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Judicial Supervision of Prisons via the Eighth Amendment

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This court, and many writers and land planners, have suggested regional planning as an alternative to the present system of localized zoning.[48] The theory is that a regional zoning board would be better funded, have a better overall viewpoint, be impartial, and could more easily provide for all segments of the population. Most likely this system would be more efficient than the present one. It would seem, however, that the court here ignored the regional influence, since there were many apartments available in the areas immediately adjacent to Nether Providence.[49]

If the legal reasoning and the public policy announced on the surface of this case appear strained, it is not improper to speculate as to a further consideration underlying the court's decision. The effect of zoning ordinances such as this one is to "zone out" certain people, particularly low-income groups. It has already been noted that this "zoning out" effect is the most offensive aspect of the ordinance to the court.[50] This case would seem to allow representatives of special groups, specifically low-income groups, to contest such ordinances on the very vague constitutional grounds found in this decision. Therefore, what the court may be condemning is the inherent economic discrimination in ordinances of this type. And the ordinance is not saved by the fact that it bears a substantial relation to the public safety, general welfare, or preservation of resources. This motive would at least demonstrate an understandable reason for the decision.

Undoubtedly the Constitution requires that, within reason, an individual should be allowed to do with his land as he pleases. But this right can be modified for the protection of the existing community. For example, almost anyone would agree that it is not reasonable to allow a refuse disposal plant to be built in the middle of an exclusively residential area. The question of reasonability becomes more complicated, however, in cases like *Girsh*. Courts have traditionally allowed local zoning boards and legislative bodies to make that decision, as long as the issue of reasonability is "fairly debatable." The court in *Appeal of Girsh* has exercised its judicial review in a situation most courts would rightfully avoid.

Paul T. Mann

Judicial Supervision of Prisons via the Eighth Amendment

Eight inmates of the Arkansas penitentiary system brought class actions,[1] alleging, *inter alia*, that confinement within the system amounted

[48] 263 A.2d at 399 n.4.

[49] Brief for Appellees at 41, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970). Counsel for appellees list 546 existing apartments, 90 under construction, and permits for 161 more in the borough adjacent to the northwest; 132 existing adjacent to the north, with 96 under construction and permits for 66; and adjacent to the east, 162 units with several elevator apartments and a pending proposal for 251 units.

[50] *See* note 36 *supra*.

[1] The actions were brought under 28 U.S.C. § 1343(3) (1964) and 42 U.S.C. § 1983 (1964). 42 U.S.C. § 1983 (1964) provides a cause of action, and 28 U.S.C. § 1343 (1964) gives federal

to cruel and unusual punishment in violation of the eighth and fourteenth amendments.[2] No specific instances of individual prisoner mistreatment were alleged. The inmates particularly complained of the trusty system which allows trusties to carry firearms and exercise almost complete authority over other inmates in many areas of prison life.[3] The inmates further complained of the open barracks system where prisoners slept on cots in large unguarded areas, thus having little or no protection from sexual assaults, fights, and stabbings, which occurred with some frequency.[4] The inmates also alleged extreme neglect by prison officials of prisoners in solitary confinement or "isolation" cells. The lack of vocational training and rehabilitative programs was also cited as part of a totality of circumstances, which, it was alleged, made mere confinement within the system unconstitutional. *Held, injunction granted*: The subjection of prisoners to the conditions and practices within the Arkansas penitentiary system, including the trusty system and open barracks, constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

I. The Scope of the Eighth Amendment

Originally drafted to prohibit the tortures of the Stuart reign, such as the rack and the screw, branding, drawing and quartering, burning alive, and decapitation, the prohibition against cruel and unusual punishments[5] has expanded into areas beyond "the mischief which gave it birth."[6] The various means of inflicting the death penalty occasioned early construction of the eighth amendment, when in *Wilkerson v. Utah*[7] the Supreme Court held that shooting was a constitutional method of carrying out the death penalty. Subsequently, execution by hanging,[8] lethal gas,[9] or electrocu-

district courts original jurisdiction, in suits against "[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983 (1964).

[2] U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] "Commissioner Sarver testified without contradiction that more than 90 percent of prison functions relating to inmates are performed by trusties." Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970).

[4] "The undisputed evidence is to the effect that within the last 18 months there have been 17 stabbings of Cummins [one of the System's units], all but one of them taking place in the barracks, and four of them producing fatal results." *Id.* at 376.

[5] The phrase "cruel and unusual punishments" was first used in the English Bill of Rights of 1688, 1 W. & M. c. 2, at 143.

[6] Weems v. United States, 217 U.S. 349, 373 (1910). In the 1890's at least one court thought the eighth amendment was obsolete. Hobbs v. State, 133 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893).

[7] 99 U.S. 130 (1879).

[8] State v. Kilpatrick, 201 Kan. 6, 439 P.2d 99 (1968).

[9] Hernandez v. State, 43 Ariz. 424, 32 P.2d 18 (1934); *In re* Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968); People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911,

tion[10] was approved. The reasoning of the courts has been that the eighth amendment does not prohibit methods which were used at common law[11] and that do not "involve torture or lingering death."[12]

Arguments that a particular *form* of punishment is inherently cruel and unusual have also provided a basis for application of the guaranty. Although the Supreme Court has never expressly held that sterilization as punishment is cruel and unusual,[13] state courts have held both ways.[14] As recently as 1963, whipping has been upheld in the face of arguments that it is cruel and unusual.[15] In *Trop v. Dulles*[16] it was held that Congress might not deprive an individual of his citizenship[17] for desertion of military duty. The Court rejected the idea that, since the death penalty is not unconstitutional, anything short of death is a constitutional punishment. The Court remarked that although no pain is inflicted, expatriation is worse than the barbarous tortures of the Stuarts in that the expatriate loses "the right to have rights."[18]

That punishment should be proportionate to the gravity of the offense is a concept which can be attributed to the eighth amendment.[19] However,

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cert. denied, 346 U.S. 827 (1953); State v. Gee Jon, 46 Nev. 418, 217 P. 587 (1923); Hathcox v. Waters, 94 Okla. Crim. App. 286, 234 P.2d 950 (1951).

[10] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (wherein it was held that a state may attempt a second execution when the failure of the first effort was not intentional); *In re* Kemmler, 136 U.S. 436 (1890); Trimble v. State, 220 Ga. 229, 138 S.E.2d 274 (1964); Sims v. Balkcom, 220 Ga. 7, 136 S.E.2d 766 (1964); State v. Burdette, 135 W. Va. 312, 63 S.E.2d 69 (1950); State v. Painter, 135 W. Va. 106, 63 S.E.2d 86 (1950).

[11] Wilkerson v. Utah, 99 U.S. 130, 137 (1879).

[12] *In re* Kemmler, 136 U.S. 436, 447 (1890). In *Kemmler* the Court also said, "[The word cruel as it is used in the Constitution] implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* In this connection, see also *In re* Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), and People v. Chessman, 52 Cal. 2d 467, 341 P.2d 679 (1959), where the anxiety caused by long years on death row awaiting execution was held not to amount to cruel and unusual punishment.

[13] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (criminal sterilization statute held unconstitutional as a violation of the equal protection clause of the fourteenth amendment); and Buck v. Bell, 274 U.S. 200 (1927), wherein Justice Holmes made his well-known statement: "Three generations of imbeciles are enough." *Id.* at 207.

[14] *See* State v. Feilen, 70 Wash. 65, 126 P. 75 (1912) (sterilization for statutory rape upheld). *Contra*, Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). *See also* Davis v. Walton, 74 Utah 80, 276 P. 921 (1929), where a statute compelling sterilization of "an habitual sexual criminal" was upheld, but unconstitutionally applied to the petitioner, who was not shown to be likely to produce "socially inadequate" offspring, and who was not allowed to select the particular surgical technique to be used. *Contra, In re* Cavitt, 183 Neb. 243, 157 N.W.2d 171 (1968).

Both civil and criminal sterilization statutes have been struck down most often on equal protection and due process considerations. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); *In re* Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935); State v. Troutman, 50 Idaho 673, 299 P. 668 (1931); Smith v. Schaffer, 126 Kan. 607, 270 P. 604 (1928); *In re* Clayton, 120 Neb. 680, 234 N.W. 630 (1931); Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933); *In re* Main, 162 Okla. 68, 19 P.2d 153 (1933).

[15] State v. Cannon, 5 Storey 587, 190 A.2d 514 (Del. 1963).

[16] 356 U.S. 86 (1958).

[17] As a matter of comity, states prohibit banishment from state borders as punishment. *In re* Tomlin, 241 Cal. App. 2d 668, 50 Cal. Rptr. 805 (1966); Application of Newbern, 168 Cal. App. 2d 472, 335 P.2d 948 (1959); *In re* Scarborough, 76 Cal. App. 2d 648, 173 P.2d 825 (1946).

[18] 356 U.S. at 102. *See also* Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1962), where a sentence was held to be cruel and unusual punishment when its suspension was conditioned on the defendant's leaving the country.

After Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and Afroyim v. Rusk, 387 U.S. 253 (1967) (prohibiting Congress from denationalizing any citizen involuntarily for any reason), it is not surprising that expatriation was condemned as punishment for crime.

[19] The case cited for this proposition is Weems v. United States, 217 U.S. 349 (1910). *Weems* held that imposition of the Philippine punishment, *cadena temporal*, which involved imprisonment

judicial self-restraint has generally deferred judgment to the legislature, striking down a legislatively prescribed punishment only when it is "so severe as to shock the moral sense of the community."[20]

In *Robinson v. California*[21] the eighth amendment was imaginatively applied as a substantive limitation upon what a state may define as crime.[22] *Robinson* held that narcotic addiction could not be punished as crime. Although it was thought that *Robinson* disallowed punishment for any condition or act over which a person had no control,[23] *Powell v. Texas*[24] made it apparent that the limitation only prohibited the infliction of criminal punishment when there was no *actus reus* and that the limitation would, therefore, be slight and not further extended.

From the great variety of instances in which the eighth amendment has been invoked, it appears that the provision is progressive and flexible and "may acquire meaning as public opinion becomes enlightened by a humane justice."[25] In the words of Chief Justice Warren, "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[26]

II. The Eighth Amendment and Prisoner Mistreatment

For many years courts have required that a person convicted of a crime leave his "dignity" outside the prison walls. Some courts stated they had no *power* to interfere in ordinary prison affairs,[27] while others stated the

for fifteen years at "hard and painful labor" and loss of many civil liberties after release, for falsifying government records was cruel and unusual. It could be argued that proportionality was not part of the holding, but that the exotic punishment of Spanish derivation—foreign to English-speaking countries—was *inherently* cruel and unusual.

[20] State v. Espinosa, 101 Ariz. 474, 421 P.2d 322 (1966). Consecutive sentencing for many petty criminal acts has been upheld even though the resulting total punishment is severe. Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970); United States *ex rel.* Darrah v. Brierly, 290 F. Supp. 960 (E.D. Pa. 1968); Pulaski v. State, 23 Wis. 2d 138, 126 N.W.2d 625 (1964).

Habitual offender statutes have also been approved. Wessling v. Bennett, 290 F. Supp. 511 (N.D. Iowa 1968); Vandall v. State, 438 S.W.2d 578 (Tex. Crim. App. 1969).

Statutes have been upheld despite allegations that they are excessive vis-à-vis the offense or that they further no rational purpose of penology, *i.e.*, that they do not further society's interest in isolation, deterrence or rehabilitation. Ralph v. Pepersack, 335 F.2d 128 (4th Cir. 1964); Butler v. State, 232 So. 2d 631 (Ala. 1970); Rudolph v. State, 275 Ala. 115, 152 So. 2d 662, *cert. denied*, 375 U.S. 889 (1963); Williams v. State, 173 S.E.2d 182 (Ga. 1970); State v. Crook, 253 La. 961, 221 So. 2d 473 (1969); Smith v. State, 437 S.W.2d 835 (Tex. Crim. App. 1968). *Contra*, Faulkner v. State, 445 P.2d 815 (Alaska 1968) (where an aggregate sentence of 36 years for larceny by check was held cruelly disproportionate); Dembowski v. State, 240 N.E.2d 815 (Ind. 1968) (greater punishment for the lesser included offense than for the greater offense held cruel and unusual); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968) (life imprisonment without parole is cruel and unusual when applied to juveniles—on the theory that no fourteen-year-old youth is incorrigible). It should be noted that Indiana, like many states, has a provision in her constitution specifying that: "All penalties shall be proportioned to the nature of the offense." Ind. Const. art. 1, § 16.

[21] 370 U.S. 660 (1962).

[22] The resemblance of the *Robinson* holding to the substantive due process of the 1930's was pointed to by Justice White in his dissent. *Id.* at 689.

[23] For examples of areas into which *Robinson* was expected to be extended, see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 645-55 (1966).

[24] 392 U.S. 514 (1968).

[25] Weems v. United States, 217 U.S. 349, 376 (1910).

[26] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[27] Banning v. Looney, 213 F.2d 771 (10th Cir. 1954). "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." *Id.* at 771. *See also* Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910, 911 (9th Cir. 1957).

principle in terms of judicial self-restraint.[28] This "hands-off" doctrine was based on several considerations: (1) it was not known just what "rights" convicts retained;[29] (2) the doctrine of separation of powers was thought to forbid interference with the executive function;[30] and (3) judicial intervention could be expected to discourage experimentation with various penological techniques,[31] as well as "open the door"[32] to large numbers of prisoner petitions to the detriment of general prison maintenance and the efficient administration of justice.[33]

Nevertheless, since *Coffin v. Reichard*,[34] the landmark case concerning prison mistreatment, the "hands-off" doctrine has been steadily eroded.[35] While a specific definition and delineation of the rights of inmates has proven elusive, one court has said: "[The convict's civil rights] that are *fundamental* follow him, with appropriate limitations, through the prison gate . . . ."[36] A look at the cases indicates that restrictions upon a prisoner's religious freedom,[37] access to the courts,[38] acquisition of legal information,[39] reasonable right of correspondence,[40] or, in general, the right to be secure from arbitrary disciplinary measures[41] are reviewable by the courts.[42]

Judicial scrutiny of prison punishment developed slowly. Courts were particularly hesitant to interfere with disciplinary measures, since these were thought to be peculiarly within the knowledge and discretion of prison professionals.[43] However, the principle developed that instances of extreme prisoner mistreatment provided a basis for judicial relief grounded

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[28] Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir. 1964); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 955 (7th Cir. 1956).

[29] The diverse and changing views of convict rights are illustrated by the following: "The prisoner has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state." Ruffin v. Commonwealth, 62 Va. 790, 796 (1871); and Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) where the court said: "[A] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."

[30] *See* Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949). *See also* 18 U.S.C. § 4001 (1969) (vesting control and management of the federal prisons in the Attorney General).

[31] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967).

[32] Stroud v. Swope, 187 F.2d 850, 852 (9th Cir. 1951).

[33] *Id. See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 84 (1967).

[34] 143 F.2d 443 (6th Cir. 1944).

[35] *See* Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966): "The District Court's opinion is based on the hands-off doctrine, which is a questionable absolutism in many areas today." *See generally* Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178-92 (1967).

[36] Courtney v. Bishop, 409 F.2d 1185, 1187 (8th Cir. 1969) (emphasis added).

[37] Cooper v. Pate, 378 U.S. 546 (1964); Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966), *cert. denied*, 385 U.S. 988 (1967); Barnett v. Rodgers, 133 App. D.C. 296, 410 F.2d 995 (1969); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961).

[38] *Ex parte* Hull, 312 U.S. 546 (1941); Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967).

[39] Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966).

[40] Dayton v. McGrenery, 201 F.2d 711 (D.C. Cir. 1953).

[41] Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964); *In re* Riddle, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962).

[42] *See generally* Gallington, *Prison Disciplinary Decisions*, 60 J. CRIM. L.C. & P.S. 152 (1969); Note, *Prison Restrictions—Prisoner Rights*, 59 J. CRIM. L.C. & P.S. 386 (1968).

[43] Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); Snow v. Roche, 143 F.2d 718 (9th Cir.), *cert. denied*, 323 U.S. 788 (1944).

upon the eighth amendment. Emphasis in this approach was placed upon the progressive character of the eighth amendment, *i.e.*, its ability to change with the "general conscience" and concepts of "fundamental fairness."[44]

In recent years, the eighth amendment has been the basis for relief in many prisoner mistreatment cases. In *Fulwood v. Clemmer*[45] it was held that exclusion from the general prison population for two years, when applied to a prisoner who had merely attempted to exercise his lawful right to religious freedom, was cruel and unusual. Similarly reprisals for writ writing and "lying in court" have been proscribed.[46] Several cases have held that solitary confinement cells must meet minimum sanitation standards and that the prisoner must not be left to live under "animal-like conditions."[47] In *Jackson v. Bishop*[48] a federal district court held that such modern torture devices as the "crank telephone" and the "teeter board" were unconstitutional.[49] On appeal in *Jackson*, the court of appeals went further and permanently enjoined whipping by Arkansas prison officials as offensive to "contemporary concepts of decency and civilization . . . ."[50] In *Talley v. Stephens*[51] the intentional compulsion of an inmate, known to be weak, to perform difficult physical labor was held to constitute cruel and unusual punishment. In a unique application of the eighth amendment, it was held that a breach of the duty to exercise ordinary care with respect to the safety of an inmate may constitute cruel and unusual punishment, where the injury is "so severe and shocking to the conscience, and so utterly disproportionate to the crime . . . as to constitute cruel and inhuman treatment."[52]

III. HOLT V. SARVER

Holt v. Sarver is the first case in which general prison conditions are attacked as being violative of the eighth amendment.[53] The court's holding

[44] Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965). "It may be observed in this connection that penal admeasurements made by general conscience and sense of fundamental fairness doubtless will not be without some relationship to the humane concepts and reactions of present-day social climate." *Id.*

[45] 206 F. Supp. 370 (D.D.C. 1962).

[46] Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

[47] Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). In *Jordan* the court said: "[W]hen, as it appears in the case at bar, the responsible prison authorities in the use of the strip cells have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene—and intervene promptly —to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States." 257 F. Supp. at 680.

[48] 268 F. Supp. 804 (E.D. Ark. 1967).

[49] The "crank telephone" was an electrical shocking device, the source of the electricity being an old-fashioned hand-crank telephone. The "teeter board" consisted of two boards nailed together with nails protruding through the top on which prisoners were made to balance.

[50] Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

[51] 247 F. Supp. 683 (E.D. Ark. 1965).

[52] Roberts v. Williams, 302 F. Supp. 972, 989 (N.D. Miss. 1969). In *Roberts* a county prison superintendent had entrusted a shotgun to an inmate trusty and failed to take precautions to insure its safe use. The trusty shot, apparently accidentally, a 14-year-old prisoner who had been convicted of petty larceny for theft of articles having a retail value of $2.11. The prisoner sustained probable brain damage and total blindness. The court said, "Indeed, it is our view that the moral sense of all reasonable men of this day would be shocked by the punishment visited upon the plaintiff, yet a minor, as a direct result of inattentive and careless prison administration." *Id.*

[53] However, in *Ex parte* Pickens, 13 Alaska 477, 101 F. Supp. 285 (Territorial Ct. 1951), a

that mere confinement within the Arkansas penitentiary system amounts to cruel and unusual punishment is the combined result of an application of a kind of "totality of the circumstances"[54] test, formerly used only in cases of individual prisoner mistreatment, and of an exhaustive study of the policies, conditions, and practices within the system in the light of that test.

Previously, where a particular institutional practice was held unconstitutional, the action had been brought by an inmate personally subjected to the evil.[55] *Holt*, however, is unique in that it is a class action brought on behalf of the entire inmate population. For such a claim to justify relief under section 1983[56] as a deprivation of the constitutional right to be free from cruel and unusual punishment, the court stated that the confinement must be "characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people . . . ."[57] The court reasoned that since confinement of prisoners in isolation cells is cruel and unusual punishment where such confinement is "shocking to the conscience," confinement "in population" may, in extreme circumstances, be unconstitutional also. Thus, the test formerly applied only to conditions and practices relating to prisoners in solitary confinement was applied to all prisoners.

Having found a method by which to determine the constitutionality of prison conditions, the court began its examination of the Arkansas penitentiary system. The trusty system, open barracks, overcrowded isolation cells, and general unsanitary and filthy living conditions were all analyzed in great detail. While specific practices and conditions were discussed, the court considered the combined effect upon the inmate to be the controlling factor. Much testimony was heard that these practices and conditions were penologically unsound. Although the court was unwilling to adopt penological standards as constitutional standards, the court's conclusion that "few individuals come out of [the Arkansas state penitentiary] better men for their experience; most come out as bad as they went in, or worse"[58] indicated that the absence of a rehabilitation program (universally condemned by penologists) was a factor to be considered in the totality of the circumstances.

The court concludes that mere confinement in the Arkansas penitentiary system is an inherently and disproportionately cruel and unusual punishment, which the court defines as "shocking [and] disgusting to people

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prisoner sought release from a United States jail in Anchorage, Alaska, on eighth amendment grounds. The jail was alleged to be overcrowded and unhealthy. The writ of habeas corpus was denied—primarily because the court was unwilling to order the release of a prisoner for the grounds alleged, rather than on the basis of a determination of the constitutionality of the jail conditions. *Pickens* is not cited in *Holt*.

[54] *See* Sostre v. Rockefeller, 312 F. Supp. 863, 871 (S.D.N.Y. 1970), where the court said: "The court also holds that the *totality of the circumstances* to which Sostre was subjected for more than a year was cruel and unusual punishment when tested against 'the evolving standards of decency that mark the progress of a maturing society.' " (Emphasis added.)

[55] *See* cases cited notes 36-42, 46-51 *supra*.

[56] 42 U.S.C. § 1983 (1964).

[57] 309 F. Supp. at 373.

[58] *Id.* at 379.

of reasonable sensitivity."[59] Exposure to physical danger and being forced to live in degrading conditions is said to be inherently repugnant to the eighth amendment. The court also points out that Arkansas juries and judges are unaware when they convict and sentence a person to the penitentiary that the person will receive much more than mere imprisonment. What is worse, the receipt of this added burden does not depend upon the gravity of the offense committed. Hence, there exists a unique infliction of a disproportionate punishment: instead of diverse punishments being applied to persons with identical criminal violations, prisoners of greatly differing criminal backgrounds are recipients of identical, unconstitutional confinement.

IV. Conclusion

Holding an entire state prison system to be unconstitutional is one thing, but formulating an enforceable remedy is another. Even though the court refused to characterize the case as an attempt to coerce the Arkansas General Assembly into appropriating more money for the system, it is apparent that this was exactly what had to occur if the system were to comply with constitutional standards. Though the Arkansas legislature has appropriated substantial additional funds in a special session[60] for the operation of the prison and it appears that the system will be in compliance with the court's order, it is interesting to speculate upon the possible consequences of non-compliance. The court warned: "If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."[61] Non-compliance would, therefore, amount to a decision not to run a penitentiary system. The state would presumably have to send its prisoners (at no small cost) to other state or federal prisons. Although a federal marshal-state governor confrontation at the "big house door" is farfetched, the court has, nevertheless, certainly shown no hesitancy to ignore the prudence of the "hands-off" doctrine.

It should be noted that it is entirely possible that the Arkansas penitentiary system is sui generis. Such use of trusties is probably nowhere more pervasive, although trusty guards, an evil the court expressly criticized, are used in Louisiana and Mississippi.[62] While many other state prisons undoubtedly have some unconstitutional conditions and engage in some unconstitutional practices, it is not likely that a court will again find it necessary to condemn an entire penitentiary system. Thus, *Holt* may be the furthest judicial incursion ever made into prison management. In any event, it will not be the last. Although the federal courts may not be the answer to Juvenal's question: "But who will watch the

[59] *Id.* at 380.

[60] *See* Act 17 of the First Extraordinary Session of the 1969 General Assembly and Acts 7 and 72 of the 1970 Extraordinary Session. Respondent's Report at 1-3, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

[61] 309 F. Supp. at 385.

[62] *See* expert testimony of James V. Bennett, a former Director of the Federal Bureau of Prisons. *Id.* at 373.