

LAAMAN v. HELGEMOE: DEGENERATION, RECIDIVISM AND THE EIGHTH AMENDMENT

In *Laaman v. Helgemoe*¹ the Federal District Court of New Hampshire held that confinement at New Hampshire State Prison (NHSP) constituted cruel and unusual punishment in violation of the eighth amendment of the United States Constitution.² Although such a decision would normally have rested upon the court's finding that the conditions of incarceration were shocking to the conscience,³ the court in *Laaman* found an absence of shocking conditions.⁴ Its conclusion was instead based upon its finding that the cumulative impact of the conditions of incarceration made prisoner "degeneration probable and reform unlikely."⁵ That conclusion, the degeneration/recidivism standard upon which it is founded, and the court's far-reaching relief order⁶ together constitute the broadest application yet of the eighth amendment to prison conditions.

Until the mid-sixties, state and federal courts traditionally exercised a "hands-off" policy concerning prison conditions, believing

1. 437 F. Supp. 269 (D.N.H. 1977). The suit began as a civil rights action by prison inmate Laaman under 42 U.S.C. § 1983 (1974) and grew into a class action attack on the general living conditions at New Hampshire State Prison (NHSP). Defendants included Helgemoe in his capacity as prison warden, members of the Board of Trustees at NHSP and the prison physician. *Id.* at 275.

2. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It applies to the states through the due process clause of the fourteenth amendment. *Robinson v. California*, 370 U.S. 660 (1962).

3. Note, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L.L. REV. 367, 369 (1977) [hereinafter cited as *Confronting the Conditions*]. See, e.g., *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119 (D.D.C. 1976); *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), Supplemental Opinion and Order June 14, 1977, *aff'd*, 564 F.2d 388 (10th Cir. 1977).

4. The court stated "[t]he New Hampshire prison is not marked by barbaric and shocking physical conditions. . . ." 437 F. Supp. at 306. Furthermore, the court did not describe any of the non-physical conditions as "shocking" or "barbaric." Instead the conditions were often found to be "inadequate" or "insufficient." See, e.g., 437 F. Supp. at 280, 301, 302, 323, 324.

5. 437 F. Supp. at 325. The court's degeneration/recidivism test is set forth in text accompanying note 14 *infra*.

6. See note 33 *infra*.

that the treatment of prisoners was a disciplinary matter within the discretion of the executive and legislative branches of government.⁷ But such deference increasingly gave way to closer scrutiny of prison conditions and practices in the face of alleged constitutional violations under the first, sixth, eighth and fourteenth amendments of the United States Constitution.⁸ A violation of the eighth amendment was found if a particular prison condition or practice was so shocking or barbarous as to offend society's evolving sense of decency.⁹ Application of the "shocking" test was broadened in the 1971 case of *Holt v. Sarver*,¹⁰ where the Federal District Court in Arkansas held that confinement itself could amount to cruel and unusual punishment if the *totality* of prison conditions and practices were shocking to the conscience.¹¹ Although the totality ap-

7. Typical of the "hands off" approach was the statement of the court in *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951): "We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964); *Banning v. Looney*, 213 F.2d 771 (10th Cir. 1954), cert. denied, 348 U.S. 859 (1954); See *Roberts v. Peppersack*, 256 F. Supp. 415 (D. Md. 1966); *Confronting the Conditions*, supra note 3, at 367 n.1; Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 654-55 (1971) [hereinafter cited as *Role of the Eighth Amendment*].

8. See, e.g., *Cruz v. Beto*, 405 U.S. 319 (1972) (reasonable opportunities must be granted to all prisoners to exercise their religious freedom guaranteed by the first and fourteenth amendments); *Johnson v. Avery*, 393 U.S. 483 (1969) (interference with the right to counsel and access to adequate legal materials violated the sixth amendment); *Lee v. Washington*, 390 U.S. 333 (1968) (racial segregation in the Alabama prison system violated the fourteenth amendment). See also Hirschkop & Millemann, *The Unconstitutionality Of Prison Life*, 55 VA. L. REV. 795 (1969).

9. See, e.g., *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (whipping of prisoners); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967) (solitary confinement of naked prisoner in below-freezing cell without soap or toilet paper); *Hancock v. Avery*, 301 F. Supp. 786, 792 (M.D. Tenn. 1969) ("particularly barbaric" physical punishments).

In addition to the "shocking to the conscience" test, there is another traditional eighth amendment test: whether the punishment is grossly disproportionate to the offense. See, e.g., *Coker v. Georgia*, 97 S.Ct. 2861, 2866 (1977), where the Court held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." See *Weems v. United States*, 217 U.S. 349 (1910). The "grossly disproportionate" test has not, however, been the basis of any prison conditions cases.

10. 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971).

11. *Id.* at 372-73. See *Confronting the Conditions*, supra note 3, at 372; *Role of the Eighth Amendment*, supra note 7, at 659-63; Note, *Decency And Fairness: An Emerging Judicial Role In Prison Reform*, 57 VA. L. REV. 841, 858-59 (1971).

proach is no longer novel,¹² the United States Supreme Court has not yet ruled on its validity. Even the courts that have used the totality approach have rested their holdings of cruel and unusual punishment upon findings of "shocking" or "barbaric" conditions.¹³ In contrast, the finding of an eighth amendment violation in *Laaman* was made in the absence of shocking conditions and was premised upon a new test: "Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration," then confinement under such conditions constitutes cruel and unusual punishment.¹⁴ Judge Bownes¹⁵ ordered specific and extensive reforms to correct the constitutional violation. The State of New Hampshire has appealed the decision to the First Circuit.¹⁶

This note will summarize the findings and the analysis from which the court drew its conclusions and test. It will also discuss the fundamental issues and problems raised by *Laaman* which are likely to be considered by the First Circuit Court of Appeals.

I. THE CONDITIONS AT NHSP

The sixty-three page opinion describes in detail the conditions

12. See, e.g., *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) petition for cert. filed, 46 U.S.L.W. 3571 (U.S. Mar. 14, 1978) (No. 77-1107); *William v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119 (D.D.C. 1976); *Barnes v. Virgin Islands*, 415 F. Supp. 1218 (D. St. Croix 1976); *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), Supplemental Opinion and Order June 14, 1977, *aff'd*, 564 F.2d 388 (10th Cir. 1977). Cf. *Padgett v. Stein*, 406 F. Supp. 287, 304 (M.D. Pa. 1975) ("[p]rison reform is a matter for the political branches of government, not for the courts.").

13. See *Confronting the Conditions*, *supra* note 3, at 372. *Accord*, *Barnes v. Virgin Islands*, 415 F. Supp. 1218 (D. St. Croix 1976). The court in *Barnes* did not specifically describe the prison conditions as "barbaric" or "shocking," but a fair conclusion is that the conditions were considerably worse than at NHSP. For example, at NHSP the educational and mental health programs were found to be understaffed, 437 F. Supp. at 325, whereas the St. Croix correctional facility did not have any programs at all. 415 F. Supp. at 1226, 1228.

14. 437 F. Supp. at 323.

15. Judge Hugh H. Bownes has since been nominated to the First Circuit, and the nomination has been confirmed by the Senate. 46 U.S.L.W. 2198 (Oct. 18, 1977).

16. 437 F. Supp. 269 (D.N.H. 1977), *appeal docketed*, No. 77-1460 (1st Cir. July 30, 1977).

at NHSP, facility-by-facility, program-by-program. The food services were found to be "deplorable" and prison sanitary conditions "inexcusable."¹⁷ The solitary confinement cells, with "inadequate lighting, ventilation, plumbing, size, and the uncontrollable temperatures" were described as comparable only to a "medieval dungeon."¹⁸ Fire protection was found to be "inadequate,"¹⁹ and the state's "consultant concluded that 'the personal safety of the inmates [was] all but ignored.'"²⁰ In sum, the lack of upkeep and the ineffective use of the "antiquated"²¹ prison was found to be "dangerous to the lives of both the keepers and the kept."²²

In addition to these deficiencies, the court found serious inadequacies in prison programs. Insufficient staffing and funding for medical services and facilities "endanger[ed] the lives and the health of the prison community."²³ The number of personnel in the "crisis oriented"²⁴ mental health care program was found to be "insufficient" to meet the needs of the inmates.²⁵ Educational programs were found to be "responsive to only 60% of the inmate population."²⁶ The work situation was characterized as "dismal,"²⁷ with the inmates generally idle and receiving little or no training in marketable skills.²⁸ Security and treatment classifications, which determined an inmate's eligibility for prison housing, jobs and programs,²⁹ were found by Judge Bownes to be "like so many other aspects of prison life, [because they] did not correspond at all with the outline of the procedures given by defendants."³⁰

17. 437 F. Supp. at 323-24.

18. *Id.* at 280.

19. *Id.* at 323.

20. *Id.* at 281.

21. *Id.* at 323.

22. *Id.* at 282.

23. *Id.* at 324. The one full-time physician was found to have an "overwhelming" workload and was "on call twenty-four hours a day, seven days a week." *Id.* at 285. He spent "approximately \$1,000 per year of his personal income purchasing medication for the prisoners because the budget [was] inadequate." *Id.* at 288. The infirmary had "not been licensed by the New Hampshire Department of Public Health since January, 1968." *Id.* at 284.

24. *Id.* at 290.

25. *Id.* at 324.

26. *Id.* at 295.

27. *Id.* at 294.

28. *Id.* at 325. Most jobs were found to take "only between fifteen and forty-five minutes a day." *Id.* at 293.

29. *Id.* at 300.

30. *Id.* The court found that "few, if any [inmate files] contained even a majority of

Applying the totality of conditions analysis the court found that "[t]ime at NHSP costs a man more than part of his life; it robs him of his skills, his ability to cope with society in a civilized manner, and, most importantly, his essential human dignity."³¹ Judge Bownes concluded that "the conditions at NHSP make degeneration probable and reform unlikely."³² Thus, according to the court's application of the degeneration/recidivism test the cumulative impact of the prison conditions violated the eighth amendment's proscription against cruel and unusual punishment.

The court ordered extensive reforms, with measures ranging from a permanent closing of the old isolation cells to overhauling programs relating to mental and physical health, education, vocational training and prisoner classification.³³

the materials that [were] supposed to be considered" by the Classification Team. *Id.* Furthermore, the treatment and security classifications generally did not affect eligibility for jobs, programs or housing inside the prison. *Id.* at 301.

Failure to comply with the prisoner reclassification section of the prison reform ordered in *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977) recently resulted in a civil contempt citation for the State of Rhode Island. *N.Y. Times*, Mar. 29, 1978, at 12A, col. 6. The court stated in its citation that it was "dismayed at defendants' inability to perceive the potential for inmate abuse, degradation and fear of violence and rape which is perpetuated by the lack of proper classification." *Id.*

31. *Id.* at 325.

32. *Id.*

33. The detailed court order included the following provisions: In addition to closing the old isolation cells permanently, it prohibited the confinement of any inmate in acceptable isolation cells for more than fourteen consecutive days, and required that one so confined receive a daily examination by a qualified medical professional, *id.* at 326; ordered that food be prepared under the direction of a qualified dietitian and that each prisoner who required a special diet for reasons of health or religion be provided the appropriate diet, *id.*; required that all the facilities be brought into compliance with the appropriate health, medical and fire codes, *id.*; ordered a detailed major upgrading in the medical and mental health service programs, *id.* at 327-28; ordered the hiring of an outside expert to aid in the planning and implementation of a prisoner classification system, under which each inmate's eligibility for various prison programs could be rationally determined, *id.* at 329; required that each prisoner be afforded an opportunity to work at a useful job, and that each inmate be afforded an opportunity to learn a skill marketable in New Hampshire; ordered the hiring of the necessary staff to implement at least six meaningful vocational training programs, *id.* at 329; ordered the hiring of additional teachers to accomplish specific educational goals, *id.* at 330; ordered the hiring of a recreational director to oversee recreational, sports and exercise programs, *id.*; ordered improvements in the visitation facilities, *id.*; and enjoined defendants from harassing or in any way interfering with any prisoner's sixth amendment right of access to the courts, *id.* at 331.

The defendants were ordered to submit a plan to the court to show how they intended to implement each requirement of the order, *id.* at 325; the court issued a partial stay order

II. THE FRONTIER OF THE EIGHTH AMENDMENT

The totality of conditions analysis and the extensive relief ordered place *Laaman* in a class of significant prison reform cases which have expanded the boundaries of the application of the eighth amendment.³⁴ Although the conditions found by the court in *Laaman* depict a grim, prisoner-degenerating existence, Judge Bownes did not find that the daily prison life at NHSP was characterized by the shocking conditions which have supported a holding of cruel and unusual punishment in other cases. Absent at NHSP were the horrendous overcrowding,³⁵ the racial discrimination,³⁶ and the everyday occurrences of "robbery, rape, extortion, theft and assault"³⁷ found in *Pugh v. Locke*,³⁸ *Williams v. Edwards*³⁹ and *Holt v. Sarver*.⁴⁰ The court also expressly acknowledged the absence of the "medical horror stories" which were found to be dispositive of

pending appeal. *Laaman v. Helgemoe*, No. 75-258 (D.N.H., Oct. 17, 1977).

Failure to comply with a portion of the sweeping prison reform ordered in *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977) recently resulted in a civil contempt citation for the State of Rhode Island. *N.Y. Times*, Mar. 29, 1978, at 12A, col. 6. Federal District Court Judge Raymond Pettine ordered that Rhode Island be fined \$1,000 a day if it did not come into compliance by May 1, 1978. *Id.*

34. See, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3571 (U.S. Mar. 14, 1978) (No. 77-1107); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119 (D.D.C. 1976); *Barnes v. Virgin Islands*, 415 F. Supp. 1218 (D. St. Croix 1976); *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), Supplemental Opinion and Order June 14, 1977, *aff'd*, 564 F.2d 388 (10th Cir. 1977); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

35. See, e.g., *Pugh v. Locke*, 406 F. Supp. 318, 322 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3571 (U.S. Mar. 14, 1978) (No. 77-1107), where conditions were so crowded that inmates in quarantine had to sleep on mattresses "spread on floors in hallways and next to urinals." 406 F. Supp. at 323.

36. 406 F. Supp. at 325.

37. *Id.* at 324. The district court described the Alabama penal system as marked by "rampant violence and jungle atmosphere," *id.* at 325, and counsel for the State admitted "that the evidence conclusively established aggravated and existing violations of plaintiffs' Eighth Amendment rights." *Id.* at 322.

38. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3571 (U.S. Mar. 14, 1978) (No. 77-1107).

39. 547 F.2d 1206 (5th Cir. 1977). In that case an undisputed finding was made that in the three years prior to hearings by the Special Master there had been more than 270 stabbings of inmates by other inmates, with twenty deaths resulting. *Id.* at 1211.

40. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

the constitutional issue in other prison cases.⁴¹ Thus, *Laaman* goes further than previous prison reform cases by finding the cruel and unusual punishment clause applicable to a totality of "threatening" and "inadequate" or "insufficient" conditions.⁴²

While recognizing that prison administrators must be allowed broad discretion in performing their tasks, the court's analysis began with the premise that prisoners lose only those constitutional protections which are "'essential concomitants of incarceration.'" ⁴³*Laaman* then drew⁴⁴ upon the recent United States Supreme Court opinions of *Gregg v. Georgia*⁴⁵ and *Furman v. Georgia*⁴⁶ where, in the context of capital punishment, the Supreme Court stated that punishment must comport with human dignity to be constitutional.⁴⁷ *Laaman* further relied⁴⁸ upon *Estelle v. Gamble*⁴⁹ where the Supreme Court stated that the eighth amendment "proscribes more than physically barbarous punishments,"⁵⁰ and which held that

41. *Laaman v. Helgemoe*, 437 F. Supp. 269, 312 (D.N.H. 1977). See, e.g., *Williams v. Edwards*, 547 F.2d 1206, 1217 (5th Cir. 1977), where "unsupervised inmate staff appl[ie]d casts to broken bones, sutur[ed] wounds and perform[ed] other technical tasks for which the parties stipulated that they were unqualified." The parties also stipulated that "inmates in need of surgery [had to] wait five to six months." *Id.* Furthermore, the whirlpool bath of the physical therapy department "was inhabited by fish being kept fresh prior to being eaten." *Id.*

42. Whereas previous "totality of conditions" cases have premised their holdings of cruel and unusual punishment upon a finding of "shocking" conditions, see *Confronting the Conditions*, *supra* note 3, at 369, the court in *Laaman* found an absence of shocking conditions. See note 4 *supra*. The court expressly incorporated a consideration of "threatening" conditions in its test for cruel and unusual punishment, 437 F. Supp. at 323. In describing the conditions at NHSP, the court frequently used the adjectives "inadequate" and "insufficient." See, e.g., 437 F. Supp. at 280, 302, 323, 324.

43. 437 F. Supp. at 307 (quoting *Newman v. Alabama*, 503 F.2d 1320, 1329 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975)). An early statement of this principle was made in *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), where the court stated that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." Although the United States Supreme Court has not explicitly announced such a standard, it has recognized that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). See also *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Cruz v. Beto*, 405 U.S. 319, 321, 322 (1972).

44. 437 F. Supp. at 307-08.

45. 428 U.S. 153 (1976).

46. 408 U.S. 238 (1972).

47. *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion of Stewart, Powell and Stevens, J.J.); *Furman v. Georgia*, 408 U.S. at 270 (Brennan, J., concurring).

48. 437 F. Supp. at 308, 315.

49. 429 U.S. 97 (1976).

50. *Id.* at 102.

"deliberate indifference to serious medical needs of prisoners"⁵¹ was unconstitutional as an "'unnecessary and wanton infliction of pain.'"⁵² Judge Bownes also cited⁵³ *Pell v. Procunier*,⁵⁴ a case in which inmates brought an unsuccessful first amendment challenge to a prison regulation prohibiting media interviews with prisoners, and *Gregg v. Georgia*,⁵⁵ for their dicta that prisoner deprivations must be justified by the legitimate penological objectives of the correctional system.⁵⁶

The *Laaman* court, using these Supreme Court principles as an analytical starting point, then surveyed⁵⁷ the conditions found and the remedies ordered by other federal courts that have taken an active role in applying the eighth amendment to prison conditions.⁵⁸ Although conceding that no federal constitutional right to rehabilitation had yet been judicially recognized,⁵⁹ Judge Bownes acknowledged a "growing recognition that convicts have a right to be incarcerated in conditions that: First, do not threaten their sanity or mental well-being; second, are not counterproductive to the in-

51. *Id.* at 104.

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

53. 437 F. Supp. at 315.

54. 417 U.S. 817 (1974).

55. 428 U.S. 153 (1976).

56. *Pell v. Procunier*, 417 U.S. at 822; *Gregg v. Georgia*, 428 U.S. at 183 (plurality opinion of Stewart, Powell and Stevens, J.J.). The First Circuit Court of Appeals recently rejected the penological objectives test as applied by Judge Bownes, noting that it had not been accepted by a majority of the United States Supreme Court. See *Nadeau v. Helgemoe*, 561 F.2d 411, 415 (1st Cir. 1977). But see *Coker v. Georgia*, 97 S. Ct. 2861 (1977), where the plurality opinion of Mr. Justice White, joined by Justices Stewart, Blackmun and Stevens, recognized a penological objectives test; and *Gregg v. Georgia*, where Mr. Justice Powell, joined the plurality opinion of Justices Stewart and Stevens, which stated that a penalty might be cruel and unusual if it were "so totally without penological justification that it results in the gratuitous infliction of suffering." 428 U.S. 153, 183 (1976) (plurality opinion of Stewart, Powell and Stevens, J.J.). Thus by combining the recent opinions in *Coker* and *Gregg*, it appears that a majority of the United States Supreme Court has accepted the validity of the penological objectives test, at least in the context of capital punishment.

57. *E.g.*, 437 F. Supp. at 308-23.

58. See, *e.g.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3571 (U.S. Mar. 14, 1978) (No. 77-1107); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119 (D.D.C. 1976); *Barnes v. Virgin Islands*, 415 F. Supp. 1218 (D. St. Croix 1976); *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), Supplemental Opinion and Order June 14, 1977, *aff'd*, 564 F. 2d 388 (10th Cir. 1977).

59. 437 F. Supp. at 316.

mates' efforts to rehabilitate themselves; third, do not increase the probability of the inmates' future incarceration."⁶⁰ Building on the "unnecessary suffering" rationale in *Gamble*, the court stated that "[i]mprisonment in an institution where degeneration is probable and self-improvement unlikely would cause unnecessary suffering in the form of probable future incarceration."⁶¹ The court buttressed its position by reasoning that punishment "under conditions which spawn future crimes and more punishment" would be, as in *Gregg*, "so totally without penological justification that it [would result] in the gratuitous infliction of suffering' in violation of the Eighth Amendment."⁶² Furthermore, the court noted that the "emergent right" to be imprisoned in conditions that do not increase the likelihood of future incarceration is also based upon society's interest in avoiding the cultivation of recidivism.⁶³

The unifying theme of the court's analysis is that human dignity is at the core of the eighth amendment.⁶⁴ The cumulative impact of prison conditions is constitutionally impermissible if it unnecessarily violates human dignity and inflicts additional suffering in the form of a likelihood of degeneration and/or recidivism.⁶⁵ "Incarceration is the legitimate punishment for convicted felons," not needless deprivations.⁶⁶

The *Laaman* recognition of a fundamental human dignity right for prisoners, set in the framework of a totality of "non-shocking" conditions, represents the furthest reach of eighth amendment protection for prisoners to date. Its unique test focuses on the underlying substantive issue of the degenerative impact upon the individual and the resulting probability of recidivism as an interest of both the inmate and society. Although *Laaman* does not explicitly recognize a right to rehabilitation, one result of applying the court's test would

60. *Id.* (citations omitted).

61. *Id.*

62. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

63. *Id.*

64. The court stated that at least five members of the United States Supreme Court have accepted an eighth amendment test in the context of the death penalty as one of determining whether a punishment "comports with the basic concept of human dignity at the core of the Amendment. . . ." *Id.* at 308 (quoting *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976)). Judge Bownes applied this test. *Id.*

65. 437 F. Supp. at 323.

66. *Id.* at 308.

be to require the state to provide conditions which at least do not impede the rehabilitation of inmates. Read more broadly, the decision imposes an affirmative, rehabilitative duty upon the state, for if a probability of degeneration/recidivism violates the eighth amendment,⁶⁷ then it arguably follows that the only way to pass constitutional muster would be to provide a probability of rehabilitation.

III. ISSUES PRESENTED

One difficulty with the *Laaman* test is defining the extent of the state's rehabilitative duty: it is unclear whether the state's responsibility under the eighth amendment is limited simply to providing sufficient *opportunities* to overcome the degenerative aspects of imprisonment, or whether it has an absolute duty to insure that there be a probability of rehabilitation.⁶⁸ Furthermore, no clear standard is presented to measure the threat of degeneration or the probability of recidivism.⁶⁹ And whose probability of recidivism is considered—each inmate's or perhaps the average inmate's? Even if all the ordered reforms were instituted, would NHSP—or any prison in America—meet the court's degeneration/recidivism standard?

More fundamentally, the State is expected to argue on appeal that the court's finding of a constitutional violation in the face of "non-shocking" conditions was an unwarranted application of the eighth amendment,⁶⁹ and that the court's holding and relief order overstepped the judicial boundaries imposed by the separation of powers and our federal system of government. The opinion of the

67. *Id.* at 316, 323.

68. There is an implication that the state's duty would be fulfilled if it were to "provide sufficient time, opportunities and encouragement to overcome the degenerative aspects . . . so that at least the state takes no part in the promotion of further crimes." *Id.* at 317. The *Laaman* test provides, however, that the eighth amendment is violated whenever the cumulative impact of conditions "threatens the physical, mental and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration. . . ." *Id.* at 323. Thus, even if sufficient opportunities for rehabilitation were provided, arguably there could still be a probability of degeneration/recidivism.

69. Telephone interview with New Hampshire Assistant Attorney General James C. Sargent, Jr. (Mar. 14, 1978).

70. *See, e.g.,* *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) where the Court stated:

First Circuit in *Nadeau v. Helgemoe*,⁷¹ issued after *Laaman*, provides clues as to how the appellate court may react. In *Nadeau* the inmates at NHSP brought a class action, via the first, sixth, eighth and fourteenth amendments, against the unequal treatment of prisoners in protective custody.⁷² The First Circuit specifically rejected Judge Bownes' use of a "novel" eighth amendment test that all punishments must have a legitimate penological purpose.⁷³ The appellate court held that such a test "at the present stage of development of the law relating to prisoners . . . [was] not required by the Constitution."⁷⁴ In so ruling, the court noted that there was a "likelihood that the legitimate penological purpose test, as applied below, would simply substitute the values and judgment of a court for the values and judgment of the legislature and prison administration."⁷⁵

Although *Laaman* does not primarily rely upon the penological purpose test, a strong argument can be made that the degeneration/recidivism test is both more "novel" and at least equally susceptible to judicial overreaching. On the other hand, in affirming Judge Bownes' decision in part, the appellate court in *Nadeau* stated that "the changes ordered by the district court strike us as wise."⁷⁶ Furthermore, the closing language of the First Circuit's opinion indicates that the door to judicially ordered prison reform is still open:

We emphasize that our rejection of the district court's novel test is not a signal to abandon any judicial role in prison af-

Suffice it is to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Accord, *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973); *Nadeau v. Helgemoe*, 561 F.2d 411, 417 (1st Cir. 1977).

71. 561 F.2d 411 (1st Cir. 1977), *aff'g in part and vacating and remanding in part*, 423 F. Supp. 1250 (D.N.H. 1976).

72. 423 F. Supp. 1250 (D.N.H. 1976). Protective custody is the voluntary segregation of those prisoners who fear for their safety. *Id.* at 1254.

73. 561 F.2d at 415. *See* note 56 *supra*.

74. 561 F.2d at 415.

75. *Id.* at 417.

76. *Id.* at 419.

fairs. Our major purpose in this opinion, compelled by the present state of the authorities, has been to indicate that while the court's review should continue to be rigorous, such review must take into account rational positions advanced by the prison authorities. But genuinely barbarous or shocking prison conditions must not be tolerated. . . .⁷⁷

Since neither the First Circuit nor the United States Supreme Court has decided a totality of prison conditions case, it is probable that the First will look to the Fifth and Eighth Circuits which have shared the leadership in the contemporary expansion of the application of the eighth amendment to prison conditions.⁷⁸ Perhaps the most significant recent case, and one which formed a theoretical bridge to the *Laaman* degeneration/recidivism analysis, is the Federal District Court opinion of Judge Frank Johnson⁷⁹ in *Pugh v. Locke*.⁸⁰ There, in the face of admitted violations of the eighth amendment,⁸¹ the district court stated in dicta⁸² that it was "cruel and unusual punishment to confine a person in an institution which

77. *Id.* at 420.

78. The Eighth Circuit was the first to recognize the totality of prison conditions approach as an extension of the application of the eighth amendment "shocking" test. See *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Confronting the Conditions*, *supra* note 3 at 372; *Role of the Eighth Amendment*, *supra* note 7, at 659-63; Note, *Decency And Fairness: An Emerging Judicial Role In Prison Reform*, 57 VA. L. REV. 841, 858-59 (1971). More recently, the Eighth Circuit applied the totality approach in *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974).

A review of relevant decisions indicates that, along with the above Eighth Circuit decisions, cases from the Fifth Circuit are most frequently cited in support of a conclusion that the totality of prison conditions may violate the eighth amendment. See, e.g., *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3571 (U.S. Mar. 14, 1978) (No. 77-1107). See generally *Confronting the Conditions*, *supra* note 3.

79. Judge Johnson was nominated by President Carter to be Director of the FBI. The nomination was withdrawn at Judge Johnson's request, however, because of ill health. N.Y. Times, Nov. 30, 1977, at 1, col. 2.

80. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rehearing and rehearing en banc denied*, 564 F.2d 97 (1977), *petition for cert. filed*, 46 U.S.L.W. 3571 (U.S. Mar. 14, 1978) (No. 77-1107).

81. 406 F. Supp. at 322. "The trial concluded with the admission by defendants' lead counsel, in open court, that the evidence conclusively established aggravated and existing violations of plaintiffs' Eighth Amendment rights." *Id.*

82. The holding of *Pugh* apparently rested on the conclusion that the conditions of confinement bore no reasonable relation to legitimate institutional goals, *id.* at 329, although as the court stated, "[t]here can be no question that the present conditions of confinement . . . violate any current judicial definition of cruel and unusual punishment. . . ." *Id.*

increase[d] the likelihood of future confinement" and that "a penal system cannot be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation."⁸³ Judge Bownes extended the application of the dicta in *Pugh* to reach a holding of an eighth amendment violation in the absence of shocking conditions. Although the Court of Appeals for the Fifth Circuit affirmed *Pugh*, it declined to enter the "unchartered bog" of what is needed to avoid mental, physical and emotional deterioration.⁸⁴ The Court of Appeals instead concluded that the state met its obligations under the eighth amendment if it "furnishe[d] its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment."⁸⁵

There is a tension in the Fifth Circuit's opinion: although it expressed deep concern with judicial overreaching, it also affirmed the judicial activism of a totality approach and most of the detailed relief order. Recent decisions of the United States Supreme Court also reflect the shifting, uneasy balance between the expanding dynamics of the eighth amendment and the issues of separation of powers in a federal system of government.⁸⁶

83. *Id.* at 330. It is interesting to note that the Court of Appeals for the Tenth Circuit, in a decision issued approximately four months after *Laaman*, seems to substantially adopt the *Laaman* test in dicta. See *Battle v. Anderson*, 564 F.2d 388, 403 (10th Cir. 1977) where the court stated without citation "[w]e believe that [an inmate] is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being." The court also stated that the eighth amendment is "intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely. . . ." 564 F.2d at 393 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Gregg v. Georgia*, 428 U.S. 153 (1976) without mention of *Laaman* or *Pugh*).

84. 559 F.2d at 291.

85. *Id.*

86. A reading of the unusually large number of separate opinions in the capital punishment cases of *Coker v. Georgia*, 97 S. Ct. 2861 (1977) (death penalty for rape held excessive punishment in violation of the eighth amendment), and *Gregg v. Georgia*, 428 U.S. 153 (1976), demonstrates the Court's difficulty with the application, within a federalist system, of the *Tropp v. Dulles*, 356 U.S. 86, 101 (1958), proposition that "[t]he [eighth] amendment must draw its meaning from the evolving standards of decency." This grappling with the issue of the extent of the application of constitutional standards to state inmates is evident in other contexts as well. Compare *Jones v. North Carolina Prisoners' Union*, 97 S. Ct. 2532 (1977) (upheld prison regulations against first amendment and equal protection challenges that prohibited prisoners from soliciting other inmates to join the union and barred union meetings) with *Bounds v. Smith*, 430 U.S. 817 (1977) (held that the fundamental constitutional right of access to the courts requires that prison authorities provide inmates with adequate law libraries or adequate assistance from legally trained persons).

One objective tool which the courts may profitably utilize in resolving what the eighth amendment requires and federalism permits is a comparison of the conditions at bar with the standards of the voluntary prison accreditation program of the American Correctional Association.⁸⁷ That organization has recently published a *Manual of Standards for Adult Correctional Institutions*⁸⁸ which has been hailed as "[w]hat will likely prove to be the most influential standards ever written for adult correctional institutions."⁸⁹ Its 465 standards are already field-tested and are "said to represent 'a professional consensus.'"⁹⁰ Since there are other instances in which the United States Supreme Court has taken judicial notice of objective evidence in determining "contemporary standards of decency,"⁹¹ the above standards and accreditation system should be of aid to the courts in their determination of the contemporary requirements of the eighth amendment.⁹² The weight which courts give to such standards may shape the judicial response to the *Laaman*-type application of the eighth amendment.

CONCLUSION

The application of the eighth amendment by Judge Bownes to "non-shocking" prison conditions places *Laaman* at the forefront of constitutional prison reform. In expanding the reach of the eighth

87. The American Correctional Association, founded in 1870, sponsored the preparation and publication of the *Manual of Standards for Adult Correctional Institutions* (1977) by the commission of the Accreditation for Corrections, Inc. The Commission is a group of twenty correctional and criminal justice administrators and professionals elected by the membership of the Association.

88. COMMISSION ON ACCREDITATION FOR CORRECTIONS, *MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS* (1977).

89. 8 CRIMINAL JUSTICE NEWSLETTER, Sept. 26, 1977, at 1.

90. *Id.*

91. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103-04 n.8 (1976), where the Court noted support in its determination of "contemporary standards of decency" by reference to various proposed minimum standards for the treatment of prisoners.

92. It is interesting to observe that the relief ordered by Judge Bownes generally falls well within the above proposed accreditation standards of the American Correctional Association. The question, of course, is to what extent compliance with the standards is required by the eighth amendment's "evolving standards of decency." For a recent eighth amendment totality of prison conditions case where the court made considerable use of independent organizational standards, see *Palmigiano v. Garrahy*, 443 F. Supp. 956, 961 n.2, 979-80 n.30, 990-94 (D.R.I. 1977).

amendment, however, *Laaman* may be criticized as an impermissible intrusion into legislative and executive prerogatives. Furthermore, its degeneration/recidivism standard presents questions of workability and achievability. But the fact that a decision raises questions and departs from tradition has not always been dispositive of a constitutional issue.⁹³ This is especially true of the eighth amendment, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁹⁴ The First Circuit, in deciding *Laaman*, may provide a clearer definition of the constitutional standard of decency for prisoners.

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93. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Tropp v. Dulles*, 356 U.S. 86 (1958); *Brown v. Board of Education*, 347 U.S. 483 (1954).

94. *Tropp v. Dulles*, 356 U.S. 86, 101 (1958).

