CONSTITUTIONAL LAW—ARKANSAS STATE PENITENTIARY TRANSGRESSES CONSTITUTIONAL PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT—*Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971).

The spirit and meaning of the eighth amendment provision against cruel and unusual punishment[1] have long eluded the courts of this country. Aroused by the deplorable conditions within the Arkansas Prison System, federal courts of the Eighth Circuit have launched a program of increased federal intervention in the state prison administration. For the first time an entire state penitentiary system was declared unconstitutional.[2]

Holt v. Sarver[3] was a class action brought by inmates of the Cummins Farm Unit and the Tucker Intermediate Reformatory against Commissioner Sarver and the members of the Board of Corrections.[4] Petitioners alleged deprivation of their rights under the eighth amendment,[5] basing their allegations on the existence of four abusive conditions within the prisons. The first of these was the extensive use of the trusty guard system, which resulted in the employment of very few non-inmate guards. As a consequence of this, prisoners serving long or life terms were in virtual control of the prison. This led to wholesale corruption, trafficking in liquor and drugs, a proliferation of weapons among the prison population and, in general, was most responsible for the abuses that existed within the institutions. A second serious threat to inmate safety was the barracks-style living quarters. Such an arrangement led to sexual attacks on younger, weaker inmates and also allowed for violent, armed attacks against prisoners while they slept. Unsanitary and debasing conditions existed in the

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1 There are provisions against cruel and unusual punishment in all state constitutions. *See, e.g.*, ARK. CONST. art. II, § 9; N.J. CONST. art. I, par. 12; N.Y. CONST. art. I, § 5.

2 Holt v. Sarver, 309 F. Supp. 362, 365 (E.D. Ark. 1970):

> As far as the Court is aware, this is the first time that convicts have attacked an entire penitentiary system in any court, either State or federal.

3 442 F.2d 304 (8th Cir. 1971).

4 Federal court jurisdiction was based on 42 U.S.C. § 1983 (1964), which provides:

> Every 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, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5 In Novak v. Beto, 320 F. Supp. 1206, 1211 (S.D. Tex. 1970) the trial court said:

> At least since Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed. 2d 758 (1962), the prohibition against cruel and unusual punishments has been applicable to the States through the due process clause of the fourteenth amendment.

isolation cells, which petitioners hoped to have corrected; and lastly, while a rehabilitative program had been established at Tucker, there was no affirmative rehabilitation program at Cummins.[6]

The trial court entered a declaratory judgment decreeing that confinement at the two institutions under the existing conditions constituted cruel and unusual punishment violative of the eighth amendment, and the State of Arkansas was ordered to correct the deficiencies within its prisons.[7] On appeal respondents contended that such a suit was, in effect, against a state and thus barred by the eleventh amendment, that the trial court accepted inadmissible and highly prejudicial evidence and that the court's findings were not supported by substantial evidence. The first two arguments were summarily rejected,[8] and, as to the third contention, the court of appeals decided that the trial court's findings were not only supported by substantial evidence but by

> overwhelming substantial evidence and that such findings afford a firm basis for his determination that imprisonment of inmates at the Cummins and Tucker units constitutes cruel and unusual punishment violative of the Eighth Amendment under conditions shown to have existed at the time of the decree.[9]

The case was remanded to continue federal supervision and to insure that progress consistent with the court order was being made.[10]

The concept of "cruel and unusual punishment" has remained vague and undefined over the years. A primary roadblock to its develop-

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6 309 F. Supp. at 373-79.

7 *Id.* at 385. The court stated:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. 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.

Id.

What the federal government could or would have done if the State of Arkansas failed to comply with the federal court order is subject to conjecture. It appears that the trial court recognized a willingness on the part of the Arkansas Governor and Legislature to see that funds were provided to correct deficiencies within its prisons. Arkansas experienced enforcement of a federal desegregation decree in 1957, when President Eisenhower ordered federal troops into Little Rock under the authority derived from the Constitution and 10 U.S.C. §§ 332, 333 (1964). There is no indication that such a course of action would be necessary, as the court of appeals found:

> The reports on file show substantial progress in meeting the constitutional deficiencies. Money has been appropriated for new buildings and needed improvements and for the employment of additional free world guards. The trial court has recognized that the State is making a sincere effort to remedy the deficiencies.

442 F.2d at 309.

8 442 F.2d at 306-08.

9 *Id.* at 307-08.

10 *Id.* at 309.

ment was the determination by the courts to consider only situations of direct, physical brutality as subject to the eighth amendment provision.[11] In *Weems v. United States*,[12] where the defendant was sentenced to fifteen years of hard labor, as well as several other punishments, for falsifying an official document, the United States Supreme Court expanded the eighth amendment proscription. Not only was the mode of punishment found to be inherently cruel and unusual (constant enchainment, "painful" labor), but the Court indicated that the punishment might be cruel and unusual because of its excessive nature in light of the relatively petty crime involved.[13]

However, it was not until *Trop v. Dulles*,[14] where the Supreme Court held that depriving a man of his citizenship for wartime desertion constituted cruel and unusual punishment, that the necessity for physical violence against an individual completely disappeared. While there was no precise definition of the limits of the eighth amendment, the Supreme Court noted that the provision "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[15]

The State of Arkansas' system of corrections[16] provided federal courts with the impetus to intervene and further bury an already disintegrating stumbling block to judicial considerations of questionable prison practices—the hands-off policy.

> In most states and in the Federal system, the responsibility for administration of the prison system is delegated by statute to the Executive branch of government. The traditional view had been that the delegation was absolute, and that the judiciary had no power to review the internal prison administration.[17]

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11 *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130, 134-36 (1878). *See generally* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

12 217 U.S. 349 (1910).

13 *Id.* at 380-81.

14 356 U.S. 86 (1958).

15 *Id.* at 101.

16 The difference between Arkansas prisons and those of other states is generally one of degree. *See* Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969) for a review of prison abuses in Virginia. *See also* Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATH. U.L. REV. 365, 372-86 (1971); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 n.5 (1969).

17 Goldman, *Prisoners' Civil Rights: A Trend Toward Continued Judicial Determination*, 93 N.J.L.J. 461 (1970) (footnotes omitted). In Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951) the court held:

> We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined. (Footnote omitted).

See also Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954) (al-

Recent federal court involvement with Arkansas prisons[18] began with *Talley v. Stephens*.[19] An injunction was sought and obtained by three inmates restraining the penitentiary superintendent from using corporal punishment[20] until adequate safeguards were provided to prevent abuse of the disciplinary procedure.[21] Relying on *Monroe v. Pape*[22] the court held that plaintiffs did not have to exhaust their remedies in the state court before seeking federal relief. Federal refusal to review complaints of state prison inmates for their failure to exhaust state court remedies was a practice which accounted for the dearth of such cases in the federal courts and the slow development of eighth amendment constitutional law.[23]

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leged violation of constitutional rights in which it was held that "[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations"); People v. Collins, 200 N.Y.S.2d 919, 920 (Schenectady County Ct. 1960) (inmate sought judicial relief after being declared insane and transferred to a mental hospital, in which the court decided that it had "no statutory authority to question or vary the wisdom or legality of such decisions"); Commonwealth v. Banmiller, 194 Pa. Super. 566, 168 A.2d 793 (1961) (petitioner sought remedy for alleged denial of proper medical treatment in prison, but the court held that it was a matter of penal administration and refused to take jurisdiction). For further examination of the hands-off policy, *see* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); Note, *Prisoners—Enforcing Prisoners' Rights*, 73 W. VA. L. REV. 38 (1970).

18 Federal intervention in Arkansas

> signaled the development of the "cruel and unusual punishment" clause as a judicial tool for regulating unconstitutional prison abuse. Up until that time the Supreme Court, as well as lower federal courts, had been grappling with the scope and meaning of this eighth amendment proscription.

Note, *Conditions and Practices of the Arkansas Penal System Violative of the Eighth and Fourteenth Amendments*, 19 KAN. L. REV. 139, 141 (1970).

19 247 F. Supp. 683 (E.D. Ark. 1965).

20 Corporal punishment was inflicted by means of a leather strap, five feet in length, approximately four inches wide, ¾ of an inch thick and usually attached to a six inch wooden handle. The lashes were inflicted by a warden on the area of the buttocks as the inmate lay on the floor. *Id.* at 687.

21 Forced labor beyond the limits of a prisoner's physical condition was ruled cruel and unusual, but

> corporal punishment has not been viewed historically as a constitutionally forbidden cruel and unusual punishment, and this Court is not prepared to say that such punishment is per se unconstitutional.

Id. at 687-89.

22 365 U.S. 167 (1961) (private citizens alleging violations of fourth amendment rights by police officers need not exhaust state remedies when proceeding in federal court under the federal Civil Rights Statute, 42 U.S.C. § 1983 (1970)).

23 Until *Pierce v. Vallee* [293 F.2d 233 (2d Cir. 1961)], the doctrine that complaints alleging mistreatment of state prisoners must first be heard in state courts was well established.

Note, *supra* note 16, at 1276. In *Pierce* the federal court opened the door to complaints of mistreatment by state prisoners by holding that

Defendants in *Talley* were reminded that:

> Although persons convicted of crimes lose many of the rights and privileges of law abiding citizens, it is established by now that they do not lose all of their civil rights, and that the Due Process and Equal Protection Clauses of the 14th Amendment follow them into the prison . . . .[24]

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the present complaints, with their charges of religious persecution, state a claim under the Civil Rights Act which the district court should entertain.

293 F.2d at 235.

However, it was not until Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam), where legal material in preparation for an inmate's appeal was confiscated by prison officials, that the Supreme Court held that prisoners proceeding under 42 U.S.C. § 1983 (1970) did not have to exhaust state remedies and failure to do so would no longer be grounds for dismissal.

[24] 247 F. Supp. at 686. *See also* Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961) (inmates' allegations of denial of constitutional rights because of their religion warranted a hearing); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944) (court ordered that inmate's petition for a writ of habeas corpus be filed on the basis of the circumstances surrounding his arrest and the treatment he received from guards and co-inmates while confined).

When determining what "rights and privileges" inmates lose, discipline within the prison is of paramount importance. This consideration greatly affected the outcome of a significant number of suits involving Black Muslim prisoners demanding greater religious freedom and an end to alleged cruel and unusual punishment resulting from the practice of their religion. *See* Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964) (prison officials should attempt to formulate workable rules and regulations which would allow Muslim inmates as much religious practice possible within prison discipline limitations); Banks v. Havener, 234 F. Supp. 27, 30 (E.D. Va. 1964) (Muslims confined in the District of Columbia Youth Center must be permitted to practice their religion "on a non-discriminatory basis so long as it does not present a clear and present danger to the orderly functioning of the institution"); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1961) (restrictions placed on Black Muslim religious activities were found to be reasonable).

It has been long established that while freedom to believe is absolute, freedom to exercise the belief is not. The latter must be determined by general public welfare, or paramount compelling interest, in this case the importance of order within the prison system. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Reynolds v. United States, 98 U.S. 145, 166-67 (1878); Sadlock v. Carlstadt Bd. of Educ., 137 N.J.L. 85, 91, 58 A.2d 218, 222 (Sup. Ct. 1948).

New Jersey courts have echoed the hesitation to become involved with state prison administration. In McBride v. McCorkle, 44 N.J. Super. 468, 477, 130 A.2d 881, 885 (App. Div. 1957) the court said:

> Courts are not required to supervise the administration of prison rules and regulations and prison disciplinary procedures. . . . Such matters are left to the discretion of prison authorities so long as their conduct does not involve deprivation of the prisoner's constitutional rights and is not clearly capricious or arbitrary.

In *McBride* the court concluded that plaintiff's continued confinement in the segregation wing of the state prison was fully warranted based on his prior conduct and thus he was not subjected to cruel and unusual punishment by being so confined. The court further held that since his segregated confinement was appropriate, denial of permission to attend religious services with the general prison population was neither cruel and unusual nor depriving him of his constitutional right to free exercise of religion.

The same court in *Jackson v. Bishop*[25] adhered to *Talley*, holding that corporal punishment of itself is not cruel and unusual, but found that adequate safeguards regulating its use were not provided.[26] The telephone shocking device,[27] the teeter board[28] and whipping on the bare skin were permanently restrained as cruel and unusual punishment.[29]

Traditionally, a suit could be brought only by named inmates, with relief afforded to them accordingly.[30]

> Elimination of this restriction would facilitate the review of general prison conditions, such as lack of rehabilitative treatment, by expanding the scope of prison experiences which a court might consider relevant.[31]

With the emergence of a forum for inmates' complaints concerning prison practices and conditions, there was also an increase in the employment of class action suits, resulting in more effective judicial intervention and correction of existing deficiencies.[32]

Jackson v. Bishop was appealed, and it was held that corporal punishment was unconstitutional per se, regardless of the restrictions placed on its use.[33] In *Jackson* the scope of cruel and unusual punish-

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Basing their decision to a large extent on *McBride*, the New Jersey Supreme Court in Cooke v. Tramburg, 43 N.J. 514, 523, 205 A.2d 889, 894 (1964) held that allowing religious freedom, in this case collective worship of Black Muslims, would lead to prison disruptions and denial of such services was not capricious or arbitrary. The requirement of prison order and discipline was again the controlling factor.

25 268 F. Supp. 804 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968).

26 The court considered adequate safeguards to be more than one person's judgment in the decision to administer corporal punishment, "an objectively reasoned, dispassionate decision," some investigation beyond the mere accusation of the guard or trusty and participation in or review of the punishment by a superintendent. 268 F. Supp. at 815-16.

27 The "Tucker telephone" was an electrical device used to shock the prisoner's testicles. *Id.* at 812; Singer, *supra* note 16, at 376.

28 The "teeter board" was a plank on which the prisoner was required to balance himself for long periods of time. If he fell off he was beaten with a leather strap. 268 F. Supp. at 811-12; Singer, *supra* note 16, at 376.

29 268 F. Supp. at 816.

30 Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 658 (1971).

31 *Id.*

32 *Id. See also* Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970); Wilson v. Kelly, 294 F. Supp. 1005 (N.D. Ga.), *aff'd*, 393 U.S. 266 (1968) (per curiam); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (per curiam).

33 404 F.2d at 579. The court ruled that

> the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess . . . .

Id.

ment remained vague and evasive, but the standards of application were made somewhat more distinguishable.

> [S]o far as the Supreme Court cases are concerned, we have a flat recognition that the limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered, and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.[34]

There followed a slight retreat in the trend of Eighth Circuit decisions with *Courtney v. Bishop*,[35] where the court of appeals rejected a prisoner's contention that the particular conditions of his solitary confinement constituted cruel and unusual punishment. It appears, however, that the plaintiff failed to prove his allegations regarding lack of adequate medical treatment, sanitation facilities and diet.[36]

In a decision rendered shortly afterward,[37] bearing the same name as the subject case, the meaning of the eighth amendment was further clarified[38] and it held that while solitary confinement was not uncon-

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34 *Id.*

35 409 F.2d 1185 (8th Cir.), *cert. denied*, 396 U.S. 915 (1969).

36 *Id.* at 1188.

Courts in other jurisdictions have not hesitated to declare solitary confinement unconstitutional if the living conditions were sufficiently wretched. *See* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966), where in similar fact situations the inmates in solitary confinement were denied clothing, soap and toilet paper and exposed to long periods of freezing cold in a barren cell.

Inmates of New Jersey State Prisons have attempted to improve conditions within their solitary confinement cells. In Gurczynski v. Yeager, 339 F.2d 884 (3d Cir. 1964), the court affirmed dismissal of a prisoner's complaint alleging, *inter alia*, that punishment in solitary confinement violated his civil rights. It was decided that the case concerned New Jersey prison operation and discipline, no federal right was involved and that "[d]iscipline reasonably maintained in those prisons is not under the supervisory direction of the federal courts." *Id.* at 884-85. Prisoners sought to reform practices of solitary confinement in the New Jersey State Prison at Trenton with Ford v. Board of Managers of New Jersey State Prison, 407 F.2d 937 (3d Cir. 1969). The court affirmed the granting of a motion for summary judgment, finding that conditions within the solitary confinement cells did not constitute cruel and unusual punishment. The court, as in *Gurczynski*, saw the situation as one of state prison disciplinary practice and thus not under federal supervision. *Id.* at 940.

37 Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969). This action was never terminated but was later consolidated with the present Holt v. Sarver, 309 F. Supp. 362, 368 n.3 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

38 [A] punishment or system of punishment is unconstitutional if it offends concepts of decency and human dignity and precepts of civilization which Ameri-

stitutional per se, it could be, if the living conditions within the cell warranted such a finding.[39] The court declared that there is a duty imposed upon a state to use ordinary care for the health and safety of the inmates, and that the overcrowded confinement in the Cummins isolation cells created conditions which made such confinement unconstitutional.[40]

Thus the federal courts of the Eighth Circuit had considerable experience with the overall situation within the Arkansas Prison System, and the stage was set for a finding that confinement of all prisoners in that system, under the conditions that then existed, was unconstitutional.

In *Holt v. Sarver* it was contended that

> conditions in the Arkansas penal system, including but not limited to those relating to inmate safety, may be so bad that it amounts to an unconstitutional cruel and unusual punishment to expose men to those conditions, regardless of how those conditions may operate fortuitously on particular individuals.[41]

Abuse brought about by the trusty guard system, the constant threat to inmate safety existing under confinement in a barracks structure, and the continued intolerable conditions in isolation cells[42] all combined to render the situation as a whole unconstitutional.[43]

The role of rehabilitation in the decision is of particular future significance. The court in *Holt* said that the lack of a rehabilitation program does not make imprisonment in the institution unconstitutional,[44] even though one day such "a sociological theory or idea may ripen into constitutional law."[45] However:

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cans profess to possess, or if it is disproportionate to the offense, or if it violates fundamental standards of good conscience and fairness.

300 F. Supp. at 827.

39 *Id.*

40 *Id.* at 827-28. Confinement in isolation cells at Cummins was not isolation in the ordinary sense of the word. Cells were in fact overcrowded, dirty and unsanitary, and pervaded by bad odors from the toilet in the cell. *Id.* at 832.

41 309 F. Supp. at 373.

42 Overcrowding was relieved after the earlier *Holt* decision, but the trial court in the later *Holt* found that the other deficiencies continued to exist. *Id.* at 378.

43 *Id.* at 372-73.

44 The court said:

> Given an otherwise unexceptional penal institution, the Court is not willing to hold that confinement in it is unconstitutional simply because the institution does not operate a school, or provide vocational training, or other rehabilitative facilities and services which many institutions now offer.

Id. at 379.

45 *Id.*

> The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation.[46]

Thus the combination of prison conditions and practices which so hindered any possibility of inmate rehabilitation were held to be violative of the eighth amendment. As it comes to be recognized that rehabilitation is the most important goal of prison confinement,[47] it is not unforeseeable that the lack of a rehabilitation program of itself eventually might be deemed a violation of the eighth amendment. Such a finding was suggested by Judge Lay:

> Until immediate and continued emphasis is given to an affirmative program of rehabilitation the district court should retain jurisdiction.[48]

Holt is important for the relief that it offered to inmates subjected to appalling conditions within the Arkansas Prison System. But its primary significance is the groundwork that has been laid for progressive state penal reform through judicial intervention. Arkansas may be unique in some of its penal procedures, but it is certainly not unique in treating prisoners in an inhuman and unconstitutional manner, and it is becoming evident that prison inmates will no longer wait passively for meaningful reform. By taking greater cognizance of inmates' complaints regarding prison deficiencies and using the powers available to relieve them, state and federal courts could possibly avert violent attempts to redress grievances. *Holt v. Sarver* can be a valuable precedent. But society must begin to shoulder its moral (and financial) responsibility toward incarcerated individuals[49] and the courts must respond to their duty to implement change, using every tool available to them, in the penal institutions where it is necessary.[50]

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46 *Id.*

47 The trial court in *Holt* reflected:

> Many penologists hold today that the primary purpose of prisons is rehabilitation of convicts and their restoration to society as useful citizens; those penologists hold that other aims of penal confinement, while perhaps legitimate, are of secondary importance.

Id.

48 442 F.2d at 310 (concurring opinion) (footnotes omitted).

49 Hughes, *Corrections Reform: We Are Our Brother's Keeper*, 2 SETON HALL L. REV. 311 (1971).

50 Hirschkop & Millemann, *supra* note 16, at 838-39; Comment, *supra* note 30, at 654.