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Rape: The Unstated Sentence

Homosexual rape has been recognized as a problem in American prisons for many years. The problem appears to be a malady universally associated with correctional confinement. The situation is especially serious in institutions housing males. For this reason, the need is great for the examination of homosexual rape in male occupied correctional institutions. While experts seem unable to estimate accurately the incidence of sexual assault among inmates, they admit that the problem is serious and has grave effects upon the victims.

The eighth amendment to the United States Constitution prohibits “cruel and unusual” punishment. A formal sentence assigning a criminal to five years in a state penitentiary as a sexual pawn to a gang of fellow inmates would attract nationwide attention for its uniqueness and cruelty. Any judge who imposed that type of sentence would be inviting reversal and perhaps a reprimand. While sentences are not imposed in terms so graphic, the stark reality is that for certain particularly vulnerable offenders, a conventional prison term all too often may carry with it a sentence of prolonged captivity under the constant threat of sexual assault. Increasingly, judges are beginning to recognize and consider this fact when sentencing certain offenders.

Convicts who are particularly vulnerable to sexual assault deserve protection from this type of abuse while serving their terms. The eighth amendment apparently promises that protection. Legal and practical re-

3. See infra notes 55-69 and accompanying text.
4. U.S. CONST. amend. VIII. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Id.
5. See infra notes 36-49 and accompanying text.
alities, however, make this promise rather hollow. Bureaucratic obstacles and considerations of federalism often work to deny victimized inmates any meaningful relief. The purpose of this comment is to outline the causes of action currently available to highly vulnerable offenders, to point out inadequacies of these actions, and to suggest innovative theories for relief.

This comment will commence with a survey of the literature discussing the prevalence and effects of sexual assault in correctional institutions, and identifying the victims and aggressors. An analysis of sexual assault in the context of the eighth amendment to the United States Constitution will follow. This analysis will reveal that the likelihood for relief under the federal Constitution is questionable, particularly in light of recent United States Supreme Court interpretations of the prohibition against "cruel and unusual" punishment. The federal district court case of Mostyn v. Carlson, which contained an inmate's allegations of confinement under cruel and unusual conditions including sexual assault, will be examined in context with these recent Supreme Court decisions. An argument will be made that under current federal constitutional law, a particularly vulnerable inmate may have a better chance for preventative relief under California constitutional principles. The sympathetic approach of the California judiciary toward the defense of "necessity" for the crime of escape tends to support this view. The California cases of People v. Anderson and People v. Lovercamp will be shown to support an independent interpretation of the California Constitution, which is more favorable to inmate suits. Finally, alternatives to conventional sentencing will be suggested, with special emphasis on practicable options for highly vulnerable first offenders.

THE DIMENSIONS OF THE PROBLEM

To appreciate the urgency of finding a consistently useful theory of relief for highly vulnerable prisoners, several aspects of the problem must be
understood. The first aspect to be discussed is the statistical incidence of sexual assault. This discussion will be followed by an identification of the likely victims and aggressors of homosexual rape. Finally, the effects of sexual assault upon the victim will be examined.

A. Statistics

Criminologists and psychologists agree that violence among prisoners, and especially sexual assault, is a very real problem.\(^{18}\) Statistical literature, however, is scant, and the literature that does exist is contradictory.\(^{19}\) Some commentators have stated that actual rapes are rare.\(^{20}\) Conversely, other studies have produced shocking figures that suggest that the incidence rate for sexual assaults hovers at over 40% for particularly vulnerable inmates in some institutions.\(^{21}\)

One of the most recent independent studies analyzed the incidence rates of reported and unreported\(^{22}\) sexual assaults that occurred at an unnamed California prison.\(^{23}\) The researcher concluded that 14% of the inmates at that prison would be sexually assaulted while incarcerated.\(^{24}\) The California Department of Corrections, in an official 1974 report, listed a rape incidence of 4.3 per 100.\(^{25}\) Because of notoriously poor reporting records, however, that reported rate is believed to be low.\(^{26}\)

A low recorded rate for the incidence of rape does not indicate that the problem is nonexistent. Any thorough analysis of these rates must consider that the records upon which the official statistics are based suffer from gross underreporting.\(^{27}\) Several factors discourage inmates from reporting assaults. Prisoners often fear reprisals from the very assailants


\(^{19}\) Compare D. Lockwood, Prison Sexual Violence 92 (1980) with C. Felton, Violence in Prison (paper presented to Academy of Criminal Justice Sciences (1979), cited in L. Bowker, Prison Victimization 21 (1980)).

\(^{20}\) Lockwood, supra note 18, at 92.

\(^{21}\) W. Wooden & J. Parker, Men Behind Bars: Sexual Exploitation in Prison 18 (1982). Inmate interviews in a California state institution indicated 14% overall rate of sexual assault, with homosexuals reporting the highest rate of attacks at 41%. Id.

\(^{22}\) "Unreported" incidents refer to assaults which do not appear on official prison records but which were corroborated by other inmates. Many times inmates simply do not report these attacks to the guards. See infra notes 28-32 and accompanying text.

\(^{23}\) Wooden & Parker, supra note 21, at 5.

\(^{24}\) Id. at 18.

\(^{25}\) L. Bowker, Prison Victimization 24-25 (1980).

\(^{26}\) Id. at 26. Bowker also estimates that a prisoner serving a twenty year sentence runs a 1 in 67 risk of being murdered while incarcerated. Id.

\(^{27}\) Id. at 2-3. One hundred fifty-six assaults were documented, yet only 96 were reported, and, of those, only 64 were actually listed in prison records. Id.
they would report. The "Convict Code," the unwritten rules of conduct enforced by the inmates themselves, mandates punishment for "ratting." Furthermore, inmates are unlikely to be eager to publicize their humiliating experiences. Once a prisoner acquires a reputation as a "punk boy," he is vulnerable to even further harassment and attack. This reputation can follow the inmate from one institution to the next. In addition, many victims also fear the reaction of their families to news that they are no longer "real" men.

An accurate statewide picture of the problem of homosexual rape in the California penal system, then, is almost impossible to obtain. Beginning in 1983, however, the California Department of Corrections began tabulating more accurately the incidence of sexual assaults. Before 1983, all sexual incidents, including consensual sexual behavior, were grouped together under the heading of "sex." Only obvious sexual assaults were included under incidents of "assault." This change in reporting method indicates that the state has finally recognized the need for accurate and meaningful monitoring of prison sexual violence. This closer analysis of the sex-related incidents in California prisons should alert officials that certain types of prisoners are the most likely victims of rape because not all inmates are equally vulnerable to sexual victimization.

B. Victims and Aggressors

Despite the lack of agreement over incidence rates, a consensus on the characteristics of the classic victim does exist. The most vulnerable inmate typically is a white, middle-class male with a slight build who possesses a youthful and attractive demeanor. He is also likely to be a first offender who has been convicted of a property crime, such as car theft. This offender need not have a violent encounter with a victim to perpe-

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28. See People v. Harmon, infra note 188, at 214; Wooden & Parker, supra note 21, at 60.
30. The term "punks" in the prison context, refers to young, small inmates who are used for the sexual gratification of older stronger inmates. Tucker, A Punk's Song: View from the Inside, in Male Rape 66 (A. Scacco, Jr. ed. 1982).
32. See generally id. at 1.
34. Id.; Offender Information Services Branch, California Department of Corrections, Inmate Incidents in Institutions 1970-1982, Table 2 (May 4, 1983).
35. Id.
36. See Bowker, supra note 25, at 11; Lockwood, supra note 1, at 33-36.
37. Bowker, supra note 25, at 11.
trate his crime.\textsuperscript{38} He usually does not project a dangerous personality.\textsuperscript{39} Inexperienced and lacking an air of machismo, this type of inmate is a prime target for sexual victimization.

In addition to youthful first offenders, two other categories of inmates are highly vulnerable to the threat of sexual assault: male-to-female transsexuals and effeminate gays.\textsuperscript{40} Transsexuals in the final stages of transformation are particularly vulnerable because of their feminine appearance and mannerisms.\textsuperscript{41} For these individuals who have not yet completed their transformation, life in a male penitentiary can be terrifying.

The vulnerable inmate often is left with limited choices for survival. A violent outburst in reaction to the very first sexual advance is often considered by veteran inmates to be the best defense to a future encounter.\textsuperscript{42} This response also establishes a “straight” image.\textsuperscript{43} If the prisoner is unable or unwilling\textsuperscript{44} to make a physical display of his dangerousness, often the safest course of action for a target is to find an older, stronger “jocker.”\textsuperscript{45} A jocker is an inmate who offers the target some measure of protection in exchange for a long-term commitment to give the jocker whatever sexual favors he requests.\textsuperscript{46} Unfortunately, the target will remain subject to the whims of his “protector.” The unwritten convict code sanctions only two types of pairing, jocker and punk boy or effeminate homosexual. Even professed homosexuals are not tolerated as couples.\textsuperscript{47} Each homosexual is expected to pair up with a jocker.

To protect the victim of sexual violence as adequately as possible, likely aggressors must be identified and efforts must be made to understand their motivations. Aggressors, interestingly enough, consider themselves to be heterosexual, which is one reason why they pick on inmates who more closely resemble females.\textsuperscript{48} Unfortunately, in our penal institutions today, an inmate’s manhood and physical prowess most commonly are

\begin{thebibliography}{99}
\bibitem{38} See id.
\bibitem{39} See id.
\bibitem{41} BOWER, supra note 25, at 141.
\bibitem{42} Id. This sort of self-help remedy is often recommended by the guards themselves when an inmate complains of sexual harassment; however, it will often result in punishment, delayed release or parole. Id. LOCKWOOD, supra note 1, at 141.
\bibitem{43} Id.
\bibitem{44} During the Vietnam War many conscientious objectors of the Quaker faith were imprisoned. Because of their pacifist beliefs, they were highly vulnerable. They refused to fight back when assaulted. Tucker, The Account of the White House Seven, in MALE RAPE 30-57 (A. Scacco, Jr. ed. 1982).
\bibitem{45} “Jocker” is the term used for the aggressor in a prison rape. He plays the masculine role while the “punk” or effeminate gay plays the submissive feminine role. See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 526 (1978).
\bibitem{46} WOODEN & PARKER, supra note 21, at 18.
\bibitem{47} Id. at 19.
\bibitem{48} LOCKWOOD, supra note 1, at 32.
\end{thebibliography}
demonstrated by raping his fellow inmates. 49

From all reports, aggressors are predominantly black. 50 Numerous theories have been advanced for this phenomenon. Sociologists have suggested that blacks choose white victims out of racial animosity. 51 The large number of blacks in our prisons does not explain the situation fully. While the prison population is composed of a disproportionate number of blacks, 52 the statistics on aggressors and victims do not follow purely mathematical ratios. 53 If the incidence of black aggressors were purely a function of racial percentages, then racial profiles of victims would reflect a similarly disproportionate number of blacks. Victims, however, are predominantly white. Because the reason behind aggressors being predominantly black is unclear, solutions to the problem are more difficult to design. 54 A solution, though, must be found soon because the effects on the victim inmate resulting from the threat of attack and actual attack are staggering.

C. The Effects

The prolonged stress of living with verbal harassment and the constant threat of physical abuse and rape takes an inevitable psychological toll even on inmates who are not themselves assaulted. 55 Only a few members of a group need actually be assaulted for the entire group to feel vulnerable. 56 The resultant fear itself is damaging. 57

Specifically, fear raises the level of violence in an institution. 58 Even inmates who are not likely victims learn quickly to behave in aggressive ways to deflect potential sexual advances. 59 Also, victims often begin to

49. Miller, Foreward to MALE RAPE (A. Scacco, Jr. ed. 1982).
50. LOCKWOOD, supra note 1, at 1.
51. Scacco, Jr., The Scapegoat is Always White, in MALE RAPE (A. Scacco, Jr. ed. 1982).
52. See SILBERMAN, supra note 45, at 160-61; BOWKER, supra note 25, at 8-9.
53. See LOCKWOOD, supra note 1, at 2.
54. Classification and segregation of inmates based on racial criteria, while arguably sensible based on this data, does raise constitutional issues based on the equal protection clause of the fourteenth amendment and component of the fifth amendment. See infra note 221 and accompanying text.
55. See infra note 221 and accompanying text.
56. Unfortunately, all too often prison guards themselves have been documented as aggressors. Bartolls, Staff Exploitation of Inmates: The Paradox of Institutional Control, in MALE RAPE 195 (A. Scacco, Jr. ed. 1982). Correctional institutions are increasingly sensitive to this outrageous situation and are making efforts to screen job applicants better and abolish the practice of using other inmates as supervisors. See Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). This comment, however, will focus on intra-inmate violence.
57. See supra note 1, at 143.
58. Once a victim has submitted from fear he may begin to doubt his masculinity. See id. at 1.
59. BOWKER, supra note 25, at 15.
react violently in an attempt to end their submissive roles. The brutalization of the victim is poignantly displayed by one victim's comment: "Even though I defeated fear with hate, I destroyed myself."

Exposure to rape or the threat of rape, in addition, also may effect a young inmate's sexual orientation permanently. Some psychologists suggest many professed homosexual inmates might not be homosexual had they never been incarcerated under conditions that subjected them to being physically abused or to witnessing the sexual victimization of fellow youthful inmates. Many youthful offenders who have been sexually exploited throughout their incarceration find heterosexual relationships very difficult to establish upon their release.

Inmates who are unable to break out of their victim role often take the path of least resistance and submit consensually. Some of these inmates are unable to accept the demoralizing experience of becoming prison "prostitutes." Some mutilate themselves; others commit suicide.

One of the traditional functions of imprisonment is rehabilitation. This function, however, will be rendered meaningless if the effects of rape in prison continue to be tolerated. Rehabilitation seems a cruel irony for vulnerable inmates. Victimized inmates rarely, if ever, will return to society better adjusted or less violent than they were when they entered the system.

As demonstrated, sexual violence is a serious problem in our penal system that effects certain types of inmates more seriously than others. The prison sentences imposed on these particularly vulnerable inmates should not include sexual harassment and abuse. Once imprisoned, these inmates need a remedy. The eighth amendment to the United States Constitution seems a logical basis for providing that remedy.

INTERPRETATIONS OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The eighth amendment prohibition against "cruel and unusual" punishment has undergone various interpretations since its ratification. This
section will begin with the history of those interpretations. An analysis of the current status of the eighth amendment as a theory of relief for inmates imprisoned under conditions including a high threat of sexual assault will conclude this section.

A. History

Originally, the eighth amendment was read as little more than a prohibition against punishments which had recently been abolished in England. One of the earliest decisions that expanded the protections of the eighth amendment was *Weems v. United States.* In *Weems,* the United States Supreme Court ruled that a sentence of fifteen years at hard labor was grossly disproportionate to the severity of the crime committed--falsifying a public document. Judicial review in that case, however, was limited to the sentence imposed and did not include an evaluation of the actual punishment suffered by the criminal.

Courts continued to deny review of prisoners' claims of unconstitutionally harsh treatment actually received under the inmates' imposed sentences for the next fifty years. The judiciary refused to inquire into the supervision of state prison conditions by state correctional officials. So long as the official punishments mandated by state legislatures and ordered by state judges complied with minimum constitutional standards of type and proportion, the United States Supreme Court declined to interfere in state prison administration.

In 1964, however, the Warren Court began to change the previous policy of nonintervention. The Supreme Court held for the first time, in

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70. See infra notes 72-99 and accompanying text.
71. See infra notes 125-59 and accompanying text.
73. 217 U.S. 324 (1910).
74. Id. at 380-82.
75. Note, Creatures, supra note 72, at 1101-02.
76. See Note, Sexual Assaults, supra note 72, at 430.
78. Note, Creatures, supra note 72, at 1101-02.
Cooper v. Page, that prisoners had standing to sue under the Civil Rights Act of 1871 for violations of their constitutionally protected rights. The first major cases using this remedy challenged the draconian prison system in Arkansas. Investigation revealed that violence and sexual abuse by guards and inmates existed in epidemic proportions throughout the system. The cases of Holt v. Sarver (I) and Holt v. Sarver (II) identified conditions of confinement posing so serious a threat of rape or stabbing that many inmates clung to the bars at night hoping to escape attacks while they slept. Starting with the Arkansas cases, the lower federal courts began to develop a broader definition of "cruel and unusual" punishment as applied to conditions of confinement.

Modern definitions of "cruel and unusual" punishment have varied, but several phrases seem to form a common thread among recent cases. In 1958, Trop v. Dulles introduced the idea that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In that case, the United States Supreme Court held that loss of citizenship was too severe a punishment for desertion. This type of punishment offended the very dignity of man. More recently, "cruel and unusual" punishment has been defined as "unnecessary and wanton infliction of pain" and "totally without penological justification." The Weems concept of punishment, "grossly disproportionate to the severity of the crime," is still accepted as a definition of improper sentencing. The eighth amendment, however, now is applied to the conditions of confinement as well as to the punishment mandated. One condition of confinement for vulnerable inmates is the high risk of sexual assault. The time has come for recognition of the right of inmates to be free from the constant threat of attack. This author,
therefore, proposes that the eighth amendment affords vulnerable inmates a cause of action.

B. The Right To Be Free from Sexual Assault

Given the modern development of eighth amendment interpretations, the question remains whether inmates have a cause of action against confinement under conditions that include a serious threat of sexual assault. The first court, however, to recognize specifically an inmate's right to be reasonably protected from sexual assault was the Fourth Circuit Court of Appeals. In Woodhous v. Virginia, the Fourth Circuit held that,

[W]hile occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment ..., confinement where violence and terror reign is actionable. A prisoner has a right secured by the eighth and fourteenth amendments, to be reasonably protected from the constant threat of violence and sexual assault by fellow inmates, and he need not wait until he is actually assaulted to obtain relief.

Woodhous seemingly would support a highly vulnerable inmate's right to be free from sexual assault under the eighth amendment. The court opened the way for a damage suit against state prison officials if a prisoner could establish that (1) a pervasive risk of harm from other inmates existed, and (2) officials were not exercising reasonable care or were creating an unreasonable risk. Woodhous, however, was only a circuit court decision, and the United States Supreme Court since has interpreted the eighth amendment in ways which well may hamper an inmate's petition for confinement that is secure against sexual assault.

C. Rhodes v. Chapman: A Retreat?

The recent United States Supreme Court decision of Rhodes v. Chapman has been read as evidencing a substantial retreat from the trend toward expanding prisoners' rights developed during the Warren years. Prior to Rhodes, several lower courts had held that overcrowding, and the

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98. Id. at 890.
99. Id.
doublebunking necessitated by population increases, constituted cruel and unusual punishment. These courts had accepted expert testimony warning that prolonged confinement with minimal space per inmate created stress and hostility, raising the levels of all forms of violence, including sexual assault. Some judges had even set a minimum standard for cell size based on experts’ consensus that fifty square feet was the absolute minimum. Rhodes unequivocally holds that overcrowding itself does not amount to “cruel and unusual” punishment, at least in the absence of proof of other aggravating circumstances.

The district court in Rhodes originally held that the prison conditions constituted cruel and unusual punishment. The inmates alleged that the crowding resulting from a prison population exceeding design capacity by over thirty-eight percent had created numerous constitutionally impermissible conditions. Inmates claimed that violence had increased as a direct consequence of the doublebunking necessitated by the crowding. These inmates also complained that security and staff were insufficient, as were medical, food, and ventilation facilities. The district court, however, was unable to find any factual support for most of the prisoners’ allegations. Acknowledging the modern design and facilities of the institution, the court was able to find substantiation only for the complaints regarding a reduction in job and rehabilitation opportunities. Ultimately, however, the district court found that these deprivations, together with doublebunking and reduced per capita cell space, amounted to “cruel and unusual” punishment. The Sixth Circuit Court of Appeals affirmed, but the United States Supreme Court reversed the holding.

Eight justices of the United States Supreme Court declined to rule that these prison conditions amounted to “cruel and unusual” punish-

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103. See BOWKER, supra note 25, at 164-65.
104. 423 F. Supp. at 743.
105. 452 U.S. at 348-51.
106. 434 F. Supp. at 1022. Court order allowed state 90 days to develop a plan to alter double cells. Id.
107. Id. at 1021.
108. Id. at 1014-15.
109. Id. at 1009.
110. Id. at 1014-18.
111. Id. at 1018.
112. Id. at 1021.
114. 452 U.S. at 352.
115. Only Justice Marshall dissented, finding on the facts that the conditions of confinement violated the 8th and 14th Amendments. Three justices, however, joined Brennan’s concurrence which emphasized that this decision was not a return to the old “hands-off” policy of pre-1960 jurisprudence but only a factual decision. 452 U.S. at 352-53.
Prisoners' rights advocates find two things disturbing about the decision. The majority opinion used language demonstrating a great deference to prison administrators' decisions and rejected the use of expert testimony that indicated the significant effects upon inmate behavior caused by overcrowding. The majority used federalist rhetoric which suggested that in the future, the Court would be less willing to scrutinize state prison administrators' policy decisions aimed at coping with the problem of overcrowding. The opinion asserted that considerations such as crowding, reduced rehabilitation opportunities, prolonged confinement in cells, and other consequences of the strain on budgetary allotments for prisons were more "properly weighed" by prison officials and legislators than by federal judges. The majority chided activist judges saying that the courts cannot assume that state legislatures and prison officials are sensitive to the requirements of the Constitution. The majority seemed to imply that state prison policies concerning conditions of confinement should be respected.

This deference to the decisions of state prison officials followed an earlier Supreme Court decision, *Bell v. Wolfish*, that was handed down two years before the *Rhodes* decision. In *Bell*, the majority advocated granting ministerial decisions made by prison administrators "wide-ranging deference." By echoing the sentiments of this earlier case, *Rhodes* may have established a pattern of noninterference in prison conditions. The current position of the Court apparently is that state prison officials are most competent to decide how to deal with shrinking resources and increasing inmate populations. Given the deference paid to prison officials in *Bell* and *Rhodes*, a successful eighth amendment challenge to overcrowded conditions does not appear likely.

D. Viability of Eighth Amendment Challenges after Rhodes

A cause of action to gain relief from sexual assaults might also prove unsuccessful after *Rhodes v. Chapman*. An argument can be made, however, that despite the disturbing passages in the majority opinion, *Rhodes*

116. *Id.* at 352.
117. *Id.* at 349-52.
118. 452 U.S. at 348, n.13.
119. The concept of federalism as used in this paper refers to the political philosophy that great deference should be shown to the actions and decisions of the states as states, and is related to the old "states' rights" arguments which proliferated in the pre-Civil War southern states. See generally *Note, Prison Overcrowding*, supra note 77, at 717, nn.36-37.
120. 452 U.S. at 349-52.
121. *Id.* at 349.
122. *Id.* at 352.
123. 441 U.S. 520 (1979).
124. *Id.* at 547.
should be read narrowly on its facts. This interpretation would leave viable the protections promised by Woodhous. After all, the Rhodes majority assured that the federal courts would not ignore the duty to protect prisoners’ constitutional rights when conditions of confinement actually amount to “cruel and unusual” punishment.

Justice Brennan’s concurring opinion in Rhodes, in which he was joined by two other justices, offers more encouragement. This concurrence stressed that its position was strongly based on the findings of fact made by the district court. Since the district court found that none of the deprivations alleged by the inmates was supported by the evidence except for rehabilitation and job opportunity reductions, the result reached by the majority was inevitable. Justice Brennan emphasized, however, that judicial intervention is indispensable to the enforcement of the eighth amendment. Presumably, if an inmate could prove that the incidence of sexual assault was high enough, a federal court would hold that confinement under these conditions constituted “cruel and unusual” punishment. The problem, then, becomes one of gathering evidence sufficiently shocking, as in Woodhous, to convince the court to overlook the deference given the decisions of state prison officials in the administration of their institutions. Since Rhodes rejected expert testimony on the dangers of overcrowding and its effects upon inmate behavior, a case based solely on expert testimony pointing out the damaging effect that living under the threat of rape has on a vulnerable inmate probably has been foreclosed. This leads to the conclusion that an inmate would not be able to win a suit unless he had already been raped several times and could introduce sufficient corroborating evidence of the attacks. The eighth amendment, therefore, currently does not offer any meaningful relief for the many inmates who are living under the constant threat of rape or for those inmates who have been raped, but who are unable to provide documentation of their attacks and remain in danger of continued abuse.

One recent California district court case, Mostyn v. Carlson, did grant an inmate relief based on an eighth amendment sexual assault theory. The facts of the case, however, were strong and the ruling cautious and narrow. This writer has concluded that Mostyn is an illustration of the limited

126. 452 U.S. at 352.
127. Id. at 347-49.
128. Id. at 354.
129. The problem of underreporting has been discussed earlier in this comment. See notes 26-30 and accompanying text.
130. See 452 U.S. at 348-49; Note, Prison Overcrowding, supra note 77, at 747.
131. The difficulty of obtaining reliable corroborating evidence of prison assaults has been discussed earlier in this comment. See supra notes 26-30 and accompanying text.
scope of protection provided to highly vulnerable inmates under the current interpretations of the eighth amendment. These inmates need preventative protective measures. They should not have to wait and suffer until their files are filled with sufficiently shocking incident reports to support a suit for the limited kinds of relief granted in Mostyn.

An examination of the facts of Mostyn illustrates the shocking nature of the sexual harassment which was an incident of Ms. Mostyn's imprisonment. In 1982, Anna Marie Mostyn instituted a suit against the Federal Bureau of Prisons and the Director, Norman Carlson. At the time of her incarceration, Ms. Mostyn was a preoperative male-to-female transsexual who, despite her obviously feminine appearance, retained male genitalia. Ms. Mostyn, therefore, was classified legally as a male. The plaintiff alleged that her confinement among the male population at the State Medical Correctional Facility at Vacaville and several federal prisons amounted to "cruel and unusual" punishment because of the sexual harassment to which she was subjected.

After many humiliating incidents and at least one rape, Ms. Mostyn was assigned almost indefinitely to segregation units for her protection. During the course of her lawsuit, however, she was threatened with removal to the general male population. Ms. Mostyn's petition for a preliminary injunction against that type of a transfer eventually was granted by the Federal District Court for the Eastern District of California in April 1983 over objection by the United States Attorney's Office. Counsel for the United States government argued that the court should defer decisions about prison housing to the discretion of corrections administrators. In support of this position, counsel cited Rhodes, Bell v. Wolfish, and several Ninth Circuit Court of Appeals decisions. Each

133. Mostyn v. Carlson, No. 82-2687 (filed Sept. 21, 1982).
135. Id. at 3.
136. See Plaintiff's First Amended Complaint at 43, Mostyn v. Carlson, No. 82-1108 (filed Jan. 10, 1983).
137. Mostyn v. Carlson, No. 82-1108 at 9 (May 19, 1983) (order granting permanent injunction).
138. Plaintiff's First Amended Complaint at 43, Mostyn v. Carlson, No. 82-1108. Segregation units are usually used as a form of punishment. See infra notes 222-24 and accompanying text.
139. Plaintiff's Memorandum of Points and Authorities, in support of Application for Preliminary Injunction at 1, Mostyn v. Carlson, No. 82-1108 (filed Mar. 3, 1983).
142. 452 U.S. 337.
143. 441 U.S. 520. Day-to-day operations are best left to prison administrators' judgment as needed to preserve internal order and discipline. Id. at 546-48. See also supra notes 128-29 and accompanying text.
144. Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982). Inmate suit against conditions of confinement which included abuse by guards and tortious conditions in protective cus-
of these cases involved challenges to the conditions of confinement in state prisons. Relying on the holdings of these cases, the government argued that Ms. Mostyn’s papers supporting her petition for injunctive relief failed to present facts sufficient to establish that prior administrators had abused their discretion by exaggerating their response to the situation or by acting capriciously to violate Ms. Mostyn’s constitutional rights.  

The district court, however, relied on the older eighth amendment cases such as Woodhous, acknowledging that the state has a responsibility to protect the safety of its prisoners. The court granted the injunction, thereby protecting Ms. Mostyn from transfer to the general male population. The court, however, dismissed Ms. Mostyn’s damage suit against Carlson and other prison officials and was very careful to qualify its decision to grant injunctive relief. The order was specific on one point: the decision was not meant to set a general precedent for the confinement of transsexuals, effeminate gays, and transvestites. The ruling was based solely on the facts presented.

The cautious ruling in Mostyn succeeded in extricating Ms. Mostyn from her intolerable situation. Prison administrators were enjoined from transferring Ms. Mostyn to the general male population. The court also suggested keeping her segregated, and stated that if neutral administrative segregation was unavailable, Ms. Mostyn should be housed in the female side of the institution. The court also ordered that while housed in administrative segregation, Ms. Mostyn should have all the privileges allowed to the general prison population.

The Mostyn case does little to advance the cause of particularly vulnerable inmates. The court sidestepped the Rhodes rule of deference by finding facts sufficient to bring the situation beyond the reach of routine administrative decisions. Ms. Mostyn was able to document an actual sexual assault and several incidents of harassment while confined with males in several penal institutions. Parts of the decision no doubt were based on judicial notice. Ms. Mostyn was five feet, four inches tall and...
very feminine. Little imagination is needed to recognize that confinement of this type of person among males unable to engage in conventional heterosexual activity would be dangerous.

While *Rhodes* is not an absolute bar to inmate petitions against the conditions of their confinement, the case is at least an indication of the direction in which the majority of the United States Supreme Court is moving: nonintervention except in the most shocking of cases. Not all courts will be able or willing to make findings of fact that override the deference that *Rhodes* mandated. *Rhodes*, therefore, may prove an insurmountable obstacle for many inmates. Especially affected will be inmates merely threatened with sexual assaults because they cannot produce documentation of attacks. Those inmates will not be allowed to introduce expert testimony warning of the effects that fear alone can have on a prisoner. Since the United States Supreme Court is unlikely, at this date, to expand prisoners' rights, inmates who are likely targets of sexual harassment are left without a legal theory that supports their demands for preventative steps. These inmates should not be forced to wait until they have endured sufficient pain before the discretion of officials can be overridden. Another source of authority is needed. At least for state prisoners, a challenge based on an independent interpretation of the California Constitution offers an alternative route for relief.

**INDEPENDENT INTERPRETATION OF THE CALIFORNIA CONSTITUTION**

The progressive tone of the Warren Court certainly has been tempered by the more conservative philosophy espoused by the Burger Court. In response to this trend, some state courts have developed independent interpretations of their own state constitutions to better preserve individual freedoms. California courts are among those that do rely on their own state constitution to ensure the protection of fundamental rights.

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156. 452 U.S. at 337.
157. See supra notes 26-34, 131 and accompanying text.
158. See supra notes 118, 130-31 and accompanying text.
159. See supra notes 120-25 and accompanying text.
160. This refers to the Nixon and Ford appointees: Burger, Powell, Blackmun, Rehnquist, and Stevens.
A. California Supreme Court Cases

The California Supreme Court, as the court of last resort for state constitutional rulings, recognizes the obligation to give independent meaning to constitutionally guaranteed rights. The parameters of the right to privacy, for example, are much broader under California law than under federal law. Likewise, the rights of prisoners have received additional protection.

Independent interpretation of parallel provisions of the United States Constitution and a state constitution is most easily justified and logically developed when an actual textual difference exists between the two provisions. For example, the California Supreme Court took advantage of a textual variation to hold in People v. Anderson that the death penalty was unconstitutional "per se." This ruling was based upon the California version of the eighth amendment contained in the California Constitution which is textually different from the federal eighth amendment. Article I, section 17 of the California Constitution prohibits the imposition of "cruel or unusual" punishment, whereas the eighth amendment to the United States Constitution prohibits "cruel and unusual" punishment. The use of the disjunctive rather than the conjunctive in the California Constitution implies that both punishments that are "cruel" and punishments that are "unusual" must be banned. This distinction encompasses a potentially wider range of punishments than the federal provision. In addition, the difference lends support to an inmate's petition for an independent interpretation providing relief from the serious threat of sexual assault. Although the textual variation has been noted, the definitions of "cruel" and "unusual" remain elusive.

In Anderson, the California Supreme Court took the opportunity to de-
fine “cruel” under the California Constitution.\textsuperscript{170} The court reaffirmed its decision\textsuperscript{171} to borrow the federal definition of “cruel,” first enunciated in \textit{Trop v. Dulles},\textsuperscript{172} to interpret section 17 of the California Constitution,\textsuperscript{173} the prohibition against “cruel or unusual” punishment. The \textit{Trop} formula, which defines constitutional violations under the eighth amendment, is based on an “evolving standard of decency.”\textsuperscript{174} This standard considers the psychological effects\textsuperscript{175} of punishment that subject an inmate to ever-increasing fear and distress.\textsuperscript{176} The standard is much more liberal than the current standard espoused by the United States Supreme Court.\textsuperscript{177} Inmates who are living in fear under the serious threat of rape, but who have not yet been attacked, should find encouragement in the sensitivity of the California court to punishments that are psychologically damaging. The state court forum seems much more promising than the federal, because \textit{Rhodes} appears to have foreclosed the use of the fear of rape as a basis for a successful eighth amendment suit.

In addition to fixing the definition of “cruel,” the \textit{Anderson} court reiterated the correctional policy of California.\textsuperscript{178} Retribution and vengeance are insufficient state interests to justify imposing a particular form of punishment.\textsuperscript{179} Under California law, a punishment also must be necessary to serve rehabilitative, security, or deterrence goals.\textsuperscript{180} The retribution language of \textit{Rhodes}, therefore, may not apply to \textit{state} scrutiny of state imposed punishment. The \textit{Rhodes} decision considered conditions that were harsh and restrictive to be part of the penalty that criminal offenders pay for their offenses against society.\textsuperscript{181} In California, prison administrators must justify harsh conditions as serving something more than purely punitive purposes.\textsuperscript{182} Conditions of confinement that include a high risk of sexual assault, therefore, would not be an acceptable part of the punishment for an inmate’s offense.\textsuperscript{183}

Under these California Supreme Court rulings, a state prisoner clearly

\begin{itemize}
\item \textsuperscript{170} 6 Cal. 3d at 648, 493 P.2d at 893, 100 Cal. Rptr. at 165.
\item \textsuperscript{171} People v. Clark, 3 Cal. 3d 97, 99, 473 P.2d 997, 998, 89 Cal. Rptr. 253, 254 (1970).
\item \textsuperscript{172} 356 U.S. 86 (1958).
\item \textsuperscript{173} 6 Cal. 3d at 650, 493 P.2d at 895, 100 Cal. Rptr. at 167.
\item \textsuperscript{174} 356 U.S. at 101.
\item \textsuperscript{175} 6 Cal. 3d at 650, 493 P.2d at 895, 100 Cal. Rptr. at 167.
\item \textsuperscript{176} 356 U.S. at 101.
\item \textsuperscript{177} While the Supreme Court has not overruled its holding in \textit{Trop}, the rejection of expert testimony delineating the psychological effects of overcrowding tends to emasculate the ruling of \textit{Trop}. See 452 U.S. at 340–49; \textit{supra} notes 107–22 and accompanying text.
\item \textsuperscript{178} 6 Cal. 3d at 651, 493 P.2d at 896, 100 Cal. Rptr. at 168; \textit{In re Estrada}, 63 Cal. 2d 740, 48 Cal. Rptr. 172, 176, 408 P.2d 948, 952 (1965).
\item \textsuperscript{179} 6 Cal. 3d at 651, 493 P.2d at 896, 100 Cal. Rptr. at 168.
\item \textsuperscript{180} \textit{Id}.
\item \textsuperscript{181} 452 U.S. at 347.
\item \textsuperscript{182} See 6 Cal. 3d at 651, 493 P.2d at 896, 100 Cal. Rptr. at 168.
\item \textsuperscript{183} Sexual assault does not improve rehabilitation. It does not improve security since victims often become violent themselves. \textit{See supra} notes 58–63 and accompanying
\end{itemize}
could state a cause of action under the California Constitution for a violation of the prohibition of "cruel or unusual" punishment. The standard to be met would be less than under Rhodes because no obstacle of deference need be overcome. The standard, instead, is based on the Trop "evolving standard of decency." This allows meaningful relief for both the actual rape victim and the inmate merely threatened with rape. Preventative relief can become a reality. Furthermore, because of the California policy on correctional goals and incarceration, California courts would be more willing to scrutinize closely prison administrative decisions that impact on conditions of incarceration. The sensitivity of California courts to the conditions of confinement is evidenced by the recognition of a defense of escape based upon an imminent danger of being sexually assaulted while incarcerated.\textsuperscript{184}

\section*{B. The Escape Cases}

Another line of California cases, those dealing with escape, supports an inmate's plea for relief from confinement that includes the threat of sexual assault.\textsuperscript{185} In 1974, a decision was rendered by the Michigan Court of Appeals\textsuperscript{186} which was to have a profound influence almost immediately in California.\textsuperscript{187} In People v. Harmon,\textsuperscript{188} the court ruled that duress caused by the imminent threat of sexual assault was a legitimate defense to a criminal charge of escape from prison.\textsuperscript{189} Until the Harmon decision, courts had resisted this type of ruling, even when a prisoner's claim of extreme mitigating circumstances was substantiated.\textsuperscript{190} Reluctant to return an inmate to a dangerous situation, judges had been even more hesitant to open the door to escaping prisoners crying "rape."\textsuperscript{191}

Almost immediately, a California court followed the Michigan lead and accepted "necessity" based upon the imminent threat of serious injury, death, or rape as a defense to the crime of escape.\textsuperscript{192} The defendants in People v. Lovercamp were female inmates at the women's medium security facility, the California Rehabilitation Center. These defendants claimed to have been threatened repeatedly with rape and physical abuse

\begin{footnotes}
\footnote{184. See infra notes 198-204 and accompanying text.}
\footnote{185. Id.}
\footnote{186. People v. Harmon, 220 N.W.2d 212 (1974).}
\footnote{187. People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); see infra notes 198-204 and accompanying text.}
\footnote{188. 220 N.W.2d 212 (1974).}
\footnote{189. Id at 215.}
\footnote{190. Id.}
\footnote{191. Id.}
\footnote{192. 43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115.}
\end{footnotes}
by other inmates. \textsuperscript{193}

The \textit{Lovercamp} court established limited parameters for the defense of necessity and professed not to be making a new rule of law.\textsuperscript{194} Most commentators, however, view the decision as both new and significant. Since 1974, the case has received mixed acceptance.\textsuperscript{195} Nevertheless, in 1982, the California Third District Court of Appeal joined the Fourth District in acknowledging the existence of a necessity defense to escape.\textsuperscript{196} While this defense is narrow, its recognition reflects the sensitivity of California courts to a prisoner's right to be free from sexual assault as delineated by \textit{Woodhous}.\textsuperscript{197}

Although an inmate's remedies under post-\textit{Rhodes} federal law have become seriously limited,\textsuperscript{198} these remedies appear not to be so restricted under California law. The legal foundation for an inmate's suit under section 17 of the California Constitution can be established by an independent interpretation of the California constitutional prohibition against "cruel or unusual" punishment,\textsuperscript{199} together with the correctional policy of the state.\textsuperscript{200} The \textit{Lovercamp} decision, read in conjunction with this state constitutional framework, supports an inmate's petition for preventative relief. Using a legal argument based on the constitutional and escape cases, an inmate is justified in requesting relief even before he is assaulted. A threat of assault or a personal profile that labels him as a likely victim of assault\textsuperscript{201} should be a sufficient basis to seek judicial protection. The form of this protection may be of several types.

\textbf{TYPES OF RELIEF OR REMEDIES}

Once an inmate has been able to establish an argument that a certain form of confinement subjects him to cruel and/or unusual punishment, the question of what form of relief he can reasonably expect to receive remains. The final section of this comment will survey the forms of relief currently available to inmates.\textsuperscript{202} The section will conclude with this

\textsuperscript{193} \textit{Id.} at 825, 108 Cal. Rptr. at 111.
\textsuperscript{194} \textit{Id.} at 831, 118 Cal. Rptr. at 115.
\textsuperscript{195} \textit{In re} Grand Jury Proceeding v. Gravel, 605 F.2d 750 (5th Cir. 1979) (defendant attempted to raise duress to contempt for refusal to testify); People v. Condley, 69 Cal. App. 3d 999, 1008-10, 138 Cal. Rptr. 515, 519-21 (1977) (an affirmative defense, not an element of the crime).
\textsuperscript{196} People v. Pritcock, 134 Cal. App. 3d 795, 184 Cal. Rptr. 772 (1982).
\textsuperscript{198} \textit{See supra} notes 120-35 and accompanying text.
\textsuperscript{199} \textit{See supra} notes 168-90 and accompanying text.
\textsuperscript{200} \textit{See supra} notes 184-89 and accompanying text.
\textsuperscript{201} \textit{See supra} notes 38-42 and accompanying text.
\textsuperscript{202} \textit{See infra} notes 211-32 and accompanying text.
writer's suggestion for a new sentencing procedure that would consider each inmate's vulnerability to sexual assault under conventional forms of confinement.203

A. Self-Help

The convict code, which favors private solutions, continues to influence inmate behavior in modern prisons.204 Unfortunately, most inmates resort to self-help as a means of dealing with sexual aggression by fellow inmates.205 Confronted with a sexual advance or an actual assault, many inmates follow the advice of veteran inmates and often the guards, as well, and fight back or attempt to escape.206 The worst part of this approach is that the victimized inmate often finds himself punished for the assault by losing "good time"207 for fighting. As a result of the assault, the inmate's incarceration may be prolonged and his parole date delayed.208 More formal means of relief, however, are available.

B. 42 U.S.C. §1983

The most frequently used legal action to reform debilitating prison conditions has been a tort action under 42 U.S.C. section 1983.209 Under this legislative enlargement of the fourteenth amendment, a prisoner may receive monetary compensation for a denial or abridgment of his constitutional rights.210 Money, however, does not compensate adequately an inmate who has been viciously raped, nor does it ensure that his confinement will be qualitatively different after his section 1983 action has proved successful. Courts also have been reluctant to hold prison officials responsible for conditions that continue to exist, not so much because of the administrator's callousness, as a lack of funding by the legislature.211 Section 1983, under certain circumstances, can also provide injunctive relief.212 An inmate, however, needs protective measures that provide for his security before an assault occurs and the damage is done.

203. See infra notes 239-45 and accompanying text.
204. LOCKWOOD, supra note 1, at 47.
205. Id. at 49.
206. Id. at 51-55.
207. "Good time" refers to credit given by parole boards for good behavior.
208. LOCKWOOD, supra note 1, at 57.
210. Id. at 285.
211. See Kish v. County of Milwaukee, 441 F.2d 901, 904-06 (7th Cir. 1971).
C. Classification and Protective Segregation

Many prison systems employ another accepted means of controlling prison violence: classification.\textsuperscript{213} When prisoners are first sentenced, they are screened according to age, history of violence, and previous prison time before being assigned a classification code.\textsuperscript{214} The purpose of classification is to avoid putting young, inexperienced first offenders in the same cell or area as more hardened criminals.\textsuperscript{215} Classification appears viable since it is possible to compile both victim and aggressor profiles.

Unfortunately, recent legislation mandating jail sentences for committing a crime with a gun,\textsuperscript{216} and a rise in the crime rate, in general, have caused prison populations to swell dramatically.\textsuperscript{217} Legislative funding for prisons has not kept pace with the expanding prison population.\textsuperscript{218} Overcrowding severely strains the flexibility and viability of any classification system. Frequently, single rooms or low risk roommates are not available for vulnerable inmates. Without the facilities to implement prison classification properly, the remedy is worthless.

Additionally, efforts to classify inmates on a strictly statistical basis are discouraged by civil rights and gay rights advocates.\textsuperscript{219} Although statistically blacks are more likely to be aggressors and whites are more likely to be victims of sexual assaults,\textsuperscript{220} automatic segregation of inmates on a racial basis would raise equal protection and antisegregation attacks.\textsuperscript{221} Similarly, gay rights advocates strongly object to segregation of gays based solely upon their sexual preferences, especially if this segregation includes a reduction in privileges.\textsuperscript{222}

The only other method consistently used to protect particularly vulnerable inmates is "protective segregation."\textsuperscript{223} Unfortunately, protective custody is often indistinguishable from solitary confinement, entailing the same diminished privileges as administrative detention for punitive pur-
Aside from the basic unfairness of this treatment, the gravity of the situation is magnified because the vulnerable inmate, unlike the recalcitrant inmate, must serve his entire sentence under these highly restrictive conditions. Courts have recognized that conditions which might be tolerable as a temporary punishment are unconstitutional as a permanent condition of confinement. Protective segregation, then, is not a viable long-term remedy for the rape victim.

D. Innovations

Other forms of relief have been suggested. Victimized inmates could be transferred to another facility in order to remove them from the influence of their aggressors. Reputations, however, tend to follow inmates, and the problem of sexual violence seems to permeate the penal system. Preoperative male-to-female transsexuals could be integrated into women's institutions or given the necessary surgery to complete their metamorphosis. Prison administrators, however, have been very reluctant to stir up the controversy that either one of these options would be likely to create. Inmates' attorneys have repeatedly suggested early release or probation for inmates who have been subjected to sexual victimization. A better solution, however, would be to restructure the sentencing process so that inmates who are likely victims could be punished without being abused.

The remedies described thus far have inherent limitations. An innovation that has the potential to be much more helpful to the potential rape victim and to all of society is a supervised community residency program. This remedy should be available only to offenders who have not been convicted of a violent crime. Proponents of this alternative estimate that existing programs could be expanded to include three to four times the supervisory staff and counselling hours and still cost the state less than what it now spends to feed, house, and supervise an inmate in a maximum

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225. Note, supra note 40, at 1272.

226. See infra notes 234-41 and accompanying text.

227. See generally Mostyn v. Carlson, No. 82-1108 at 3 (May 19, 1983) (order granting permanent injunction).

228. LOCKWOOD, supra note 1, at 146.


230. See generally id. at 32-34.


232. See infra notes 234-38 and accompanying text.
security unit. Of course, this type of program frequently is confronted with strong community opposition. No one wants a halfway house in his neighborhood.

The most significant aspect of the halfway house alternative, though, is that the typical inmate who becomes a victim of sexual assault has not been convicted of a violent crime. Therefore, he is less likely to pose a threat to the community. This fact, if made known to the community, should help lessen the hostility toward halfway houses. The threat of reassignment to a conventional prison would always remain as a deterrent to inmates who fail to cooperate with the rehabilitation program offered by a community supervised facility.

After examining the constitutional and humane considerations at stake, alternative sentencing to halfway houses should be a routinely available option for the sentencing judge in cases not involving violent crimes. Of course, the offender would have to meet certain criteria in order to qualify for this type of program. If the judge thinks the offender might qualify, he would order an in-depth psychological screening similar to the screening routinely performed for classification purposes. If the offender does not evidence a violent personality, if he is young, attractive, and not heavily built, and if he lacks an extensive previous prison record, he would qualify for halfway house sentencing on a probationary basis. Lack of cooperation would be a ground for reassignment to a conventional prison setting. With sufficient supervisory and counseling staff and in-depth screening on nonviolent offenders, alternative sentencing would be the answer to the highly vulnerable inmate's dilemma. This remedy would provide the preventative remedy lacking under the current federal constitutional structure.

CONCLUSION

Homosexual rape is not a constitutionally or ethically acceptable punishment. It is, however, too frequently a part of a vulnerable inmate's correctional experience. The effects upon actual victims, and upon inmates who live under the constant threat of becoming victims, are devastating and include increased rates of suicide and antisocial behavior. Overcrowding, which has become the rule and not the exception in California, neutralizes the positive result that an effective classification system

233. American Bar Association, supra note 231, at 123.
234. See supra notes 38-40 and accompanying text.
235. See supra notes 58-70 and accompanying text.
236. California Governor Deukmejian was quoted as saying that overcrowding in the state prisons "has reached beyond the breaking point..." L.A. Daily Journal, Sepi. 8, 1983, §1, at 1, col. 6.
could have upon this problem.\textsuperscript{237} If rehabilitation is to remain a serious correctional goal, California must overcome budgetary constraints to ensure the lowest sexual assault rate practicable within the state prison system.

Any aggravation of the problem falls heaviest upon the inmates most likely to become targets of sexual aggression.\textsuperscript{238} This comment has analyzed the current status of an inmate’s eighth amendment challenge to the conditions of his confinement which include a high risk of sexual victimization. After the United States Supreme Court ruling in \textit{Rhodes}, a successful challenge to state prison conditions has become less likely. Unless an inmate has already suffered sexual assault during his confinement and can substantiate his claims, he has little hope of gaining relief. The purpose of this comment has been to suggest another source of relief: the California Constitution.

The California Supreme Court has adopted the practice of independently interpreting its own state constitution. No longer limited to federal interpretations of parallel state and federal constitutional provisions, California can, and has, extended protection to the individual rights of its citizens, including criminals, beyond the protections mandated by the United States Constitution.

Establishment of a right to secure conditions of confinement without a meaningful form of protection is a hollow victory. Perhaps repeated court rulings of unconstitutional confinement will be required to spur the legislature to enact responsible legislation providing secure and humane correctional confinement. Alternative sentencing to a halfway house for highly vulnerable inmates could prove to be just the type of preventative form of relief that these prisoners desperately need in the interim.\textsuperscript{239}

\textit{Catherine A. Greene}

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\textsuperscript{238} See notes 38-42 and accompanying text.
\textsuperscript{239} This author wishes to acknowledge a possible limitation to this remedy. The racial component in victim aggressor profiles could cause this alternative to be made less available to blacks. For this reason the author submits this remedy not as an ultimate solution to the problem of prison sexual assaults, but only as a pragmatic short term device for protecting as many vulnerable inmates as possible. Any long term solution will require increased prison funding to allow single occupancy of cells and effective classification.
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