, in 1979, California established a state commission, Jail Overcrowding Task Force, to conduct a study of imprisonment trends and to discuss ways to alleviate prison overcrowding. *See id.* at 113.

47. *See Zolnowski*, 944 F. Supp. at 1101.

48. *See id.*

49. *See id.* at 1102.

sink for every eight inmates.[50] However, where the facilities house prisoners beyond the maximum capacity, officials may obtain permission from the Commission allowing the facility to deviate from the regulations.[51] In this manner, the state commission also loses the power to serve as an effective oversight mechanism. As a result, inmates have relied on the courts to challenge inadequate prison conditions—including overcrowding—as violating prisoners' constitutional right to be free of cruel and unusual punishment.[52]

B. *Eighth Amendment Jurisprudence and Prison Conditions*

The Eighth Amendment prohibits "cruel and unusual punishment" and thus imposes constitutional limits on the methods and conditions of criminal punishment and confinement.[53] Prior to the 1960s, courts invoked the Eighth Amendment primarily to check legislative abuse in the determination of punishments.[54] For example, in *Weems v. United States*,[55] the Court analyzed whether a statutory punishment was proportionate to the gravity of the crime committed.[56] The Court held that for the crime of making false entries on public records, a punishment of fifteen years imprisonment at hard labor, lifelong surveillance, and loss of various individual rights constituted cruel and unusual punishment.[57] Also, in *Trop v. Dulles*,[58] the Court held that the punishment of denationalization for wartime desertion violated the Eighth Amendment.[59] In doing so, the Court stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man .... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[60] In this manner, although the Court applied the Eighth Amendment primarily to check whether the statutory punishment was proportionate to the seriousness of the offense, the "decency" standard served as one of the primary tools for analyzing cruel and unusual punishment claims.

Although courts also reviewed cruel and unusual punishment suits relating to the sentencing of individuals, federal courts did not invoke the Eighth Amendment once an individual was actually sentenced until the mid-1960s.[61] Prior to that time, courts typically declined

50. *See id.*
51. *See id.*
52. *See* Sturm, *supra* note 38, at 691-92.
53. *See* Gutterman, *supra* note 20, at 376.
54. *See* Woodbury, *supra* note 10, at 717.
55. 217 U.S. 349 (1910).
56. *See id.* at 351.
57. *See id.* at 363-66, 382.
58. 356 U.S. 86 (1958).
59. *See id.* at 101.
60. *Id.* at 100-01.
61. *See* Pamela M. Rosenblatt, Note, *The Dilemma of Overcrowding in the*

subject matter jurisdiction in cases addressing inadequate prison conditions because they viewed prison management to be under the control of the legislative branch of the government.[62] Because courts considered correctional facilities to be administrative agencies, the separation of powers doctrine enabled courts to employ a highly deferential standard of review when addressing claims of poor prison conditions.[63] Moreover, the demands of federalism, which restrain federal courts from interfering with state institutions, also contributed to the lack of involvement by the courts.[64] Other justifications for this "hands-off" policy of non-intervention included judicial inexpertise, courts' hesitancy in undermining the jails' disciplinary systems, and the fear of opening a floodgate of prisoner litigation.[65]

In the 1960s and 1970s, however, some courts departed from the "hands-off" judicial doctrine and allowed prisoners to obtain relief through litigation.[66] They were aided in this endeavor by *Robinson v. California*,[67] in which the Supreme Court applied the Eighth Amendment protection against cruel and unusual punishment directly to the states through the Fourteenth Amendment.[68] In addition, the Court in *Cooper v. Pate*[69] allowed a state inmate to bring a civil rights action against the prison warden in federal court under 42 U.S.C. § 1983.[70]

Relying on these advances made by the Supreme Court in Eighth Amendment jurisprudence, courts no longer allowed the barrier of federalism to prevent them from adjudicating cases in which prisoners were subjected to constitutional deprivations.[71] Prisoners, therefore, could obtain relief by filing a writ of habeas corpus and bringing a claim of constitutional violation in federal court.[72] In the ensuing years, Eighth Amendment protection became the primary tool with

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Nation's Prisons: What are Constitutional Conditions and What Can be Done?, 8 N.Y.L. Sch. J. Hum. Rts. 489, 494-95 (1991); Woodbury, *supra* note 10, at 718-19.

62. *See* Woodbury, *supra* note 10, at 717; *see, e.g.*, Oregon v. Gladden, 240 F.2d 910, 911 (9th Cir. 1957) ("A federal court has no jurisdiction to supervise the administration of a state penitentiary by its warden.").

63. *See* Ira P. Robbins, *The Cry of* Wolfish *in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. Crim. L. & Criminology 211, 212 (1980) [hereinafter Robbins, *Cry of* Wolfish]; Rosenblatt, *supra* note 61, at 495.

64. *See* Elizabeth F. Edwards & Nancy G. LaGow, Note, *Prison Overcrowding as Cruel and Unusual Punishment in Light of* Rhodes v. Chapman, 16 U. Rich. L. Rev. 621, 624 (1982).

65. *See id.*

66. *See* Woodbury, *supra* note 10, at 719-22.

67. 370 U.S. 660 (1962).

68. *See id.* at 667.

69. 378 U.S. 546 (1964) (per curiam).

70. *See id.* at 546. 42 U.S.C. § 1983 allows individuals to sue state-delegated authorities for violations of constitutional rights. *See* 42 U.S.C. § 1983 (1994).

71. *See* Woodbury, *supra* note 10, at 719.

72. *See* Robbins, *The Cry of* Wolfish, *supra* note 63, at 214 & n.51.

which inmates sought relief in prison conditions and jail overcrowding cases.[73]

In 1981, the Supreme Court for the first time reviewed the application of the Eighth Amendment specifically to an overcrowding claim at a particular prison in *Rhodes v. Chapman*.[74] In *Rhodes*, the plaintiff-inmates challenged the correctional facility's practice of "double-celling."[75] Double-celling consists of housing two prisoners in a cell designed to accommodate only one inmate.[76] The Court indicated that an analysis of an Eighth Amendment violation should be grounded, to the extent possible, on objective standards such as historical precedents, state legislative actions, and sentencing by juries.[77] The conditions must also not "involve unnecessary and wanton infliction of pain,"[78] nor be "grossly disproportionate to the severity of the crime."[79] Furthermore, the Court held that the definition of cruel and unusual punishment must be based on evolving and contemporary "standards of decency that mark the progress of a maturing society."[80]

In assessing these standards of decency, however, the Court attempted to restrict the use of experts who sought to provide opinions regarding the effect of overcrowding on inmates.[81] The Court stated that "public attitude toward a given sanction" should determine the contemporary norms of decency, not opinions of experts.[82] At the same time, however, the Court noted that expert opinions could be "helpful and relevant with respect to some questions," but did not specify what those questions were.[83]

The Court also cited case law finding constitutional violations when prison conditions resulted in "unquestioned and serious deprivations of basic human needs," such as the denial of medical care.[84] The

73. *See* Susan N. Herman, *Institutional Litigation in the Post-*Chapman *World*, 12 N.Y.U. Rev. L. & Soc. Change 299, 306 (1983-84); Woodbury, *supra* note 10, at 722; *see, e.g.*, Williams v. Edwards, 547 F.2d 1206, 1213 (5th Cir. 1977) (finding that the state should operate its prison system in accordance with the standards of the U.S. Constitution).

74. 452 U.S. 337, 345 (1981); *see* Herman, *supra* note 73, at 299.

75. *See Rhodes*, 452 U.S. at 339.

76. *See id.* at 340. Each prison cell in the instant case measured approximately 63 square feet. *See id.* at 341.

77. *See id.* at 346-47.

78. *Id.* at 346 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

79. *Id.* at 346 (citing Coker v. Georgia, 433 U.S. 584, 592 (1977)).

80. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

81. *See id.* at 348 n.13 ("Respondents ... erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency.").

82. *Id.* at 349 n.13.

83. *Id.* at 348 n.13; *see* David J. Gottlieb, *The Legacy of* Wolfish *and* Chapman*: Some Thoughts About "Big Prison Case" Litigation in the 1980s, in* Prisoners and the Law 19-21 (Ira P. Robbins ed., 1999).

84. *Rhodes*, 452 U.S. at 347.

Court stated that other conditions "alone or in combination, [which] deprive inmates of the minimal civilized measure of life's necessities," could also be found to violate the Eighth Amendment under the contemporary standard of decency.[85] However, the Court did not articulate the specific range of conditions that would lead to a finding of cruel and unusual punishment.[86] Yet, the Court did indicate that conditions that do not violate the Eighth Amendment under contemporary standards are not unconstitutional.[87] Thus, "restrictive" or "even harsh" conditions cannot rise to the level of cruel and unusual punishment, but are merely part of the penalty that prisoners pay for their criminal offenses.[88]

Applying this standard, the Court held that housing two prisoners in one cell does not constitute cruel and unusual punishment.[89] It found that double-celling did not lead to "deprivations of essential food, medical care, or sanitation[,]" nor did it "create other conditions intolerable for prison confinement."[90] Furthermore, violence among prisoners had not increased due to the alleged overcrowding.[91] Instead, the prison's physical plant in the instant case was considered to be "'unquestionably a top-flight, first-class facility.'"[92] The Court thus found that the discomfort stemming from double celling alone does not violate the Eighth Amendment.[93]

The Court's findings in *Rhodes* were limited to the facts of the particular case before it.[94] Therefore, while the Court held that prison crowding in excess of design capacity does not violate the Constitution in and of itself, the Court failed to articulate a specific standard for other courts to follow when interpreting the Eighth Amendment.[95] Nor did it list specific types of conditions that may produce findings of unconstitutionality.[96] The Court did make clear, however, that the complainant must prove an objective component, which demonstrates that the alleged deprivation is serious and denies "the minimal civilized measure of life's necessities[,]"[97] in accordance with the "contemporary standards of decency."[98]

In addition to this objective element, the Supreme Court in *Wilson*

85. *Id.*
86. *See* Gottlieb, *supra* note 83, at 17.
87. *See Rhodes*, 452 U.S. at 347.
88. *See id.*; Gottlieb, *supra* note 83, at 16.
89. *See Rhodes*, 452 U.S. at 347-48.
90. *Id.* at 348.
91. *See id.* at 348, 365.
92. *Id.* at 341 (quoting Chapman v. Rhodes, 434 F. Supp. 1007, 1009 (1977)).
93. *See id.* at 347-48.
94. *See id.* at 349 n.14.
95. *See id.* at 347; Gottlieb, *supra* note 83, at 17.
96. *See* Gottlieb, *supra* note 83, at 17.
97. *Rhodes*, 452 U.S. at 347.
98. *Id.* at 348 n.13.

v. Seiter[99] held that in order for courts to find an Eighth Amendment violation of prison conditions, the complainant must also prove a subjective component, which shows that the prison official acted with deliberate indifference to challenged prison conditions.[100] As to this subjective component, the inmate must demonstrate that the prison official had knowledge of and disregarded "an excessive risk to health and safety."[101] Furthermore, the Court stated as a preliminary matter that confinement conditions are unconstitutional only if they produce "the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."[102] When no specific deprivation of a single human need exists, however, "overall conditions" do not constitute cruel and unusual punishment.[103] Although the Court in *Wilson* may have narrowed the totality-of-conditions approach[104] by requiring the deprivation of a human need, by not explicitly articulating what those basic human needs are, the Court still failed to establish a particular standard for other courts to use when assessing Eighth Amendment claims.[105] For example, some lower courts have ruled that overcrowding itself does not constitute a deprivation of a single human need,[106] while others have held that overcrowding leads to conditions that deprive the inmate of a single, identifiable human need—living space.[107] As a result of the analytical gaps left by the Court's Eighth Amendment rulings, the lower courts have developed different standards to determine whether prison overcrowding constitutes cruel and unusual punishment.[108] The next part describes these varying approaches.

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99. 501 U.S. 294 (1991).

100. *See id.* at 299-304. Although the test in determining whether prison conditions violate the Eighth Amendment requires both the objective and subjective standards, this Note focuses primarily on the split of authority concerning the objective standard. *See also infra* note 261 (discussing international human rights law as it pertains to the objective standard).

101. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

102. *Wilson*, 501 U.S. at 304.

103. *See id.* at 305.

104. *See infra* notes 109-12 and accompanying text.

105. The Court did not provide an exhaustive list of the basic human needs, but only articulated a few examples, such as food, warmth, and exercise. *See Wilson*, 501 U.S. at 304.

106. *See, e.g.*, Waldo v. Goord, No. 97-CV-1385, 1998 WL 713809, at *2-*3 (N.D.N.Y. Oct. 1, 1998) (holding that overcrowding did not deprive the inmate of any basic needs).

107. *See, e.g.*, McCrae v. Oldham, No. 91-6598, 1992 WL 216642, at *2 (4th Cir. Sept. 10, 1992) (stating that overcrowding and other conditions caused the deprivation of living space, which is an identifiable human need).

108. *See infra* Part II.

II. THE EIGHTH AMENDMENT AND PRISON OVERCROWDING

In the absence of a clear Supreme Court standard for determining when a claim of prison overcrowding rises to the level of an Eighth Amendment violation, the circuit courts have applied varying standards in making this determination. Some courts examine the totality of circumstances in deciding whether jail overpopulation constitutes cruel and unusual punishment, while other courts consider only specific "core" conditions in making their assessment. Still other courts consider prison overcrowding to be a violation of the Eighth Amendment in and of itself. This part presents these three approaches.

A. *Totality-of-Conditions Approach*

In determining whether prison conditions are unconstitutional, some federal courts have adopted the totality-of-conditions test.[109] This approach allows courts to exercise broad discretion in considering the prison conditions at issue and to determine whether, individually or in combination, these conditions violate the Eighth Amendment.[110] In deciding whether the challenged prison conditions fall below constitutional norms, these courts examine not only the availability of basic necessities, such as food, clothing, safety, and shelter,[111] but also other factors, such as overpopulation, adequacy of staff supervision, and availability of recreational opportunities.[112] Thus, the totality approach reviews all complaints presented by the plaintiff, whether they concern medical services, overcrowding, or other types of restrictions.

In *Tillery v. Owens*,[113] for example, the Third Circuit employed the totality analysis in finding that the conditions of confinement at a state correctional facility constituted cruel and unusual punishment.[114] The inmates alleged that double-celling in an "overcrowded, dilapidated and unsanitary state prison" violates the Constitution.[115] The court stated that factors such as prison overcrowding, unsanitary conditions, prolonged isolation, and denial of medical care have all been found to constitute cruel and unusual punishment under contemporary norms of decency.[116] In determining whether prison conditions violate the Constitution, the court held that it "must look at the totality of the

109. *See* Woodbury, *supra* note 10, at 723-24; *infra* notes 113-43 and accompanying text.

110. *See* Rosenblatt, *supra* note 61, at 499.

111. *See* Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977); Gottlieb, *supra* note 83, at 18.

112. *See* Gottlieb, *supra* note 83, at 18.

113. 907 F.2d 418 (3d Cir. 1990).

114. *See id.* at 427-28.

115. *Id.* at 420.

116. *See id.* at 426.

conditions within the institution."[117] The court interpreted the holding in *Rhodes* to require a totality analysis in examining allegations of unconstitutional prison conditions.[118] By employing such a method, it determined that in addition to prison overcrowding, the correctional facility's lighting, ventilation, plumbing, showers, and fire safety provisions fell below constitutional norms because they deprived the prisoners of life's necessities.[119] The court also noted that the confinement conditions resulted in increased violence among the inmates.[120] Thus, by considering the totality of the circumstances affecting inmates' quality of life, the court held that the overall conditions violated the Eighth Amendment.[121]

In *Wellman v. Faulkner*,[122] the Seventh Circuit also followed the totality-of-conditions approach in finding the challenged prison unconstitutionally overcrowded.[123] The inmates alleged that overcrowding, inadequate medical care, high levels of violence, poor physical conditions of the facility, and the amount of time inmates were forced to spend in their cells violated the Eighth Amendment.[124] The court stressed the importance of considering prison overpopulation along with other conditions that could worsen its effects.[125] In this case, the court found the effects of overcrowding to be aggravated by the age of the facility, lack of staff, and inadequate health care services.[126] Therefore, taking into account all the circumstances, the court found the prison conditions to be unconstitutional.[127]

Although it proceeded under a totality approach, the court in *Wellman* acknowledged prison overpopulation as a factor that is also independently subject to a constitutional analysis.[128] Thus, although the court reviewed all of the confinement conditions together in determining the existence of an Eighth Amendment violation, it also considered whether the overcrowding factor alone could be unconstitutional.[129] The court inferred that it could when it stated that

117. *Id.*
118. *See id.* ("The Supreme Court made this precept clear in *Rhodes* where it stated that conditions of confinement, 'alone, *or in combination*, may deprive inmates of the minimal civilized measure of life's necessities.'").
119. *See id.* at 427-28.
120. *See id.* at 428.
121. *See id.*
122. 715 F.2d 269 (7th Cir. 1983).
123. *See id.* at 274.
124. *See id.* at 271, 274.
125. *See id.* at 274; Gottlieb, *supra* note 83, at 19.
126. *See Wellman*, 715 F.2d at 274.
127. *See id.*
128. *See id.* (supporting the lower court's finding that the "most serious problem at the prison is simple overcrowding"); Gottlieb, *supra* note 83, at 19.
129. *See Wellman*, 715 F.2d at 274.

"[t]his overcrowding constitutes a violation of the Eighth Amendment."[130]

In *Nami v. Fauver*,[131] the Third Circuit again applied the totality approach in reviewing the inmates' claims.[132] The prisoners in this case alleged that they were subject to cruel and unusual punishment because two inmates were housed in a single cell measuring eighty square feet, containing only one bed, forcing one inmate to sleep on the floor by the toilet.[133] Because of the limited floor space, the prisoners were in effect confined to their beds when in their cells.[134] In addition, the ventilation system allegedly often failed to function, sanitation was inadequate, and the prison lacked recreational, educational, and rehabilitation programs.[135]

In analyzing these claims, the court in *Nami* noted that there is no static test by which courts can evaluate whether prison conditions violate the Eighth Amendment.[136] Rather, the Constitution "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[137] The court found that the district court erred when it analyzed the inmates' allegations separately, by splitting their claims into double-celling, increased violence, and equal protection categories.[138] Instead, the circuit court held that "double celling can amount to an Eighth Amendment violation if combined with other adverse conditions."[139] It ruled that in assessing cruel and unusual punishment claims, "it is necessary to examine the totality of the conditions at the institution."[140] Thus, in addition to double-celling, the court reviewed other conditions in determining whether they were at odds with the contemporary standards of decency, such as the "length of confinement, the amount of time prisoners must spend in their cells each day, sanitation, lighting, bedding, ventilation, noise, education and rehabilitation programs, opportunities for activities outside the cells, and the repair and functioning of basic physical facilities such as plumbing, ventilation, and showers."[141] In this manner, the court considered the cumulative impact of all of the conditions affecting prisoners.

The totality-of-circumstances test not only takes into account conditions that produce physical discomfort for inmates, but also

130. *Id.*
131. 82 F.3d 63 (3d Cir. 1996).
132. *See id.* at 67-68.
133. *See id.* at 65-66.
134. *See id.* at 66.
135. *See id.*
136. *See id.*
137. *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).
138. *See id.*
139. *Id.* at 67.
140. *Id.*
141. *Id.*

considers conditions that may cause psychological harm. For instance, the Third Circuit in *Union County Jail Inmates v. Di Buono*[142] indicated that in evaluating the totality of circumstances in a prison-condition case, the district court should have considered the amount of time the inmates spend in their cells daily and the opportunities for prisoner activities outside of their cells.[143] By reviewing these factors, in addition to the size of the cell, the court can determine whether the inmates were deprived of "'habitable shelter,' as measured under 'contemporary standards of decency.'"[144] Although these factors would not necessarily have affected the physical well-being of the prisoners, they would have produced psychological pain for the inmates.

Moreover, in *Williams v. Griffin*,[145] the Fourth Circuit held that factors causing psychological harm to inmates can constitute cruel and unusual punishment. The prisoners in this case alleged that unsanitary confinement conditions, combined with overcrowding, violated the Eighth Amendment.[146] In response, the court stated that overcrowding, in light of the overall conditions of the prison, could deprive the plaintiffs of a basic human necessity, "thereby rendering the cumulative effect of the prison conditions unconstitutional."[147] The court further declared that based on the prison conditions at issue, "psychological harm could be inferred" because "severe overcrowding combined with other deficiencies . . . can cause 'a high level of violence and psychological injury to some prisoners.'"[148] In this way, the totality-of-circumstances approach considers all factors affecting inmates' health, including those that may cause psychological harm.

In 1996, however, Congress passed the Prison Litigation Reform Act ("PLRA")[149] in an effort "to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners."[150] The PLRA allows inmates to file prison-condition suits if they suffer physical harm, but not psychological harm.[151] Courts, however, should

142. 713 F.2d 984 (3d Cir. 1983).

143. *See id.* at 1000.

144. *Id.* at 999 (quoting Union County Jail Inmates v. Scanlon, 537 F. Supp. 993, 1008 (D.N.J. 1983)).

145. 952 F.2d 820 (4th Cir. 1991).

146. *See id.* at 824.

147. *Id.* at 825.

148. *Id.* (quoting Johnson v. Levine, 588 F.2d 1378, 1380 (4th Cir. 1978)).

149. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C.) [hereinafter PLRA].

150. 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole, introducing the PLRA in the Senate).

151. *See* PLRA § 803(d), 42 U.S.C.A. § 1997e(e) (West Supp. 1999) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without

review the constitutionality of this provision because the Eighth Amendment prohibits not only physical injury, but "unnecessary and wanton infliction of 'pain'."[152] According to the Supreme Court, "'[p]ain,' in its ordinary meaning surely includes a notion of psychological harm."[153] Thus, constitutional protection should encompass factors that cause both psychological and physical pain to inmates.[154]

B. *Core-Conditions Approach*

In assessing whether prison conditions, including overcrowding, constitute cruel and unusual punishment, other federal courts have applied a core-conditions approach.[155] Under this test, in order to find an Eighth Amendment violation, a court must identify particular conditions that fail to meet constitutional requirements.[156] These core conditions specifically consist of deprivations of "adequate food, clothing, shelter, sanitation, medical care, and personal safety."[157]

Courts utilizing this approach, however, have not viewed overcrowding as a core condition.[158] As a result, a court cannot find an Eighth Amendment violation on the basis of prison overpopulation alone, unless overcrowding leads to a deprivation of a core condition.[159] Thus, a court can consider a non-core factor only if it is the source of a deficient core area.[160] Moreover, in contrast to the totality test, this approach does not allow a combination of several weak core conditions to amount to an Eighth Amendment violation.[161] Although various prison conditions can be considered together to determine the violation of a single core area, the separate core

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a prior showing of physical injury.").

152. Hudson v. McMillian, 503 U.S. 1, 16 (1992).

153. *Id.*

154. *See generally* Stacey H. O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 Va. L. Rev. 1189 (1997) (arguing that the PLRA's physical harm requirement restricts the courts to hear constitutional claims by inmates).

155. *See* Cody v. Hillard, 830 F.2d 912, 914 (8th Cir. 1987); Hoptowit v. Ray, 682 F.2d 1237, 1245-47 (9th Cir. 1982); Gottlieb, *supra* note 83, at 18-19.

156. *See* Rosenblatt, *supra* note 61, at 500-01.

157. *Hoptowit*, 682 F.2d at 1246; *see also* Kitt v. Ferguson, 750 F. Supp. 1014, 1020 (D. Neb. 1990) ("Double-bunking . . . can be viewed as cruel and unusual punishment only if it leads to deprivations of essential food, medical care, or sanitation, or if it increases violence among inmates.").

158. *See* Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981); Rosenblatt, *supra* note 61, at 500.

159. *See Hoptowit*, 682 F.2d at 1246-47 n.3 ("The *Rhodes*' rationale suggests that the Court would require evidence of specific conditions amounting to one of the enumerated deprivations."); Gottlieb, *supra* note 83, at 18.

160. *See* Rosenblatt, *supra* note 61, at 500-01. Under the totality-of-circumstances approach discussed above, however, a court can examine prison overcrowding alone, or in combination with other factors. *See supra* notes 128-30 and accompanying text.

161. *See Hoptowit*, 682 F.2d at 1247; Gottlieb, *supra* note 83, at 18.

conditions themselves cannot be combined to constitute cruel and unusual punishment.[162] If the core conditions are tolerable when independently examined, then the prison has met its constitutional requirements.[163]

In *Hoptowit v. Ray*,[164] for example, inmates alleged that the prison conditions—including overcrowding, inadequate medical care, poor physical plant, lack of recreational opportunities, and high levels of violence—amounted to cruel and unusual punishment.[165] The Ninth Circuit held that in assessing Eighth Amendment claims, courts must examine whether the correctional facility provided the prisoners with adequate core conditions, and not whether the totality of all conditions violates the Constitution.[166] The core conditions must be analyzed separately because "[a] number of conditions, each of which satisfy Eighth Amendment requirements, cannot in combination amount to an Eighth Amendment violation."[167] The court further stated that if the prison conditions are found to have violated the Constitution under the core-conditions approach, only the particular conditions that violate the Eighth Amendment must be remedied, and the remedy "may be only so much as is required to correct the specific violation."[168] Therefore, a court can order the prison to remedy its overcrowding situation only if that factor will significantly lessen the problem of the deprivation of a core condition.[169]

The district court in *Waldo v. Goord*[170] also applied the core-conditions approach in assessing a prison overcrowding claim, where the plaintiff alleged that overcrowding caused increased tension and violence among the inmates.[171] The court did not rule for the plaintiff, however, because the inmate did not claim that "he was deprived of any basic needs such as food or clothing, nor [did] he assert any injury beyond the fear and tension allegedly engendered by the overcrowding."[172] Thus, the court considered only the allegations concerning enumerated core conditions in evaluating the inmate's Eighth Amendment claim.

The core conditions method also differs from the totality analysis in that the core areas involve only those factors that may cause physical

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162. *See* Gottlieb, *supra* note 83, at 18.
163. *See id.*
164. 682 F.2d 1237 (9th Cir. 1982).
165. *See Hoptowit*, 682 F.2d at 1245.
166. *See id.* at 1246-47.
167. *Id.* at 1247.
168. *Id.*
169. *See also* Cody v. Hillard, 830 F.2d 912, 914 (8th Cir. 1987) (stating that in order to find an Eighth Amendment violation in an overcrowding claim, the elimination of double-celling must have alleviated the problem of deficient core condition).
170. No. 97-CV-1385, 1998 WL 713809 (N.D.N.Y. Oct. 1, 1998).
171. *See id.* at *2.
172. *Id.*

harm to the prisoners.[173] Thus, they do not encompass conditions that may produce severe psychological discomfort for inmates.[174] For example, in *Cody v. Hillard*,[175] the inmates alleged that overcrowding, which led to conditions including inadequate recreational and rehabilitation programs, amounted to a constitutional violation.[176] In response, the circuit court stated that the confinement conditions did not amount to cruel and unusual punishment because "'limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments.'"[177] The court therefore focused only on factors that produce physical injury to prisoners, such as increased violence and lack of medical care.[178] Thus, under the core conditions test, Eighth Amendment protection applies only to factors that can cause acute physical pain for prisoners.

C. *Per Se Approach*

A third approach in determining whether prison overcrowding constitutes cruel and unusual punishment is the *per se* test.[179] This approach considers overcrowding itself to violate the Eighth Amendment.[180] Although courts taking this approach have not provided a clear definition of *per se* prison overcrowding, its meaning has ranged from conditions that "shock[] the general conscience"[181] to those that offend contemporary standards of human decency.[182] Some courts have defined prison overcrowding as simply the accommodation of inmates beyond design capacity.[183]

For example, the Seventh Circuit in *Chavis v. Rowe*[184] found confinement conditions of five men to a cell measuring five-by-seven feet to have "shock[ed] the general conscience," and stated that such overcrowding conditions were *per se* unconstitutional.[185] The court cited case law that found that "housing two men in 'a little 35-40 square foot 'cubby hole' . . . offends the contemporary standards of human decency,'"[186] and that housing "an average of 4, and

173. *See* Gottlieb, *supra* note 83, at 19.
174. *See id.*
175. 830 F.2d 912 (8th Cir. 1987).
176. *See id.* at 914.
177. *Id.* at 914-15 (quoting Rhodes v. Chapman, 452 U.S. 337, 348 (1981)).
178. *See id.* at 914.
179. *See* Bobby Scheihing, *An Overview of Prisoners' Rights: Part II, Conditions of Confinement Under the First and Eighth Amendments*, 14 St. Mary's L.J. 991, 993-94 (1983).
180. *See id.*
181. Chavis v. Rowe, 643 F.2d 1281, 1291 (7th Cir. 1981).
182. *See id.*
183. *See* Rhodes v. Chapman, 452 U.S. 337, 347-48 (1981).
184. 643 F.2d 1281 (7th Cir. 1981).
185. *See Chavis*, 643 F.2d at 1291.
186. *Id.* (quoting Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977)).

sometimes as many as 10 or 11, prisoners" in windowless eight-by-ten foot cells amounted to cruel and unusual punishment.[187] As a result, the *Chavis* court held that overcrowding violates the purposes of the Eighth Amendment, which is to safeguard prisoners from an environment "which inflict[s] needless mental or physical suffering."[188]

Some courts have also suggested that prisons must provide each inmate with a certain minimum living space.[189] For example, in *Lareau v. Manson*,[190] the district court found that prison overcrowding violated the Eighth Amendment and stated that the recommendations of cell size of various groups, such as the ACA and the American Public Health Association ("APHA"), could be instructive, and referred to such standards in assessing the overcrowding claim.[191] The court noted the ACA's recommendation of a minimum of sixty square feet per inmate in single cells, a minimum of fifty square feet in dormitory accommodations, and the APHA's call for at least sixty square feet of living space per inmate.[192] In *Gates v. Collier*,[193] another district court considered the recommendations from outside groups in determining whether prison overcrowding was unconstitutional. The court stated that "generally accepted correctional standards require a minimum of 50 square feet of living area for every prison inmate," and that adhering to this standard is "needed to ensure a minimum level of decency."[194] In assessing what constitutes decency, therefore, the court considered the standards set forth by outside experts and organizations.

In *Campbell v. Cauthron*,[195] the Eighth Circuit ruled that the plaintiffs' claim of overcrowding constituted cruel and unusual punishment because six to eight prisoners were held in cells measuring fourteen-by-ten- or eleven-feet, giving each inmate "approximately eighteen to twenty-six square feet of living space, including the space occupied by the bunks, the wash basin and the open toilet."[196] In reaching its decision, the court stated that "[T]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," and that the "Amendment must draw its meaning from the evolving standards of decency . . . ."[197] In evaluating those standards of decency, the court considered expert testimony that explained the debilitating physical consequences of overcrowding, as well as the

187. *Id.* (citing Hutto v. Finney, 437 U.S. 678, 682 (1978)).
188. *Id.*
189. *See id.* at 1291 n.11.
190. 507 F. Supp. 1177 (D. Conn. 1980).
191. *See id.* at 1187-89 n.9.
192. *See id.* at 1187 n.9.
193. 390 F. Supp. 482 (N.D. Miss. 1975).
194. *Id.* at 486.
195. 623 F.2d 503 (8th Cir. 1980).
196. *Id.* at 506.
197. *Id.* at 505 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

negative psychological effect on the prisoners.[198] It also noted the minimum standards set forth by various organizations, such as APHA and the Arkansas Criminal Detention Facilities Board, which called for seventy square feet per inmate in cells.[199] Based on these factors, the court held that the conditions at issue violated decency standards.

In *Rhodes*, however, the Supreme Court rejected the *per se* approach where it defines overcrowding as housing inmates beyond the original design capacity.[200] The Court in *Rhodes* stated that overcrowding in excess of design capacity will not, in and of itself, produce a constitutional violation.[201] Courts therefore have interpreted this finding to mean that overcrowding is not *per se* unconstitutional.[202] Although present courts typically do not determine the constitutionality of overcrowding based only on whether the number of inmates exceeds design capacity, a few courts nevertheless continue to consider the size of the cell in determining whether prison conditions constitute an Eighth Amendment violation.[203] In reviewing the size of the cell, however, courts do not necessarily contradict the *Rhodes* holding because they are not focusing on whether the facility is housing inmates beyond original capacity, but on the actual size of the cell itself. In this manner, a *per se* approach that defines overcrowding *by the size of the cell*, rather than by the housing of prisoners beyond design capacity, may still apply.

Courts' conflicting standards in applying the protections of the Eighth Amendment to prison overcrowding claims result in uncertainty for both prison officials and inmates seeking to vindicate their rights. In attempting to reconcile these approaches and to determine which standard best comports with the right to dignity of prison inmates in increasingly populated facilities, it is useful to examine standards set by international human rights agreements. The next part examines these international standards and their conception of the elusive meaning of "decency," the standard invoked by the

198. *See id.* at 506.

199. *See id.* at 506-07.

200. *See* Rhodes v. Chapman, 452 U.S. 337, 347-48 (1981); *see also* Randall B. Pooler, *Prison Overcrowding and the Eighth Amendment: The* Rhodes *Not Taken*, 9 New Eng. J. on Crim. & Civ. Confinement 1, 2-3 (1983) (stating that *Rhodes* "sounded the death knell" for courts that found prison overcrowding unconstitutional *per se*).

201. *See Rhodes*, 452 U.S. at 347-48; *supra* notes 74-80 and accompanying text.

202. *See, e.g.*, Nami v. Fauver, 82 F.3d 63, 66 (3d Cir. 1996) (noting that "*Rhodes* may stand for the proposition that double celling does not *per se* amount to an Eighth Amendment violation"); French v. Owens, 777 F.2d 1250, 1252 (7th Cir. 1985) (stating that "the mere practice of double celling is not *per se* unconstitutional").

203. *See, e.g.*, McCrae v. Oldham, No. 91-6598, 1992 WL 216642, at *3 (4th Cir. Sept. 10, 1992) (remanding to determine "whether the size of the cell alone, or the overcrowding in combination with the other conditions, amounts to a constitutional deprivation").

Rhodes Court for Eighth Amendment violations in prison-condition cases.

III. INTERNATIONAL HUMAN RIGHTS STANDARDS

In addition to the United States Constitution and case law, international human rights law provides standards applicable to prison-condition claims.[204] In analyzing the effect of prison overcrowding, international norms may assist in interpreting the cruel and unusual punishment clause because they provide a more comprehensive understanding of the contemporary standard of decency, an essential component in evaluating Eighth Amendment challenges.[205] This part examines the various sources of international human rights law, the application of international law in United States courts, and international decency standards as they pertain to prison conditions.

A. *International Law and Its Effect in United States Courts*

International human rights law addresses the protection of individual and group rights against government violations as set forth by international instruments.[206] International law is derived from four main sources: (1) treaties; (2) international custom; (3) general principles of law; and (4) judicial decisions and statements by scholars.[207] Of these sources, treaties and international custom are the major sources of international human rights law.[208]

Treaties are agreements among states that individual nations sign and ratify.[209] Treaties may be either self-executing or non-self-executing.[210] A treaty is considered self-executing when it operates by itself, without the aid of any implementing legislation.[211] Non-self-

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204. *See* Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 Rutgers L.J. 759, 764 (1994).

205. *See* Steven M. Karlson, Note, *International Human Rights Law: United States' Inmates and Domestic Prisons*, 22 New Eng. J. on Crim. & Civ. Confinement 439, 460 (1996); *supra* note 85 and accompanying text.

206. *See* Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 Wash. L. Rev. 1, 18 (1988) [hereinafter Buergenthal, *International Human Rights*].

207. *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060, T.S. No. 993, 3 Bevans 1179, 1224 (1945).

208. *See* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 367, 368 (1985) [hereinafter Lillich, *Invoking International Law*].

209. *See* Vienna Convention on the Law of Treaties, art. 14, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1979), entered into force Jan. 27, 1980 [hereinafter Vienna Convention].

210. *See* Louis Henkin, Foreign Affairs and the United States Constitution 199-200, 203 (1990) [hereinafter Henkin, Foreign Affairs].

211. *See id.* at 199. In *Foster v. Neilson*, Chief Justice Marshall stated that a treaty

executing treaties, on the other hand, do not have the automatic quality of law.[212] Instead, they require an additional measure, such as an act of implementation by the legislative branch.[213] Based on the authority granted by the Supremacy Clause of the United States Constitution, self-executing treaties are judicially enforceable in United States courts.[214] The self-executing treaty's provisions, therefore, become domestic law. These treaty provisions supersede earlier inconsistent federal statutes and all state laws.[215]

When treaties are not self-executing, they are not enforceable in United States courts unless Congress passes implementing legislation.[216] Even when treaties are not self-executing, however, they are legally binding on the United States government.[217] Although their provisions may not be judicially enforceable, non-self-executing treaties are still the supreme law of the land, and it is the duty of the President or Congress to ensure that their provisions are implemented.[218] Thus, the President or Congress has the obligation to make the treaty binding on courts if the treaty so requires—for example, through implementing legislation, or if "making it a rule for the courts is a necessary or proper means for the United States to carry out its obligation."[219]

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is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." 27 U.S. (2 Pet.) 253, 314 (1829). In deciding whether a treaty is self-executing, courts examine the intent of the parties involved as manifested by the treaty's language. *See* Sei Fujii v. State, 242 P.2d 617, 620 (Cal. 1952). In order for the treaty to be self-executing, it must seem as if "the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts." *Id.*

212. *See* Henkin, Foreign Affairs, *supra* note 210, at 199.

213. *See id.* at 200; *Foster*, 27 U.S. at 314 ("[W]hen the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.").

214. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

215. *See* Lillich, *Invoking International Law*, *supra* note 208, at 368.

216. *See id.* at 369-70. An example of a non-self-executing treaty is a provision that requires the United States to undertake financial obligations. *See* Henkin, Foreign Affairs, *supra* note 210, at 203. Because the Constitution states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," the government cannot appropriate funds without the Congress implementing legislation. *Id.* (quoting U.S. Const. art. I, § 9) (internal quotations omitted).

217. *See* Henkin, Foreign Affairs, *supra* note 210, at 203.

218. *See id.*

219. *Id.* at 204. The "necessary and proper means" requirement stems from the Constitution, which provides that Congress shall "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

In determining a treaty's effect on domestic law, courts consider whether the United States government has entered any reservation to provisions that are set forth in the treaty.[220] Under the Vienna Convention, which governs the interpretation and application of treaties, a reservation is a statement "made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State...."[221] A state may enter a reservation unless "the reservation is incompatible with the object and purpose of the treaty."[222] Thus, a state may enter reservations to provisions of a treaty to the extent that they do not contravene the established purpose of the international instrument.[223]

In addition to treaties, customary international law also binds governments. International custom does not require individual state ratification or assent of individual nations, but does reflect general practice among nations and a sense of legal duty on their part to conform to such a custom—"opinio juris."[224] As long as a government has not objected to the general practice at the time of its development, customary law binds the nation, including a state that has not acknowledged the norm.[225] For example, in *Fernandez v. Wilkinson*,[226] the United States district court held that a Cuban excludable alien may not be held indeterminately at a United States detention facility pending unforeseeable deportation because customary international law prohibits such arbitrary detention.[227] Thus, although the detention of an excludable alien does not violate the United States Constitution or its statutes, it violates customary international law and can be judicially attacked in United States courts.[228] As evidenced by the *Fernandez* case, customary international law has the same status as treaty-based law.[229]

United States courts have invoked international law in interpreting

220. *See* Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 Tex. Int'l L.J. 291, 302 (1983).

221. Vienna Convention, *supra* note 209, art. 2(1)(d).

222. *Id.* art. 19(c).

223. *See id.*

224. *See* North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 44 (Feb. 20). "Opinio juris" (opinion of law) requires more than acts of fairness or courtesy by the states. *See* Rebecca M. Wallace, International Law 14 (1986). The governments must believe that the practice they are adhering to amounts to a legal obligation in order to constitute custom. *See id.*

225. *See* Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt. b (1987).

226. 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981). The decision of the district court was affirmed on statutory grounds by the Tenth Circuit Court of Appeals. *See Fernandez*, 654 F.2d at 1382.

227. *See Fernandez*, 505 F. Supp. at 798.

228. *See id.*

229. *See* Lillich, *Invoking International Law*, *supra* note 208, at 368.

domestic federal law since the 1800s.[230] In 1804, the Supreme Court in *Murray v. The Schooner Charming Betsy*[231] noted that "an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains."[232] Since then, many courts have used the *Charming Betsy* canon of construction in resolving domestic cases involving statutes that involve the interpretive uses of international law.[233]

The Restatement (Third) of the Foreign Relations Law of the United States reiterates this canon, stating that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[234] Thus, the *Charming Betsy* canon has played a role in defining the United States' legal international obligations.[235] The canon places the courts in a position of oversight to prevent the country from incurring international liability.[236] In addition, the canon applies to all international duties of the United States, even if the obligations are not enforceable in domestic courts.[237]

One principle underlying the canon is that it allows legislative intent to be implemented.[238] This idea assumes that, in general, Congress does not wish to violate international law because such acts may jeopardize United States foreign relations.[239] As a result, when a statute is ambiguous, the canon assists courts in implementing the congressional will.[240] Another common notion is the "internationalist conception," which views the canon as supplementing domestic law and conforming it to international standards.[241] Under this conception, courts are to facilitate the implementation of international norms by interpreting a statute broadly to reflect international law.[242]

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230. *See* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 482 (1998).

231. 6 U.S. (2 Cranch) 64 (1804).

232. *Id.* at 118.

233. *See* Bradley, *supra* note 230, at 482.

234. Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987).

235. *See* Bradley, *supra* note 230, at 482. Although courts have applied international human rights law directly to domestic cases in only a few instances, courts have regularly turned to the *Charming Betsy* canon in interpreting domestic law. *See id.* at 482-83; Lillich, *Invoking International Law*, *supra* note 208, at 411-12. In some instances, this indirect application of international law may have the same impact as direct incorporation of international human rights law. *See* Bradley, *supra* note 230, at 483.

236. *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1128 (1990).

237. *See* Bradley, *supra* note 230, at 483.

238. *See id.* at 495.

239. *See id.*

240. *See id.*

241. *See id.* at 498.

242. *See id.* at 498-99; Steinhardt, *supra* note 236, at 1144. The internationalist conception is closely related to the idea that customary international law is judicially

Thus, unlike the "legislative intent conception," courts act as "'agents of the international order' rather than as agents of Congress."[243]

Although courts have primarily used the *Charming Betsy* canon in interpreting ambiguous statutes, the logic of the canon, particularly the internationalist-intent conception, is also applicable to constitutional provisions. Under this view, courts are to facilitate the United States' implementation of international standards.[244] Thus, when courts are faced with an ambiguous constitutional provision, such as the Eighth Amendment's prohibition against cruel and unusual punishment in light of contemporary standards of decency, they should construe the provision broadly in order to mirror international norms.[245] In this manner, the courts may continue to act as "agents of the international order."[246]

In recent years, the number of cases that address issues of international law has increased rapidly in the United States.[247] In many of these cases, particularly in the area of human rights, the international law raised pertains to matters that are traditionally within domestic jurisdiction.[248] Thus, domestic courts have increasingly been faced with individuals attempting to invoke international law to address human rights concerns taking place in the United States. Because international human rights instruments address issues relating to confinement conditions, inmates in the United States can attempt to invoke these international standards in prison-condition cases.[249]

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enforceable in United States courts because it constitutes an independent source of law. *See* Bradley, *supra* note 230, at 499. For instance, in *Filartiga v. Peña-Irala*, the Second Circuit stated that the *Charming Betsy* canon is "[t]he plainest evidence that international law has an existence in the federal courts independent of acts of Congress." *Id.* (quoting Filartiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980)).

243. Bradley, *supra* note 230, at 498 (quoting Richard A. Falk, The Role of Domestic Courts in the International Legal Order 72 (1964)). A third view of the *Charming Betsy* canon is the "separation of powers conception." *Id.* at 524. This conception views the canon as a tool that preserves a proper balance and relationship among the three branches of the federal government, and respects the constitutional roles of Congress and the President. *See id.* at 525.

244. *See supra* notes 241-43 and accompanying text.

245. *See infra* Part III.B for international standards relating to the prohibition of cruel and unusual punishment.

246. Bradley, *supra* note 230, at 498; *supra* note 243 and accompanying text.

247. *See* Bradley, *supra* note 230, at 480.

248. *See id.*; *see, e.g.*, State v. Steffen, No. C-930351, 1994 WL 176906, at *4 (Ohio Ct. App. May 11, 1994) (involving a claim that a state's death penalty provision violated international treaties and custom); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986) (involving a claim that indeterminate detention of Cubans by the Immigration and Naturalization Service violated customary international law).

249. *See, e.g.*, Lareau v. Manson, 507 F. Supp. 1177, 1187-89 n.9 (D. Conn. 1980) (noting that prison overcrowding violated international standards, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners and customary international law).

B. *International Treaties, Conventions, and Models Pertaining to Prison-Condition Cases*

Since the end of World War II, a considerable body of international law pertaining to the treatment of prisoners has developed.[250] This body includes international treaties, regional conventions, model standards, committee reports, and General Assembly resolutions.[251] These instruments are instructive in assessing prison overcrowding claims in the United States because they provide a more comprehensive understanding of the contemporary standard of decency, a core component of the substantive definition of cruel and unusual punishment in an Eighth Amendment analysis.[252]

1. International Covenant on Civil and Political Rights

In 1966, the United Nations adopted the International Covenant on Civil and Political Rights ("ICCPR"), which entered into force in 1976.[253] The ICCPR is a binding treaty for states that have ratified the Covenant.[254] Two provisions of the ICCPR pertain to the treatment of prisoners.[255] Article 7 forbids "cruel, inhuman or degrading treatment or punishment."[256] Article 10 provides that all people "deprived of their liberty... be treated with humanity and with respect for the inherent dignity of the human person."[257] Moreover, Article 4 does not permit derogation from Article 7,[258] even in "time of public emergency which threatens the life of the nation."[259]

In 1992, the United States ratified the ICCPR with a reservation on Article 7, which interprets the provision to mean no more than that which is prohibited by the Fifth, Eighth, or Fourteenth Amendments of the Constitution.[260] Because the Article 7 language is more

250. *See* Bernard, *supra* note 204, at 764.

251. *See id.*

252. *See supra* notes 85, 87 and accompanying text.

253. *See* Louis Henkin et al., Human Rights 321 (1999) [hereinafter Henkin, Human Rights]; Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 Ga. J. Int'l & Comp. L. 1, 1-2 (1995/1996) [hereinafter Lillich, *Customary International Law*].

254. *See* Henkin, Human Rights, *supra* note 253, at 321.

255. *See* Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 Cal W. Int'l L.J. 139, 143-44 (1995).

256. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 7, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

257. *Id.* art. 10(1).

258. *See id.* art. 4(2).

259. *Id.* art. 4(1). To the extent strictly required, nations are permitted to take measures derogating from their duties under the ICCPR in times of public emergency. *See id.* For fundamental rights, such as Article 7, however, states may not derogate from their obligations even in times that threaten the life of the nation. *See id.* art. 4(2).

260. The reservation states: "That the United States considers itself bound by

expansive than that of the Eighth Amendment, the reservation curtails the protection that the ICCPR provides to United States prisoners.[261] The United States, however, has not entered a reservation on Article 10.[262] In addition, the United States has placed a declaration that the treaty is not self-executing, and Congress has not yet passed implementing legislation.[263]

2. Human Rights Committee: Interpretations of the ICCPR

Because the ICCPR does not itself define nor explain the provisions "cruel, inhuman, or degrading treatment," or "respect for the inherent dignity of the human person," their meanings are derived from the decisions of the ICCPR's interpreting body—the Human Rights Committee ("Committee").[264] Pursuant to the enforcement provisions of the ICCPR, the Committee was established in 1976 to monitor states' compliance.[265] The Committee's purpose is to examine reports from and complaints against the states, and to issue comments and opinions.[266] All state parties are required to submit reports to the Committee on the measures they have adopted to implement the ICCPR.[267] Moreover, under the First Optional

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Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." *See* 138 Cong. Rec. S4783 (daily ed. Apr. 2, 1992); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harv. Hum. Rts. J. 59, 71 (1993).

261. For instance, Article 7 prohibits an additional measure, "degrading treatment." *See* ICCPR, *supra* note 256, art. 7. Moreover, in proving an Eighth Amendment claim, a complainant in the United States would need to demonstrate that the prison official had knowledge of and disregarded an excessive risk to the health and safety of the inmate. *See supra* notes 99-101 and accompanying text. The language of Article 7, however, does not require the applicant to prove the subjective intent of the prison official. *See* Human Rights Watch & American Civil Liberties Union, *supra* note 7, at 99. It thus provides broader protection for prisoners and affords a wider avenue of redress. *See id.*

262. *See* Karlson, *supra* note 205, at 450-51.

263. *See* Henkin, Human Rights, *supra* note 253, at 784. Because Congress has not yet passed legislation implementing the ICCPR in the United States, the United States is in violation of its international obligations. *See supra* notes 217-19 and accompanying text.

264. *See* Miller, *supra* note 255, at 149, 152-53.

265. *See* Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights 44, 46 (1991). Articles 28 to 45 of the ICCPR authorize the establishment of the Human Rights Committee in order to enforce the ICCPR's provisions. *See* ICCPR, *supra* note 256, arts. 28-45. The Committee consists of 18 elected members who are nationals of the state parties and who serve in their personal capacity. *See id.* art. 28.

266. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 344 (1997); Torkel Opsahl, *The Human Rights Committee*, *in* The United Nations and Human Rights: A Critical Appraisal 369, 397-407, 412-16 (Philip Alston ed., 1992).

267. *See* ICCPR, *supra* note 256, art. 40(1).

Protocol of the ICCPR ("Optional Protocol"), individual citizens may petition against the state for violations of rights, provided that the country has ratified the Protocol.[268] If the country has not ratified the Optional Protocol, then the state is not subject to individual petitions, but only to inter-state petitions.[269]

In determining whether prison conditions violate the ICCPR provisions, the Committee has used the *per se* test[270] or a totality analysis.[271] For example, in *Mukong v. Cameroon*,[272] the Committee primarily employed a totality analysis. The complainant, a journalist detained in a Cameroon jail, argued that his incarceration violated Article 7 of the ICCPR due to overcrowding, insalubrious conditions, and deprivation of food and clothing.[273] The complainant had been held in a cell measuring approximately twenty-five square meters,[274] together with twenty-five to thirty other detainees, and was deprived of food for several days.[275] Authorities then transferred him to another cell in which he was forced to sleep on a concrete floor.[276]

As to the general conditions of detention, the Committee held that certain minimum standards regarding prison conditions must be observed by all state parties, even if economic considerations make such compliance difficult.[277] These standards include, according to the United Nations Standard Minimum Rules for the Treatment of Prisoners ("Minimum Rules"): "minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing . . . , provision of a separate bed, and provision of food of nutritional value adequate for health and strength."[278]

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268. *See* Helfer & Slaughter, *supra* note 266, at 341-42. The United States, however, has not ratified the Optional Protocol of the ICCPR. *See* Henkin, Human Rights, *supra* note 253, at 334.

269. *See* Henkin, Human Rights, *supra* note 253, at 498-99. Inter-state petitions can be made when one state party files a complaint with the Committee alleging that another state party failed to comply with the provisions of the ICCPR. *See id.*

270. *See supra* notes 179-83 and accompanying text.

271. *See supra* notes 109-12 and accompanying text.

272. *Views of the Hum. Rts. Comm. Under Article 5, Paragraph 4, of the Optional Protocol to the Int'l Covenant on Civil and Political Rts.*, U.N. GAOR, 51st Sess., Annex, U.N. Doc. CCPR/C/51/D/458/1991 (1994) (visited Oct. 19, 1999) <http://www1.umn.edu/humanrts/undocs/html/vws458.htm> [hereinafter *Mukong*, U.N. Doc. CCPR/C/51/D/458/1991].

273. *See Hum. Rts. Comm. Annual Rep. to the U.N. General Assembly*, vol. 1, ¶ 420, U.N. Doc. A/49/40 (1994) (visited Oct. 19, 1999) <http://www1.umn.edu/humanrts/hrcommittee/hrc-annual94.htm> [hereinafter *Annual Report*, U.N. Doc. A/49/40].

274. Twenty-five square meters is equivalent to approximately 83 square feet.

275. *See Mukong*, U.N. Doc. CCPR/C/51/D/458/1991, *supra* note 272, ¶ 2.2.

276. *See id.* ¶¶ 2.3, 9.4.

277. *See id.* ¶ 9.3.

278. *Id.* The Minimum Rules, however, do not specify what constitutes "minimum floor space." *See* United Nations Standard Minimum Rules for Treatment of Prisoners, E.S.C. Res. 663 (XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1, ¶ 10, U.N. Doc. E/3048 (1957) (amended 1977) [hereinafter Minimum Rules]. For a

Although the requirement of minimum floor space is consistent with the *per se* approach to analyzing cruel and unusual overcrowding conditions, the inclusion of other prison condition requirements in addition to overcrowding reflects a totality analysis in identifying ICCPR violations.[279] In this case, the Committee noted that the minimum requirements had not been met. Based on the facts revealed, the Committee found that the prison conditions and the treatment of the complainant violated Article 7 of the ICCPR.[280]

In *Massiotti v. Uruguay*,[281] the complainant, an inmate in an Uruguayan prison, also contended that the conditions of her imprisonment amounted to a violation of the ICCPR.[282] The complainant claimed that officials housed thirty-five inmates in one cell measuring four-by-five meters,[283] and that during the rainy season, water flooded the cell by up to ten centimeters.[284] Also, because the jail had no open courtyard, prisoners were forced to remain indoors under artificial light throughout the entire day.[285] When officials transferred the complainant to a second prison, they placed her in a hut measuring five-by-ten meters,[286] along with 100 other prisoners.[287] In addition, the complainant was provided with very poor food and subjected to hard labor.[288] In light of these facts, the Committee ruled that the prison conditions in the Uruguayan prisons constituted inhuman treatment, in violation of Articles 7 and 10 of the ICCPR.[289]

In reaching its decision, the Committee enumerated each of the various factors of the confinement and stated that "because the[se] *conditions* of her imprisonment amounted to inhuman treatment," they violated the ICCPR.[290] Although the Committee did not expressly indicate that it employed the totality-of-circumstances test, by listing the separate conditions and by using the plural form of the word "condition," it can be inferred that the Committee considered

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discussion on the Minimum Rules, see *infra* Part III.B.5.

279. *See supra* Parts II.A., II.C. The totality approach considers a broad range of factors—including non-core conditions, such as prison overcrowding—and determines, whether individually or in combination, they constitute cruel and unusual punishment. *See supra* notes 110-12 and accompanying text.

280. *See Annual Report*, U.N. Doc. A/49/40, *supra* note 273, ¶ 420.

281. *Views of the Hum. Rts. Comm. Under Article 5 (1) of the Optional Protocol to the Int'l Covenant on Civil and Political Rts.*, U.N. GAOR, 37th Sess., Supp. No. 40, Annex XVIII, at 187, U.N. Doc. A/37/40 (1982) [hereinafter *Massiotti*, U.N. Doc. A/37/40].

282. *See id.* ¶ 3.2.

283. Four-by-five meters is equivalent to approximately 13-by-17 feet.

284. *See Massiotti*, U.N. Doc. A/37/40, *supra* note 281, ¶ 11. Ten centimeters is equivalent to four inches.

285. *See id.*

286. Five-by-ten meters is equivalent to approximately 17-by-33 feet.

287. *See Massiotti*, U.N. Doc. A/37/40, *supra* note 281, ¶ 11.

288. *See id.*

289. *See id.* ¶ 13.

290. *Id.* (emphasis added).

not just one of these factors, but the various conditions together in its analysis. The Committee thus effectively applied a totality analysis in assessing the alleged prison conditions.

The Committee has also used both the totality and *per se* approaches to prison overcrowding in its specific country reports. For example, in its report on Nigeria, the Committee noted its disturbance at the inadequate prison conditions, including "severe overcrowding, lack of sanitation, lack of adequate food, clear water and health care, *all* of which contribute to a high level of death in custody."[291] It held that these conditions did not meet the basic guarantees as provided by Article 10 of the ICCPR, and thus were incompatible with the ICCPR.[292] In making this assessment, the Committee considered all of the factors noted above, including overcrowding and other core conditions. By doing so, it employed the totality analysis in making its determination about conditions of confinement in Nigeria.

In its report on Brazil, however, the Committee appeared to use the *per se* approach in assessing prison overcrowding. Here, the Committee also expressed its deep concern at intolerable prison conditions.[293] These conditions included "first and foremost, overcrowding."[294] The Committee stressed the state's duty to comply with Article 10 of the ICCPR, particularly as it pertains to prison conditions.[295] It recommended that the state take steps to alleviate jail overcrowding, such as adopting alternative sentencing measures that would enable some prisoners to serve their sentences in the community.[296] In this manner, the Committee applied the *per se* method of analyzing jail overcrowding and found a violation of Article 10 of the ICCPR.

Similarly, in its comment on Colombia, the Committee indicated its concern at "appalling prison conditions, including first and foremost the serious problem of overcrowding... as well as the lack of measures taken to date to address this problem."[297] The Committee also urged the state to adhere to the standards set forth in Article 10 and to take measures to reduce the overcrowding problem.[298] It

291. *Consideration of Rep. Submitted by States Parties Under Article 40 of the Covenant [Nigeria]*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., ¶ 19, U.N. Doc. CCPR/C/79/Add.65 (1996) (emphasis added).

292. *See id.*

293. *See Consideration of Rep. Submitted by States Parties Under Article 40 of the Covenant [Brazil]*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., ¶ 9, U.N. Doc. CCPR/C/79/Add.66 (1996).

294. *Id.*

295. *See id.* ¶ 25.

296. *See id.*

297. *Consideration of Rep. Submitted by States Parties Under Article 40 of the Covenant [Colombia]*, U.N. GAOR, Hum. Rts. Comm., 59th Sess., ¶ 26, U.N. Doc. CCPR/C/79/Add.75 (1997) (visited Oct. 19, 1999) <http://www1.umn.edu/humanrts/hrcommittee/Colombia97.htm>.

298. *See id.* ¶ 39.

suggested that the state commit greater resources to expand prison capacity and to improve confinement conditions.[299] Similar to the report on Brazil, the Committee used the *per se* approach in determining whether prison overcrowding violated the ICCPR provision by focusing "first and foremost" on the problem of overcrowding.[300]

Thus, in its various cases and reports, the Committee has employed either the *per se* or the totality approach in determining whether the conditions of confinement violated Articles 7 and 10 of the ICCPR. Because the United States has ratified the ICCPR, it, too, is bound to those standards.[301] Although the treaty has not been implemented by Congressional legislation in the United States, the government is nevertheless under a duty to take measures to comply with the ICCPR provisions because treaties—both self-executing and non-self-executing—are considered to be the supreme law of the land.[302] Moreover, even though the United States has entered a reservation on Article 7 of the ICCPR, this reservation may not apply to prison overcrowding because there is no uniform, definitive Constitutional interpretation of confinement overcrowding.[303] Also, even if the reservation does apply to prison overcrowding, the United States has not entered a reservation on Article 10 of the ICCPR. As such, the United States is arguably bound to the *per se* or the totality-of-conditions analyses in examining prison overcrowding claims.

3. American Declaration of the Rights and Duties of Man

In addition to the ICCPR, the United States may also be bound to the provisions of another international instrument pertaining to the treatment of prisoners, the American Declaration of the Rights and Duties of Man ("American Declaration"). Other than the international instruments created by the United Nations, the regional human rights systems, such as the Inter-American, European, and African systems, also promote human rights standards.[304] The regional human rights system affecting the countries in North and South America—the Inter-American system—has two different sources of law: one based on the Charter of the Organization of American States ("OAS"), a multilateral treaty that entered into force in 1951, and the other based on the American Convention on Human Rights ("American Convention"), also a multilateral treaty

299. *See id.*
300. *See id.* ¶ 26.
301. *See supra* note 260 and accompanying text.
302. *See supra* note 217-19 and accompanying text.
303. For a fuller discussion on the analysis of the ICCPR and United States prison overcrowding, see *infra* notes 430-37 and accompanying text.
304. *See* Buergenthal, *International Human Rights*, *supra* note 206, at 15-17.

that entered into force in 1978.[305] The system based on the OAS Charter binds all OAS member states.[306] The Convention-based system, however, binds only those states that have ratified the American Convention.[307]

The Charter-based Inter-American system promulgated the American Declaration in 1948, which applies to all OAS member states, including the United States.[308] Although the Declaration was first adopted as a non-binding resolution, it has since become a normative instrument that provides authoritative interpretation of the OAS Charter, which binds all member states.[309] The American Declaration states that all individuals deprived of their liberty have the "right to humane treatment during the time [they are] in custody."[310] In addition, it prohibits "cruel, infamous or unusual punishment."[311]

The OAS also developed the American Convention, which binds states that are parties to the treaty.[312] Article 5 of the American Convention prohibits cruel, inhuman, or degrading punishment or treatment.[313] It also provides that "all persons deprived of their liberty . . . be treated with respect for the inherent dignity of the human person."[314]

Two inter-governmental organs provide for the supervision of human rights in the Americas: the Inter-American Commission on Human Rights ("Inter-American Commission") and the Inter-American Court of Human Rights ("Inter-American Court").[315] The Inter-American Commission, which was created in 1959, examines communications from individuals or state parties alleging violations of the American Convention or the American Declaration.[316] The Inter-

305. *See* Richard B. Lillich, International Human Rights: Problems of Law, Policy, and Practice 646 (2d ed. 1991) [hereinafter Lillich, International Human Rights]. The Organization of American States is a regional inter-governmental organization that includes the sovereign states of the Americas. *See* Buergenthal, *International Human Rights*, *supra* note 206, at 16.

306. *See* Buergenthal, *International Human Rights*, *supra* note 206, at 16.

307. *See* Thomas Buergenthal, *The OAS Charter After Forty Years*, 82 Am. Soc'y Int'l L. 101, 116 (1988) [hereinafter Buergenthal, *OAS Charter*].

308. *See* Henkin, Human Rights, *supra* note 253, at 524.

309. *See id.* at 343.

310. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, art. XXV, *in* 1 Annals Organization Am. Sts. 130 (1949) [hereinafter American Declaration].

311. *Id.* art. XXVI.

312. *See* Henkin, Human Rights, *supra* note 253, at 523-24; American Convention on Human Rights, *opened for signature* Nov. 22, 1969, arts. 1, 2 O.A.S.T.S. No. 36, 9 I.L.M. 673 (entered into force July 18, 1978) [hereinafter American Convention].

313. *See* American Convention, *supra* note 312, art. 5.

314. *Id.*

315. *See id.* art. 33.

316. *See* Henkin, Human Rights, *supra* note 253, at 524; American Convention, *supra* note 313, arts. 44, 45.

American Court was established by the American Convention on Human Rights.[317] The Court can hear cases submitted by states and the Inter-American Commission alleging violations of rights as set forth by the Inter-American instruments.[318] The Court also has jurisdiction to grant either advisory opinions regarding interpretations of the Convention or other treaties, or decisions over contentious cases concerning the protection of human rights.[319]

Although the United States has not ratified the American Convention, it may nevertheless be bound to the human rights obligations of the American system.[320] As a member state of the OAS, the United States is a party to the OAS Charter, which proclaims the "fundamental rights of the individual."[321] In 1989, the Inter-American Court noted that for OAS member states, "the [American] Declaration is the text that defines the human rights referred to in the Charter.... [T]he American Declaration is for these States a source of international obligations related to the Charter of the Organization."[322] Because the American Declaration is viewed as an authoritative interpretation of the OAS Charter, the United States may be bound to the Declaration's provisions regarding the treatment of prisoners.[323] As a result, the Inter-American Commission and the Court may have the power to receive and evaluate claims alleging human rights violations by the United States.[324]

The Inter-American Commission has discussed prison overcrowding in its country reports and has employed a totality analysis. For example, in the Report on the Situation of Human Rights in Brazil, the Commission found that "in a space about three by four meters[325]... designed to house six prisoners, almost twenty people ate and slept there, without beds or any minimal comfort...."[326] The Commission further noted that due to jail overpopulation, Brazil's correctional facilities frequently housed

317. *See* Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 Am. J. Int'l L. 231, 231 (1982) [hereinafter Buergenthal, *Inter-American Court*].

318. *See* American Convention, *supra* note 312, art. 61.

319. *See id.* arts. 62-64; Buergenthal, *Inter-American Court*, *supra* note 317, at 235.

320. *See* Henkin, Human Rights, *supra* note 253, at 343.

321. Charter of the Organization of American States, April 30, 1948, art. 3(k), 2 U.S.T. 2394, 119 U.N.T.S. 3, *amended by* Protocol of Buenos Aires, *signed* Feb. 27, 1967, 721 U.N.T.S. 324, and the Protocol of Cartagena de Indias, *approved* Dec. 5, 1985, O.A.S.T.S. No. 1-E [hereinafter OAS Charter]; *see* Henkin, Human Rights, *supra* note 253, at 343.

322. Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) Judgments and Opinions, No. 10, ¶ 45 (1989).

323. *See* Henkin, Human Rights, *supra* note 253, at 343.

324. *See id.* at 524. The opinions of jurists are considered sources of international law. *See supra* note 207 and accompanying text.

325. Three-by-four meters is equivalent to approximately 10-by-13 feet.

326. *Report on the Situation of Hum. Rts. in Brazil*, Inter-Am. C.H.R., Ch. 4, ¶ 6 (1997) (visited Jan. 8, 2000) <http://www.cidh.oas.org/countryrep/brazil-eng/chaper%204.htm>.

individuals detained for the first time together with inmates who have been sentenced to long terms for serious crimes, a situation that violated international standards.[327] As a result, the Commission recommended that the prison system capacity be increased substantially to reduce overcrowding.[328] It also stated that the physical conditions of the correctional facility be modeled in accordance with international norms, such as the U.N. Standard Minimum Rules for the Treatment of Prisoners.[329]

In explaining its conclusions, the Inter-American Commission used a totality-of-circumstances approach. Although the Commission's concern with the overcrowding of prisoners in a given space is consistent with a *per se* analysis, the Commission's findings that the facilities often housed first-time detainees with long-term inmates in violation of international standards reflects a totality approach.[330] Because the Commission indicated that the mixing of the two categories of prisoners was due to the correctional facility's lack of space, the Commission considered both the overcrowding factor and the effects stemming from the mingling of the two groups of inmates in reaching its conclusion about the prison conditions.[331]

The Inter-American Commission also addressed the issue of prison overcrowding in its Report on Ecuador.[332] The Commission stated that overcrowding is the "principal concern with respect to prison conditions" and noted that some correctional facilities held more than double the number of prisoners intended for the space.[333] For example, although the Rehabilitation Center No. 2 was originally designed to house 428 inmates, it accommodated 1067 prisoners.[334] Also, although the projected capacity of the Provisional Detention Center was 212, it housed 722 inmates.[335] Moreover, the Commission found that many of the prisoners were crowded into a space with inadequate ventilation and sanitation, with "only the narrowest of corridors between the crowded bunks."[336] As a result of overcrowding, the facilities housed prisoners convicted of violent offenses together with those sentenced for non-violent crimes.[337] In addition, the prisons housed inmates with long-term sentences along

327. *See id.* ¶ 7.
328. *See id.* Conclusions.
329. *See id.* For a discussion on the Minimum Rules, see *infra* Part III.B.5.
330. The totality analysis not only allows courts to consider all of the conditions of the prison, but also to determine whether any factor alone, such as overcrowding, is subject to a constitutional analysis. *See supra* notes 128-30 and accompanying text.
331. *See supra* note 327 and accompanying text.
332. *See Report on the Situation of Hum. Rts. in Ecuador*, Inter-Am. C.H.R., Ch. VI, at 55 (1997) [hereinafter Inter-Am. C.H.R., *Ecuador*].
333. *Id.*
334. *See id.*
335. *See id.*
336. *Id.*
337. *See id.* at 62.

with those who were awaiting trial.[338] Furthermore, the report noted that conditions of jail overpopulation contributed to tensions, which sometimes led to physical altercations among prisoners, as well as between inmates and prison officials.[339]

Similar to the Report on Brazil, the Inter-American Commission applied a totality analysis in its findings on prison conditions in Ecuador.[340] The Commission began by using a *per se* analysis when it noted statistics of overcrowding and indicated that the "principal concern" regarding jail conditions was housing prisoners beyond design capacity.[341] The Commission applied the totality-of-conditions approach, however, when it examined prison overcrowding in combination with its various effects, such as the mixing of different types of inmates, physical altercations, and inadequate sanitary conditions.[342] As a consequence, the Commission concluded by recommending that the correctional facilities provide every prisoner with a bed and mattress, take measures to segregate the accused from those already convicted, and make integrated efforts to alleviate the problem of jail overcrowding in order to reduce tensions within the facilities.[343]

The Inter-American Commission used similar approaches in its reports on Colombia and Mexico in addressing issues of prison overcrowding. In the Report on Colombia, after an examination of the jail system, the Commission concluded that the conditions of the facilities constituted cruel, inhumane, and degrading treatment of prisoners in violation of the American Convention and other relevant international instruments.[344] It noted that the Colombian jail system accommodated more than 40,000 inmates in 176 correctional facilities designed for 28,000 people.[345] The Commission expressly stated that "[a] crucial element of these human rights violations is prison overcrowding[,]"[346] and thus considered the overpopulation factor first.[347] Yet, in determining whether the prison conditions violated the Convention, the Commission considered not only prison overcrowding, but also a combination of other factors, such as deficient sanitary services and inadequate medical care.[348] By doing so, the Inter-American Commission employed the totality approach.

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338. *See id.*
339. *See id.* at 55.
340. *See supra* notes 330-31 and accompanying text.
341. *See supra* note 333 and accompanying text.
342. *See supra* notes 336-39 and accompanying text.
343. *See* Inter-Am. C.H.R., *Ecuador*, *supra* note 332, at 65.
344. *See Third Rep. on the Situation of Hum. Rts. in Colombia*, Inter-Am. C.H.R., Ch. 14, ¶¶ 4, 62 (1999) (visited Jan. 8, 2000) <http://www.cidh.oas.org/countryrep/Colom99en/chapter-14.htm>.
345. *See id.* ¶ 5.
346. *Id.*
347. *See id.* ¶ 11.
348. *See id.* ¶¶ 13, 30.

Furthermore, in the Country Report on Mexico, the Commission also noted the "serious and complex problem" of "inadequate capacity of prison facilities."[349] Although it considered the problem of prison overcrowding, the Commission also reviewed other conditions, such as insufficient sanitation, lack of privacy, and inadequate recreational opportunities.[350] By weighing these factors in combination with jail overcrowding, the Commission employed the totality method in assessing confinement conditions.

Although the Inter-American Commission has addressed prison overcrowding in its country reports, there has not been considerable adjudication of prison overcrowding allegations by the Inter-American Court.[351] The international standards concerning the treatment of prisoners as set forth in the American Declaration and the Convention, however, may be compared with and inferred from other developed jurisprudence, such as the case law stemming from the European Convention and the European Court of Human Rights.[352]

4. European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ("European Convention") entered into force in 1953.[353] Although the United States is not bound to this regional convention, it may nevertheless draw interpretations of international standards from the European Convention because they indicate "customs and usages of civilized nations."[354] Moreover,

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349. *Report on the Situation of Hum. Rts. in Mexico*, Inter-Am. C.H.R., Ch. 3, ¶ 232 (1998) (visited Mar. 16, 2000) <http://www.cidh.oas.org/countryrep/mexico98en/chapter-3.htm>.

350. *See id.* ¶ 224.

351. Instead, much of the Inter-American Court's case law on cruel and unusual punishment has concerned issues of torture and "disappearances." *See, e.g.*, Godínez Cruz Case, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 197 (1989) (finding that the Honduran government violated Article 5 of the Convention regarding the "disappearance" of the victim); Velásquez Rodríguez Case, 4 Inter-Am. Ct. H.R. (ser. C) ¶¶ 176, 185 (1988) (holding the Honduran government liable for the victim's "disappearance" in violation of Article 5).

352. In other cases regarding the treatment of prisoners, such as disappearance cases, the Inter-American Court has often ruled more favorably toward detainees and inmates than has the European Court. *Compare Velásquez*, 4 Inter-Am. Ct. H.R. (ser. C) ¶¶ 176, 178 (finding that the Honduran government violated Article 5 of the American Convention because it did not conduct any form of investigation into the alleged "disappearance" of the victim, even though the plaintiff was unable to provide specific proof), *with* Kurt v. Turkey, 27 Eur. H.R. Rep. 373, 412-13 (1998) (stating that the Turkish government did not violate Article 3 of the European Convention regarding the disappearance of the victim because the plaintiff was unable to furnish specific evidence). See *infra* Part III.B.4 for a discussion of the European Convention.

353. *See* Bernard, *supra* note 204, at 782-83.

354. Fernandez v. Wilkinson, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd on other*

the case law stemming from the European Convention can provide guidance for the Inter-American system regarding issues of prison overcrowding.

Article 3 of the European Convention prohibits "torture... inhuman or degrading treatment or punishment."[355] Article 15 does not allow derogation from Article 3, even in times of "public emergency threatening the life of the nation."[356] Similar to the ICCPR, the European Convention does not itself define what constitutes inhuman or degrading treatment or punishment.[357] The decisions of the European Convention's interpreting bodies—the European Court of Human Rights ("European Court") and European Human Rights Commission ("European Commission")—therefore interpret Article 3, providing insight into the meaning of the "inhuman or degrading" clause.[358]

In interpreting the treaty, the European Court found that the punishment or treatment must attain a particular level of severity before it can be classified as "inhuman" or "degrading" within the meaning of Article 3 of the European Convention.[359] The assessment of this minimum level is relative, depending on "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, *etc.*"[360] In providing these types of guidelines for assessing the minimum standard of tolerable prison conditions, the European Court applied the totality-of-circumstances approach.[361]

In *Peers v. Greece*,[362] the European Commission also applied a totality analysis in determining whether prison overcrowding violates Article 3 of the European Convention. In this jail overcrowding case, the Commission found that although the complainant's cell was built

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grounds, 654 F.2d 1382 (10th Cir. 1981). For an explanation of the circuit court's decision, see *supra* note 226.

355. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 222 [hereinafter European Convention].

356. *Id.* art. 15; Miller, *supra* note 255, at 143. The European Convention, like the ICCPR, allows states to derogate from some of their Convention obligations in times of war or other public emergency. *See* European Convention, *supra* note 355, art. 15(1). It does not, however, permit derogation from fundamental rights, such as Article 3. *See id.* art. 15(2).

357. *See* Miller, *supra* note 255, at 143.

358. *See id.* at 143, 149-50. Both the European Court and the European Commission were established for the purpose of evaluating claims of alleged violations of the European Convention. *See* Henkin, Human Rights, *supra* note 253, at 553. These two supervisory bodies were replaced by a single Court in November 1998. *See id.*

359. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), 2 Eur. H.R. Rep. 25, ¶ 162 (1978); Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A), 2 Eur. H.R. Rep. 1, ¶¶ 29-30 (1978).

360. *Ireland*, 25 Eur. Ct. H.R. ¶ 162.

361. *See id.*; *supra* Part II.A.

362. App. No. 28524/95, Eur. H.R. Rep. (1999) (Commission report).

for one person, it housed two inmates.[363] As a result of overcrowding, the complainant was forced to spend a considerable part of each day confined to his bed in a cell that lacked ventilation.[364] Other than a peephole in the door, the cell had no opening, and was therefore exceedingly hot.[365] In addition, because the toilet in the cell was not separated by a screen, the complainant and the other cellmate used the toilet in one another's presence.[366] As a result of these combined conditions, the Commission concluded that the prison overcrowding constituted "degrading treatment" in violation of Article 3 of the Convention.[367] In making its decision, the European Commission considered not only prison overcrowding or core conditions, but other factors, such as the humiliation of having to use the toilet in the presence of another prisoner.[368] By doing so, the Commission applied the totality-of-circumstances method in finding a violation of the European Convention.

The concurring opinion in *Peers* held that the prison conditions went even beyond the level of "degrading treatment."[369] In fact, the conditions constituted "inhuman treatment" because they caused the complainant severe physical and mental suffering rather than mere humiliation or debasement—which is the requisite for "degrading treatment."[370] The concurrence concluded that "confinement in a very small cell with no ventilation, no window or opening other than a peephole . . . and in a stinking atmosphere and having to be present while the open toilet . . . was being used by his cellmate" constituted inhuman treatment.[371]

Because "inhuman treatment" is measured by physical and mental suffering, and "degrading treatment" by humiliation and debasement, Article 3 of the Convention—which includes both provisions—protects prisoners not only from conditions that produce physical harm, but also from those that cause mental and emotional suffering.[372]

5. United Nations Standard Minimum Rules for Treatment of Prisoners

In addition to the international treaties and regional conventions, aspirational models, such as the United Nations Standard Minimum

363. *See id.* ¶ 94.
364. *See id.* ¶¶ 94, 96.
365. *See id.*
366. *See id.* ¶¶ 95-96.
367. *See id.* ¶¶ 96, 101.
368. *See id.*
369. *See id.* at concurring opinion.
370. *See id.*
371. *Id.*
372. *See id.*

Rules for the Treatment of Prisoners ("Minimum Rules"), also contain guidelines regarding confinement conditions.[373] The Rules set forth minimum acceptable prison condition requirements.[374] In 1957, the U.N. Economic and Social Council ("ECOSOC") formally approved the Minimum Rules, giving them official U.N. endorsement as the standards for the treatment of prisoners by member nations.[375] The main purpose of the Minimum Rules is to enable the states to incorporate these standards into their national penal codes.[376] Because ECOSOC does not have legislative authority, however, the Minimum Rules do not have the force of law.[377] Nevertheless, the Rules have been increasingly acknowledged as an acceptable model of basic minimal requirements for the treatment of prisoners.[378]

In the United States, the Minimum Rules were incorporated into the 1962 Model Penal Code and the correctional standards developed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973.[379] Although the United States government has not officially adopted the Minimum Rules, several states have adopted and endorsed them.[380] For example, in 1971, Pennsylvania adopted the Minimum Rules for its state correctional systems, and the State Bureau of Corrections promulgated the Rules as an administrative directive.[381] In subsequent years, additional states, such as South Carolina, Ohio, Minnesota, Connecticut, and Illinois, have adopted the Minimum Rules.[382]

Among other provisions, the Rules set forth minimum acceptable standards for prison accommodations.[383] As such, they condemn jail overcrowding "per se." For instance, the Minimum Rules provide that each prisoner "occupy by night a cell or room by himself."[384] Even if there are special circumstances of temporary overcrowding, the Rules state that "it is not desirable to have two prisoners in a cell or room."[385] Moreover, they indicate that all accommodations "shall meet all requirements of health, due regard being paid . . . particularly to cubic content of air, [and] minimum floor space . . . ."[386] Thus, by

373. *See* Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. Int'l L. & Econ. 453, 454-55 (1975).
374. *See id.* at 455.
375. *See id.* at 454-56.
376. *See* Bernard, *supra* note 204, at 771.
377. *See id.*
378. *See* Miller, *supra* note 255, at 148; Skoler, *supra* note 373, at 455.
379. *See* Bernard, *supra* note 204, at 774; Miller, *supra* note 255, at 148.
380. *See* Lillich, International Human Rights, *supra* note 305, at 287.
381. *See* Bernard, *supra* note 204, at 774-75; Skoler, *supra* note 373, at 462.
382. *See* Skoler, *supra* note 373, at 462.
383. *See* Minimum Rules, *supra* note 278, ¶¶ 9-10.
384. *Id.* ¶ 9.
385. *Id.*
386. *Id.* ¶ 10.

imposing minimum standards of jail space, the Rules discourage prison overcrowding "per se."[387]

The various international human rights instruments have applied the *per se* or the totality-of-conditions analyses in evaluating prison overcrowding claims. As a consequence, the United States may be bound to the standards set forth by these international treaties and models. The United States may be required to comply with the international norms based on its treaty obligations, such as the ICCPR or the American Declaration through the OAS Charter, or it may be bound because the standards promulgated by the different international instruments may be said to have achieved the status of

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387. Other international instruments also have provisions that pertain to the treatment of prisoners. The United Nations Charter, a multilateral treaty to which virtually all countries are parties, entered into force in 1945. *See* Henkin, Human Rights, *supra* note 253, at 320; Miller, *supra* note 255, at 141. Article 55 of the Charter promotes "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. Charter art. 55. Article 56 states that "[a]ll [m]embers pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55." *Id.* at 56. As a state party to the Charter, the United States is bound to its provisions. *See* Lareau v. Manson, 507 F. Supp. 1177, 1188 n.9 (D. Conn. 1980).

Moreover, as a state bound to the requirements of the Charter, the United States may also be obligated to adhere to the provisions of the Universal Declaration of Human Rights ("Universal Declaration"), which was adopted in 1948. *See* Henkin, Human Rights, *supra* note 253, at 322. The Declaration prohibits cruel, inhuman, or degrading treatment or punishment. *See* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., art. 5, U.N. Doc. A/810 (1948). Some scholars have argued that the Universal Declaration articulates and specifies the human rights obligations as expressed in Articles 55 and 56 of the U.N. Charter. *See* Henkin, Human Rights, *supra* note 253, at 322. Thus, a state party to the Charter would also be obligated to abide by the standards of the Universal Declaration. States are also bound to the Declaration because although the Declaration is not a treaty, it has become part of customary international law through state practice. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 882 (2d Cir. 1980).

In addition to the Universal Declaration and the U.N. Charter, another international instrument that addresses the treatment of inmates is the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), which was opened for signature in 1984. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, art. 16, U.N. Doc. A/39/51 (1984). The Torture Convention prohibits torture and "other acts of cruel, inhuman or degrading treatment or punishment." *Id.* Similar to the ICCPR, when the United States ratified this Convention, it attached a reservation limiting the provision's protection to that found in the Fifth, Eighth, or the Fourteenth Amendment of the Constitution. *See* Miller, *supra* note 255, at 146.

The language of the Universal Declaration and the Torture Convention is identical to that found in other international instruments, such as the ICCPR, American Declaration, and the European Convention, which prohibits not only cruel punishment, but also inhuman and degrading treatment of prisoners. *See supra* notes 256, 313, 355 and accompanying text. Similarly, because the ICCPR, American Declaration, and the European Convention employ the *per se* and the totality approaches in examining prison overcrowding cases, these standards may also apply to the Universal Declaration and the Torture Convention. *See supra* Part III.B.1-4.

customary international law.[388] Even if the norms are not yet considered international custom, however, they nevertheless provide insight into the content of contemporary standards of decency, an essential component in evaluating Eighth Amendment claims. The next part discusses the reasons the United States courts should apply either the *per se* or the totality analysis in reviewing prison overcrowding claims.

IV. AN ARGUMENT FOR A *PER SE* OR TOTALITY-OF-CONDITIONS APPROACH TO PRISON OVERCROWDING

As a result of the steep rise in the number of inmates in United States correctional facilities, an increasing number of prisoners have filed claims in response to worsening confinement conditions, including overcrowding of prisons.[389] The Supreme Court in *Rhodes v. Chapman* stated that although double-celling is not unconstitutional "per se," overcrowding and other confinement conditions can be found to violate the Eighth Amendment under the contemporary standard of decency if they "deprive inmates of the minimal civilized measure of life's necessities."[390] As a result, federal courts have applied differing standards in reviewing overcrowding claims, such as the totality, core-conditions, and *per se* approaches. In addition to United States case law, international human rights instruments have provided standards applicable to prison condition claims. These international norms may aid in interpreting the Eighth Amendment because they provide a more comprehensive understanding of the contemporary standard of decency. In light of the standards set forth by international human rights law, courts should use the *per se* approach or the totality-of-conditions analysis in adjudicating inmates' claims of cruel and unusual punishment as a result of prison overcrowding.

A. *Eighth Amendment Protection and the Consideration of the Prison Overcrowding Factor*

In addressing an inmate's claim that prison overcrowding constitutes cruel and unusual punishment, courts should apply either the *per se* or the totality analysis because these approaches cover a broader range of factors that affect an inmate's well-being than does the core conditions approach.[391] The *per se* approach provides the most protection for prisoners' rights by acknowledging that a lack of

388. *See* Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt. i (1987) ("International agreements constitute practice of states and as such contribute to the growth of customary law.... Some multilateral agreements may come to be law for non-parties.").

389. *See* 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

390. 452 U.S. 337, 347 (1981).

391. *See supra* Parts II.A-C.

living space alone can lead to physical and psychological pain in contravention of the Eighth Amendment guarantee. Even though the *Rhodes* Court has rejected the *per se* approach of defining overcrowding simply as housing inmates beyond design capacity, rather than focusing on cell size, application of the *per se* approach should be revisited because by providing a clear judicial guideline, it allows foreseeability and certainty in habeas litigation. Such a bright line rule also provides judges with the most objectivity in assessing Eighth Amendment claims. Prison overcrowding claims therefore are less susceptible to the differing views of individual judges.

Moreover, prison overcrowding extends beyond the purposes behind the punishment of incarceration. Statutory punishment for criminal offenses typically involves incarceration, or the loss of one's liberty.[392] Punishment in excess of incarceration must have a specific penological purpose, such as solitary confinement imposed on inmates for deterrence and retribution for offenses committed while in prison.[393] In the case of overcrowding, however, this prison-wide, indiscriminate condition does not serve a penological purpose because often overcrowding is simply the result of a lack of resources available to house inmates at or below design capacity.[394] Because prison overcrowding lacks a penological justification, it should be deemed cruel and unusual punishment.

Furthermore, the *per se* approach ensures that courts properly consider the prison overcrowding factor in determining confinement condition claims. Much research and case law have shown that overcrowding of prisons causes increased violence and physical and mental illnesses among inmates, deteriorating conditions of the physical plant, inadequate medical care, sanitation, food, and rehabilitation programs.[395] Because the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man,"[396] the Constitution should protect inmates from the deleterious effects of prison overcrowding.

Although no uniform definition of *per se* overcrowding has been adopted, courts should define it as that which "offends the contemporary standards of human decency."[397] This standard enables

392. *See* Finney v. Arkansas Bd. of Corr., 505 F.2d 194, 215 (8th Cir. 1974) ("Segregation from society and loss of one's liberty are the only punishment the law allows."), *aff'd sub nom.* Hutto v. Finney, 437 U.S. 678 (1978); Barnes v. Government of the Virgin Islands, 415 F. Supp. 1218, 1224 (D. St. Croix 1976) ("A convicted person is not sent to a penal institution to receive additional punishment . . . . The fact of incarceration is the punishment."); Pooler, *supra* note 200, at 40 (recognizing that incarceration is "the statutory punishment for a given crime").

393. *See* Pooler, *supra* note 200, at 40-41.

394. *See id.* at 41 & n.265.

395. *See* Nami v. Fauver, 82 F.3d 63, 65-67 (3d Cir. 1996); Tillery v. Owens, 907 F.2d 418, 426-28 (3d Cir. 1990); Pooler, *supra* note 200, at 35-36.

396. Trop v. Dulles, 356 U.S. 86, 100 (1958).

397. Chavis v. Rowe, 643 F.2d 1281, 1291 (7th Cir. 1981) (citing Battle v. Anderson,

the courts to interpret cruel and unusual punishment based on the evolving norms "of decency that mark the progress of a maturing society," in accordance with *Rhodes*.[398] In determining the contemporary standard of decency, however, courts should be able to consider the opinions of experts and correctional minimum standards, such as those set by the ACA and the APHA.[399] For example, both organizations have suggested that providing each prisoner with a living space of at least sixty square feet reflects the standard of decency.[400] The Court in *Rhodes* undermined the role of experts and instead relied on the "public attitude toward a given sanction."[401] Judges, however, may not always be able to objectively gauge public attitudes. Thus, the definition of public opinion may vary substantially depending on the individual judge. Expert opinions, on the other hand, provide a more objective standard based on a studied third-party perspective that relies on additional supporting evidence, such as statistical data.[402] Courts should be able to weigh these types of recommendations in order to avoid purely subjective analyses based on the individual judge's sense of right and wrong—a danger of the vague "human decency" standard.

If courts refuse to apply the *per se* test because the Supreme Court in *Rhodes* has held that housing prisoners in excess of design capacity in and of itself is not unconstitutional, the courts should, at a minimum, use a totality-of-circumstances analysis.[403] The totality analysis covers a wider range of factors affecting inmates than does the core-conditions approach,[404] which does not consider prison overcrowding as a core factor.[405] The totality approach also allows courts to combine all of the various conditions together in order to find an Eighth Amendment violation.[406] Because the Eighth Amendment's "protections extend to the whole person as a human being,"[407] the cumulative impact of the confinement conditions, including prison overcrowding, should be considered when reviewing habeas claims. Even if no single condition is itself unconstitutional, when combined, several conditions can reinforce each other and subject prisoners to cruel and unusual punishment.

In contrast to the more amorphous totality approach, however, the

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564 F.2d 388, 395 (10th Cir. 1977)).

398. Rhodes v. Chapman, 452 U.S. 337, 346-47 (1981) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

399. *See supra* note 191 and accompanying text.

400. *See Chavis*, 643 F.2d at 1291; Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980).

401. *Rhodes*, 452 U.S. at 349 n.13.

402. *See* Gottlieb, *supra* note 83, at 20-21.

403. *See supra* note 109 and accompanying text.

404. *See supra* notes 156-59 and accompanying text.

405. *See* Gottlieb, *supra* note 83, at 19.

406. *See supra* notes 110-12 and accompanying text.

407. Laaman v. Helgemoe, 437 F. Supp. 269, 307 (D.N.H. 1977).

core conditions test does provide a measure of certainty in analyzing prison conditions cases because the test enumerates a specific checklist of factors that courts may consider in finding an Eighth Amendment violation.[408] This specific checklist also makes it harder for prisoners to establish a claim than under the totality approach because the conditions must fit the particular core requirements. Thus, by setting a higher standard for prisoners to meet through the enumeration of specific criteria, courts may not be as flooded with claims challenging confinement conditions because prisoners may be discouraged from bringing suit.

Yet, under the core conditions test, a court cannot find a constitutional violation based on prison overcrowding unless it specifically results in a deprivation of food, clothing, shelter, sanitation, medical care, or personal safety.[409] Prison overcrowding, however, may lead to other factors that can harm inmates, such as deteriorating physical conditions of the prisons, inadequate staff supervision, and lack of rehabilitation programs.[410] Courts should be able to weigh all of these factors, and others, in determining whether the prison conditions violate the Eighth Amendment, rather than being confined to rigid categories.

Moreover, under a core conditions analysis, although various confinement conditions can be considered together to assess the violation of a single core area, the separate core conditions themselves cannot be combined to result in a finding of unconstitutionality.[411] Thus, if the prison conditions consist of several weak core areas, a court cannot combine them together in order to determine whether the overall conditions constitute cruel and unusual punishment.[412] Courts should have the ability to consider all relevant factors in deciding whether the total confinement conditions violate the Constitution because the totality of the various conditions, when grouped together, may constitute cruel and unusual punishment.

Furthermore, the core conditions approach considers only factors that cause physical harm to inmates.[413] It does not analyze conditions that cause prisoners to experience psychological pain.[414] The totality-of-circumstances method, on the other hand, encompasses conditions

408. *See* Gottlieb, *supra* note 83, at 19.
409. *See supra* notes 155-57 and accompanying text.
410. *See supra* note 9 and accompanying text.
411. *See supra* notes 162-63 and accompanying text.
412. *See supra* notes 162-63 and accompanying text.
413. *See* Hoptowit v. Ray, 682 F.2d 1237, 1246-47 (9th Cir. 1982). The Prison Litigation Reform Act also requires a showing of physical injury in order to bring prison-condition claims to court. *See supra* notes 150-51 and accompanying text. Courts, however, should review the constitutionality of the PLRA because Eighth Amendment protection extends to inmates' physical and psychological pain. *See infra* notes 414-19 and accompanying text.
414. *See* Gottlieb, *supra* note 83, at 19.

that cause both physical and psychological harm to inmates, including prison overcrowding.[415] The Eighth Amendment, however, prohibits not only "injury," but "unnecessary and wanton infliction of 'pain' . . . [and] '[p]ain' in its ordinary meaning surely includes a notion of psychological harm."[416] Thus, the constitutional protection should take into account not only the conditions that cause physical pain to prisoners, but also factors that produce acute psychological pain.[417]

In overpopulated prisons, inmates are more apt to suffer severe psychological harm, which together with physical hardships may rise to the level of cruel and unusual punishment. For example, in *Zolnowski v. County of Erie*,[418] the court stated that the overcrowding conditions subjected prisoners to:

> being stepped on and urinated upon while sleeping, exposure to other prisoners defecating in the only available toilet while prisoners are taking meals seated on the floor, vomiting on the floor and in the toilet by prisoners who become sick and noxious odors caused by a combination of too many people in too little space.[419]

In such a scenario, the confinement conditions may cause the prisoner acute psychological harm, but not necessarily physical injury. Eighth Amendment protection should encompass conditions that produce severe mental suffering for prisoners because such conditions may rise to the level of "unnecessary and wanton infliction of pain,"[420] which constitutes cruel and unusual punishment.

B. *International Norms and the Contemporary Standard of Decency*

In determining whether prison overcrowding violates the Eighth Amendment, a court's decision should reflect the evolving decency standards of our global society.[421] These standards should not merely mirror the subjective views of judges, but should be based on objective factors as developed by human rights theorists and organizations.[422] International instruments, including the ICCPR,

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415. *See supra* Part II.A.

416. Hudson v. McMillian, 503 U.S. 1, 16 (1992); *see also* Thomas v. Farley, 31 F.3d 557, 559 (7th Cir. 1994) ("Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases... to be actionable as cruel and unusual punishment.").

417. *See* Williams v. Griffin, 952 F.2d 820, 824-25 (4th Cir. 1991) (holding that the confinement conditions may violate the Eighth Amendment because psychological harm could be inferred from prison overcrowding). In *Helling v. McKinney*, a case in which an inmate alleged violation of the Eighth Amendment due to his exposure to environmental tobacco smoke, the Supreme Court even held that future physical harm was within the ambit of Eighth Amendment protection. *See* 509 U.S. 25, 35 (1993).

418. 944 F. Supp. 1096 (W.D.N.Y. 1996).

419. *Id.* at 1113.

420. Rhodes v. Chapman, 452 U.S. 337, 346 (1981).

421. *See supra* note 80 and accompanying text.

422. *See Rhodes*, 452 U.S. at 346 (1981) (holding that "judgment[s] should be

American Declaration, American Convention, U.N. Charter, European Convention, and Standard Minimum Rules, provide concrete formulations of the contemporary standard of decency and can aid United States courts in giving content to the Eighth Amendment.[423]

By considering international instruments, judges gain a better understanding of this decency standard by examining the treatment of prisoners on an international scale. Because the international bodies apply both the *per se* and totality methods in analyzing prison overcrowding cases, these approaches evidence acceptable norms for analyzing the treatment of prisoners. In addition, such a global outlook increases objectivity because judges do not rely solely on provincial standards that can fluctuate according to local tastes and politics. Also, if standards reflect only the subjective views of judges, the treatment of prisoners may vary depending on individual ruling.[424] By taking into account international norms, courts can achieve objectivity and uniformity of decision-making regarding prison overcrowding.[425]

An example of a case that considered international norms in determining whether prison overcrowding violates the Eighth Amendment is *Lareau v. Manson*.[426] The inmates alleged that the confinement conditions, principally overcrowding, as well as other conditions resulting from prison overpopulation, such as inadequate medical care, food, sanitation, and heating, amounted to cruel and unusual punishment.[427] Here, the court held that on the facts of this case, prison overcrowding was unconstitutional, and relied on the Standard Minimum Rules, United Nations Charter, ICCPR, and Universal Declaration of Human Rights for guidance in interpreting the "evolving standards of decency."[428] The court stated that the

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informed by objective factors to the maximum possible extent.") (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980)).

423. *See* Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980).

424. An example of the individual justices interpreting the contemporary standard of decency to reflect their own values is the debate on capital punishment. In *Gregg v. Georgia*, Justice Brennan stated that in his view, the death penalty shocked the conscience of society and was no longer acceptable. *See* 428 U.S. 153, 227-29 (1976) (Brennan, J., dissenting). Justice Marshall stated that the decency standards may be inferred from an informed public, and that if the citizenry were informed of the death penalty's ineffectiveness, their views would differ. *See id.* at 232 (Marshall, J., dissenting). On the other hand, Justice Stewart held that the polls concluded that more than a majority of the public favored the death penalty and that at least 35 states had reinstated capital punishment. *See id.* at 179-81.

425. *See also* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. Cin. L. Rev. 3, 3 (1983) (arguing that courts should use external sources, such as international human rights norms, in interpreting domestic laws).

426. 507 F. Supp. 1177 (D. Conn. 1980).

427. *See id.* at 1178.

428. *See id.* at 1188 n.9, 1193 n.18.

norms embodied in these international instruments are relevant to the "canons of decency and fairness which express the notions of justice" because they "constitute an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind."[429] In this manner, the court relied on the international instruments to gain a more in-depth understanding of the contemporary standard of decency.

Moreover, the international obligations of the United States require courts to apply either the *per se* approach or a totality analysis in assessing jail overcrowding cases. The United States ratified the ICCPR in 1992, with reservations on some of its provisions, as well as a declaration that the treaty is not self-executing.[430] Although the ICCPR is not self-executing in the United States, the government is nevertheless under an obligation to take measures to adhere to the convention's provisions because non-self-executing treaties are still considered to be the supreme law of the land.[431] Despite the fact that the United States has entered a reservation on Article 7 of the ICCPR indicating that the government is bound only to the extent that the provision means that which is prohibited by the United States Constitution, this reservation may not apply to prison overcrowding because there is no consensus on what the Constitution actually says about overcrowding.[432] Although *Rhodes* may be read to have found a *per se* analysis unconstitutional, the Supreme Court has not yet ruled on whether courts should apply a totality or core conditions approach.[433] The Constitution therefore is not definitive on the specific mode of analysis to be employed in prison overcrowding cases. Thus, as evidenced by the split among the circuits, there is no uniform standard among the courts in interpreting the analytical requirements of the Eighth Amendment.[434] The reservation therefore may not be applicable in this situation because the courts are not in agreement as to the meaning and content of cruel and unusual punishment. As such, Article 7 of the ICCPR may bear authority in prison overpopulation cases in the United States. Therefore, the United States courts may need to comply with the ICCPR standards and employ either the *per se* or the totality approach and consider the overcrowding factor in evaluating Eighth Amendment claims, rather than the core-conditions approach, which does not consider prison overpopulation unless it specifically produces a deprivation of a core

429. *Id.* at 1188 n.9.
430. *See supra* notes 260-63 and accompanying text.
431. *See* Henkin, Foreign Affairs, *supra* note 210, at 203-04; *supra* notes 217-19 and accompanying text.
432. *See supra* Part II.
433. *See supra* notes 94-108 and accompanying text.
434. *See supra* Part II.

condition. By applying the ICCPR standards, courts grant greater weight to claims of prison overcrowding.

Even if the reservation on Article 7 does apply to prison overcrowding cases, the United States has not entered a reservation on Article 10, which provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[435] In jail overcrowding cases alleging violations of Article 10, the Human Rights Committee has applied a totality-of-conditions analysis.[436] Also, in its various country reports, the Committee has employed both the *per se* and totality approaches in determining whether the state violated Article 10 of the ICCPR.[437] Because the United States has ratified the ICCPR without a reservation on Article 10, it is bound by its provisions. In light of the Committee's decisions regarding Article 10 violations, therefore, the United States courts should apply either the *per se* approach or the totality of circumstances analysis in assessing prison overcrowding cases. In applying these approaches, courts conform to the norms as set forth by the ICCPR, which consider prison overcrowding as a factor that violates inmates' guaranteed rights.

Furthermore, the United States may be bound to the international standards as set forth in the American Declaration, which prohibits cruel, infamous, or unusual punishment, and which provides prisoners with the right to humane treatment.[438] Even though the United States has neither formally acceded to the provisions of the American Declaration nor of the American Convention, it may still be bound to the obligations of the American Declaration.[439] Because the Inter-American Court noted that the American Declaration defines human rights as expressed in the OAS Charter, the United States may be bound to the Declaration because it is a party to the Charter.[440] Although the Inter-American Court has not yet adjudicated many cases regarding the issue of prison overcrowding, the Inter-American Commission has applied the totality approach in its country reports.[441] Thus, in handling prison overcrowding cases, the Inter-American system has thus far employed the totality-of-conditions analysis. In adhering to the standards of the American Declaration, United States courts therefore cannot apply the core-conditions approach. By using the totality analysis, courts consider a broader range of factors affecting inmates, including prison overcrowding, in assessing Eighth Amendment claims.

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435. ICCPR, *supra* note 256, art. 10; *see* Karlson, *supra* note 205, at 450-51.
436. *See supra* notes 289-90 and accompanying text.
437. *See supra* notes 291-99 and accompanying text.
438. *See supra* notes 310-11 and accompanying text.
439. *See supra* notes 320-24 and accompanying text.
440. *See supra* notes 320-24 and accompanying text.
441. *See supra* notes 326-52 and accompanying text.

Another reason the United States may be required to adhere to the provisions of the international instruments is that they may constitute customary international law.[442] The international agreements designed for adherence by countries generally may establish binding rules on nations by virtue of state practice and "opinio juris."[443] The existence of the various international instruments that set forth similar guidelines in assessing prison overcrowding claims may be said to have achieved the status of international custom.[444] The Universal Declaration, for example, which contains the same "cruel, inhuman, or degrading treatment or punishment" language as the other international instruments, has been recognized as customary international law.[445] In *Filartiga v. Peña-Irala*,[446] the Second Circuit observed that the Declaration constitutes "basic principles of international law" and that it has become "a part of binding, customary international law."[447] In this manner, the Declaration's provision, which is identical to the other international agreements, but broader in scope than the language of the Eighth Amendment, is binding on the United States.[448] The international standards provide increased protection for inmates by considering the prison overcrowding claim in confinement conditions cases.

Finally, courts should consider international norms in assessing prison condition cases in order to prevent isolating the United States from standards guiding the growing international community. As legal scholar Gordon Christenson has stated, with the increase of globalization and "world-wide forces," the United States should not "turn completely inward in judicial attitude in ways that deny the rich traditions of the rule of law beyond our borders."[449] By employing international human rights standards, not only would the United States not withdraw itself from the international norms, it would take a more active role in such globalization efforts and in the development of international human rights law.[450] In particular, by employing the *per se* or the totality approach in analyzing prison overcrowding cases, the United States would grant inmates the same level of protection they would receive under international standards.

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442. *See* Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980).

443. *See supra* notes 224-25 and accompanying text.

444. *See* Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt. i (1987).

445. *See supra* note 387.

446. 630 F.2d 876 (2d Cir. 1980).

447. *Id.* at 882-83.

448. The language of the Universal Declaration and the other international human rights instruments prohibits "cruel, inhuman or degrading treatment or punishment," while the Eighth Amendment prohibits "cruel and unusual punishment." *See* Universal Declaration, *supra* note 387, art. 5; U.S. Const. amend. VIII.

449. Christenson, *supra* note 425, at 35.

450. *See id.* at 34.

CONCLUSION

The alarming growth in the prison population in the United States has reached a point of crisis, particularly as a result of a nationwide crackdown on crime.[451] Federal courts have increasingly addressed overcrowding concerns by reviewing habeas petitions brought by inmates. In assessing prison overpopulation claims, courts have employed various standards, including the totality-of-circumstances analysis, the core conditions test, and the *per se* approach. Other authoritative sources, such as international human rights law, have also invoked the totality and *per se* approaches in adjudicating international claims based on standards set forth in treaties and agreements.

In order to achieve uniformity and best serve the principles underlying the Eighth Amendment's proscription against cruel and unusual punishment, courts should use the *per se* approach, which considers prison overcrowding itself to be a constitutional violation, or the totality analysis, which considers a broad range of confinement conditions, including prison overcrowding, in determining whether the jail conditions violate the Eighth Amendment. Both approaches best reflect the contemporary standard of decency, particularly in light of international norms. Moreover, applying these analyses will enable the United States to adhere to international standards and not isolate itself from the international community.

451. *See* Human Rights Watch 1999, *supra* note 3, at 387.