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The Federal Judiciary's Role in the Prevention of Communicable Diseases in State Prisons

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THE FEDERAL JUDICIARY'S ROLE IN THE PREVENTION OF COMMUNICABLE DISEASES IN STATE PRISONS

I. Introduction

The goal of preventing the spread of communicable diseases in prisons is widely accepted. Yet the United States apparently has failed to achieve that goal, because the rate at which communicable diseases are contracted in prisons remains high.

Control over the spread of communicable diseases is particularly important in prisons. The high incidence of disease among inmates entering prisons is amplified by the special circumstances of the prison setting that promote the spread of communicable diseases and

1. See American Public Health Ass'n, Control of Communicable Diseases in Man 288 (A. Benenson ed. 1970) (communicable disease defined as illness that arises through transmission of specific infectious agent to susceptible host).
2. For the purposes of this Note, "prison" is defined as any federal, state or local facility used to incarcerate convicted criminals.
3. See Standard Minimum Rules for the Treatment of Prisoners Rule 24 (United Nations 1955) in Medical Care of Prisoners and Detainees app. 1 at 202 (Ciba Foundation Symposium 1973) (minimum rule mandating examination of every prisoner, with particular emphasis on discovering and segregating prisoners with communicable disease) [hereinafter cited as United Nations Standards]. France, for example, has implemented a policy of disease prevention in its prisons. Fully, Penitentiary Medicine in France in Medical Care of Prisoners and Detainees 80 (Ciba Foundation Symposium 1973) ("[p]reventive medicine is exercised in the form of systematic screening for tuberculosis, venereal diseases and mental diseases ...").
4. See D. Jones, The Health Risks of Imprisonment 36 (1976) (prisoners under 45 years of age had reported sickness rate 3.2 times higher than non-institutionalized males of same age group); Walker & Gordon, Health and High Density Confinement in Jails and Prisons Fed. Probation, March 1980, at 53, 56 (American Medical Association (AMA) found an extremely high incidence of communicable diseases among inmates in United States correctional institutions).
6. See Amicus Brief, supra note 5, at 13 ("[t]he broad consensus of medical judgment is opposed to prolonged close confinement because of the 'danger of [the] spread of acute infectious diseases' ") (citation omitted); L. Novick & M. Al-Ibrahim, Health Problems in the Prison Setting: A Clinical and Administrative Approach 5 (1977) (prisoners are special "at-risk" population with respect to certain health problems) [hereinafter cited as Health Problems]. See generally Sobal & Loveland, Infectious Disease in a Total Institution: A Study of the Influenza Epidemic of 1978 on a College Campus, 97 Public Health Reports 66, 67 (1982) (social structure of "total" institutions, i.e., those characterized by standardized mass activity under central authority, provides greater opportunity for spread of infectious disease).
foster diseases like Acquired Immunodeficiency Syndrome (AIDS)\textsuperscript{7} and tuberculosis.\textsuperscript{8} The extent of the spread of disease, coupled with inmates' dependency on prison authorities for proper medical care,\textsuperscript{9} mandate close scrutiny of both judicial and legislative responses to the problem.\textsuperscript{10}

Insufficient state legislation\textsuperscript{11} and unresponsive prison administrators\textsuperscript{12} have forced prisoners to seek federal judicial relief.\textsuperscript{13} Federal overcrowding in prisons increases the risk of the spread of communicable disease. See Battle v. Anderson, 564 F.2d 388, 398 (10th Cir. 1977) (for example, flu, hepatitis, tuberculosis, etc).

7. LaRocca v. Dalsheim, 120 Misc. 2d 697, 702, 467 N.Y.S.2d 302, 306 (Sup. Ct. Dutchess County 1983). "On consideration of age, sex, and geographical distribution, coupled with the homosexual and IV drug user prison population, it must be, and indeed is, recognized that a state correctional facility . . . is a potentially high risk setting for AIDS." \textit{Id. But see} Maffucci, \textit{Responding to AIDS in Prisons: The Team Approach}, 45 \textit{CORRECTIONS TODAY} 68, 82 (Dec. 1983) (inmates who are not intravenous drug users and do not engage in homosexual activity have no greater risk of developing AIDS than general public).

8. Abeles, Feibes, Mandel & Girard, \textit{The Large City Prison: A Reservoir of Tuberculosis}, 101 AM. REV. OF RESPIRATORY DISEASE 706, 708 (1970) ("[t]he population of a large city prison is an ideal seed bed for tuberculosis"); Stead, \textit{Undetected Tuberculosis in Prison: Source of Infection for Community at Large}, 240 J. A.M.A. 2544 (1978) (documented rate of tuberculosis among inmates in Arkansas prisons was reported to be 6.5 times greater than in general population).

9. See Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met"); Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977) (government has affirmative duty to meet inmates' medical needs).

10. Enforcing prisoners' rights to medical care may require wide-ranging reform of systemic problems, such as reducing prison populations, shutting an entire facility or even questioning the very institution of imprisonment. See Note, \textit{Complex Enforcement: Unconstitutional Prison Conditions}; 94 HARV. L. REV. 626, 635-37 (1981) [hereinafter cited as \textit{Complex Enforcement}]. With these possibilities in mind, this Note will be limited to the discussion of less drastic disease preventive measures such as intake screening, periodic physical examinations, hygiene maintenance and adequate record-keeping. For a discussion of model standards, see infra text accompanying notes 148-71.

11. For a discussion of state statutes, see infra notes 120-25 and accompanying text.

12. See Union County Jail Inmates v. Dibuono, 718 F.2d 1247, 1253 (3d Cir. 1983) (petition for rehearing en banc denied) (Gibbons, J., dissenting) ("[c]ounty officials acknowledge that new inmates are not given complete physical examination at the time of commitment"); French v. Owens, 538 F. Supp. 910, 918 (S.D. Ind. 1982) (despite statute entitling committed prisoner to medical care (IND. CODE ANN. § 11-10-3-2(c) (Burns 1981)), prisoners' communicable tuberculosis went undetected for months).

13. See Hass, \textit{The Comparative Study of State and Federal Judicial Behavior Revisited}, 44 J. OF POLITICS 721 (1982) (state supreme courts have been significantly less inclined than United States Courts of Appeals to support prisoners' efforts to secure judicial redress of their grievances).
courts, however, traditionally have been reluctant to become entangled with state prison administration due to the barriers established by federalism and separation of powers. This Note attempts to balance the federal courts' need to insure that state prisoners are adequately protected from communicable diseases against the argument that federal judicial interference in state prison administration endangers legitimate state interests of federalism and separation of powers.

II. Federalism

The federal government's excessive entanglement with the administration of state affairs traditionally has been proscribed by the doctrine of federalism. The contemporary federal/state conflict is posed most sharply in lawsuits brought against state and local officials in federal courts under 42 U.S.C. § 1983. This conflict inevitably surfaces in prison condition cases because complaints about inade-

14. See L. Berkson, The Concept of Cruel and Unusual Punishment 111-12 (1975) (hands-off doctrine is based on fundamental principles of separation of powers, federalism and judicial self-restraint) [hereinafter cited as Berkson]; Comment, Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform, 12 Harv. C.R.-C.L. L. Rev. 367, 371 (1977) ("[t]he need to remedy constitutional violations stands against the notion that judicial interference in prison administration endangers legitimate concerns of federalism, the separation of powers, and deference to the expertise of state administrators") (footnotes omitted) [hereinafter cited as Prison Reform].

15. This Note challenges the notion that a study of prison reform requires application of very narrow legal principles that are restricted to the confines of prisons, since a solution to the problem of communicable disease transcends prison walls and requires an examination of fundamental concepts of American democracy. See P. Clute, The Legal Aspects of Prisons and Jails 5 (1980).

16. See The Federalist No. 23, at 256 (J. Madison) (Colonial Press 1901). "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Id.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

18. For a discussion of prison condition cases under the eighth amendment see infra notes 72-100 and accompanying text.
quate state prison conditions typically are brought in federal district courts. Three different stages of judicial responses to this problem have emerged.

A. The Hands-off Policy

In the past, federal courts took a “hands-off” approach to complaints about state correctional practices. This policy had the advantage of leaving the decision-making to those most knowledgeable about the needs of the local correctional system while avoiding federal intervention in state affairs. However, the “hands-off” approach had the disadvantage of leaving important constitutional issues at the administrative rather than the judicial level, where “administrative decisions were largely invisible, reasons for decisions were seldom given, and formal policies were largely nonexistent.” The demise of the “hands-off” doctrine has been well chronicled, reducing it to


22. See Prieser v. Rodriguez, 411 U.S. 475, 492 (1973) (disputes in state prisons over “eating, sleeping, dressing, washing, working and playing... are so peculiarly within state authority and expertise the states have an important interest in not being bypassed in the correction of those problems”); Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972). The tools for prison reform “do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perserverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities.” Id. Why Intervention, supra note 20, at 37 (intervention in prison affairs usurps powers reserved to states).


24. See, e.g., Bell v. Wolfish, 441 U.S. 520, 562 (1979); Comment, Eighth Amendment—A Significant Limit on Federal Court Activism in Ameliorating State
historical significance, but the doctrine continues to provide insight into the federal judiciary's attitude toward state prisons.

B. The Open Door Policy

During the 1960's and 1970's, access to the federal judiciary, foreclosed during the hands-off era, was opened wide to inmate complaints about state prison conditions. This access was immediate and burgeoning. The epitome of the open door era were decisions which examined prisons in great detail and fashioned remedies touching nearly every aspect of prison life. This judicial activism gave way to a period of re-evaluation.

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For the seminal work on the demise of the hands-off doctrine, see Comment, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L.J. 506 (1963).

25. See Judicial Report, supra note 19, at 30 (recognizing "open-door" era); Why Intervention, supra note 20, at 37 ("during the 1960s and 1970s literally thousands of Section 1983 actions were filed by state prisoners").


State prison condition cases brought under the Federal Habeas Corpus Act, 28 U.S.C. §§ 2241-2255 (1976), require a prior exhaustion of state remedies. 28 U.S.C. § 2254b (1976) (writ of habeas corpus will not be granted unless applicant exhausts available remedies in state courts). Although habeas corpus remains a permissible means of bringing conditions-of-confinement cases, see Judicial Report, supra note 19, at 1 n.8 (some state conditions-of-confinement cases are brought under 28 U.S.C. § 2254), the Advisory Committee on Rules of Criminal Procedure has advised against it. H.R. Doc. 94-464, 94th Cong., 2d Sess. 113 (1976).

27. In 1966, the first year that civil rights cases filed by prisoners were categorized separately, state prisoners filed 218 civil rights complaints. By 1976, the number had increased by nearly 3,100% to 6,958 cases. Administrative Office of the U.S. Courts, Annual Report of the Director 159 (1976).

28. See infra notes 76-84 and accompanying text for a discussion of the totality approach under the eighth amendment.

29. See Judicial Report, supra note 19, at 31 (recognizing period of re-evaluation).
C. Re-evaluation

Recently, both Congress\textsuperscript{30} and the federal judiciary\textsuperscript{31} have attempted to re-evaluate the role of federal courts in state prison affairs.

1. Congress

In 1980, Congress passed the Institutionalized Persons Act (the Act).\textsuperscript{33} The Act has two primary purposes. First, it gives the United States Attorney General standing\textsuperscript{33} to bring federal suits on behalf of residents of state institutions to protect their constitutional and federal statutory rights.\textsuperscript{34} Secondly, the Act mandates that federal courts grant continuances\textsuperscript{35} to section 1983 actions brought by adult prisoners who have not exhausted “plain, speedy, and effective administrative remedies as are available.”\textsuperscript{36} This exhaustion requirement is a narrow exception to the general rule that exhaustion of state remedies is not a prerequisite to section 1983 action.\textsuperscript{37}


\textsuperscript{31} Id. In contrast to the open door policy, "[r]ecent United States Supreme Court decisions have emphasized judicial deference to the decisions of prison administrators in the management of prisons." Id. See infra notes 51-55 and accompanying text for a discussion of those decisions.


\textsuperscript{33} 42 U.S.C. § 1997a (Supp. V 1981). This portion of the Act was passed in response to two decisions holding that the United States Attorney General lacked standing to initiate civil challenges to conditions in state institutions. See Senate Report, supra note 32, at 2-3; 1980 U.S. CODE CONG. & AD. NEWS at 789-90 (citing United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), aff'd, 563 F.2d 1121 (4th Cir. 1977); United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979)).

\textsuperscript{34} The word "institution" is defined at 42 U.S.C. § 1997(1) (Supp. V 1981). Generally, the Act is intended to cover "any facility where persons residing therein are dependent for their basic living needs on the services provided by the facility." See Senate Report, supra note 32, at 36; 1980 U.S. CODE CONG. & AD. NEWS 818. Privately owned and operated facilities whose sole nexus with the state is licensing or payment or approval of a state plan under the Social Security Act are not institutions under the Act. 42 U.S.C. § 1997(2) Supp. V 1981.


\textsuperscript{37} Patsy v. Board of Regents, 457 U.S. 496, 508 (1982). For authority supporting the general rule, see cases cited in supra note 26. This portion of the Act was
The Act's effectiveness and appropriateness in correcting inadequate disease prevention measures is unclear. The Attorney General can bring an action on behalf of prisoners in a state institution only if he has reasonable cause to believe that there is an egregious and flagrant violation of the prisoners' constitutional rights. Violation of prisoners' federal statutory rights, however, does not warrant action by the Attorney General. Combined with the relative disuse of this section of the Act in prison cases, the requirement of an "egregious or flagrant" constitutional violation makes it doubtful that the Attorney General will use the Act to correct a subtle but harmful condition such as the lack of adequate disease prevention measures.

In addition, application of the Act's exhaustion requirement is contingent upon state maintenance of administrative remedies which meet the standards proposed by the Attorney General. A state's administrative remedy can be approved by its district court or certified by the Attorney General. However, only Virginia's administrative remedy has been certified, and district courts have been reluctant in response to the burgeoning number of prisoner cases that found their way into the federal court system during the 1960s and 1970s. Patsy, 457 U.S. at 509.


41. Id. The Act expressly provides that the Attorney General only has standing to sue on behalf of prison inmates for violation of rights "secured or protected by the Constitution of the United States." Id.

42. See N.Y. Times, Feb. 3, 1984 at 1, col. 1 ("[f]ederal officials said the suit was the first against a local jail under the 1980 Civil Rights of Institutionalized Persons Act"). But see United States v. Elrod, 627 F.2d 813 (7th Cir. 1980) (relying on Act, court of appeals reinstated an action brought by Attorney General on behalf of inmates in Illinois prison which previously was dismissed for lack of standing).


44. For a discussion of the constitutionality of disease prevention measures in prisons see infra notes 72-100 and accompanying text.

45. 42 U.S.C. § 1997e(a)(2). "The exhaustion of administrative remedies . . . may not be required unless . . . such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated [by the Attorney General] . . . " Id. These standards are codified at 28 C.F.R. §§ 40.1-.22 (1983).


tant to review administrative procedures in the absence of the Attorney General's certification.48 Thus, the exhaustion requirement has been ineffective in encouraging the states to adopt acceptable administrative remedies.

Even if a state maintains adequate administrative procedures, the physical harm that may result from any delay may make it inappropriate for courts to grant continuances in cases alleging inadequate disease prevention measures.49 The exhaustion requirement is not absolute and should be applied only when "appropriate and in the interests of justice."50

2. Judiciary

The Supreme Court recently has criticized federal judicial intervention in prison administration.51 In Bell v. Wolfish52 and Rhodes v. Chapman53 the Court criticized lower federal court judges for allowing themselves to become involved in the affairs of state prisons.

In Wolfish the Court found that:

many of these... courts have, in the name of the Constitution, become increasingly enmeshed in the minutae of prison operations. Judges... have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of a particular institution... .54

A similar admonition was repeated in Rhodes.55

A severe restriction on federal court intervention in state affairs was enunciated in the recent decision of Penhurst State School and Hospi-
tal v. Halderman. In Penhurst, mentally retarded citizens claimed that state officials violated Pennsylvania’s Mental Health and Mental Retardation Act of 1966. The Court held that the eleventh amendment prohibits federal courts from ordering state officials to conform their conduct to state law even where the claim arises from the federal court’s pendent jurisdiction.60

This decision will have a particularly chilling effect on federal cases alleging inadequate disease prevention measures. In light of Penhurst, federal courts will be proscribed from adjudicating inmates’ claims of inadequate disease prevention measures because the claims are against state officials and often arise from pendent claims alleging violations of state statutes. The Penhurst interpretation of the eleventh amendment, however, does not bar federal courts from enjoining state officials pursuant to the United States Constitution.63

In prison condition cases in particular, the Supreme Court has stated that “a policy of judicial restraint cannot encompass any failure
to take cognizance of valid constitutional claims whether arising in a federal or state institution." Federal court intervention in the prevention of communicable disease therefore hinges on whether lack of a particular disease prevention procedure gives rise to such a valid constitutional claim.

II. Constitutionality

A. Background

Prisoners once were believed to be "slaves of the state" and devoid of all legal rights. Now, a more humanistic approach has been taken by the Supreme Court, which has stated that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." Prisoners' constitutional rights are balanced against legitimate state interests and penal objectives. Unlike school children and pre-
trial detainees, however, prisoners have been granted the protection of the eighth amendment's ban on "cruel and unusual punishments."  

B. The Eighth Amendment

Although the eighth amendment originally was perceived as a ban against whippings, floggings and other forms of excessive punishment, it is a dynamic provision that draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." The prohibition against cruel and unusual punishment is not limited to specific acts directed at select individuals, but is equally applicable to general prison conditions that are violative of these "evolving standards of decency."

Some cases have used emotional language, holding prison conditions unconstitutional if they prompt a "'cry of horror'" or are "foul, . . . inhuman and . . . violative of basic concepts of decency." It is inappropriate to apply these emotional appeals to the failure to maintain adequate disease prevention measures.

Generally courts have considered two unemotional approaches in analyzing the sufficiency of disease prevention measures in prisons. They either apply a specific test to determine the adequacy of prison medical care or use the totality approach.

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70. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (pre-trial detainees are granted protection of fifth or fourteenth amendment's due process clause but not protection of eighth amendment). See Lareau v. Manson, 651 F.2d 96, 102 (2d Cir. 1981) (inquiry regarding pre-trial detainees is whether there was any punishment rather than whether punishment was cruel and unusual).

71. U.S. Const. amend. VIII. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The eighth amendment is applicable to the states through the due process clause of the fourteenth amendment. Robinson v. California, 370 U.S. 660, 667 (1962).

72. See Berkson, supra note 14, at 55. For a history of the eighth amendment, see Granucci, "Nor Cruel and Unusual Punishment Inflicted": The Original Meaning, 57 Calif. L. Rev. 839 (1969).


74. Robinson, 370 U.S. at 676 (Douglas, J., concurring) (quoting O'Neil v. Vermont, 144 U.S. 323, 340 (1891) (Field, J., dissenting)).

75. Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).


77. Estelle v. Gamble, 429 U.S. 97 (1976). "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." Id. at 104 (citation omitted).
1. The Totality Approach

Courts utilizing the totality approach avoid deciding the constitutionality of a single condition by determining whether the cumulative effect of all prison conditions results in the infliction of cruel and unusual punishment. Though there are some advantages to this approach, the totality cases that use traditional eighth amendment tests fail to establish guidelines for particular conditions, thus offering little prospective guidance to prison administrators or courts. However, the extensive court orders which are a by-product of the totality approach offer some guidance.

For example, in Laaman v. Helgemoe, the court found that the "initial failure of the system to provide for discovery of latent and incubating diseases and medical problems" was one of many problems which rendered New Hampshire State Prison's conditions unconstitutional in their totality. The court succeeded, however, in fashioning a precise remedy in spite of its initial broad focus on general prison conditions. The court issued a mandatory injunction ordering "[a] prompt medical examination and medical history by a physician


79. See Prison Reform, supra note 14, at 368-69 (totality approach enables judges to reform more basic problems of filth, overcrowding, inadequate diet and violence, which if decided individually, would not rise to constitutional violation).

80. See Federal Courts, supra note 76, at 127.

81. For examples of extensive court orders, see cases cited in supra note 53.

82. See Complex Enforcement, supra note 10, at 638 (tendency in complex cases is for "remedies to become part of the substantive law, as 'rights' in themselves or, more generally, as the normative criteria by which a system's lawfulness is judged").


84. Id. at 312. A formal policy existed at New Hampshire State Prison requiring a new inmate to have a routine blood test within seventy-two hours of his arrival. In reality, this procedure was a sham as only one inmate testified that he had seen the doctor within the prescribed seventy-two hour period, while many never saw a doctor at all. Id. at 283.

85. The court specifically found inadequate physical facilities, insufficient medical and mental health care and an overall dangerous environment. Id. at 322-25.
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upon commitment, . . . directed to the discovery of physical or mental illness; [and] the segregation of prisoners suspected of infectious or contagious conditions." 86

2. Medical Care under the Eighth Amendment

The alternative to the totality approach is the specific approach. The test used to determine the constitutionality of a prison's medical care under the specific approach was enunciated in *Estelle v. Gamble* 87 and developed in subsequent cases. 88 It is the prevailing basis for determining the adequacy of a prison's disease prevention measures. 89

The Supreme Court in *Estelle* held that deliberate indifference to serious medical needs 90 of prisoners constitutes an unnecessary and wanton infliction of pain proscribed by the eighth amendment. 91 In *Lareau v. Manson*, 92 the Second Circuit quoted *Estelle* in holding that failure to adequately screen newly arrived inmates for communicable diseases was an omission " 'sufficiently harmful to evidence deliberate indifference to serious medical needs.' " 93

The *Estelle* test subsequently was tailored to assist in the identification of systemic institutional violations. Courts have held that the eighth amendment is violated when "systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable." 94

86. Id. at 327.
88. For a discussion of this development, see infra note 95 and accompanying text.
89. See *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (applying *Estelle* to intake screening procedures); *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977) (finding that *Estelle* does not mandate that all incoming prisoners be given medical examination within 36 hours of incarceration in absence of reasonable grounds to suspect that inmate requires examination to protect himself or others).
91. A "serious medical need" is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977).
92. 429 U.S. at 104.
93. 651 F.2d 96 (2d Cir. 1981).
94. Id. at 109.
95. See *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977); accord *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); *Cruz v. Ward*,
This test was used in *Lightfoot v. Walker*, where the court found that the measures used to isolate prisoners with communicable diseases and to conduct physical examinations upon admission were so inadequate that suffering was inevitable.

The *Estelle* test and its progeny are well suited for determining the adequacy of a prison's disease prevention procedure. These tests offer more specific guidelines than the subjective and moralistic *eighth amendment* tests used in totality cases. Frivolous cases that allege inadequate protection from colds and flu will be dismissed as not meeting *Estelle*'s "serious illness" requirement.

A specific approach like *Estelle*', assists federal courts in making their threshold determination of whether a claim that a prison lacks adequate disease prevention measures rises to the level of a constitutional violation. If so, it is a proper subject matter for federal court adjudication.

**C. Constitutional Avoidance**

In determining the need for disease preventive measures, many cases have avoided confrontation with the federalism doctrine by applying state statutes. These statutes are applied in accordance


97. *Id.* at 512, 524. Because examinations systematically lacked blood and syphilis tests and other ordinary preventive medical measures, it was feared that the entire medical community would be endangered. *Id.* at 524.

98. *See Holt*, 309 F. Supp. at 373. There the court held that the eighth amendment is violated when prison conditions shock the conscience. *Id.* Commentators suggest that no objective standard can be drawn from this approach. *See Prison Reform, supra* note 14, at 372; Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 838 (1972). *See also Prison Reform, supra* note 14, at 377 (describing eighth amendment as an "inevitably subjective constitutional command").

99. *See supra* notes 74-72 and accompanying text.

100. Gibson v. McEvers, 631 F.2d 95 (7th Cir. 1980) (refusal of medical treatment for cold was not basis for constitutional violation).

with the principle that courts should avoid constitutional issues where statutory claims are dispositive. Analysis of the Penhurst decision, however, questions the viability of the constitutional avoidance doctrine at least as it applies to claims against state officials.

Because Penhurst prohibits federal courts from enforcing pendent state claims against state officials, courts may be prompted to avoid the state claim and base their decisions on federal constitutional grounds. As a result, state prison condition cases alleging inadequate disease prevention measures that are brought in federal court increasingly will be decided on eighth amendment rather than pendent state grounds. Ironically, the Penhurst majority, “guided by ‘the principles of federalism that inform [the] Eleventh Amendment,’” actually may have debased the federalism doctrine by forcing federal courts to ignore state law and to make their decisions on federal constitutional grounds.

Even before Penhurst, the constitutional avoidance doctrine was not absolute and could be disregarded when necessary. Justifications for reaching the constitutionality of prison conditions were enunciated in Lightfoot v. Walker. In Lightfoot, the federal court decided that state disease prevention measures were inadequate despite the existence of a dispositive state statute.

102. This is in accord with general constitutional law. See Hagens v. Lavine, 415 U.S. 528, 543 (1974); Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) “[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will only decide the latter.” Id. at 347; Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909).

103. See supra notes 56-63 and accompanying text.


105. Id. at 922 (Stevens, J., dissenting). “This new pronouncement will require the federal courts to decide federal constitutional questions despite the availability of state-law grounds for [its] decision . . . .” Id.

106. Id. at 908 (quoting Hutto v. Finney, 437 U.S. 678, 691 (1978)).

107. Id. at 942 (Stevens, J., dissenting). “[T]he rule the majority creates today serves none of the interests of the State. The majority prevents federal courts from implementing State policies through equitable enforcement of State law.” Id.

108. Siler, 213 U.S. at 193. Where a case can be decided in federal courts without reference to the Federal Constitution, then “that course is usually pursued and is not departed from without important reasons.” Id.


110. Id. at 524 (court’s conclusion was based upon eighth amendment standards of Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977).

111. The court could have ruled on intake screening procedure pursuant to ILL. REV. STAT. UNIFIED CORRECTIONS CODE ch. 38, § 1003-8-2(c) (Smith-Hurd 1982) (eff.
The court determined the adequacy of the prison's conditions on constitutional grounds because the relief was to be financed by state resources. Therefore, the court stated that "[a] decision predicated solely on state law may give the state impetus to change that law ... to circumvent the [expense of] the relief." This rationale is supported by the fact that the relief in prison condition cases is prospective and awarded to "an unfavored disenfranchised class of persons." In addition, the court reasoned that if the constitutional question were avoided and the law later changed, the state would be "without guidance as to the minimally acceptable standards necessary to comply with the Constitution."

The need for proper guidance concerning minimal constitutional standards of disease prevention measures, evidenced by the varied and conflicting approaches and responses to the problem, can be cured by enlightened federal court decisions. While federal courts retain the power to determine minimum constitutional standards, however, the remedies necessary to enforce those standards are often so comprehensive that the judiciary is criticized for breaching the doctrine of separation of powers.

IV. Separation of Powers

The Supreme Court has warned 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.”119 However, state legislative response to the need for disease prevention measures has been inadequate. For example, statutes prescribing physical examinations at intake often are not mandatory,120 aimed at discovering only particular communicable diseases,121 or completely silent on the issue of communicable diseases.122 Other state statutes requiring prisoners to be removed from prison after pestilence breaks out do not address the primary goal of preventing communicable diseases.123 Even where legislative policy apparently has satisfied eighth amendment requirements,124 state prison conditions remain unchanged because administrators’ discretionary authority can shield prison conditions from close legislative and public scrutiny.125 The inadequate response of the legislative and

119. Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). The Court held that the prison’s mail censorship procedure was violative of the first amendment. Id. at 415-16.


and executive branches of government may justify judicial intervention.

Prisoners lack political power and therefore have difficulty achieving redress through normal democratic processes.\textsuperscript{126} Thus, the judiciary is forced to balance the interests of the majority against the rights of a politically weak minority.\textsuperscript{127} The political powerlessness of prisoners is exacerbated by the lack of outside intervention by politically stronger community members\textsuperscript{128} who are discouraged by security considerations and the physical and emotional invisibility of prisons.\textsuperscript{129}

Fiscal restraints also may have prevented legislatures from acting more responsibly.\textsuperscript{130} Prison administration expenses have increased as the prison population has risen.\textsuperscript{131} Judicial intervention, however, forces states to allocate resources to rectify state prison conditions,\textsuperscript{132}


\textsuperscript{127} See United States v. Carolene Products, 304 U.S. 144 (1938). Chief Justice Stone questioned "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Id. at 153 n.4.

\textsuperscript{128} Rhodes, 452 U.S. at 358 (Brennan J., concurring) (public apathy contributes to prison neglect). Prior to the famous Holt litigation, the people of Arkansas "'knew little or nothing about their penal system.'" Id. (quoting Holt v. Sarver, 309 F. Supp. 362, 367 (E.D. Ark. 1970)). Outside community intervention is further limited by the political weakness of the inmates' family and friends. See Prison Reform, supra note 14, at 386 (prisoners come from socio-economic groups which lack political power).

\textsuperscript{129} "Both as cause and effect of this invisibility, the community ordinarily has as little interest in the people it sends to prison as most of us have in our garbage—we want it disposed of safely, quickly, and without much mess, but we don't particularly care how." Bronstein, Offender Rights Litigation: Historical Future Developments in 2 Prisoners' Rights Sourcebook: Theory-Litigation-Practice 7 (I. Robbins ed. 1980).

\textsuperscript{130} See Rhodes, 452 U.S. at 357 (Brennan, J., concurring) (prison funding often has been dramatically below what is required to comply with basic constitutional standards). For example, to comply with constitutional standards the Louisiana prison system "required a supplemental appropriation of $18,431,622 for a single year's operating expenditures, and of $105,605,000 for capital outlays." Id. (citing Williams v. Edwards, 547 F.2d 1206, 1219-21 (5th Cir. 1977) (Exhibit A)).

\textsuperscript{131} The Justice Department reported an increase of 11.5% or 43,797 inmates in federal and state prisons between 1982 and 1983. U.S. News & World Report, Aug. 22, 1983, at 11, col. 4. Between 1975 and 1981 the number of inmates in federal and state correctional facilities rose 42%. Krajick, The Boom Resumes, 7 Corrections Mag., 16-20 (Apr. 1981) (report of annual survey of prison population). Causes for the rise in population are stiffer sentencing, increased crime rates, and more restrictive parole practices. Id. at 17.

\textsuperscript{132} Rhodes, 452 U.S. at 359 (Brennan, J., concurring) "Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution,
because "costs cannot be permitted to stand in the way of eliminating [prison] conditions below Eighth Amendment standards." 133

One commentator observed that "[j]udges have not entered this domain by usurping a roving commission to cure the manifold evils of our nation's prisons," but they have "performed the ordinary judicial function of granting redress for 'specific legal injury.'" 134 However, in light of the extensive and complex remedies in institutional reform litigation, 135 the judiciary may lack the requisite expertise necessary to formulate such redress, while the legislature does not. 136 In response to this criticism, courts have enlisted the help of outside masters 137 with the expertise necessary to oversee the extensive remedies used in prison condition cases. 138

"Courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial costs." Id.

133. Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981); see Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 201 (8th Cir. 1974); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974).

134. Kaufman, Foreword to 2 Prisoners' Rights Sourcebook: Theory-Litigation-Practice (I. Robbins ed. 1980). According to Judge Kaufman, "[w]hen we grant relief to a party—even the most far-reaching and detailed injunctive relief—we do so because we are compelled to." Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 689 (1979)

135. See supra notes 78 & 117 and accompanying text. See also Nathan, The Use of Masters in Institutional Reform Litigation, 10. Tol. L. Rev. 419, 419 (1979)(indicating fundamental constitutional rights in prison setting requires remedy which is often "complex and generally requires an extended period of time for effectuation") [hereinafter cited as Use of Masters].

136. See supra notes 117-19 and accompanying text.


Courts originally based their authority to appoint masters upon their inherent power "to provide themselves with appropriate instruments required for the performance of their duties." Ex parte Peterson, 253 U.S. 300, 312-13 (1920). Now their authority is based on the express provisions of Rule 53 of the Federal Rules of Civil Procedure which states: "The court in which any action is pending may appoint a special master therein." Fed. R. Civ. P. 53(a).

District courts' use of masters can have incidental benefits, such as establishing a new standard for prison social structure and conditions\textsuperscript{139} and exposing "prison officials to more effective methods of administration."\textsuperscript{140} A master's primary function, however, is providing a coercive constituency for inmates so that resources and energy are devoted to improving prison conditions.\textsuperscript{141}

Masters can be used more effectively in the disease prevention setting than in totality cases. For example, contempt for judicial intervention in prison affairs\textsuperscript{142} may prompt prison officials to attempt to frustrate the master's effectiveness.\textsuperscript{143} In totality cases, such an attempt at frustration may be successful because of the master's inability to oversee and execute the comprehensive remedy.\textsuperscript{144} In the less complicated disease prevention setting, however, a master's task of administering remedies is easier, since medical examinations and intake screenings are performed by a small number of people who can be supervised more easily.\textsuperscript{145} In addition, choosing a master with the myriad skills necessary to administer remedies in totality cases is difficult.\textsuperscript{146} Choosing a master to oversee disease prevention measures is easier, given the specific medical expertise needed.\textsuperscript{147}


139. Mastering Prisons, supra note 138, at 1067-68.

140. Id. at 1068. Prison administrators often are unaware of alternative methods of operation. Id. at 1067.

141. Id. at 1073.

142. Id. at 1074 (prison administrators "are not committed to judicial intervention as a way of addressing prison problems"). Officers and guards resent judicial intervention in prisons because they feel that courts favor inmates. Prison administrators also resent being "second-guessed" by the courts. J. Jacobs, New Perspectives on Prisons and Imprisonment 56 (1983).

143. See Palmigiano v. Garrahy, 448 F. Supp. 659, 671 (D.R.I. 1978), enforcing 443 F. Supp. 956 (D.R.I. 1977) (prison officials held in civil contempt for failure to implement court order because of reasons unrelated to their ability to comply); Mastering Prisons, supra note 138, at 1075-78 (prison administrators may try to control information available to master).

144. Mastering Prisons, supra note 138, at 1081 (master "lacks the power to modify the prison's internal delegation of responsibility" for executing solutions to problem).

145. See French v. Owens, 538 F. Supp. 910, 927 (S.D. Ind. 1982) (court ordering medical staff at prison housing over 1500 inmates to include two full-time medical doctors, five full-time physician assistants and nine medical technicians).

146. See Use of Masters, supra note 135, at 448 (multi-issue cases require general administrative skills).

147. See id. at 445-46 (prison medical service case requires expertise in only that area).
V. Model Standards

The danger caused by the high incidence of disease permeating our nation's prisons\textsuperscript{148} has prompted correctional organizations and public health professionals to design model disease prevention standards.\textsuperscript{149} Yet courts have been reluctant to use these model standards in their eighth amendment analysis of prison conditions\textsuperscript{150} because "they simply do not establish the constitutional minima . . . ."\textsuperscript{151} Rather, courts have relied on "the public attitude toward a given sanction."\textsuperscript{152} However, public antipathy,\textsuperscript{153} political aberrations regarding convicted inmates,\textsuperscript{154} and subjective eighth amendment standards\textsuperscript{155} present a strong prima facie case for the use of nonpolitical model standards to guide courts and legislatures in establishing eighth amendment norms.\textsuperscript{156}

Consequently, courts should realize that model standards, rather than "public attitudes," will control the spread of disease in our nation's prisons. The following procedures, suggested by a variety of organizations, are intended to reduce inmates' chances of being exposed to communicable disease.

A. Intake Screening

A pre-trial detainee or convicted inmate should have a complete medical examination\textsuperscript{157} by a qualified physician\textsuperscript{158} before admittance

\textsuperscript{148} See supra notes 4-9 and accompanying text.
\textsuperscript{149} See infra notes 157-73 and accompanying text.
\textsuperscript{150} Rhodes, 452 U.S. at 348 n.13 (1981)(assumption that "opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency” found erroneous).
\textsuperscript{151} Bell v. Wolfish, 441 U.S. 520, 544 n.27 (1979)
\textsuperscript{153} See supra notes 128-29 and accompanying text.
\textsuperscript{154} See supra notes 125-26 and accompanying text.
\textsuperscript{155} See supra notes 98-99 and accompanying text.
\textsuperscript{156} See Federal Activism, supra note 24, at 1365.
\textsuperscript{158} The term "qualified physician" should be interpreted carefully because
into the general prison population.\textsuperscript{159} The examination should include: (1) history of exposure to infectious agents and details about the patient’s lifestyle necessary to indicate infectious problems,\textsuperscript{160} and (2) systematic rather than selective\textsuperscript{161} utilization of biological,\textsuperscript{162} chemical,\textsuperscript{163} and physical\textsuperscript{164} diagnostic\textsuperscript{165} tests to detect communicable diseases.\textsuperscript{166}

\textbf{B. Record Keeping}

A uniform\textsuperscript{167} system of medical records, including the inmate’s history of communicable diseases, should be kept.\textsuperscript{168}

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\textsuperscript{159}See O’Brien, 437 F. Supp. at 598 (physical must be given prior to admitting newly arrived inmates into general prison population in order to protect all inmates). This requirement avoids arbitrary time limits. Compare Lareau, 651 F.2d at 111 (examination required to take place within 48 hours of inmate’s arrival) with Lightfoot, 486 F. Supp. at 526 (examination required within seven days of inmate’s arrival).

\textsuperscript{160}See Health Problems, supra note 6, at 25, 28 (medical history is most important component of intake screening); A.C.A. Standards, supra note 157, Standard 2-4292. For an example of a jail health screening form, see Nicholson v. Choctaw County, 498 F. Supp. 295, 315 (S.D. Ala. 1980) (Exhibit I).

\textsuperscript{161}Health Risks, supra note 4, at 178.

\textsuperscript{162}For example, blood, urine, leukocyte counts, sputum and urogenital tract specimens should be taken. See Health Problems, supra note 6, at 143-44.

\textsuperscript{163}See Health Risks, supra note 4, at 178 (Wassermann test for syphilis).

\textsuperscript{164}Id. (x-rays).

\textsuperscript{165}Id.

\textsuperscript{166}Id. The examination should serve other purposes such as detection of health, psychiatric, dental, alcohol and drug problems. See A.C.A. Standards, supra note 157, Standard 2-4289. Additionally, an immediate physical examination of incoming inmates limits prison administrators’ potential liability for a specific illness. See Health Risks, supra note 4, at 178.

\textsuperscript{167}Uniformity of medical records is easily achieved through the use of the International Classification of Diseases. Health Risks, supra note 4, at 180-81. Unfortunately, research and solutions for the problems of the spread of communicable diseases in prisons have been hampered by the lack of data. See, Health Problems, supra note 6, at 15-16 (information describing prevalence of venereal disease and tuberculosis in correctional facilities is unavailable).
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C. Education

A program designed to educate the prison population about basic health education and specific disease prevention measures should be conducted.\textsuperscript{166}

D. Periodic Exams

Routine periodic physical examinations should be made to identify and isolate communicable disease.\textsuperscript{170}

E. Hygiene

Each inmate should be provided with sufficient bathing facilities\textsuperscript{171} and clean clothing\textsuperscript{172} to enable him to maintain reasonable personal hygiene and cleanliness. The institution should maintain pest control through routine extermination procedures.\textsuperscript{173}

VI. Conclusion

Because of aberrations of the political process surrounding convicted inmates, legislation prescribing disease prevention measures

\textsuperscript{166} See A.C.A. Standards, supra note 157, Standards 2-4319 to -4320; A.B.A. Draft, supra note 157, Standard 23-5.4. Courts have recognized the need for medical records. See Dawson, 527 F. Supp. at 1306-07 (inadequate medical records give rise to "possibility for disaster") (quoting Burks v. Teasdale, 492 F. Supp. 650, 676 (W.D. Mo. 1980)).


\textsuperscript{170} See A.C.A. Standards, supra note 157, Standard 2-4302 (persons under 50 years of age should receive examinations biennially, anyone older should receive them annually); A.B.A. Draft, supra note 157, Standard 23-5.4(b)(ii).


\textsuperscript{173} See A.C.A. Standards, supra note 157, Standard 2-4258.
either has been inadequate or ignored by prison administrators. Consequently, exposure to dangerous diseases compels state prison inmates to seek redress in federal courts through section 1983 actions. In the past, concerns over notions of federalism and separation of powers completely proscribed federal judicial intervention in state prison affairs. Presently, federal courts will adjudicate a prisoner's constitutional rights.

A prisoner's right to adequate disease prevention measures is derived from the Constitution's eighth amendment; therefore, federal judicial intervention is permitted. Such intervention can be made more effective if masters and model standards are employed.

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