

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WAYNE COUNTY JAIL INMATES, MICHAEL HARRIS,
JAMES JOHNSON, LAWRENCE ROBERT PLAMONDON,
NORMAN RICHARDSON, CAROLYN TRAYLOR, and
NORA WARE, individually and on behalf of
all other persons similarly situated,

Plaintiffs

Civil Action

No. 173-217

-v-

WAYNE COUNTY BOARD OF COMMISSIONERS: ROBERT
E. FITZPATRICK, Chairman of the Board,
WILLIAM LUCAS, Sheriff of Wayne County,
FRANK WILKERSON, Administrator of the Wayne
County Jail; ARTHUR A. SUMERACKI and JOHN
P. WILLIAMS, members of the Wayne County
Board of Auditors; and GUS HARRISON,
Director of the Michigan State Department
of Corrections, individually and in their
official capacity,

Defendants.

OPINION OF THE COURT

STATEMENT OF PROCEEDINGS

& Order of the Court

On January 25, 1971, plaintiffs, confined in the Wayne County Jail awaiting trial on various criminal charges, instituted these proceedings against the defendants to obtain judicial redress for alleged deprivations of rights guaranteed to them by the US Constitution, the laws of the State of Michigan and regulations of the Michigan Corrections Commission. Pursuant to the provisions of GCR 1963, 925.3, an order of the Presiding Judge, dated January 28, 1971, was duly entered convening a three-judge panel to preside over the instant proceedings. Upon motion of the plaintiffs, the proceedings were dismissed as to the Director of the Michigan Department of Corrections by order of the Court, dated March 22, 1971.

Although plaintiffs originally initiated these proceedings as a purported class action on behalf of all persons detained in the Wayne County Jail awaiting trial or who in the future would be so detained the Court, pursuant to stipulation of the parties entered an order declaring that its rulings would have general application to the Wayne County Jail, and, to the extent permitted by law, would be binding upon all defendants and their respective successors in office. However, the named plaintiffs by the entry of the order, were not precluded individually from seeking and recovering any of the relief requested in the Complaint. By order, based upon stipulation of the parties, plaintiffs' claims for monetary damages were severed from these proceedings and reserved for future adjudication. Additionally, it was stipulated that discovery and the Pre-Trial Summary would be waived in order to permit an immediate adjudication on the merits of the factual and legal issues raised by the pleadings.

It is contended, inter alia, by the plaintiffs that confinement in the Wayne County Jail has resulted, and continues to result, in a deprivation to inmates awaiting trial of rights guaranteed by the US Constitution, including due process of law, equal protection of the laws, right to counsel, right to a fair trial, and freedom from cruel and unusual punishment. It is also contended by plaintiffs that the County Jail structure violates the State Housing Law by reason of its spatial inadequacy, state of disrepair and unsanitary condition. Further, plaintiffs claim that regulations of the State Corrections Department, protective of their rights, are being violated by the defendants. Generally

speaking, it is urged that deprivations of plaintiffs rights arise from the manner in which the jail is administered and from the confinement in a structure that is physically inadequate to house its inmate population due to its size, state of disrepair and deterioration.

The plaintiffs urge that hardships and restrictions of liberty are imposed on them which punish them in advance of trial and which are unnecessarily broad, thereby depriving them of due process of law. These impositions, they contend, discriminate against them as compared to accused persons at liberty on bond in the free community, in violation of their right to equal protection of the laws. They argue that these hardships and restrictions inflict upon them cruel and unusual punishment. They claim that these burdens and restrictions upon their liberty are so onerous that they have a coercive effect, inducing inmates to plead guilty in order to terminate their confinement and that this coercion violates their constitutional right to a fair trial.

The plaintiffs complain that the Sheriff's system of discipline for alleged rule's inf ctions deprives them of due process of law and imposes on them cruel and unusual punishment.

They contend that restrictions upon their means and opportunities for visitation and communication deprive them of their rights to effective assistance of counsel; to prepare a defense; to a fair trial; to free speech, free press, free thought and free association; and to petition government for redress of grievances.

Plaintiffs maintain that the defendants, in breach of their legal duty, fail to provide reasonable care for the plaintiffs' health and safety.

The plaintiffs seek declaratory and injunctive relief to redress their alleged grievances.

Defendants' position, simply stated, is that the plaintiffs have failed to establish the right to any of the relief requested and that the proceedings should be dismissed.

Specifically, it is conceded by the defendants that the confinement of inmates at the Wayne County Jail is in accordance with constitutionally permissible procedures, and that the defendants in discharging their responsibilities have substantially complied with applicable state statutes and the regulations of the Michigan Corrections Commission. They deny the application of the State Housing Law or the various health and safety codes of the City of Detroit to the Wayne County Jail or the maintenance thereof.

It is further contended by the defendants that the overcrowded conditions at the jail is a situation over which they have no control, because of the Sheriff's legal responsibility to accept for confinement all persons lawfully presented to him for detention and the financial inability of the County of Wayne to procure sufficient needed additional jail facilities.

Although defendants concede the necessity of making repairs to the jail and the need for acquiring additional facilities, it is their position that the appropriation and expenditure of funds for such purposes is vested by law in the defendant, Board of Commissioners, and that the separation of powers principle precludes judicial intervention.

With the approval of counsel, the three-judge panel "viewed" the Wayne County Jail on two occasions, i.e. February 18, 1971 and March 25, 1971. These views included virtually all of the jail's interior and exterior.

Upon the completion of the trial and the submission of the case for decision, the Court concluded that certain unlawful conditions existed at the jail, warranting immediate relief until the entry of the Court's judgment. Therefore, in an order, dated March 25, 1971, the Court set forth partial findings of fact and ordered the Sheriff (1) to arrange for the removal of dangerous mentally disturbed inmates from the jail and their admission to a mental care facility for appropriate treatment; (2) to provide inmates confined to the "hole" with

washing facilities and drinking water; and (3) to provide each inmate with the bedding supplies required by the regulations of the Michigan Corrections Commission.

The unresolved issues will be hereinafter considered in this opinion, and the Court's findings of fact and conclusions of law will appear herein as provided for by GCR 1963, 517.1. In addition to the briefs filed on behalf of the parties, leave to file briefs Amicus curiae was granted to the Metropolitan Detroit Branch of the American Civil Liberties Union; the Legal Aid and Defender Association of Detroit; and the Detroit Bar Association.

PHYSICAL FACILITIES

The prisoners at the Wayne County Jail have a legal right to be housed in a physical facility which complies with the laws of our state and nation. This right is being infringed by the Defendants.

Overcrowding

The most serious infringement is the overcrowding of prisoners in violation of the space requirements of the State Housing Law and the Michigan Corrections Department. Plaintiffs are each entitled to 500 cubic feet of air space in their cells. They are not getting it. Jail Inmates are each entitled to 52 square feet of floor space. They are not getting it. Our conclusions are predicated on the following facts and law:

The Michigan Housing Law applies to jail, including county jails. Section 2 of the Michigan Housing Law (MSA 5.2772) defines "Class b multiple dwellings" to include:

" . . . jails and all other dwellings similarly occupied"

Section 10a of the Housing Law (MSA 5.2781) states:

"All . . . , jails and similar institutions shall be constructed as near as may be practicable according to the provisions of this act, and according to the plans and specifications approved by the enforcing officials as to safety, fire protection and fire prevention and according to the plans and specifications approved by the State Board of Health as to sanitation, light and ventilation." 1

Section 83 of the Housing Law (MSA 5.2855), which was in effect prior to the building of the "old section" of the jail, provides:

No bedroom or room used as a bedroom in any class "b" multiple dwelling shall be so occupied as to provide less than 500 cubic feet of air space per occupant

1 We take the phrase "as near as may be practicable" as modifying, not each section of the act individually, but the act as a whole, so as to exclude completely those requirements which are clearly not appropriate to a jail, but to retain intact those sections which are.

For example, it would be impracticable, as a matter of common sense to apply § 87, which provides that: "No encumbrance or obstruction shall be placed or maintained on any part of any fire escape or in any means of access to a fire escape," since it is not the kind of standard that is applicable to a confinement facility. We do not believe, however, that the applicability of the act is to be determined by merely quantitative considerations as defendants urge in certain of their arguments which seek escape from space requirements of the Housing Law.

The Housing Law became effective in 1917. § 10a, (MSA 5.2781), which deals expressly with jails; § 2, (MSA 5.2272), which includes jails in class b, multiple dwellings; and § 93, (MSA 2055), which requires 500 cubic feet of air space per person in sleeping rooms, were all in effect at the time construction of the old section of the jail was started in 1926. These sections of the Housing Law remained in effect at the time when construction of the new jail annex was started in 1961.

The Defendants argue that the State Housing Law does not apply to the County Jail and that the only space requirement binding on the Defendants is the one contained in Michigan Corrections Department Regulation 791.101(5). Defendants point to section 1 of the Housing Law, (MSA 5.2771), which states that the provisions of the act "shall apply to every city and organized village" they argue that since the act does not expressly apply to counties, it does not apply to county buildings such as the jail. This argument misconceives the thrust of the statute. The criterion of applicability is not building ownership, but territorial location. If the applicability of the act were to be determined by reference to who owned the dwelling, then "shall apply to every city and organized village" could only mean that the provisions of the act would only apply to dwellings owned by a city or organized village and not to dwellings owned by private individuals. Such an absurd interpretation of the scope of the act is clearly erroneous.

We take § 1 to mean that the State Housing Law applies to dwellings in "every city and organized village"

Regulation 791.101(5) of the Michigan Corrections requires that "jail or lockup floor space shall have a ratio of not less than 52 square feet per inmate." This regulation is not a substitute or replacement for the 500 cubic feet of air space per inmate required by the Housing law. Section 8 of the Housing Law, (MSA 5.2778), provides:

The provisions of this act shall be held to be the minimum requirements adopted for the protection of health, welfare, and safety of the community.

Clearly, the Legislature intended to have the Housing Law fix minimum standards, only, so as to permit higher or more rigorous standards, than those established in the Housing Law, itself. But the Housing Law just as clearly, did not contemplate the fixing of lesser standards by any governmental body.

In its enactments creating the State Corrections Department and establishing its powers, (MSA 28.2271), the Michigan Legislature did not intend to amend, replace or repeal those provisions of the Housing Law which apply to jails. The correction statutes in question are Act 232 of the Public Acts of 1955, and the statute which it superseded, Act 4 of the Public Acts of 1947. An examination of the titles and of the provisions of these two statutes reveals, respecting county jails, an intention merely to vest in the State Corrections Department power to supervise and inspect local jails and to promulgate standards relating to "proper management" and "efficient, humane administration" of such jails. (See the titles and MSA 28.2271 and 28.2322). We are mindful of the rule that the law does not favor amendment or repeal of statutes by implication. Civil Service Commission v. Supervisors, 384 Mich. 363, 370.

Nowhere in the "corrections statutes" is there discernible an intention to amend or repeal the minimum space requirements of the State Housing Law or to permit the Corrections Department to set standards lower than those established by the Housing Law. The State Corrections Department, as part of the executive branch of the state government does not have authority on its own, apart from State statutes to fix space standards for jails, less rigorous than those required by the State Housing Law. The executive branch of government is patently without power to alter, amend, replace, undermine, or violate laws enacted by the State Legislature. While the Michigan Corrections Department is without power to set space requirements for county jails

at a level lower than that established by the Housing Law, nothing in the Housing Law would preclude the Corrections Department from setting standards higher than those contained in the Housing Law. Furthermore, Corrections Department Regulations may fill, interstitially, any gaps in the Housing Law.

On the basis of these legal considerations, we conclude that the air space required of cells and dormitory type lockups is at least 500 cubic feet per occupant, and the floor space in individual cells, dormitory type lockups and multiple inmate cells must be at least 52 square feet per inmate.

We interpret the Michigan Corrections Department Regulation as requiring at least 52 square feet of space per inmate of any area in which an inmate may be confined for a substantial period of time.

We reject the argument that the floor area of the "rock" should be taken into account in applying the Corrections Department 52 square (1) foot space requirement. (The "rock" is a long hallway or common area in front of the cells.) We believe that the subject matter of the regulation is the territory or "elbow room" which each inmate may call his own: that quantum of space which jail confinement, to be humane, must accord to a prisoner at all times. Thus, the fact that a prisoner at times has access to the rock area is not material. He spends nine hours or more each day cooped up in a cell. It seems to us that the intent of the regulation is to guarantee to a jail inmate an absolute minimum of breathing room which is always his. The cell in which he is confined for substantial periods of time must give the inmate 52 square feet of "elbow room."

In construing the regulation of any administrative agency, one must take into account the legislation which authorizes the exercise of administrative power. Such legislation generally creates standards to guide the administrator's rule making power. In this case the standard is "efficient and humane administration" of county jails (MSA 28.2322). If there is any doubt or ambiguity in the regulation, the doubt or ambiguity should be resolved in favor of the legislative standard: "humane administration." Thus if there is a doubt about including the rock area in calculating an inmate's minimum territory, the rock area ought not to be included. Fifty two square feet of cell space per inmate is

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little enough. Any less violates our notions of humane administration.

We further conclude that the various defendants have a legal obligation to provide these minimum space requirements as a result of the following statutes. The defendants, Wayne County Board of Commissioners and Robert E. FitzPatrick, Chairman thereof, have a duty in their official capacities, at the "cost and expense" of the County,

[to] provide at the county seat . . .
a suitable and sufficient jail . . .
and keep the same in good repair, . . .

(MSA 5.291).

The duty to "provide . . . a suitable and sufficient jail" includes the duty to provide a jail which meets minimum space requirements of the Housing Law and the Regulations of the Michigan Corrections Department.

The defendants, Sheriff William Lucas, and Frank Wilkerson, Jail Administrator, in their official capacities, have a duty under MSA 5.868² and MSA 5.863³ as the persons in charge of the jail, to restrict

² "The Sheriff shall have the charge and custody of the jails of his county, and of the prisoners in the same, and shall keep them himself, or by his deputy or jailer."

³ "Each sheriff may appoint one or more deputy sheriffs . . ."

its occupancy in accordance with the overcrowding provisions of the Housing Law and the space regulations of the Corrections Department. The Board of County Auditors shares in this responsibility to conform to the laws

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against overcrowding by reason of the "charge and control" which they have over county buildings pursuant to MSA 5.559.4. The Wayne County Board of Commissioners, Sheriff, the Jail Administrator, and the Board of Auditors are not discharging their legal obligation to comply with lawful prohibitions against overcrowding.

The cells in the old section of the jail are 6', 5" wide; 7', 10" long; and 8', 9" high. They contain about 439.8 cubic feet of air space. The legal minimum is 500 cubic feet per occupant. Thus if occupied by one man, there cells in the old section would be about 60 cubic feet short of the legally required air space. To compound the injury, frequently, about one-third of the cells in the old section are occupied, not by one man, but by three. There are two sleeping bunks fastened to the wall in these "old cells" and the third prisoner sleeps on the floor. With triple occupancy each inmate's share of air space is about 146.5 cubic feet, or approximately 353 cubic feet less than is his legal right. With double occupancy of old cells, each inmate's share of air space is about 220 cubic feet, or about 280 cubic feet less than the law allows an individual prisoner.

The cells in the old portion of the jail have an

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area of approximately 50.26 square feet, about one and three quarters square feet short of the minimum fixed by the Corrections Department. When three prisoners are confined in this area of 50.26 square feet, each inmate has only about 16.8 square feet as his portion, and thus received less than a third of the portion allowed him by the Michigan Corrections Department Regulation. When there is double occupancy, each inmate's share is 25.13 square feet, less than half of the area guaranteed him by the Corrections Department Regulation.

The individual cells in the new annex are 6'6" wide, 8' long; and 8'3" high. They contain about 429 cubic feet of air space. Presently, only one person is confined per individual cell in the annex. Even the "new cells" are about 70 cubic feet short of the air space mandated by the State Housing Law. However, the individual "new cells" do have 52 square feet of floor space as required by Corrections Department Regulation.

The dormitory cells in the annex have about 3,760 cubic feet of air space. Each dormitory cell is occupied by 10 persons, in which provides each inmate with air space of about 376 cubic feet. This is 124 cubic feet less than the minimum required by the Housing Law.

The dormitory cells are 456 square feet in area, making each inmate's portion 45.6 square feet, which is 6.4 square feet less than the area required by the State Corrections Department Regulation.

Defendants call our attention to Section 8 of the

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Housing Law, MSA 5.2778, which permits relief from "practical difficulties" or "unnecessary and unreasonable hardships" resulting from the strict application of the act. Apparently the Defendants believe that the shortage of air space in the cells is a "practical difficulty" and that compliance would result in "unnecessary and unreasonable hardship." But the statute contemplates the granting of relief by an administrative board of appeals delegated with the enforcement of the act. Defendants have not received such relief and may not come to the court for such relief until they have exhausted administrative remedies.

4 "The . . . board shall have power, and . . . is thereby . . . authorized and directed:

"Tenth. to have immediate charge and control of . . . all county buildings"

HOUSING LAW - BUILDING CODE VIOLATIONS

In connection with the plaintiffs' right to be housed in physical facilities which comply with State laws, there are, at the County Jail, serious violations of the Housing Law other than overcrowding. These violations are in the nature of departures from plumbing, ventilation, heating, electrical, fire, and sanitation requirements of the State Housing Law. There are also extensive violations of similar provisions of applicable codes of the City of Detroit. Finally there are numerous violations of similar requirements contained in the regulations of the Michigan Corrections Department.

We note that under Section 8 of the Housing Law (MSA 5.2778) the standards therein created are minimum standards only, leaving cities free to establish higher standards by ordinance. We conclude also that it was the intention of the

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Legislature, in enacting the Housing Law, to permit higher standards to be fixed by governmental agencies such as the Michigan Corrections Department. In some cases the Michigan Corrections Department regulations incorporate municipal building code regulations by reference.

Thus, the jail must comply with the more rigorous of the applicable standards provided in the Housing Law, the Michigan Corrections Department Regulations, and the Detroit Building Code.

We will merely highlight the plumbing, ventilation, heating, electrical, fire, and sanitation violations. They are set forth in greater detail in the appendix which accompanies this opinion (Page 1 et seq.)

The entire plumbing system is in an advanced state of decay and disrepair. There are extensive leaks in pipes. The hot water piping system is badly corroded and its delivery of hot water is substandard.

A great many toilets leak; in some wards, a third or more. The plumbing vent stack system is riddled with holes which leak sewer gas. Because of decay, this system fails at many points to vent in open air above the roof, but instead vents sewer gas into the topmost floor. There are sinks and basins which are not adequately trapped. This condition also results in the seepage of sewer gas into cell areas. Thus, there is extensive leakage of sewer gas

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into the living space of inmates. While l-aking sewer gasses could bring on r-spiratory problems and nausea, the evidence indicates that sewer gasses are not leaking in sufficient quantity or concentration to create hazards of explosion or poisoning.

The ventilation system is badly substandard. General sanitray conditions are poor, especially in the cells.

The result of poor ventilation, poor sanitation, leaking toilets, and leaking sewer gas is an oppressive odor which permeates the entire jail building.

Walls and floors of shower rooms are covered with filthy scum and slime.

The hearing system is badly substandard. so is the electrical system.

The Sheriff described the plumbing and electrical system as having been condemned in the sense that these systems did not meet minimum legal requirements.

The Director of the Michigan Corrections Department asked the Attorney General to start a law suit to bring the jail's hearing, plumbing and electrical systems into conformity with state laws. There was no explanation of why such suit has not been brought.

In short the defendants are gross violators of the Michigan Housing Law requirement that,

every dwelling and all parts thereof including plumbing, heating, ventilation and electrical wiring shall be kept in good repair by the owner. (MSA 5.2843)

This is an unseemly position for government to be in.

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In Olmstead v. United States, 277 U.S. 438, 72 L.Ed. 944 (1927) Mr. Justice Brandeis, dissenting, said:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

As long as the present jail facility continues to be used, the heating, plumbing, wiring, ventilation and fire protection deficiencies must be corrected. 5 Within thirty days from the interim order which results from the opinion- the defendants shall submit a plan for correction of these deficiencies. Correction must be accomplished within one year from the time of entry of judgment. The court's consideration of the defendants' plan will be as set forth in the ensuing discussion of overcrowding.

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Decay of the Physical Facilities Combined
With Overcrowding Result in Cruel and
Unusual Punishment and Deprivation of
Liberty Without Due Process of Law.

The cells in the old section were originally designed and built for a single prisoner. Even with one person in an "old cell," the cell is too small in area and air space to meet the legal requirements which the Legislature in its wisdom has imposed. Apart from the Housing Law, and "old cell," occupied by one person is not so small that it would shock the conscience of the court. When two persons are squeezed into a cell, less than 7' by 8' x 9', the conscience of the court is disturbed. Yet two men to each of these tiny "old cells" is the rule rather than the exception in the old section of the jail.

When three persons are jammed into these undersized "old cells," with one person sleeping on the floor, the conscience of the Court is not merely shocked, it is outraged. Three men are routinely confined

⁵ The defendant, Board of Commissioners, has the duty under MSA 5.327, " . . . as often as shall be necessary to cause . . . the jail . . . to be duly repaired at the expense of [the] county"; and the duty under MSA 5.291 to "provide at the county seat . . . a suitable and sufficient jail and to keep the same in good repair." The defendant, Board of Auditors, under MSA 5.559 have the duty "to provide for the maintenance of" all county buildings, subject to a proviso of questionable present vitality limiting expenditures on repairs to one-thousand dollars.

in these undersized one-man cells for nine consecutive hours from 9:00 P.M. until 8 A.M. Although not the general rule, three men to an "old cell" is by no means uncommon. The Sheriff alleges that as of the date of his answer, early in 1971, 154 of the "old cells" contained three men. There are 447 "old cells", altogether. When the jail is so densely populated, all of its facilities, and particularly its kitchen and shower facilities are badly overtaxed. The food and medical services necessarily

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suffer. So does the personal hygiene and health of prisoners.

The plight of the "third man" is particularly oppressive. He must sleep on the floor. If he is in one of the many cells with a leaking toilet, he sleeps near seeping human wastes; and if he is admitted to the jail in a peak population period, he will not even have a mattress between him and the cell floor.⁶ There are so many leaking toilets, that when inmate population runs high, the jail lacks sufficient clean, dry cell floors on which all of the newly admitted jail occupants can sleep. (One inmate, who refused to sleep on the floor of a cell with a leaking toilet, was put into the hole as punishment).

As has been pointed out, each of the cells in the old section (447 altogether) were designed originally for confinement of a single person. There are 186 cells in the new annex designed to hold a single person. In addition to these individual cells, there are nine dormitory-type cells on the second floor and nine dormitory-type cells on the third floor of the annex. Each dormitory cell was designed to hold ten persons, yielding a total dormitory capacity of 180 people.

Thus, the inmate population for which the jail was designed and built is 813 persons. We shall refer to this figure as the "design capacity".

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With the addition of a second bunk to the old cells, the bed capacity or potential was increased by 447 units. Jail capacity, as increased by the second bunk in "old cells," has sometimes been referred to as the "rated capacity". This so-called "rated capacity" has received de facto recognition from employees of the Michigan Department of Corrections. The Michigan Corrections Department has described the jail as having a "rated capacity" of 1240. This apparently makes allowance for some old cells which are not equipped with two usable bunks or which lack a toilet. The population figure of 1240, based upon almost total double occupancy of the old cells, will be referred to as the "rated capacity" of the jail.

The "design capacity" and "rated capacity" are to be distinguished from the "lawful inmate capacity" of the jail. The "lawful inmate capacity" is that inmate population which complies with the State Housing Law and with the correction Department Regulations. We have not taken the time to make the architectural and engineering analyses required to determine the maximum inmate population which conforms to "lawful inmate capacity." That population clearly is less than the "design capacity" of 813.

Taking into account the overcrowding of inmates and the advanced state of decay of physical facilities, when "rated capacity" is exceeded by the inmate population, the conditions inflicted upon the prisoners are so shocking and

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outrageous as to violate widely held precepts of human decency and ordered liberty. Thus, housing of prisoners in excess of "rated capacity" offends constitutional strictures against cruel and unusual punishment as set forth in the Constitution of our State and Nation,

⁶ The jail is over 150 mattresses short during peak population periods.

(8th and 14th Amendments, US Const., Art. I, Secs. 16 of the Mich. Const.)⁷

Confinement pending trial is a process of the criminal law. When the conditions of confinement are so debased and degrading as to shock the conscience, the inmates are deprived of liberty without the process of law which is due them.⁸ Thus, the housing of prisoners in the present facility in excess of "rated capacity" deprives prisoners of liberty without due process of law.

We recognize that instant compliance with overcrowding laws could result in the release of roughly half of the prisoners now confined. We hesitate to take such a draconian step but do not foreclose the possibility if less drastic measures fail, within a reasonable time, to restore to the prisoners their lawful floor and air space.

For the present we adopt a three-step approach to relief from overcrowding, with the expectation that redress of the prisoners legitimate grievance can be accomplished within

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a reasonable time, given good faith on the part of the defendants and their earnest desire to comply with the law. The first step is to attain "rated capacity" of 1240 inmates; the second is to achieve "design capacity" of 813 prisoners; and the third is to reach "lawful inmate capacity".

It is appropriate to discuss the three-step approach to relief as contrasted to immediate relief of overcrowding. Judicial forbearance is in order where insistence on the instant compliance with the law would severely disrupt the community and where ultimate compliance with the law necessitates drastic changes in the community's established practices. Brown v. Board of Education, (enforcement decision) 349 U.S. 294, 99 L.Ed. 1083, 1105, 1106 (1954); See also, Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970). The disgorging of half the jail population into the free community would be disruptive, to say the least, and in all probability, inimical to the public interest. Ultimate compliance with overcrowding laws requires a substantial increase in the dollar amount and the proportion of public revenues used to provide jail inmate housing. Ultimate compliance with applicable laws means in all likelihood that vastly increased new jail space must be furnished. Drastic changes are required. All of this cannot be accomplished overnight. For these reasons we refrain from insisting on instant compliance.

While we have recognized that the task of achieving lawful inmate capacity by adding jail space cannot be

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accomplished overnight, we see no reason to delay all relief until a new facility, or facilities are constructed or acquired. Therefore, a prudent first step in achieving compliance with overcrowding laws is swiftly to reduce inmate occupancy of the present jail until it is equal to or less than the "rated capacity" of 1,240. This appears to present no insurmountable problems. "Rated capacity" must be accomplished within ninety days after judgment is entered in this case.

We select this relatively short period of time for achieving "rated capacity" for the following reasons. For many years the defendants have known about the problem of unlawful overcrowding. They have had opportunity to give thought to remedies. They have already given considerable study to possible remedies. Thus they are not taken by surprise. More importantly the first step is imperative to relieve pressing problems of the utmost seriousness and urgency. Outrageous, subhuman overcrowding must be ended swiftly. The bestial crowding of

⁷ Anderson v. Nosser, 438 F.2d 183, 190 et seq. (5th Cir. 1971). Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal., S.D. 1966).

⁸ U.S. Const., Art. XIV, Sec. 1; Mich. Const., Art 1, Sec. 17.

three men into one small cell, with one man sleeping on the floor is an affront to basic human decency. This intolerable, dehumanizing overcrowding is fraught with a potential for epidemics and riots. It compounds the problems of violent assaults, suicides, homosexuality and mental illness which are endemic to any jail. Three men to an undersized one-man cell has created an explosive situation which needs immediate defusing.

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A prudent second step in eliminating unlawful overcrowding is to achieve a population in the existing county jail facility in its present state or in a remodeled state which does not exceed the "design capacity" of 813 inmates. Step number two must be accomplished within nine months of final judgment.

The final step is the achieving of "lawful inmate capacity"-- that is, elimination of overcrowding so as to meet the requirements of State and National laws. This must be accomplished within two and one-half years of final judgment.

The time allowed for accomplishment of the second and third phases of relief, reflects the Court's judgment of the complexity of problems involved in achieving the second and third goals and the diminishing urgency of the overcrowding problem as the first and second steps are accomplished.

Defendants shall submit for the Court's approval a detailed plan for accomplishment of the three steps. Such plan shall be filed with the court and served on counsel for plaintiffs within 30 days of the interim order resulting from this opinion. The Court is leaving to the defendants, initially, the formulation of such a plan.

The parties will be given an opportunity to present argument concerning the plan submitted. The plaintiff will be afforded an opportunity to submit an alternative plan.

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The fashioning of suitable relief involves large areas of legislative and executive discretion. The Court intends to afford all reasonable comity and all due respect to the executive and legislative branches of county government. Clearly, the defendants' expertise is superior to that of the Court. The Court will happily yield to such superior expertise, provided that the defendants' plans are lawful, and reflect good faith and an earnest desire to achieve prompt compliance with the law. It must be understood that the existing unlawful situation is intolerable and that failure on the part of the parties to develop an acceptable plan will force the Court on its own to take appropriate measures.

Recognizing the broad area of legislative and executive discretion, and without intending in any way to restrict or intrude upon this discretion, and with the hope that the defendants will not feel bound in any way by the ideas which follow, here are some ideas which the defendants may deem worthy of consideration for temporarily relieving overcrowding in connection with the first and second steps.

Use of Detroit House of Correction ⁹

Use of jails in other counties ¹⁰

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Leasing of facilities by contract in existing private buildings (particularly those which are presently vacant or underutilized).¹¹

⁹ MSA 28.1818 (1).

¹⁰ MSA 28.1757 et seq; MSA 5.291 (1); MSA 28.1733.

¹¹ MSA 5.331. We are informed that in addition to Crittenton Hospital, the now-vacant old Providence and Old Children's Hospitals are possibilities. The Union Depot Building and other underutilized railroad buildings may be others.

Use, with Federal consent, of facilities at Milan.¹²

Acquisition of temporary leaseholds by eminent domain.¹³

Acquisition of existing private buildings by purchase or eminent domain.¹⁴

Use with State consent of nearby State detention facilities.¹⁵

Use with City consent of City jail facilities, other than Dehoco.¹⁶

(29)
Use of out-county sheriffs' detention facilities.¹⁷

Removal of the Identification Bureau.

In addition to these approaches for temporarily enlarging holding capacity, there is another approach, that of reducing jail population. In this connection, defendants may deem worthy of consideration the following ideas:

Termination of arrangement for housing Federal prisoners.¹⁸

Pursuit of voluntary judicial program for release of accused persons on personal bond with a condition of periodic "check-in" reporting to sheriff or probation department to assure the accused's presence at trial.¹⁹

Pursuit of voluntary judicial programs to discourage sentencing of misdemeanants to the county jail.²⁰

Refusal to accept prisoners in excess of "rated capacity".²¹

11

MSA 5.331.

We are informed that in addition to Crittenton Hospital, the now-vacant old Providence and Old Children's Hospitals are possibilities. The Union Depot Building and other underutilized railroad buildings may be others.

12

We are aware of no state law which would prohibit this and 18 USC 5003 allows use of federal prisons for convicted state prisoners under certain circumstances.

13

We do not warrant that a leasehold interest may be taken by eminent domain.

14

MSA 5.331.

15

We find no prohibitory statutes, but emergency legislation may be necessary.

16

We find no prohibitory statutes, but emergency legislation may be necessary.

17

There may be capacity for 15 or more prisoners at the Henry Ruff Road location.

18

There were 60 Federal prisoners in the jail on March 7, 1971. In view of MSA 28.1721, 1751, and 1752, it would seem that state legislation would be necessary to free the sheriff of the obligation to accept Federal prisoners on the U.S. Marshall's request.

19

On March 7, 1971, 41 prisoners were being held on misdemeanor charges, 18 of which were for Traffic Court.

544 prisoners were held on bonds of \$2,500.00 or less. (Breakdown: 196 on bonds between \$1,000.00 and \$2,500.00, 194 on bonds between \$500 and \$1,000.00, 105 on bonds between \$300.00 and \$500.00 and 49 on bonds under \$300.00).

The Circuit Court currently administers a pre-trial release program, aimed at maximizing the use of personal bond. The program should

We recognize that some inconvenience will necessarily result in the temporary relief of overcrowding contemplated by steps one and two. Obviously, there will be inconvenience arising from the need to transport prisoners to court from several locations, and there will be administrative problems of decentralization which arise when prisoners are housed at more than one location. We also realize that there will be expense incurred in establishing temporary facilities pending completion of the permanent additional facilities which may in all likelihood be necessary for accomplishing the third step. However, considerations of convenience and thrift do not outweigh the rudiments of human decency. Inconvenience and expense are the inevitable price to be paid for many years of callous neglect.^{21a} The fact that obedience of the law may require some expense and inconvenience provides no excuses for disobedience. As always,

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convenience and thrift must yield to the mandate of the law.²²

Respecting the final step of attaining "lawful inmate capacity", all available information indicates that the jail population will continue to grow in the future. Judicial notice is taken of the well-documented fact that the crime rate increases as areas change from rural to urban and that Wayne County will continue in its urbanization. Judicial notice is similarly taken that the proportion of the population from age 17 to 25 contributes a disproportionately large number of criminal offenders and that this age group is, and in the future will continue to be, a growing segment of the population. Finally, judicial notice is taken that, for whatever the reason, the crime rate, countywide and nationwide, has grown in recent years and gives every indication of continuing to grow in the future. Any plan for accomplishment of the third step should allow for the likely growth in inmate population.

Without desiring in any way to limit legislative and executive discretion, we offer the following ideas respecting the third step in achieving relief.

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19 cont. and will be expended, and the Sheriff's cooperation with it is encouraged.

20 On March 7, 1971, there were 67 prisoners sentenced for misdemeanors.

21 Receipt of such prisoners is unconstitutional as an infliction of cruel and inhuman punishment and deprivation of liberty without due process of law. If obedience to a magistrate's commitment order would be unconstitutional the sheriff may ignore such order without being in contempt of court, albeit the order is valid on its face. See Miller v. Owsley, 422 SW 2d 39 (Mo. 1967); and Village of Nixa ex rel. Hedgpeth v. McMullin, 193 SW 596 (Mo. App. 1917) at 598, "... (A) marshall. . . must use care to see that his prisoner is not oppressed, and. . . not treated inhumanely and. . . if a calaboose is. . . an unfit place in which to confine a man. . . without endangering his physical condition, he must not put him there."

21a In fairness, it appears that Sheriff Lucas has tried in good faith to improve the physical facilities of the jail, but the necessary funds have not been forthcoming.

22 Watson v. City of Memphis, 373 US 526, 537, 10 L Ed. 2d 529, 538 (1963); Jackson v. Bishop, 404 F 2d 571, in which Judge (now Justice) Blackmon observed, "Humane considerations and constitutional requirements are not. . . to. . . limited by dollar consideration," and Holt v. Server, 309 F. Supp. 362 (ED. Ark., 1970) where reflecting on a state's empty coffers, Judge H. nley announced, "If Arkansas is going to operate a penitentiary system, it is going to have to be a system. . . countenanced by the Constitution. . ."

Creation of County Building Authority with contract by County to pay rent to the Authority during life of new building.^{23/}

Sale of unused excess County lands which would permit the sale^{24/} bonds in anticipation of receipts.^{25/}

The evidence contains no basis for us to weight the practical possibility of bond sales and we express no judgment on the matter. Parenthetically, our research turned up no statute or decision which would permit construction of a new county jail outside Detroit, the county seat, and counsel for the defendants have brought none to our attention, despite an assurance in oral argument that they would do so.

HEALTH AND SAFETY OF PRISONERS

The plaintiffs and other prisoners are entitled to reasonable protection of their health and safety.

Under the common law, bailees, including sheriffs, must take reasonable care of the chattels in their custody.^{25/}

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No less is required of jailers who have custody of human beings.

Farmer v. State, 79 So 2d 528 (Miss. 1955); Asher v. Cabell, 50 Fed 818, 2 US app 159; Hixon v. Cupp, 49 Pac 27; Ex Parte Jenkins 58 NE 560, 562 (Ind app 1900); Justice v. Rose, 144 NE 2d 303, 304 (Ohio app. 1957); Smith v. Miller, 40 NW 2d 597, 598 (Iowa 1950); Magenheimer v. State, 90 NE 2d 813, 817 (Ind. 1950); Kusah v. McCorkle, 170 P. 1023, 1025 (Wash. 1918); Taylor v. Slaughter, 42 P 2d 235, 237 (Okla., 1935); Indiana, ex rel Tyler v. Gobin, 94 F. 48, 50 (C.C.A. 1899).

When government imprisons people, it deprives them of freedom to look after their own health and safety. In the free community a man may run from his assailant. In a jail, flight is not possible. In the free community a man may see his own doctor at his own convenience. In jail, he must see the jail physician under the rules prescribed by the institution. In the free community he is not exposed to hardships of confinement which may bring out suicidal tendencies. Since the prisoner is very much at the mercy of his jailers, no one should be surprised, that the common law recognizes a duty on the part of the jailer to give confined persons reasonable protection against assault, suicide and preventable illness. Coffin v. Reichard, 143 F2d 443 (CA. 6, 1944), Taylor v. Slaughter, supra; Farmer v. State, 79 So 2d 528 (Miss. 1955); State ex rel Morris v. National Surety Co., 39 SW 2d 581 (Tenn., 1931).

Perhaps the same duty is placed on the government by the Constitutional prohibitions against deprivation of liberty

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without due process of law (14 Amend, US Const., Art. 1 Sec. 17, Mich. Const.) but it is not necessary to decide the point.

Unfortunately, the prisoners at the Wayne County Jail are not getting reasonable protection from assaults, suicide, and preventable illness.

Assaults

An expert witness, Thomas Murton, who is a penologist, offered

23 Voter approval of bonds not required under MSA 5.301.(1) et seq. Agreement of county to pay rent without an express pledge of county's faith and credit does not create a county debt to which constitutional or statutory debt limits apply; Walinski v. Bldg. Authority, 325 Mich. 562; Botz v. Berrien County Building Authority, 12 Mich. App. 304.

24 MSA 5.2769 (302) Voter approval of bonds not required.

25 Standard Wine Co. v. Chipman, 135 Mich. 274 (1930).

the opinion that prisoners at the County Jail are subjected to an unreasonable risk of harm from assaults. We agree. In the first eleven months of 1970, the Sheriff's Special Service Bureau investigated 31 sexual assaults and 65 non-sexual assaults. The figure for sexual assaults probably includes some homosexual soliciting and soliciting of a non-violent nature. We are unable to determine from the evidence how many of the sexual assaults involved violence. At least 65 non-sexual assaults were investigated which were in all probability violent in nature.

An investigated assault rate of almost 100 in eleven months is too high by any reasonable standard.

Recently, the ultimate in violent assault occurred. An inmate, named Weaver, killed another inmate while they were confined to the hole. Soon after being released from the hole, Weaver buried a knife in the back of still another inmate.^{26/}
(33)

Suicides

Not only is there an unreasonable risk of harm to inmates from assaults, there is an unreasonable risk of suicide, as well. We find that reasonable precautions against suicide are lacking at the jail.

There were forty-seven attempted suicides in the jail in the first eleven months of 1970. The evidence does not disclose the number of suicide attempts in the last month of 1970, if any.

There were thirteen suicide attempts in 1971 as of February 23. Projecting this rate, there will be more than 60 attempted suicides before the year 1971 is over. The County jail's attempted suicide rate is more than three times that of Jackson Prison. (For basis of this calculation, see Appendix II, "Suicides" page 6-8) Making allowances for the differences between a pre-trial detention center and a post-conviction prison, the difference is still striking and appalling.

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The jail handles its suicide attempts in a way which is likely to encourage further attempts. The jail administration does not have a policy of taking persons who attempt suicide to a psychiatrist. The jail administration does not even have a policy of invariably bringing persons who attempt suicide to a physician who is not a psychiatrist. If the suicide attempt inflicts very serious physical injuries, the inmate is taken to the jail doctor or to Detroit General Hospital, depending on the availability of the doctor and the adequacy of the jail medical department to give treatment. If the physical injury is not serious, a para-professional member of the jail staff renders treatment and the suicidal inmate never sees a licensed medical doctor, let alone a psychiatrist. After the physical wounds are patched up the suicidal inmate is placed back in a cell. If the inmate doesn't succeed in injuring himself, physically, he will not even receive para-medical observation or treatment but will be left in his cell after the implements or means of suicide are removed. There are even cases in which prisoners were disciplined by being put in the hole for having attempted suicide. This was done as punishment and not to protect the suicidal inmate.

The psychological disturbance which precedes and accompanies the suicidal act is quite generally ignored.

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(At least this has been the case during times when the jail has had no staff psychiatrist.) Some examples of the jail policy for handling suicidal people may be gleaned from Appendix II, page 6 et seq.

About half the newly admitted prisoners are narcotics addicts. During drug withdrawal they present a particularly high suicide risk.

26 On four occasions Weaver attempted suicide, once by swallowing scouring powder, once by swallowing a handful of pills, once by swallowing razor blades and once by stabbing himself. He did all of this before he was finally removed to a mental hospital after being diagnosed as psychotic by the Center for Forensic Psychiatry.

Two conclusions are possible concerning drug withdrawal programs at the jail. There is none; or it is grossly inadequate. The sheriff concedes that suicidal conduct would be lessened by a drug withdrawal program. It would seem that psychiatric assistance would be helpful in establishing and supervising such a program. There can be no doubt that the suicide problem is not helped by enforced idleness without opportunity for useful work and with little or no opportunity for wholesome recreation. Nor is the suicide problem helped by overcrowding, lack of privacy, and close confinement with little or no "walking-around" room. The testimony was undisputed that the harsh quality of jail life tends to bring out suicidal tendencies.

The suicide problem would be alleviated by procedures for identifying inmates who are high suicide risks so that

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they could be looked after accordingly. Also helpful would be a program for handling inmates who are suicidal once they are identified. The jail has neither an adequate program for identifying high risk inmates nor for caring for them once they are identified.

Persons who genuinely attempt suicide, as well as those who threaten in apparent earnest to do so, should get prompt psychiatric attention. Considering the high value which human life deserves, this is the least which government owes to inmates, presumed to be innocent, after confining them under harsh conditions which tend to bring out self-destructive impulses. The interim order which results from this opinion should forthwith require the sheriff to secure prompt psychiatric attention for inmates who genuinely attempt suicide or who threaten in apparent earnest to do so. Such order shall require the defendant commissioners to make available to the sheriff the funds reasonably necessary for this purpose.

The interim order which results from this opinion should require the sheriff within thirty days of said order to submit a plan for court approval for identifying suicidal inmates and for their care.

The interim order which results from this opinion should require the defendants within thirty days to submit a plan for court approval for dealing with drug addicts who

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experience withdrawal symptoms.

At the heart of the problem of assaults and suicides is the present inadequacy of observation by custodial staff and the dearth of manpower to intervene as necessary. The interim order resulting from this opinion should require the defendants within thirty days to submit a plan for court approval providing reasonably adequate surveillance to guard against assaults and suicides. Without wishing to bind or restrict the defendants in any way in the exercise of executive and legislative discretion we offer for consideration the possibility of a surveillance system, human or mechanical, with a capability of viewing every inmate at any time desired, and with actual continuing surveillance, direct or by mechanical means of those inmates and areas which offer a high risk of assaultive or suicidal activity. It would seem that those in the hole and in maximum security or close confinement pose high risks as well as those who have threatened or attempted suicide.

We offer also the suggestion that consideration be given in the plan to increasing the sheriff's custodial staff to make possible proper surveillance and immediate intervention to deter and prevent assaults, suicide attempts, and suicides.

Mental Illness

In the evidence concerning assaults and suicides, mental illness turned up, time and again.

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There is a high incidence of psychosis among prisoners at the jail. To begin with, they come from socio-economic segments of the community more prone than the average to mental illness. Approximately one-half of the incoming prisoners are addicted to opiate drugs and endure the physical and psychological strain of withdrawal.

There was undisputed evidence that the stark physical environment and the harsh regimen of the jail have an iatrogenic effect, tending to produce or aggravate mental illness. The worst part of the regimen is the enforced idleness. There is no opportunity for useful work, other than cell housekeeping. There is practically no opportunity for wholesome recreation. The opportunity for physical exercise is limited to that which can be enjoyed on the "rock". The rock is a long hallway or common area in front of the cells. The rock area itself is behind bars but it is not subdivided into cells. It is located between the cells and the guards' cat-walk.

The worst aspects of the physical environment are the horrible overcrowding in the old cells which deprives men of the "natural territory" or "breathing room" to which they are accustomed and the limitation on movement. The entire jail is designed and organized for maximum custody, that is close confinement. A man can walk only a relatively few yards without meeting a barrier. This deprives men of the territorial

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"moving space" to which they are accustomed. In addition, there is the deprivation of accustomed privacy. Finally, there is the shambles of disrepair and the pig-sty lack of sanitation. For whatever the reasons, the jail abounds in mentally disturbed prisoners. The sheriff testified that he never remembers touring prisoners' wards without seeing someone who was obviously suffering from severe mental disturbance. The psychiatrist, who testified, had visited the jail a short time before appearing in court. He observed many persons there who were mentally ill. Several were markedly paranoid. Others were catatonic. Some were extremely unkempt and withdrawn, indicating schizoid tendencies or full blown schizophrenia. One woman, in an extremely agitated state, thrashed about a dormitory cell, uncontrolled and seemingly uncontrollable. Other female inmates had been removed from the cell for their own protection. Next door, he observed two other women prisoners who were obviously badly disturbed in a psychological sense. Many of these people were patently psychotic.

The defendants own witness, Betty Jo Price, a deputy sheriff who is a registered nurse, testified impressively that there have been times when mentally ill female prisoners have screamed in their cells for long periods of time, without psychiatric attention and with an unsettling effect on other inmates.

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We have already mentioned the case of inmate Weaver, a homicidal, suicidal, psychotic who remained in the jail in that dangerous condition until after he had committed a homicide, attempted another homicide and made four attempts on his own life.

There are so many mentally disturbed people at the jail, who stay for such substantial periods of time, that segregated cell blocks have been selected for their confinement. These areas are known as mental wards, although no psychiatric treatment is given, other than the administration of tranquilizing drugs.

Substantial numbers of prisoners are on high daily dosages of tranquilizing drugs. Even so, the drug therapy in a considerable number of cases failed to prevent assaultive or suicidal "acting-out". In one case a drug was given to a severely depressed, suicidal inmate, apparently on the recommendation of unidentified persons at Detroit General Hospital. Unfortunately it was the wrong kind of drug. It was not an antidepressant, and the inmate successfully suicided.

The appalling incidence of suicidal conduct provides another index of the high degree of mental disturbance present at the jail.

In an interim order already entered we have dealt with the problem of mentally disturbed prisoners who are a danger to themselves or to other inmates. The relief granted in such

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interim order should be included in the judgment which is ultimately entered in this case.

The interim order did not address itself to the legal process by which the sheriff might remove dangerously disturbed prisoners to mental health care facilities. There is no need to draw attention to the routine procedures for admission and commitment to mental hospitals. Two less common legal procedures are called to the defendants' attention as advisory. The first is transfer of mentally disturbed convicted prisoners to Wayne County General Hospital by order of a circuit judge on ex parte application of the sheriff. The second is emergency hospitalization, without the certification of physicians, for a forty-eight hour period of any inmate who shows dangerous tendencies.

The first procedure arises under MSA 28.1734 et seq., an old statute which still possesses vitality.

MSA 28.1734 provides:

"Whenever it shall appear to the circuit court for any county that any convict confined in the /county/ jail has become insane, such court may. . . direct that such convict be delivered to the superintendents of the poor of the county."

Under MSA 28.1735 the clerk of the court gives notice of the circuit judges order to the superintendents of the poor

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and the superintendents become legally bound to look after the "insane" inmate.

The statute creating the superintendents of the poor (Act 146 of the Public Acts of 1925, former MSA 16. 142 et seq.) has since been replaced to a great extent by the Social Welfare Act (Act 280 of the Public Acts of 1939). Among the functions of the superintendents of the poor, was the administration of a "county infirmary", (MSA 16.146). Under Section 55, subdivision "(c)" (MSA 16.455(c)) and section 85 (MSA 16.485) of the Social Welfare Act, the powers, functions, and duties of the superintendents of the poor in Wayne County, so far as they relate to a county infirmary or county mental hospital are presently vested in the Wayne County Board of Institutions. That Board administers Wayne County General Hospital.

Transfer of an "insane" prisoner to Wayne County General Hospital may be accomplished by ex parte order of the circuit court, on application of the sheriff, with subsequent notice to the County Board of Institutions.27/

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The first procedure is clearly available for prisoners who have been sentenced. We observed at least one such inmate who appeared to be suffering from a mental disorder. The argument can be made that the word "convict" is used in the statute in the lay, rather than the legal sense. So used, the word "convict" applies to any person confined in the jail under criminal process. However, we are aware of no appellate court decisions in Michigan defining the statutory word "convict". There is doubt, therefore, as to the applicability of the statute to prisoners who are detained, awaiting trial.

The second procedure to which we referred, above, is that provided in MSA 14.809. This statute provides, inter alia:

"***Any peace officer of this state with the approval of the prosecuting attorney, obtained within 24 hours of the taking into custody and confinement, is hereby authorized to take into temporary protective custody and confine in any hospital, home, or other place of detention for a period of not to exceed 48 hours, not counting Sundays and Holidays, a person believed to be mentally ill manifesting homicidal or other dangerous

27 See MSA 14.8419(1) for means of obtaining reimbursement from the State for the cost of maintaining such inmates at Wayne County General Hospital.

tendencies. Proceedings under this Act, temporary or permanent, shall be instituted by the peace officer within 48 hours, not counting Sundays and Legal Holidays.

It is clear, first of all, that the sheriff is a peace officer within the meaning of the statute. It is also clear that approval of the prosecuting attorney may be given by his duly authorized assistants and that the Sheriff need only get such approval within 24 hours from the time the

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sheriff asserts custodial power over the inmate on the basis of the inmate's apparently dangerous mental illness. This "mental disorder custody" is to be distinguished from custody asserted exclusively on the basis of criminal detention process. Thus, the sheriff's power of emergency mental commitment does not necessarily expire within 24 hours after the admission of an inmate into the county jail. If, however, the sheriff is going to use this emergency commitment power, he must obtain the prosecutor's approval within 24 hours after the inmate first manifests signs of dangerous mental illness. It is also clear that the sheriff has the governmental power to confine such a disturbed inmate in "any hospital or home" for 48 hours, excluding Sundays and legal Holidays and that the sheriff may exercise such powers without a certificate from any physician. Before expiration of the forty-eight hour period following hospital confinement, the sheriff must initiate temporary or permanent proceedings for mental hospital admission or he must return the prisoner to the county jail. Meanwhile the dangerously disturbed prisoner would get the kind of mental health care which is his right and the jail would be free of his dangerous and unsettling presence. If questions should arise concerning his competence to stand trial on a criminal charge, they could be decided in the usual way through the Forensic Psychiatry Center procedures.

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We mention these statutes to the sheriff for his information only, without any claim that the statutory procedures are free of practical problems. The evidence before us is insufficient for us to evaluate fully the practicability of these statutory procedures.

It should be noted that while the second statute applies to persons dangerous to themselves or others, the first applies to any "insane" convict.

Our interim order regarding removal of mentally ill inmates was addressed only to those who were dangerous or whose illness had a seriously unsettling effect on the inmate population. Such disturbed inmates presented an urgent problem.

We address ourselves now to a less pressing, but equally important matter. We turn now to the mentally ill prisoners who do not appear to be dangerous. There are many in the Wayne County Jail. Their illness is as

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deserving of medical care as the purely somatic illness of other prisoners. Civilized standards of elemental human decency require prompt psychiatric attention for prisoners who appear to be mentally ill, but not necessarily dangerous. Such care may be furnished by a staff psychiatrist or by para-professional staff acting under the direct supervision of a staff psychiatrist; or such care may be furnished extramurally by competent psychiatric personnel.

If medical advice indicates that such inmates should be hospitalized the sheriff should take such steps as may be required for hospitalization. Hospitalization need not necessarily interrupt the criminal process if the prisoner is competent to stand trial. If the prosecuting authorities deem it to be in the public interest to defer prosecution while the prisoner is hospitalized, this course may be followed subject to approval by the court in which the criminal case is pending. The court has broad discretion to determine whether hospitalization or prosecution will be the route followed in those cases

where the accused is mentally ill, but competent to stand trial. Care must be taken not to infringe the right to speedy trial.

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Despite the high incidence of mental illness, there is no full-time psychiatrist on the jail staff. Throughout much of the trial and for a long period before, the jail did not even have a part-time psychiatrist. At one time the jail employed a psychiatric consultant who was personally present in the jail on a part-time basis. Every indication is that this arrangement, while better than nothing, did not meet the jail's psychiatric needs. The jail's part-time psychiatric consultant did not remain long in this position. Presently, the jail has the part-time consulting services of two psychiatrists who are employed full time by the Center for Forensic Psychiatry. Obviously, they are able only to give a portion of their professional efforts to the jail. Experience with this arrangement has been too brief to reach a conclusion regarding its adequacy.

There is a curious dispute in the evidence concerning the need for a full-time staff psychiatrist. Dr. Murton, a witness for the plaintiffs, does not see such a need. On the other hand, the sheriff and the jail administrator, testifying for the defendants, believe there is a need. So does the only psychiatrist who testified in the case. He was plaintiffs' witness.

We conclude that the defendants should consider the question of whether a full-time staff psychiatrist is necessary in order to provide reasonable care for the mental health needs of inmates. The defendants' views

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should be reflected in the plan for over-all health care which we call for later in this opinion.

Without seeking to bind or restrict the defendants' executive and legislative discretion in any way we offer for consideration the following thoughts and suggestions. We realize that as a practical matter it may be difficult to find a full time staff psychiatrist, even assuming the defendants' conclusion that there is such a need. Possibly the defendants could obtain for the jail medical staff the services of psychiatric residents at Wayne County General Hospital or who are on the staffs of other hospitals.

not

It is beyond the realm of possibility that the improvements in the jail which result from this lawsuit will reduce the jail's iatrogenic causal role in inmate mental illness. If that happens the need for psychiatric personnel may diminish. On the other hand, future developments may compell the opposite conclusion. In any event the orders of this court may be changed in the future as the facts require.

The proposed plan, called for later in this opinion, for improvement of overall health care should take into account the foregoing observations on mental health needs.

Ordinary Health Needs

We have dealt with assaults, suicides, drug withdrawal, mental disturbance, and psychosis. We have not yet dealt with the ordinary health needs of prisoners. Such health needs are not reasonably met at the jail. The jail's

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health program fails to provide reasonable care for existing illness and fails to provide reasonable safeguards against preventable future illness.

Dental care will be examined first. Although inmates' teeth are frequently pulled by the jail's part time dentist, no-one can remember a tooth being filled. A man, presumed to be innocent, who is suffering

28 Cf In re Cawley, 369 Mich 611 (1963); People v Backhaut, 312 Mich 707 (1945); In re Tworek, 311 Mich 59 (1945). See also Mich Dept. of Mental Health, Psychiatric Evaluation in Criminal Cases, 36 et seq. (prepared by Acher, Guzman & Lewin, 1967).

acute dental distress is entitled to treatment which preserves his natural body intact, if such treatment would ordinarily be given to members of the free community suffering from similar dental disease, assuming that the prisoners stay will permit such treatment. The sheriff should, therefore, in appropriate cases, arrange for dental treatment short of extraction, comparable to that rendered the free community. An order carrying out this provision should be entered forthwith.

The standard operating procedures for ordinary health care are inadequate. When incoming prisoners arrive they receive a chest xray and blood is taken for a syphilis serology study, provided that they arrive between 11:00 a.m. and 7:00 p.m., the hours when medical technicians are present. If they arrive at some other time of day, the xray and blood test are deferred to a "slack period". Evidently there isn't

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much slack, because many prisoners testified, without contradiction, that they never were offered and never received xrays or blood tests. One of them had been confined for over seven months. It would seem that there was not enough "slack time" in seven months to give the tests.

No medical history is taken from the incoming prisoners. They are not given a physical examination for communicable diseases or for injuries or illness which may require prompt attention. 28a/ Prisoners may, of course, call attention to injuries or wounds at the time of reception. Inquiry into the incoming prisoners' drug use is haphazard. So are the attempts to identify homosexuals. There is no exploration for mental illness, active or incipient. There is no effort to determine the incoming prisoners propensity for suicide. The medical procedures on prescribed medication or need prescribed medication.

The jail medical staff consists of a part-time physician and 7 para-professionals including an x-ray and a blood test technician. The physician is present in the jail from three to four hours a day Monday through Friday. None of the para-professionals is licensed or registered in the healing arts.

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An inmate who wants medical care is required to write out his complaints and the message is supposed to be delivered to the medical department. The messages are screened by para-professional personnel and by the physician, when available. From these written messages they determine which prisoners need to be seen and whether they need to be seen by the physician. When it is determined that attention from para-professional personnel is sufficient that is the course followed.

The medical department performs a diagnostic service and gives treatment to those ailments which are not so serious as to require hospitalization. Persons who require hospitalization are taken to Detroit General Hospital.

This approach to prisoners' health has not worked out well in practice. We find as did a study committee which reported to the Wayne County Auditors that

"* * * /the/. . . jail population is composed of a high percentage of inmates. . . from. . . sub-standard socio-economic strata of society and bring with them a high incidence of infectious disease * * * /T/here is usually a higher incidence of venereal disease, tuberculosis, alcoholism, . . . drug addiction and mental illness than in the population as a whole * * * the over-all medical and health services program for the. . . jail is inadequate and. . . does not meet required minimum standards."

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28 The survey and report prepared for the Wayne County Auditors recommends, "every inmate admitted to the. . . jail should be given a physical examination by a physician. If this is not possible, then the examination should be given by a nurse or trained medical assistant with a follow-up by the physician within 24 hours."

Sanitation
Poor sanitation
particularly poor in
page 13 et seq.
The large
high incidence
the spread
in

Once admitted, prisoners don't get the health care they need. At times prisoners' notes describing their ailments and requests for medical attention do not reach the medical department. Unfortunately, this is not an isolated occurrence. A registered nurse, who was a witness for defendants, testified that there are times when inmates who should get medical attention, do not get it. Female prisoners constantly complained to her that they were not getting medical attention which they thought they needed.

A psychiatrist who inspected the jail testified that inmates told him "over and over again" that they were ill and received no medical attention; that they were not seen by any one, let alone a doctor; and that their medicine was not delivered. There was much testimony from prisoners along the same lines.

The widespread belief among prisoners that they are deprived of proper medical care has been a source of serious disruption in the jail and a threat to the good order of the institution. At times severe discipline has followed concerted inmate protest of poor health care. Indeed there is a riot potential which arises from the honest belief of many prisoners that their pressing medical needs go unattended. Regretably, the prisoners belief is not without reasonable factual foundation.

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One of the reasons for the prisoners' belief is poor hospital care. The hospital care policy has not worked out well in practice. Generally speaking, prisoners who need hospital care are taken to Detroit General Hospital but are frequently returned to the jail, prematurely, when hospital bed care appears to be necessary. We detail some of the fact supporting this conclusion in Appendix, III, page 9 et seq.

From the rapidity with which seriously ill and gravely injured prisoners are returned from Detroit General Hospital to the jail, one can infer that jail patients are not overly welcome in the hospital. Considering the problems of security involved, it is not surprising that the hospital shows no delight in having jail prisoners as bed patients.

There is another problem with the use of the hospital which arises from lack of man power in the Sheriff's Department. At times visits by prisoners to the hospital have been delayed by lack of man power to escort them. At other times the lack of escort manpower has resulted in prisoners arriving at the hospital at the wrong time with the result that they receive no treatment. The same shortage of non-professional manpower has resulted in delays and failures in the delivery of medicines, and the like to jail inmates.

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Lack of para-professional, professional, and non-professional manpower is at the root of much of the medical attention problem. We wish to make it clear that the lack of medical attention does not result from any malice on the part of the sheriff, his jail administrator or medical staff. The medical staff and the assisting non-professional staff is simply inadequate for a daily prison population which runs about 1500 and includes, yearly, approximately 24,000 persons, who have an unusually high incidence of drug addiction, injuries, communicable diseases, and mental illness.

Within thirty days from the entry of the interim order which results from this opinion the defendants shall submit for court approval a plan for correcting the inadequacies which exist in the medical care of inmates. The plan shall give attention to the admission examination, and the care of admitted inmates, including those who need hospital attention.

Without intending in any way to restrict administrative and legislative discretion, we respectfully call the defendant's attention to the Manual of Correctional Standards of the American Correctional Association, particularly pages 437, 438 and 258 through 269. The plan must meet the standards provided in Michigan Corrections Department Regulation 791.109.

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Sanitation

Poor sanitation creates other perils to health. Sanitation is particularly poor in the inmates' cells and in food preparation areas. The kitchen problems are more fully discussed in Appendix IV, page 13 et seq.

The large number of leaking toilets, already described, and the high incidence of toilets which overflow, result, periodically, in the spreading of urine and fecal matter on some cell floors. The cells are poorly lit, poorly ventilated and overcrowded. The inmates who have a higher incidence of infectious diseases than the public as a whole. During the winter the heat is uneven, sweltering in some areas, while other areas are cold and damp. In the summer time the heat is stifling, sometimes reaching 120 degrees. We have here the makings of an epidemic.

For example, there is a relatively high risk of hepatitis contagion. Many heroin addicts are admitted to the jail. The incidence of hepatitis is high among addicts, as a result of using unsterile hypodermic needles. The initial examination of inmates is not likely to detect hepatitis. The disease is commonly spread in human wastes. Human wastes leak into many cells in the jail.

Similarly, there is a danger of typhoid and other communicable diseases being spread by these unsanitary conditions. As a matter of fact, there has been a considerable amount of hepatitis at the jail. One prisoner recently died of hepatitis and another of what was thought to be meningitis.

The interim order resulting from this opinion should require the sheriff forthwith to put into operation a program for disinfecting all cells which have toilet leaks or overflows

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At least one inmate, whose bed was a cell floor without a mattress, was disciplined for refusing to be locked up overnight in a cell in which the toilet leaked. To avoid subjecting inmates to an unreasonable risk of infection, the interim order which results from this opinion should prohibit forthwith the confinement of inmates in any cell in which leaking or defective equipment discharges human waste, except when the leak has been deliberately produced by the inmate's wanton acts and there is no available clean, dry cell where he may be housed without overcrowding other inmates.

There are lice-infested rats in the jail which carry a variety of diseases. At least one inmate was bitten by a rat. Another was alarmed by a rat which scampered over her. The jail is heavily infested with roaches and other vermin. The interim order resulting from this opinion should require the sheriff, within 30 days, to show the existence of an adequate vermin control program or a plan for establishing one.

The scummy filth on the shower floors and walls, previously described, is a source of athlete's foot and other

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fungous diseases. The interim order resulting from this opinion should require the shower walls and floors to be immediately scrubbed and disinfected and maintained in a sanitary condition.

There are many toilet fixtures with enamel knocked off. The porous material underneath is a breeding place for disease. Presumably, this will be taken care of in the plan for correcting plumbing deficiencies. In the interim, however, such nicked areas should be frequently scrubbed and disinfected.

Many of the cells are dirty, malodorous, and cluttered with milk cartons, stored food and confections. Although filthy conditions inside cells result from the slovenly habits of the inmates, there is more at stake than the fastidiousness of individual prisoners. Such filthy, slovenly habits are a threat to the health and well-being of everyone in the institution. It is, therefore, the duty of the sheriff to prevent unsanitary conditions inside the cells even if he must use his disciplinary power to do so.

Storage of edibles on cell floors should certainly not be permitted. Nor should the inmates be permitted to accumulate junk, debris, trash or waste in cell block areas. Among the dirtiest and most unkempt cells, were those of the trustees, who are the primary kitchen work force. The interim

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order resulting from this opinion should require the sheriff forthwith to establish rules and procedures for correction by inmates of unsanitary conditions within the inmate living areas.

Two kinds of mattresses are used at the jail. The more modern type is covered by an impermeable plastic material which is easily cleaned. Old style mattresses do not have such covers. The old type mattresses are for the most part filthy and permanently stained. Some appear to be stained by saliva, urine, feces, or vomit. They are not easily cleaned. The sheriff testified that many of the old mattresses are unclean and that the jail does not have facilities to clean and sterilize them. They are a health hazard. Reasonable protection of the health of inmates requires that the old mattresses be replaced with mattresses having plastic covers which can be easily cleaned. This must be accomplished within sixty days of entry of judgment. The interim order resulting from this opinion should so provide. Such interim order should also provide that within 60 days of entry of judgment every inmate admitted to a county jail facility shall be furnished with a clean, sanitary mattress, covered with a material which is readily cleansed and with such other bedding as may be required by the regulations of the Michigan Corrections Department.

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Trustees, who comprise most of the kitchen staff, were anything but clean and sanitary in appearance. The sheriff should require of them high standards of personal hygiene. The interim order resulting from this opinion should so provide.

At times the equipment for cleaning utensils has been inadequate. For example, the water in the kitchen sterilizer was not sufficiently hot on one occasion and failed to cleanse and sanitize utensils. The result was that at least 41 inmates and 8 deputies developed severe diarrhea about 3 and one half hours after an evening meal.

In some cases the towels given to prisoners are little more than rags. The interim order resulting from this opinion should require the towel inadequacy to be corrected forthwith.

Nutrition

The nourishment given prisoners in the county jail fails to reasonably safeguard their health. For years their diet has been lacking in Vitamins A and C as measured by generally accepted standards prescribed by the United States Department of Agriculture. Measured by the same standards the prisoners' diet is also deficient in calcium.

The diet does not meet Michigan Corrections Department Regulation 791.109 which requires identifiable sources of

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Prolonged deprivation of vitamin C can result in scurvy. Citrus fruits, and excellent source of vitamin C, are wholly lacking in the jail diet. Prolonged deprivation of vitamin A can result in skin, mucous membrane and respiratory difficulties. Milk, butter and margarine are good sources of vitamin A but are not found at all or are not found in adequate quantity in the jail diet.

There is no special diet for diabetics. 28b The jail diet is deficient in green and yellow leafy vegetables, also sources of vitamin A. All of these diet deficiencies should be corrected, forthwith and the order resulting from this opinion should so provide.

Contrary to Michigan Corrections Department Regulation 791.104(8) "heat carts" are not "furnished for transporting meals to cell blocks" so that there may be "service of warm meals".

A plan for correcting this violation should be submitted within thirty days from the date of the interim order resulting from this opinion.

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Recreation

We consider recreation only as it relates to the duty of the jailer to give inmates reasonable protection against preventable illness, assaults, and suicides.

One after another, the witnesses in this case gave testimony that the jail's facilities for recreation were totally inadequate.

The experts unanimously testified that the risks of violent assaults and suicides are increased by lack of opportunity for physical exercise and recreation. The expert witnesses reinforced our common-sense, layman's observation that physical exercise, and recreation help to provide a wholesome outlet for hostile and aggressive forces which seem to be naturally built up in people who are held in close confinement. When there are no healthy outlets for such aggressive and hostile instincts, inmates tend to hurt one another and to hurt themselves.

There is no gymnasium at the jail. There is no opportunity for out-door exercise or recreation. There is no recreation room or recreation center in the jail. The only areas available for recreation are the cells and the rock areas. In the old section of the jail the rock area, earlier

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described, is 10 to 12 feet wide. In the new annex the rock is only 3-1/2 to 4 feet wide. The rock area in the new annex, used by an entire ward, is narrower than the patrol walk designed for use of deputies.

We agree with the environmental health expert who testified that the annex rock is worthless as a recreation area. The rock in the old section is not worth much more.

About one third of the inmates are between 17 and 21 years of age. They are for the most part physically strong, and normally active but are compelled to be idle and restless.

Most of the inmates are in the jail for more than two months. A large number are there for more than three months. A substantial number are there for over half a year. A handful are there for more than a year.

Given the length of confinement and the age grouping of inmates, the absence of recreational facilities constitutes a positive danger to health and combines with other factors to unreasonably enhance the risk of assaults, suicides and riots. The absence of facilities for recreation reflects a failure on the part of the defendants to afford reasonable care for the health and safety of the prisoners. This failure must be corrected.

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28b Contrary to plaintiffs claim, the evidence indicates appropriate dietary supplementation for pregnant inmates.

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If the present jail facility is maintained there must be suitable provision for inmate recreation.²⁹ The interim order resulting from this opinion should require the defendants, within thirty days from entry of such order, to submit for court approval a plan for suitable recreation facilities within the present jail structure, if the defendants plan to continue the use of said structure. If facilities must be completed within nine months from the date of judgment. Regarding any new facilities which may be built or acquired, adequate recreation facilities must be provided and consideration should be given to providing opportunity for outdoor recreation and exercise.

In any remodeling of the present jail facility consideration should be given to affording inmates, who are not in need of maximum custody, greater mobility--that is, more "walking-around room" within the confines of the institution. The expert testimony satisfied us that such "walking-around room" is highly desirable from the standpoint of inmate health and reduction of assault and suicide hazards. It would seem that such "walking-around" space should be provided in any new jail facility for inmates who do not need close or maximum custody for the security of the institution.

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Moreover, presumptively innocent inmates should have the maximum freedom to move about consistent with the security risk presented by the individual inmate.³⁰ This is a constitutional principle inherent in due process and should be taken into account in any alteration of the existing jail building and in the construction of any new one.

The evidence in this case indicates that only a handful of the inmates are truly "maximum security cases"; most warrant "medium" or "minimum" custody classification.

The absence of recreational opportunities at the jail, not only affects inmates' health and safety, but bears importantly on institutional discipline. Where recreational opportunities abound, they become one of the inmate privileges which may be withdrawn as a disciplinary measure.³¹ When recreational opportunities are few or nonexistent, the administrator loses a possible disciplinary option. This is the case at the county jail, where there is no gym, shuffleboard, movie, or yard privilege to withdraw. Withdrawal of "rock privileges" means restriction to the inmate's undersized cell, a very harsh measure, but one of few punishments available to the jail administrator.

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GENERAL CURTAILMENT OF LIBERTIES OF INMATES

We turn now from such tangible matters as floor space, air space, health care, sanitation, nutrition, and personal safety to the less tangible, but equally important complaints of the plaintiffs regarding their individual liberties. They complain that they are being unlawfully deprived of their right freely and privately to communicate with others, to have visitors, to be free of arbitrary discipline, to have a role in the government of the institution, to enjoy the right to counsel, and generally to be spared burdens, except those essential to assure their appearance in court.

We agree with plaintiffs that persons detained on untried criminal charges are not, by the fact of detention, legally deprived of any rights, privileges or immunities, with certain narrow exceptions. Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944). The Coffin case, speaking of a sentenced convict, states:

"A prisoner retains all the rights of an ordinary citizen except those expressly,

²⁹ See Department of Corrections Reg. 791.101(11).

³⁰ Cf. Brenneman v. Madigan, No. 70-1911 (D.C.N.D. Calif. March 11, 1971).

³¹ As Dr. Murton testified "good penology" requires that withdrawal of inmate privileges is the preferred disciplinary measure; the imposition of positive burdens, such as isolation, should only be used where lesser, preferable measures are ineffective or the infraction involved is extremely serious. See, Model Penal Code Sec. 303.6(2) (Proposed Official Draft 1962); American Correctional Association, Manual of Correctional Standards, 243-46 (1959).

or by necessary implications, taken from him by law."³²

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We accept this general formulation to be the governing law, but we find it necessary to further define it. A formulation which we find more useful is that the detained, untried person, loses those privileges, rights, and immunities, the loss of which is necessarily inherent in confinement, and may also lose such other privileges, rights, and immunities, as may be reasonably and necessarily taken or restricted for the security or good order of the penal institution.

We agree with plaintiffs that persons detained on untried criminal charges are presumed to be innocent. We agree also that due process of law prohibits punishment of persons who have not been convicted of a crime. We agree that accused persons who are detained in a jail are members of the same broad class of accused people as those at liberty in the free community pending trial on criminal charges. We agree that the only lawful objective of detention, and the only lawful objective of bail, is to assure the accused's presence in court. We agree that the imposition upon detained, accused persons of any hardship or pain, physical or mental, or the deprivation or curtailment of any of their liberties is unlawful, if, such imposition or curtailment is for the purpose of punishing, that is, of exacting retribution for, the offense charged.^{32a} Such imposition of burdens or curtailment of liberties would be unconstitutional, as punishment in advance of determination of guilt. However, the imposition of burdens or the curtailment of liberties is not punishment if these tests are met:

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1. The purpose of the imposition or restriction must be the security or good order of the institution and not the exaction of a penalty for the offense charged.
2. The burden, hardship, or restriction must be reasonably related to the security or good order of the institution.
3. The burden, hardship, or restriction must not be overly broad in scope; that is, it must be no more onerous than is reasonably necessary to accomplish its institutional purpose.
4. The purpose or goal of the burden or restriction must not be the pursuit of some malicious or sadistic objective of the jailer.

The reason, purpose or goal of burdens and restrictions placed upon prisoners is to be gathered from all of the circumstances in the case.

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We do not find in this case that any of the challenged conduct of the defendants has the goal or purpose of punishing prisoners for the alleged offenses for which they were arrested. We do not find in this case that any of the challenged conduct of the defendants reflects any malicious or sadistic objective. We are referring to conduct of the defendants and the conduct of their agents and servants, authorized by defendants.

We differ with the plaintiffs, also, in that we find that certain of the conduct of which they complain has the goal of preserving the security and good order of the jail community, by means which are not unduly broad in scope, and which are reasonably related to such goal.

We do not agree that any rule of law prevents the use of disciplinary measures to enforce rules of the jail, if such rules are reasonably required for the security and good order of the institution. Jail rules are on their face lawful if they have a close and substantial relationship to such matters as prevention of escapes, protection of inmate health and safety, and maintenance of administrative authority. Inmates may be appropriately disciplined for breach of such rules. We agree with the plaintiff that cruel and inhuman

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32 The Coffin decision recognizes that there may be some curtailment of the individual liberties of prisoners for the "observance of discipline for his regulation and that of other prisoners." 143 F.2d at 445.

32a Anderson v. Nesser, 438 F.2d 183, 190 (5th Cir. 1971).

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punishment may not be meted out as discipline for violation of jail rules. We agree that due process of law must be observed in administering jail discipline. We do not agree that due process requires all the niceties of procedure urged by the plaintiffs. We will return to the subject of inmate discipline.

Although we agree that the only lawful purpose of detention is to secure the appearance of the accused, we cannot agree that the only permissible restrictions on liberty of detainees are those which are necessary to assure the appearance of the accused at trial. The latter proposition so myopically focuses on the accused, that it ignores the existence of the jail community. Given the jail community, its security and good order become highly relevant.

The four-fold test which we recognize takes into account the jail community, and the public interest in the orderliness and well-being of this community, which the plaintiffs are wont to ignore.

We reflect briefly on the equal protection argument advanced by the plaintiffs. While jail inmates belong to the total class of accused but untried persons, they belong to another class or sub-class of the jail community. Jail inmates differ in this respect from

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accused persons who are at liberty in the free community. The latter do not present problems of escape; destruction of jail property; introduction of contraband; intimidation, extortion, and assaults, against others who cannot take flight; creation of fire hazards for persons who cannot take flight; threat of riot or revolt against authority, to name but a few of the problems which are either peculiar to the jail community or occur there with special intensity.

There is therefore a difference between jail inmates and accused persons in the free community. Because they are not similarly situated, there can be disparate treatment of detained and non-detained accused persons which does not offend the equal protection clause, as long as the difference in treatment reflects reasonable classification, is reasonably related to the difference in status or class, and is closely and substantially related to a permissible governmental objective. Finley v. California, 222 US 38, 56 L.Ed. 75 (1911).

Thus, while the law presumes the innocence of accused, but unconfined detainees, it does not presume that they are choir boys, or campfire girls. Experience indicates that jail populations present special and serious problems and threats to the jail community. The erection of safeguards

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against such threats is a permissible governmental objective, and more particularly a permissible objective in connection with the detention of accused persons awaiting trial.

The jail executive authority must of necessity have some reasonable latitude and discretion in determining what rules, policies, regulations, and practices are necessary for the security and good order of the jail community. This common-sense conclusion is buttressed by the constitutional principle of separation of powers. Article III, Sec. 2 of the Michigan Constitution.

The mixed question of fact and law which this court must decide is whether the restrictions and burdens imposed by the defendants on the inmates are greater than those reasonably necessary for their detention or for the security and good order of the institution.

Visitation

We examine first the jail's program for visitation. There is unlimited visitation by attorneys, clergymen, and social workers. The accused may have visits from friends and family members who are on an approved list, but not more often than once every two weeks. The prisoner and his visitors are separated by a wall. They may see each other through a glass covered aperture or small window. They cannot touch.

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They speak with each other by means of a telephone. This "touchless" visitation is not required for visits from clergymen, social workers, and lawyers. There are small visiting cubicles where inmates may meet and speak in confidence with lawyers, clergymen, and social workers. In these cubicles they are not separated from their visitors by any partition.

There was credible testimony that visitation has resulted in contraband problems; that the Sheriff's custodial manpower is not adequate to handle more frequent or less restrictive visitation; and that space limitation and high prison population render more frequent or less restrictive visitation impracticable. On the evidence before us, we cannot say that the restrictions on visitation are not closely and substantially related to the security and good order of the jail community. Nor can we say that the rules for visitation are more onerous than are reasonably necessary for such security or good order. We cannot say that the defendant Sheriff has abused his discretion respecting visiting regulations. The visitation rules and their enforcement are not punishment because they meet the fourfold test outlined above. The visitation rules and regulations do not offend due process or equal protection rights of the prisoners. These rules and regulations do not interfere materially with the inmates' preparation for trial; nor do they deprive the prisoners of fair trials. The plaintiffs, therefore, are not entitled to

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relief respecting the frequency of visitation, the use of an approved visitor list, or the physical separation of inmates and visitors.³³

The plaintiff have asked for conjugal visitation for married inmates. Physical facilities for such visitation do not presently exist. Would the sheriff be acting within the bounds of sound discretion if he made no plans for conjugal visitation in a remodelled jail structure or in a new jail structure?

The matter of conjugal visitation lies in the legislative and executive domains. The court, in the absence of arbitrary decision by the legislative or executive branches of government, may not properly enforce a "right" of conjugal visitation. Whether or not conjugal visitation would disturb the security and good order of the institution is a matter sharply debated among penologists and prison administrators.³⁴ The position that conjugal visitation would have such a disturbing effect is, therefore, reasonably debatable. This being the case, the court, cannot on this record, find any abuse of discretion in the denial of conjugal visitation by the Sheriff.

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We come to a like conclusion respecting the plaintiffs claim of right to periodic visitation with their families outside the jail.

The Bail System

Much of the plaintiffs' arguments and those of amicus curiae, is an attack on the money bail system. We must admit that we are much moved by the plaintiffs' challenge. But a challenge to the entire money bail system is not properly raised by the pleadings or proofs in this case. To begin with this court did not fix the bail of any of the inmates in the county jail. The judges and magistrates who have fixed money bail for the release of jail inmates have not been made parties to the law suit. In an unprecedented prayer, the plaintiffs seek to have this court grant relief against the bail provisions of commitment orders made by other judges, who are not parties, and over whom the court has no jurisdiction. The challenge to the bail system made in this case is a collateral attack, not central to the issues raised by the pleadings and proofs. We concede that the money bail system is peripherally material.

³³ See American Correctional Association, Manual of Correctional Standards, 403-406, 428 (1959).

³⁴ This was indicated by the testimony of Thomas Murton. Also, compare Hopper, Sex in Prison; The Mississippi Experiment with Conjugal Visiting (1969) with Cavan and Zeman, Marital Relations of Prisoners in 28 Countries, 49 J. Cr. L., Cr. and P.S. 139 (1958).

While we do take into account a bail system which releases man because he has funds and confines another man, similarly situated because he does not, we are without power in this case to abolish money bail system. Nor can we alter the commitment orders of judges who are not parties and over whom we have no appellate jurisdiction in this case, by

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lowering their money bond requirements or by changing their money bond requirements to personal bonds. Similarly, we are without power to alter commitment orders, made by judges who are not before us, so as to provide for day-time work release or weekend visitation release.

We know of no judicial decision, and the plaintiffs have called none to our attention, in which a court released prisoners of a detention facility in wholesale numbers on the ground that under the bail system they were being held because of their poverty in violation of their equal protection rights.

Communication

We consider next restrictions on the plaintiffs opportunities for communication. Plaintiffs complain of censorship of incoming mail. Obviously there is no abuse of discretion by the Sheriff in inspecting incoming mail for escape implements, narcotics and any other contraband. Such inspection is closely and substantially related to the security and good order of the jail. The means employed by the sheriff, selective inspection, is not overly broad in scope and is not punitive under the above four-fold test. Nor is there an abuse of the sheriff's discretion in having jail authorities scan incoming mail for possible escape conspiracies or other matters which affect the security and good order of the institution.

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There does, however, appear to be an abuse of the Sheriff's discretion and a violation of the plaintiffs' constitutional rights under the First and Fourteenth Amendments of the United States Constitution, and Article I, Section 5 of the Michigan Constitution, respecting published written materials, such as books, periodicals and newspapers. The Sheriff prohibits the delivery to jail inmates of such published written materials. The Sheriff may not constitutionally do this, except to those published written materials which create a clear and present danger of violent disorder or escape³⁵ and those which do not enjoy constitutional protection because of their pornographic character.³⁶ The Sheriff may have such published written materials screened to exclude those which are pornographic and those which are so incendiary as to present such a clear and present danger. After screening, published written materials should be delivered to the inmates for whom they are intended. The plaintiffs' right to information from a free press outweighs any inconvenience to the Sheriff in handling published written materials. The interim order

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resulting from this opinion shall carry out forthwith, the above provisions regarding incoming published written materials.

With respect to outgoing mail, we conclude that the present practice of inspecting prisoner's letters to their attorneys of record is unlawful. The practice violates Regulation 791.110 of the Michigan Corrections Department, which provides:

"an inmate shall be allowed to send uncensored correspondence to public officials or counsel representing him".

"Uncensored correspondence" means private and confidential correspondence.

³⁵ cf. Long v. Parker, 390 F.2d 816, 822, (3d Cir., 1968); Sostre v. McGinnis, No 35838, (Ct of Appeals, 2d Cir., 1971); Fortune Society v McGinnis, (D.C. S.D. NY, Nov. 24, 1970), 3 Cr. L. 2157.

³⁶ Palmigiano v. Travisano, 317 F. supp. 776, 790 (D.C. R.I. 1970).

cases and situations which judges on some persons have suggested that the words "to censor" mean to obliterate written material so as to render it illegible, but more inspection or reading of written material is not "censored". We don't believe that the word "uncensored" is used in this sense in the regulation. We do not take the word "uncensored" to mean merely "not obliterated". We take the word "uncensored" to mean in its usual sense, meaning uninspected and unread. We do not believe the words "censor", "censored", and "uncensored", are not ordinary words of art and there is nothing in the regulation to indicate that the word "uncensored" is used in a special or technical sense. We believe that the ordinary meaning

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given to the word censorship includes the reading by jail authorities of inmates mail. We are supported in this conclusion by the dictionary. Webster's Third New International Dictionary defines censorship and censor to include the examination or reading of material and does not confine these terms to the obliteration of written words.

The practice of censoring inmates letters to their lawyers, not only violates Michigan Corrections Department regulations, it also violates the constitutional guarantees of the right to counsel, to a fair trial and to due process of law, Sixth and Fourteenth Amendments US Constitution and Article I, Section 20, Michigan Constitution. Palmigiano v. Travisano, 317 F. Supp. 776 (D.C. R. I.).

The inmate's right to counsel includes the right to communicate with him, freely and in confidence. Palmigiano v. Travisano, supra. The right of free and confidential communication is not fully satisfied by the jail policy which permits inmates unlimited, unrestricted visits with their lawyers. In arriving at this conclusion we take into account the pressures on the time of attorneys and the likelihood that at times they may find it impossible or highly inconvenient to visit their clients, in the jail. This inconvenience will grow if prisoners are housed at locations distant from downtown Detroit. Preparation of the inmate's defense may well be

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impeded if he is denied the opportunity to communicate with his lawyer freely and in confidence by mail. If his letters are censored, the inmate may be inhibited from revealing to counsel, self-incriminating information and information which might incriminate friends or loved ones. This chilling of lawyer-client communication, could interfere with trial preparation and lessen the chances for a fair trial.

We recognize that there is some danger that an inmate may include unauthorized messages in the envelope addressed to his lawyer, but we think this danger is outweighed by the right to counsel, the right to prepare a defense and the right to a fair trial. Moreover we should not assume that members of the bar would abuse the free and confidential communications right of their inmate clients. The danger to the security and good order of the institution from unfettered opportunity of inmates to send letters to their lawyers appears to be very slight indeed.

If inmates are so impecunious that they do not have the means of writing letters to their lawyers of record, the sheriff should, within reasonable limits, provide the means for such correspondence including writing materials, postage and mailing.

Some of the same considerations apply to inmate letters to public officials or governmental agencies. The access of presumptively innocent inmates to governmental

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agencies and public officials, should be unlimited and inmates' mail to such persons should not be censored. This right of confidential communication with government is a part of the prisoners' constitutional right "to petition government for redress of grievances," secured by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the Michigan Constitution.

The so-called authorization signed by inmates permitting censorship of their mail and interception of published written materials is ineffective as a waiver of constitutional rights. The authorization is extracted from inmates in the coercive atmosphere of the jail reception department. No attempt is made to explain to the newly admitted prisoner his right to counsel, his free press rights, his right to prepare adequately for trial, or his right to petition in

redress of grievances. We do not find in the signed card such an informed, knowledgeable relinquishment of a known right as is required for waiver of a constitutional guarantee.^{37/}

We do not agree with the plaintiffs that it is unlawful for the Sheriff to inspect outgoing inmates' mail addressed to persons other than their lawyers of record, public officials, and governmental agencies. There was credible testimony in this case that conspiratorial escape plots were found in the censorship of outgoing mail.

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Such mail may also be used to arrange for entry of contraband during visitation.

The selective censorship of outgoing mail, other than that addressed to inmates' attorneys of record, public officials, and governmental agencies, has a close and substantial relationship to the security and good order of the jail. The means employed is not overly broad in scope. Such censorship is not punishment before conviction.

Any messages from prisoners, helpful in the preparation of their defenses, can be handled in uncensored letters to their attorneys of record or in confidential face-to-face conversations with their attorneys. Censorship of mail sent by inmates to persons other than their lawyers of record, public officials, and governmental agencies does not deprive the inmates of the right to counsel, or the opportunity for a fair trial. Nor does such censorship violate due process, equal protection, or First Amendment rights.

Therefore, we conclude that there is no violation of inmates' legal rights and no abuse of discretion in censoring outgoing mail addressed to persons other than the inmate's lawyer of record, public officials, and governmental agencies.^{38/} The interim order resulting from this opinion should carry out the above provisions regarding mail censorship, giving them immediate effect.

Central or Congregate Dining

Jail inmates are fed in their cells. The plaintiffs complain that they are unlawfully denied central or congregate dining. They say that such dining is a right to be enjoyed by all except maximum-custody prisoners. We do not agree.

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The manner of dining rests in the sound discretion of the Sheriff. There is credible evidence that central dining can contribute to riot potential. Taking into account the circumstances of the physical structure of the jail, the present system for feeding the prisoners is not more onerous than is reasonably necessary for security and good order. There is no punishment in advance of trial in the present dining system. We do not believe that the Sheriff has abused his discretion in failing to make provision for central or congregate dining. We do not believe that the absence of central or congregate dining violates any legal rights of jail prisoners.

Library and Education

The plaintiffs insist that the jail library is inadequate. This too is a matter which is within the Sheriff's discretion. Nothing in the evidence convinces us that the Sheriff has abused his discretion or that any right of the plaintiffs, constitutional or otherwise, is violated by reason of the condition of the library.

Similarly the plaintiffs fault the jail for absence of education and vocational training programs. This is, like the library, a matter which the law commits to the sound discretion of the Sheriff. However much we may personally approve such programs, we can see no abuse of discretion

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37. cf. Miranda v Arizona, 384 US 436, 16 L.Ed. 2d 694 (1966); People v Kaigler, 368 Mich 281 (1962).

38. McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964).

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Sheriff, taking into account the short stay, (from an educational point) and rapid turnover of inmates. We conclude that the absence of educational programs does not violate any legal right of jail inmates. It may be the wisdom of such programs.

Telephone Service

The plaintiffs complain that they are unlawfully denied access to the telephone and the opportunity to make telephone calls in confidence. This is a matter within the sound discretion of the Sheriff. The opportunity which in fairness, accused inmates ought to have to obtain witnesses and to prepare adequately for trial, is secured by their right to send uncensored mail to their attorneys and to have unrestricted visitation in confidence with them. In those cases in which confidential telephone calls by prisoners are necessary for the marshalling of witnesses, there is nothing to prevent counsel from filing a motion for such purpose in the court where prosecution is pending. Indeed, counsel may even move for the release of prisoners in the custody of a deputy sheriff upon a showing that this is necessary to identify, find, and produce witnesses. United States v Simoneau, 32690 (D.C., E.D. Mich 1953, no published opinion, file stored at Federal Central Record Center, 7201 South Leamington, Chicago, Illinois).

We are confident that the sheriff in his discretion will permit phone calls to be made by prisoners who are confronted by serious personal or family emergencies. This, and other needed, albeit discretionary services to inmates will become more feasible as the jail population is reduced to lawful inmate capacity.

Under present conditions, however, the evidence does not indicate that the Sheriff has abused his discretion in failing to provide telephone service for the inmates. We conclude that no legal right of the prisoners is infringed by the failure to provide such service.

Law Library

Nor does the evidence indicate any violation of inmate's rights or any abuse of discretion by the Sheriff in his failure to furnish the inmates with a law library. The right to unlimited visitation and confidential correspondence with counsel, elsewhere provided for herein, adequately safeguards the plaintiffs' right to counsel, and to prepare for trial. There is no evidence in this case that any jail inmate, no matter how poor, has been denied a lawyer. There is no evidence in this case that any inmate whether charged with misdemeanor or felony has ever sought, or been denied access to law books. Even in a declaratory judgment proceeding, there must be an actual controversy. There is no actual controversy presented by the evidence involving an uncounseled inmate's desire to have law books. We do not decide hypothetical disputes which are not before us. We decline therefore to determine the right of uncounseled inmates to have access to law books.

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Inmate Self-Government

The plaintiffs complain that they are powerless and ask for participation in the government of the jail and for establishment of an inmate grievance council. Whatever we may think of the wisdom of their requests, there is no legal right to inmate self-government and no legal right to an inmate grievance council. Nor is there an inmate legal right to have representation on jail disciplinary tribunals. Such matters are clearly within the area of administrative and legislative discretion. The sheriff may afford inmate opinion such weight as he in his reasonable discretion deems proper, but this court cannot under the constitutional principle of separation of powers order the sheriff to give the inmates the influence in decision making which they seek (Article III Section 2, Mich Constitution)

Discipline

We turn now to the issue of inmate discipline. As Sheriff Lucas testified, because of the physical layout of the building and the absence of facilities for recreation, the disciplinary options available to the jail administration are few: denial of rack privileges

confinement in one of the maximum security single-cell wards on the sixth or seventh floor, or assignment to the hole.

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The deprivations incident to the imposition of any of these sanctions are onerous. Denial of rack privileges means that a man cannot have even the limited exercise available to him on the rock.

Confinement in the maximum security section entails not only an around the clock lockup, but also a greater degree of isolation and deprivation of human companionship than is suffered by other prisoners. Jail policy calls for giving persons in maximum security cells two hours a day for exercise in the narrow rock area, but at times this policy is honored in the breach.

As to the hole, an inmate confined therein lacks even the most rudimentary incidents of civilized life. It is not uncommon for disciplined inmates to spend a week or more in the hole. Confinement in the hole for twenty to thirty days is not unheard of. Later in our discussion we will describe in greater detail the conditions in the hole.

Although the Sheriff's jail regulations provide for disciplinary hearings to be held, we find that as a matter of course they are held after the fact of discipline and without the presence of the disciplined inmate. In several instances, men have been summarily sent to the hole for apparently trivial infractions, and there attempted and, in at least one instance, actually committed suicide before any hearing was held to determine whether they should have been so disciplined in the first place.

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It is our conclusion that the disciplinary system at the Wayne County Jail does not meet constitutional standards. We consider first whether discipline may be imposed prior to a hearing. We consider next the necessary elements of a lawful hearing.

It cannot, at this point in time, be questioned that institutional discipline must provide at least rudimentary procedural due process guarantees.^{39/} What process, in an institutional setting, is "due" is a more difficult question. The realities of penal administration are such that it is impracticable to clothe the accused inmate with all the protections a defendant would receive in a criminal trial. Among the facts of jail life are extensive inter-inmate extortion, intimidation and assaults. Also endemic, are destruction of public property; introduction of contraband; and attempts to corrupt custodial staff. (That such attempts are sometimes successful may be ruefully gleaned from the testimony of the penologists who were witnesses.) Reprisals by inmates against inmate informers are not uncommon. Escape, riots, and insurrection are a constant threat. In such a world the process due the accused is quite different from that due the accused in the free community. At times, custodial personnel must be able to act quickly to preserve institutional order, or they will lose control over potentially

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explosive situations. There are times when custodial personnel must impose discipline immediately or risk the severe undermining of their authority. Further, it seems clear that delay in imposition of the disciplinary sanction deprives it of some of its deterrent effect.

Thus, the case law recognizes that summary punishment of an inmate, not preceded by a hearing, does not offend due process of law, when the inmate's conduct poses a serious, immediate, and substantial threat to the safety of others or to the security of the institution, if the circumstances are such as to demonstrate strong probability of guilt.^{40/} Before administration of summary punishment, there must, of course, be "due inquiry" under MCLA 801.25. The purpose of due inquiry is to ensure that summary punishment is not arbitrary or irrational. But "due inquiry" doesn't require a hearing, necessarily.

But such summary discipline without a prior hearing is in order for a short period of time pending a hearing. Because of the gravity of the sanctions involved, review of summary disciplinary measures should consist both of automatic, immediate administrative review of summary punishment decisions by upper echelon administration,^{41/} and a prompt and fair hearing before a disciplinary board, unless waived by the inmate. The statutory requirement of "due inquiry" does not of course replace the constitutional requirement of due process of law.

For trivial offenses, those which do not seriously threaten the security or good order of the institution,

39 *Hewitt v Smyth*, 363 F.2d 499, 40-1 USTC ¶13,000, 33 AFTR2d 60-1111 (CA-4, 1960).

ards on the... these man can... an... punishment, without a hearing, is never constitutionally justified. In such cases, disciplinary action must await a hearing.

In determining what process is "due" in disciplinary hearings, it is appropriate to take into account the interests which are at stake. We have already noted that a finding of guilt results in serious penalties. On the other hand, unlike a determination adverse to a sentenced prisoner, a determination adverse to an unconvicted county jail inmate does not prolong his confinement. There is no "good time" forfeiture. From the point of view of the jail administrator, there is at stake the interest in the security and good order of the institution. Moreover, in determining what process is "due", we cannot lose sight of the facts of life in the Wayne County Jail. Large numbers of people in the sheriff's charge have prior criminal records. A very considerable number are felons who have in the past been convicted of serious offenses. There is widespread destruction of jail property. Dangerous assaults by inmate on inmate are frequent. There is a rock boss system in which the strong tyrannize the weak. The introduction of contraband, such as narcotics, weapons, and escape implements, presents a neverending problem. The inmates, held in close confinement against their will, pose a continuing threat of escape, riot, and insurrection.

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There are four fundamental requisites of due process in the setting of jail disciplinary hearings. They are notice, an opportunity to be heard, a fair hearing and an impartial decision maker.^{42/} Respecting notice, the inmate is entitled to be informed of the conduct expected of him, either from jail rules and regulations or as a matter of common sense and general knowledge. To put this another way, the inmate must have notice of what kind of conduct will subject him to discipline. The notice requirement also demands that the inmate be advised specifically of the charge against him, that is, he must be told with reasonable particularity what act or acts of misconduct he is charged with and what regulation or common sense standard his conduct allegedly violates.^{43/} The evidence discloses that the jail authorities comply with these notice requirements. Copies of written jail regulations are distributed to inmates as they enter the institution. In this distribution, an occasional inmate may be missed, but there are copies of jail rules posted in some shower areas and elsewhere in conspicuous places. Even those inmates who

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claimed that they did not get copies of the jail regulations, demonstrated a familiarity with them in the course of their testimony. Thus we conclude that the inmates do receive notice of the conduct expected of them.

We find in the evidence no case in which an inmate was disciplined without first being advised with fair specificity of the nature of the misconduct with which he was charged. The charge against the accused is reduced to writing prior to review by the jail disciplinary board. We conclude that the notice requirements of due process are respected by procedures employed by the sheriff.

Closely related to the right to notice is the right of the prisoner to be heard in his own defense, "the fundamental requisite of due process."^{44/} If the inmate is not informed of the specific misconduct of which he is charged and the specific rule he is accused of breaking, his right to be heard would be virtually meaningless.^{45/}

Fundamental fairness in a system of ordered liberty requires that the accused inmate be given an opportunity to tell his side of the story. He has the absolute right to do

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40/ Nolan v Scafati, 306 F. Supp. 1, 3 (D.C. Mass. 1969).

41/ cf. Landman v Peyton, 370 F.2d 135 (4th Cir. 1966); Sect. e.g., Sostre v. McGinnis, No. 35038, P1673, 1683 (2d Cir. Feb. 24, 1971); Nolan v. Scafati, 306 F. Supp. 1, 3 (D.C. Mass. 1969). (Wyzanski, C.J.); American Correctional Assoc., Manual of Correctional Standards, 241-42.

43 See e.g. Goldberg v. Kelly, US , 25 L. Ed. 2d 287, 299 (1970); Re Gault, 387 US 133, 18 L. Ed. 2d 527, 549 (1967); Cole v. Arkansas, 333 US 196, 201, 92 L. Ed. 644, 647 (1948).

44 Grannis v. Ordean, 234 US 385, 394, 58 L. Ed. 1363, 1369 (1914).

45 See authorities cited at note 2, supra.

this in person. The right of the inmate to be present at the disciplinary trial in order to hear the nature of the evidence against him and to have his say is so fundamental that no protestation of administrative inconvenience or institutional security can be heard to defeat it.^{46/}

It is in this respect that the disciplinary procedure of the sheriff is most deficient. Prisoners, who have been severely disciplined, testified, one after another, that they had not received a hearing. Members of the sheriff's department testified, just as invariably, that hearings had been regularly held after the imposition of serious disciplinary sanctions. We don't think that either set of witnesses deliberately lied. The explanation is that the jail disciplinary board conducted so-called hearings or reviews without the presence of the accused inmate. Imposition of a disciplinary penalty after the trial of an accused inmate, in absentia, violates due process of law.

It is not necessary here to make any decision respecting the obstreperous inmate who obstructs or brings

disorder into the hearing.^{47/}

The accused inmate's right to defend himself in a fair hearing does not guarantee to him all of the rights to which he would be entitled in a criminal trial. In the setting of a jail disciplinary proceeding, the accused inmate has no right to compulsory production of witnesses, no right to be confronted by, or to cross-examine, adverse witnesses and no right to be assisted by counsel. Sostre v. McGinnis, No. 35038, pp. 1671-72 (2d Cir. 1970), and authorities there cited; Nolan v. Scafati, 306 F. Supp. 1, 3 (D.C. Mass. 1969).

We must view the opportunity to present witnesses, to confront and cross-examine hostile witnesses and to be represented by counsel in the context of the realities of life in the Wayne County Jail. We must take into account the practicalities of jail administration.

It seems neither necessary, nor practical, to allow prisoners to be represented by counsel (or counsel substitutes) at hearings before the Disciplinary board. We have noted the necessity for swift action on the part of jail officials in dispensing punishment. There is the same need for celerity in completing disciplinary hearings, whether they precede or follow punishment. We believe, having had considerable

experience with the delays necessitated by conflicts in the schedules of busy lawyers, that allowing prisoners to be represented by counsel at disciplinary hearings would, to a great extent, rob the disciplinary procedure of its needed speed, to the detriment both of institutional order and prisoners' rights. We are not convinced that counsel substitutes answer the problem of delay, nor is it clear that untrained persons are effective counsel substitutes. There is certainly no evidence in the record which persuades us of the competence of untrained counsel substitutes.

Further, the necessity of legal assistance in disciplinary hearings is minimal. For the most part the issue will be simple: Did the inmate do the act? There are not likely to be complex questions of fact or law. Nor are such hearings governed by technical rules of evidence or procedure. Only an informal inquiry is contemplated, which, while not elaborate, will offer substantial justice. We conclude, as have other courts, that in ordinary jail disciplinary hearings, due process does not require that the accused inmate have counsel or a counsel substitute. See, e.g. Sostre v. McGinnis, No. 35038 (2d Cir. 1970); Nolan v. Scafati, 306 F. Supp. 1 (D.C. Mass. 1969).

We turn to the question of the inmate's claimed right to present witnesses. We have heard testimony about

46 See, e.g. Goldberg v. Kelly, *supra*, at 300; Powell v. Alabama, 287 US 45, 68 77 L. Ed. 158, 170 (1932); Lewis v. US, 146 US 370, 36 L Ed 1011 (1892); Galpin v. Page, 18 Wall 350, 368, 21 L. Ed. 959, 963, (1874). cf., US ex rel Marciel v. Fay, 247 F.2d 662, 669 (2d Cir. 1957).
47 Eg Cf. Illinois v. Allen, ___ US ___, 25 L. Ed. 2d 353 (1970).

the discipline against him of adminis-
 "rock boss" system which exists at the County Jail. There is in record appalling evidence of widespread assaults. There is testimony indicating that the physically strong, aggressive or cunning inmates tyrannize the weak ones. We are convinced that the possibility of inmate coercion, intimidation, extortion, and reprisal are such that it would not be wise to allow accused prisoners to call and examine fellow inmates at disciplinary hearings. It is doubtful that the interest in truth and fair hearings would be served by giving accused inmates compulsory process to call other inmates as witnesses. Also, the hearing. We conclude, as have other courts, that respecting disciplinary hearings in the setting of a pre-trial detention facility, due process does not give the accused inmate the right to compel production of witnesses on his behalf.

However, in order to accord the accused inmate a fair hearing, the disciplinary board must consider fully any defense he may make. This means that if the board does not believe the inmate's version of the facts, and the inmate claims that fellow prisoners will corroborate his story, the board has a duty to have these claims investigated, and to determine whether, in fact, the accused's defense is substantiated thereby. 47a/

Similar concerns for inmate safety and for the integrity and brevity of the hearing process, lead us to conclude that, in the context of a Wayne County Jail, disciplinary hearing, due (96) process does not require that the accused inmate be confronted by his accusers or adverse witnesses or that he be afforded an opportunity to cross-examine them. To inform an otherwise uninformed inmate of the identity of his accuser, would be, in too many cases, to throw the accuser to the wolves. The same may be said of identifying adverse witnesses whose identity is unknown to the accused inmate. 47b/ We recognize that this will, in some cases, hamper the accused inmate in showing his accusers and adverse witnesses to be incorrect, biased or maliciously false. But we are bowing to the facts of life as they presently exist on this record in the jungle which is the W. C. Jail.

The fair-hearing requirement, and the requirement of the opportunity to defend, demand that the accused be informed of the nature of the evidence against him. *Re Gault*, 387 US 133, 18 L.Ed. 2d 527 (1967); cf. *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 US 292, 300, 81 L.Ed. 1093, 1099 (1937). If this cannot be done without disclosing the identity of adverse witnesses, their identity must be disclosed, even though their safety may be endangered.

This is required because there can be no genuine opportunity to be heard and no fair hearing without apprising the accused of the nature of the evidence against him. How can the accused tell his side of the story if he doesn't know the other side? How can he meet unfavorable evidence if he doesn't know its nature? The accused, of course, must be (97)

given a chance to meet and explain unfavorable evidence through his own testimony and persuasive efforts.

The requirement of a fair hearing demands that the accused inmate not be found guilty except upon substantial evidence, which has all the earmarks of reliability 48/ and which is convincing beyond a reasonable doubt. 49/ There is a safeguard here, which, to some degree, offsets absence of confrontation and cross-examination opportunities. 49a/

Finally, for due process in disciplinary hearings, "an impartial decision maker is essential," *Goldberg v. Kelly*, 25 L.Ed. 2d 207 (1970). As presently constituted, the jail disciplinary board is composed of an inspector, a lieutenant or sergeant and a patrolman (guard), all of whom are members of the custodial staff.

This procedure, in which guards are both accusers and judges of the accused, strikes the Court as constitutionally infirm. Disciplinary hearings should be conducted by non-custodial members of the sheriff's staff.

47a / See American Correctional Assoc., *Manual of Correctional Standards* 242 (1959).

47b / Goldfarb & Singer, "Redressing Prisoner Grievances", 39 *Geo. Wash. Law-Rev.* 175, 189 (1970) indicates that penal institutions in general are jungles where reprisals ag. informers are rampant, seemingly with impunity.

48 / *Morris v. Travisono*, 310 F. Supp. 857, 873 (D.C. R.I. 1970); cf. *Glasser v. US*, 315 US 60, 80, 36 L.Ed. 680, 704 (1942); compare *Thompson v. Louisville*, 362 US 199, 4 L.Ed. 2d 654 (1960).

A verbatim record of the hearing must be kept.
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So much for the procedural aspects of due process in jail discipline. The views expressed in this opinion should be embodied in separate declaratory judgment effective forthwith.

We note that while the disciplinary sanctions applied are onerous, they do not increase the inmate's time in confinement. In county jail inmate discipline, there is no "good time" at stake. In loss of "good time" can increase the time of confinement of convicts by a third or more and influence parole possibilities. This may have led some courts dealing with convict discipline to recognize an inmate's right to production of witnesses, to confrontation and cross-examination, and to the assistance of counsel.^{50/} The case before this court is distinguishable in this respect.

The Hole

In the jail's system of discipline, there is another serious infirmity: It is the hole--at least, as presently administered. Solitary confinement does not in and of itself offend constitutional standards.^{51/} However, the circumstances and conditions of confinement, solitary or otherwise, may so offend universally-held views of elemental

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human decency as to render the confinement unconstitutional. Confinement which offends the rudimentary elements of human decency is cruel and unusual punishment.^{52/}

Cruel and unusual punishment is meted out routinely in Ward 711, of the Wayne County Jail, commonly known as the hole. There, for substantial period of time, prisoners are confined in unlighted cells, 7 1/2 by 7 1/2 feet. Hole cells are bare, save for a narrow concrete slab bunk. The prisoner in the hole gets no-mattress, bedding, or blankets. At times the cold has been so severe that leaking water pipes formed icicles.

The prisoner is confined without eating utensils. He eats with his hands or laps up his food like a dog.

He is denied the rudimentary impliments of personal hygiene, such as toilet paper, soap, washing water, towels, (and in the case of women in menses, sanitary napkins).

He must eliminate in a hole in the floor. If he wants water for washing or drinking, other than that which might be brought at the whim of a guard, he must use the water which flushes the floor drain toilet.

The only light in the cell is that which manages to penetrate a narrow mesh slit in the steel door.

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He is permitted no writing or reading materials and no visitors, except the attorney who represents him. He is confined 24 hours a day under these squalid circumstances.

50. See, e.g., Morris v. Travisono, 310 F. Supp. 857 (D.C. R.I. 1970); Sostre v. Rockefeller, 312 F. Supp. 862 (S.D.N.Y. 1970), rev'd sub nom Sostre v. McGinnis, Supra.

51. Burns v. Swenson, 430 F.2d 771, 777 (8th Cir. 1970) and authorities there cited.

52. Such punishment violates the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 16, of the Michigan Constitution.

49/In re Winship, US ___, 25 L.Ed. 2d 368 (1970); See also, Christoffel v. United States, 338 US 64, 69, 93 L.Ed. 1026, 1031 (1949).

49a/ Necessarily, there must be a disinterested investigation to determine the veracity of information adverse to the accused.

"The basic drawing its meaning from the progress the Wayne County Prison is making."

The basic concept underlying the Eighth Amendment is nothing more than the dignity of man.^{53/} The guarantee is a flexible one, drawing its meaning from "the evolving standards of decency that mark the progress of a maturing society."^{54/} Conditions in the hole at the Wayne County Jail do not measure up to those standards. Confinement as barbarous as this must threaten the health of the prisoner. Confinement as debased and degrading as this must, inevitably, erode the spirit and undermine the sanity of even the strongest man. Confinement under such conditions shocks the conscience. Its dehumanizing aspects are an affront to civilized notions of rudimentary human decency. We cannot believe that such confinement is a permissible exercise of governmental authority over a citizen of a civilized society in the year 1971.^{55/}

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If the hole is to be used as a disciplinary device, changes must be made. Inmates in the hole must be given bedding, mattresses, and the necessities of personal hygiene, such as toilet paper, soap, towels, and, in the case of women in menses, sanitary napkins. They must be done, unless there is probable cause to believe that these articles will be used as implements of self-destruction. If destroyed by an inmate, these articles may be withdrawn, and further articles withheld. The hole must be heated adequately in cold weather in accordance with Michigan Corrections Department regulation 791.102(2). Adequate light must be provided. Inmates housed in the hole must be given fresh drinking water and water for washing, apart from that which flushes the floor drain toilet. Department of Corrections regulation 791.103(1) (c) requires that incorrigible cells be equipped with a wash basin and a drinking fountain. Until drinking fountains are installed, fresh drinking water may be supplied by other means. However, if use of the hole is to be continued, drinking fountains must be installed within one-hundred twenty days from the date of entry of judgment therein.

Michigan Corrections Department Regulation 791.103(1) (c) provides that incorrigible cells must be a minimum size

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of 8' x 8'. If the hole cells are to be used as isolation or incorrigible cells they must be made to conform within one-hundred-twenty days from the date judgment is entered in this case.

It is permissible to withhold reading and writing materials from prisoners in the hole, except as the latter may be requested by an inmate for the purpose of writing to his lawyer of record, a court or other governmental body. It is permissible to deny visitation to inmates in the hole, except for the inmates' attorney of record and medical personnel.

Inmates in the hole should be permitted to visit with counsel, elsewhere, in a setting which permits confidential communication.

The provisions of this opinion concerning the hole should be embodied in an interim declaratory judgment effective forthwith.

53. *Trop v. Dulles*, 356 US 86, 100, 2 L.Ed. 2d 630, 642 (1958).

54. *Id.*, at 356 US 101, 2 L.Ed. 2d 642.

55. Other courts on Eighth Amendment grounds, have abated conditions of confinement less extreme than those before the court. See, e.g., *Knuckles v Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969); *Holt v Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969); *Jordan v Fitzharris*, 257 F. Supp. 674 (N.D. Cal., S.D. 1966).

Finally, incarceration in the hole may not be ordered for minor offenses which do not seriously and substantially threaten the security and good order of the institution.^{56/}

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Assignment to Maximum Security for Reasons Other Than Punishment

Closely connected with the question of punishment for rules infractions is the issue of non-punitive segregation of inmates within the facility. Confinement in the maximum security wards may be denominated either segregation or punishment, but the conditions under which the inmate must live remain the same. In a maximum security cell, he endures hardship beyond that suffered by the inmate population as a whole. Inmates in maximum security are isolated from their peers to a greater extent than the other jail inmates. Except for two hours a day, they are deprived of the privilege of moving about in the rock area. Their opportunity for exercise is therefore, even less than the meager opportunity afforded other inmates.

Surely the law requires a fair and rational basis for the decision to assign an inmate to a maximum security ward or cell, whether the purpose is punishment or non-punitive segregation. Due process of law requires, also, that the inmate be informed of the reason for assigning him to maximum security and that he be advised that he has the right to a hearing, if he feels aggrieved by the classification.^{57/}

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Such hearings must follow the general guidelines set forth above for disciplinary proceedings. Prisoners may be placed in maximum security pending the hearing, but a hearing, unless waived, must promptly follow their incarceration.

It is appropriate to segregate a prisoner in maximum custody if there is probably cause to believe that such segregation is necessary for the protection of others, for his own protection, or for the security or good order of the institution. The scope of the sheriff's discretion in classifying and segregating prisoners is considerable but must be reasonably exercised. Humane, efficient and orderly administration are sound objectives.

It is an appropriate object of jail administration to keep hardened criminals as far as possible from young and impressionable inmates. Aggressive, assaultive homosexuals are a disturbing and dangerous element, destructive of the good order of the institution. They may be removed as far as possible from those inmates who are the least able to defend themselves against homosexual attack. Homosexuals, whether aggressive or passive should not be given free rein within the prison population and it is proper to segregate them, especially from young inmates. Domineering inmates may be foreclosed, through segregation from tyrannizing or intimidating others by threats or violence.

Obviously, inmates with a pattern of assaultive behavior within the institution are proper subjects for maximum custody confinement. Inmates who are congenital victims of

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assaults, or against whom inmate resentment runs high, may be segregated for their own protection, not only out of concern for the particular inmate's well-being, but also as a matter of maintaining order in the institution.

Thus, if there is probably cause to believe that a prisoner's views are so unpopular with his fellow inmates that permitting him to mingle with them would create a substantial danger to him, he may be

56 Disciplinary measures, otherwise valid, may constitute cruel and unusual punishment if they are greatly disproportionate to the offense for which they are imposed, Trop v. Dulles, 356 US 86, 2 L.Ed. 2d, 630 (1958); Wooms v. United States, 217 US 349, 54 L. Ed. 793 (1910).

57 Cf., United States ex rel. Schuster v. Herold, 410 F. 2d 1071 (2d Cir. 1969).

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separate from the general population of the jail. But under *Ex v. Tate*, 378 US 546 (1964), inmates may not have any special hardship or loss of liberty imposed upon them because of their political or religious beliefs.⁵⁸

Of course, prisoners who present a particularly great threat of escape may be confined under conditions that make escape more difficult. Similarly, concern for the flow of contraband within the jail may make it necessary to segregate certain prisoners. We cannot, however, emphasize too strongly that segregation decisions that result in the imposition of additional hardships and burdens upon the segregated inmate must be based upon probable cause and substantial evidence.

Changes in circumstances within the jail may render segregation decisions, appropriately made at one time, subsequently inappropriate. Therefore, the status of segregated

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inmates should be periodically reviewed, and if a prisoner's assignment to maximum custody is no longer defensible, he should be returned to less close confinement.

These observations concerning assignment of prisoners to maximum security cells should be carried out in an interim declaratory judgment, effective immediately.

Defense of Poverty

One of the defenses of the County Commissioners and Auditors is a plea of poverty. They say there simply is not enough money in the County coffers to bring the jail into conformity with law. In the first place poverty is no defense to a failure to perform a constitutional obligation. *Watson v. Memphis*, 373 US 526, 537, (1963); *Suffern v. School Bd., Prince Edward County*, 377 US 218, 232-234 (1964); *Green v. Rent Co. School Board*, 291 US 420, *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968); *Goldberg v. Kelly*, 397 US 254 (1970); *Shapiro v. Thompson*, 394 US 618 (1969); *Bond v. Ann Arbor School Dist.*, 383 Mich 693, (1970). We need not point out again the constitutional dimensions of the defendants' infringement of plaintiffs' rights.

In the second place even if poverty were a lawful defense, the defendants' plea is not persuasive as a matter of fact. To begin with, no attempt was made by the defendants to show

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that county funds are exhausted by expenditures mandated by law. We readily concede that there are county activities and expenditures required by laws of Michigan. Indeed, the provision of a suitable and sufficient jail and its maintenance in good repair are two such mandatory responsibilities (MSA 5.327, 5.868, and 5.336). We are sure there must be others, but the defendants have not pointed them out to us. Nor have the defendants proved what it costs the county to discharge the responsibilities mandatorily thrust upon it by state law.

The defense of poverty is in the nature of an affirmative defense. Moreover, the facts concerning the revenues and costs of county government are peculiarly and specially within the knowledge of the defendants. Such facts are readily available to the defendants and easily marshalled by them. The defendants, therefore, have the burden of proof and persuasion respecting the proposition that they lack funds to bring the jail into compliance with the law.

The defendants have failed to discharge that burden. They have not begun to show that their total expenditures, those which are discretionary, as well as those which are mandated by law, leave the county financially unable to provide a suitable and sufficient jail and to keep it in repair. A fortiori, the defendants have failed to show that the expenditures, reasonably required by law, leave the county unable to discharge its statutory duty to provide and maintain the jail.

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⁵⁸ Accord, *Davis v. Lindsay*, 70 Civil 4793 (D.C. S.D. N.Y. 1970) (Politically controversial detainees may not be incarcerated on arrival at the institution under conditions more burdensome than those provided the general institutional population).

revelation of county funds by discretionary expenditures would not excuse the county's failure to discharge a responsibility placed upon the county by State law. Before the plea of poverty could be factually persuasive in the least, the defendants would have to show that after a complete discontinuance of all those county activities which are not required by law, the county would still not have funds enough to discharge its statutory duty to provide and maintain a suitable and sufficient jail and to keep it in repair. The defendants did not begin to make such a showing in the evidence.

Reservation of Jurisdiction and Appointment of Monitors

The nature of this case requires the court to reserve jurisdiction in order to see to it that its judgments are carried out. The final judgment should so provide. However, it does not seem necessary to have a three-judge tribunal see to the carrying out of every aspect of the court's judgment and the court reserves the right to revert to a single-judge court to consider disputes of lesser significance as they may arise under the final judgment.

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The court reserves unto itself the power to appoint a monitor or monitors, at the expense of the Board of County Commissioners, to see to the carrying out of its orders and its judgment.

Invasion of Legislative or Administrative Discretion

Defendants argue that the plaintiffs would have the court exercise legislative and executive authority beyond the judicial power. Without hesitation or reservation, we agree that a court may not direct or control legislative action or action which lies within the discretionary domain of the executive authority.

However, the court may not shrink from protecting the legal rights of individuals when such rights are trammelled by legislative or executive action or inaction.^{59/}

There is a parallel here to the school desegregation cases in which the US Supreme Court rights constitutional wrongs resulting from legislative and executive action.

To be sure, there is a line to be drawn beyond which the judicial power does not extend. We have taken pains not to overstep this line. We have not substituted our

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judgment for that of the sheriff or the Commissioners as to matters which are lawfully within their discretion. We have resisted the temptation to find as legally mandated, all that we think is wise. We have, in this opinion enforced only those standards which are mandated by the laws of the land.

The Commissioners of Wayne County must, by law, provide a suitable and sufficient jail. This means, at the very least, a lawful and constitutional jail. It is our sworn judicial duty, when called upon by persons subjected to unlawful jail conditions to see to it that the Commissioners provide a lawful and constitutional jail. It is our sworn judicial duty, when called upon by persons subjected to unlawful jail conditions, to see to it that the sheriff runs a lawful and constitutional jail. We must not flinch from such duty.

True, the Commissioners are authorized and directed by law to prepare within the jail "so many cells for the reception of convicts as they deem necessary," MSA 5.328. This does give them an area of discretionary power but this discretion is bound by statute and constitutional limits. The jail they provide must be "suitable and sufficient", MSA 5.291. It must not inflict upon them cruel and unusual punishment. The Commissioners lawful power to determine the number of cells

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59 Hamilton v. Schiro, No. 69-2443, Civil, (D.C. E.D. La., June 25, 1970) in which the court directed the Mayor and City Council of New Orleans, "without delay /to/ correct conditions" of the New Orleans Parish prison which are very nearly identical to those of the Wayne County jail, which we have found to be unlawful.

does not vest them with the power, irrationally, and hence unconstitutionally, to determine that cells built for 800 men are all that are necessary for 1600 men.

whether individuals are harmed by other individuals or by government, equity will not abide a wrong without a remedy. If legislative or executive action or inaction violates the legal rights of inmates, the injury must be redressed. Perhaps the highest calling of the judicial branch is to protect the weak from tyranny by government. We must not and will not hesitate to use such power as lawfully resides in this court to right the legal wrongs which exist in this case.

Let orders enter accordingly without costs, this being a public issue.