American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

April 25, 1968

TO: ACLU Leadership

FROM: John de J. Pemberton

I'm writing to ask your help for Hank di Suvero, executive director of NJACLU, who was arrested in Newark, N.J. on Saturday, April 20th, by an off duty policeman while asking an on duty policeman to arrest a man who had attacked Mrs. Rita D'Joseph, NJACLU's education director, when she passed a picket line which had been organized by a white vigilante group to demonstrate against NJACLU's annual meeting. Four charges have been lodged against Hank. The following is an account of what happened.

Mrs. D'Joseph arrived at the hotel about an hour before the meeting was scheduled to begin to check up on some last minute details. She carried ACLU signs and when she attempted to enter she was attacked, kicked, shoved, and beaten. After finally getting into the hotel she called Hank who was at the ACLU office with several board members. While he and Walter Finch rushed to the scene, Emil Oxfeld, NJACLU board chairman, called the police.

When they arrived at the hotel they found a loud and boisterous picket line of about thirty people, many of whom were wearing army fatigues and helmets. Hank and Walter Finch managed to enter the hotel without incident and found Mrs. D'Joseph in a state of shock.

When she was somewhat recovered, they asked her to identify her chief assailant, which she did. Hank then asked a police sergeant who appeared to be in charge of the police, to arrest the man. The sergeant said that the man had already been pointed out to him, that the man wasn't going anywhere and that he would get the man's name.

Hank and Walter Finch continued to stand at the side of the picket line discussing the situation. Next to them was a uniformed policeman. The picket line then began to spread out and as it passed in front of Hank the first demonstrator pushed him slightly. The second demonstrator, a woman, then shoved him against the wall and shouted that he pushed her. A man in a sport shirt came off the picket line and arrested Hank, charging him with assault and battery. Another off duty policeman appeared and the two took Hank to the patrol car. While in custody Hank was struck by the man who heads the vigilante group. Neither the uniformed or the off duty police made any move to protect Hank.

Hank was then charged with resisting arrest. Later in the paddy wagon he was charged with loud and obscene language and then in the police station, when he was alone with the police, was charged with threatening the life of a police officer. Hank, in fact, did none of the things he has been charged with.

(more)

Later, he was held in $1,000 bail despite the fact that he is an attorney, admitted to two bars, several federal bars, has a wife and three children and has never been previously arrested.

On Friday, April 27, the ACLU is bringing a suit under Section 1983 of the Civil Rights Act seeking to curb the conspiracy between the police and vigilante groups in Newark.

IT IS MOST URGENT that you write to Attorney General Ramsey Clark with copies to David Satz, U.S. Attorney for New Jersey, Post Office Building, Newark, New Jersey protesting this arrest and asking for an investigation. Will you also ask prominent persons and board members, especially lawyers, to do the same.

The idea of off duty policemen acting in the presence of approximately a dozen on duty policemen is outrageous.

We cannot stand by and permit this to happen to an ACLU leader who is in this position simply because he has been an activist in the community seeking redress for civil liberties violations. As you know, he has been militant in his criticism of New Jersey police and brought the suit to place the police department in receivership. All of his charges against the Newark police have now been substantiated by the Newark Riot Commission Report.

Please write today!!! It is important!!!

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
(NORTHERN DIVISION)

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| [illegible]PH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of WILLIE ALLEN, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of CECIL MCCARGO, JR., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN, and THOMAS E. HOUCK, JR., for themselves, jointly and severally, and for all others similarly situated,<br><br>PLAINTIFFS<br><br>vs.<br><br>FRANK LEE as Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, [illegible] MAX MCLAUGHLIN and WILLIAM MITCH, as members of the Board of Corrections of Alabama; A. MELVIN BAILEY, as Sheriff of Jefferson County, Alabama and all other Sheriff of Alabama, jointly and severally, who are similarly situated. ROBERT K. AUSTIN as Warden of the City Jail of Birmingham, Alabama and all other Wardens and jailers of city and town jails of Alabama, jointly and severally, who are similarly situated,<br><br>DEFENDANTS | CIVIL ACTION NO. 2[illegible]N |

BRIEF FOR PLAINTIFFS

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The Plaintiffs.

This is an action brought by six persons. Five are Negroes. One is white. Of the Negroes, one is confined in a county jail awaiting retrial on a capital charge; three are confined in state penal institutions, and one has been incarcerated in a city jail and is appealing a misdemeanor conviction from a city recorder's court which, if decided adversely to him, could result in his future confinement in a city jail. The white plaintiff is a civil rights worker who has been, but is not presently, confined in a city jail. They sue on their own behalf and on behalf of all others similarly situated.[1]

The Defendants.

The eight defendants include Alabama's Commissioner of Corrections, the five members of the State's Board of Corrections, the Sheriff of Jefferson County, and the Warden of the City Jail of Birmingham. The Sheriff and Warden are sued as representatives of a class.[2]

Plaintiffs contend that the state statutes involved[3] violate the terms of the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution of the United States, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of said Constitution. Additionally the plaintiffs attack the racial discriminatory prison employment practices and seek affirmative action to desegregate Alabama's state, county, and municipal penal institutions and the employment of personnel there.

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1. Regarding the standing of the plaintiffs see: Singleton v. Board of Commissioners of State Institutions, 5 cir., 356 F. 2d 771 (1966); Bailey v. Patterson, 369 U.S. 31, 33 (1962); Evers v. Dwyer 358 U.S. 202, 204 (1958); Henderson v. U.S., 339 U.S. 816, 823 (1950); Mitchell v. U.S., 313 U.S. 80, 93 (1941); Anderson v. City of Albany, 5 cir., 321 F. 2d 649, 652-3 (1963); Rackley v. Board of Trustees of Orangebury Regional Hospital, 310 F. 2d 141 (1962); Morrison v. Davis, 252 F. 2d 102, 103 (1958).

2. Cf. Sims v. Frink, 208 F. Supp. 431 (1962) in which three Alabama Judges of Probate served as representatives of all Judges of Probate.

3. The provisions of Alabama law said to unconstitutional insofar as they require a policy of racial segregation are: Title 45 Sections 4, 19, 30, 52, 121, 122, 177, 123,

122, 123,

## THE LAW

The underlying legal principles seem not contested. The Fifth Circuit has said: " . . . It is no longer open to question that a State may not constitutionally require segregation of public facilities. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954); Baltimore City v. Dawson, 350 U.S. 877 (1965); Turner v. Memphis, 369 U.S. 350 (1962); Johnson v. Virginia, 373 U.S. 61, 62, 10 L. ed 2d 195, 196 (1963). " . . . [I]n Brown v. Board of Education of Topeka, 1954, 347 U.S. 483 (1954) . . . the Supreme Court effectually foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the State." Singleton v. Board of Commissioners of State Institutions, supra, 772.

The main issue before the Court is whether there are any compelling reasons for excluding state prisons, jails and other detention and correction facilities from the broad proscriptions of the law. There are none. The compelling need is their speedy and effective integration. Edwards v. Sard, 250 F. Supp. 977 (D.C. 1966).

Confinement in a prison of necessity entails a withdrawal of certain rights and freedoms. The courts, however, have been unequivocal in their holdings that prisoners' rights, under the Cruel and Unusual Punishment, Due Process and Equal Protection Clauses are not among these:

> "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 Fourteenth Amendment follow them into the prison and protect them there fro unconstitutional administrative action on the part of prison authorities carried out under color of State law, custom, or usage. More specifically, prison authorities are not permitted to inflict upon convicts cruel and unusual punishments for violation of prison rules; they may not discriminate invidiously against a prisoner or class of prisoners, and they may not deny to a prisoner reasonable access to the courts to test the validity of his confinement or to secure judicial protection of his constitutional rights." Tally v. Stephens, 247 F. Supp. 683, (E.D. Ark. 1965).[1]

(See next page for footnote.)

While the Supreme Court of the United States has not ruled on the specific issue of racial discrimination in correctional and detentional institutions, it is apparent that these facilities are wholly within the scope of Brown and related cases. And the Federal District Courts dealing with the problem have applied the Brown rationale. In Edwards v. Sard, supra, however, the court refused plaintiffs relief on the grounds that they " . . . have failed to show that a policy of racial segregation has motivated dormitory assignments." 250 F. Supp. at 982. In Singleton v. Board of Commissioners of State Institutions, supra at 62, the court ruled that §955.12 of the Florida Statutes, F.S.A. which requires racial segregation of incarcerated male juveniles, was a violation of the Fourteenth Amendment of the Constitution of the United States. The Court utilized the Brown ruling, stating that "the principle extends to all institutions controlled or operated by the State." The case was remanded with instructions.

Defendants contend that the practice of racial segregation is a matter of routine prison security and discipline and is thus not within the scope of permissible inquiry of the courts. There is an abundance of cases that hold that prison officials have largely unfettered discretion in running their institutions generally and in determining what disciplinary measures should be used. Roberts v. Pegelow, supra; Beckett v. Kearney, 247 F. Supp. 219 (1965);

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1. (Continued from preceding page.) See also: Fulwood v. Clemmer, 295 F. 2d 171 (1961) and Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961); discrimination against inmate members of Black Muslim faith prohibited. U.S. ex rel. Cook v. Dowd, Warden, 180 F. 2d 212 (7th Cir. 1950), Ex parte Cleio Hull, 312 U.S. 546 (1941), Bailleux v. Holmes, 177 U.S. 361 (1959) and Cochran v. Kansas, 316 U.S. 255 (1942); restraints by prison officials upon inmates' preparation of legal documents and free access to the courts constitutes a violation of inmate's civil rights. Talley v. Stephens, 247 F.Supp. 683 (E.D. Arkansas 1965), Mahaffey v. State, 392 F. 2d 279 (1964) and Johnson v. Dye, Warden, 175 F. 2d 250 (3rd Cir. 1949); the constitutional prohibition against cruel and unusual punishment is available to prisoners. See also: Cooper v. Pate, 378 U.S. 546 (1965); White v. Ragen, 324 U.S. 760 (1945); Ex parte Hull, supra, U.S. ex rel. Knight v. Ragen, 337 F. 2d 425 (7th Cir., 1964); McCloskey v. State of Maryland, 337 F. 2d 72 (1964); Childs v. Pegelow, 321 F. 2d 487 (1963); Roberts v. Pegelow, 313 F. 2d 548 (1963); Sewell v. Pegelow, supra; Coleman v. Johnston, 247 F. 2d 273 (1957); Mason v. Crauor, 227 F. 2d 557 (1955); Tabor v. Hardwick, 224 F. 2d 526 (1955); Coffin v. Reichard, 143 F. 2d 443 (1944) Monroe v. Pape, 365 U.S. 167 (1961).

Harris v. Settle, 322 F.2d 908 (1963).

This is as it should be. Plaintiffs have no quarrel with this reasoning. However, the courts have never held that prison officials either on their own authority, or by virtue of State law have the power to deprive inmates of their constitutional rights solely on the basis of their race. The instant case is not one of routine prison discipline that falls within the general discretionary powers of officials. This is not a case involving a squabble or fight between inmates. It is not a case involving the fairness or unfairness of any disciplinary step taken by prison officials. Plaintiffs have broken no prison rules of any kind. This is a case involving statutary segregation in Alabama prisons and jails. Segregation, if based on race, is unconstitutional in any event. But here the prison officials have no discretion in the matter. Alabama statutes compel them to maintain racial segregation. Thus the Roberts v. Pegelow, Supra, line of cases, cases involving administrative discretion, has no relevance here.

The standard argument justifying racial segregation in prisons and jails is that separation is necessary to avoid riots and racial violence. This argument, or some subtle variant of it, has been made by segregationists since race became a public issue in this country. Before the public schools were integrated, they argued that there would be blood flowing in the streets, that neither race really wanted integration, and that in any case, there was no issue of public morality, only public safety. Many schools have since been integrated, and despite the determination of some state officials to make the transition as painful as possible, there has been little actual violence -- and certainly none on the scale predicted by segregation's prophets.

Before the integration of lunch counters and restaurants, segregationists predicted thorough-going racial violence. The customs of the community lay too deep to be touched by a mere external act of the government: Surely at last the issue had been

joined and blood would flow like water through the streets of our towns. Yet, except for a few isolated instances, the people discovered that after mixing of the races had become a fact, segregated lunch counters and restaurants weren't really important anymore. The real problem had been the fear and distrust that the old custom of separation had created and preserved.

Just as racial violence and discord had been prophesied for every public meeting of the white and Negroes, just as surely has experience shown that where the races have actually mixed, the prophecies proved empty. Violence is not the child of integration: it is the child of distrust and fear. When the Army began to integrate its ranks in 1950, there were, according to Lee Nichols, a career newsman and journalist,

> "... general predictions of ruined efficiency, wrecked morale, even bloody revolt ... (Notes Made On Breakthrough On The Color Front, Random House, New York, 1954, p.7). There were objections from the enlisted men, who predicted all kinds of trouble and some of the big guys [i.e. Department of the Army officials] jumped all over it." Ibid., pp.58-59.

And indeed, there had been trouble -- serious racial disturbances, and even full scale race riots.

Before instituting its policy of racial integration, the Army polled a large number of white companies to get the reaction and feelings of the men who stood to be most effected by the proposed changes. The Army found that "about 2/3 of the men in an average white company said that they disliked the idea of mixed companies very much ..."

In view of its history of racial disturbances and riots, and the predictions of even greater violence, and the expressions of personal distaste for racial mixing from the lowest to the highest members of the Army chain of command, what was the experience of the Army once the races had been actually mixed? According to Nichols,

> "Detailed official analyses by statements of hundreds of field commanders, showed that racial conflict -- once a

> critical military problem that led to repeated bloody riots, had all but vanished. With Negroes and whites no longer grouped separately, there was apparently little motive for racial 'gang' conflict." Ibid., p.7.

Other branches of the Armed Forces reported similar experiences.

According to official Navy records, reports showed that Negro personnel were being integrated successfully in previously all-white ship's companies. "The skippers were polled and all but one reported favorably according to an official observer." Ibid., p.60.

As far as the Air Force was concerned,

> "the experiment [of integration] was succeeding beyond the most optimistic hopes. A typical center in San Antonio, Texas, had been training airmen without racial distinction for more than two months with 'no racial disturbances in any phase .... on or off duty.'" Ibid., p.101.

In fact, in both the Army and Navy "racial experts in the Pentagon noted with satisfaction the result they had come to expect in steps to end segregation--no untoward incidents or trouble of any kind." Ibid., p. 215.

A typical example is that of Fort Jackson. Fort Jackson is located in the heart of the piney woods section of South Carolina, deep in the deep South. In 1950 not even the trains and Greyhound buses that pulled into nearby Columbia from New York and California were integrated. Somewhere along the route, Negroes were just sort of sifted to the back. To use a popular phrase of the time, this was the land of "sow's belly and segregation." The name fit and the folks, white folks, liked it that way.

In the Spring of 1950, Fort Jackson was integrated on a massive scale. There were no interracial incidents. The Fort had been recently reactivated as a major infantry training base. It was under the command of Brigadier General Frank McConnell.

The first draftees arrived in August of that year, and according to McConnell, he "tried to sort them by color, but they began pouring in more rapidly; we got up to 1000 recruits a day." Ibid., p. 109. As the recruits arrived without any pattern--a busload of Negroes, and then a busload of whites, McConnell found it impossible to sort them out on the basis of race. He conferred with his staff, and in spite of the fears expressed by some of his subordinates that he was going "off the deep end," he resolved to assign recuirts to platoons without regard to race.

The new plan went into effect smoothly, and there were no racial incidents during McConnell's entire tour of duty at Fort Jackson. According to McConnell, "I would see recruits, Negro and white, walking down the street, all buddying together; the attitude of the Southern soldier was that this was the Army way; they accepted it the same way they accepted getting booted out of bed at 5:30 in the morning." Ibid., p. 111.

It is another of life's ironies that the Armed Forces, historically justifying its policy of segregation on the grounds of maintaining efficiency and morale, now justifies a policy of complete integration on the grounds of maintaining efficiency and morale.

In Edwards v. Sard, supra, the Court said, "the association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings."

The combat armed forces is an exception to this rule. Few would deny that physical danger and psychological pressures are at least as great in war as in correctional institutions. Advocates of segregation in the Armed Forces put forth their predictable arguments to keep units from being racially mixed: "war is fraught with physical danger and psychological pressures--it's too serious a business to worry about the niceties of feeling or the law; integration would only make the problem of fighting more difficult an uncertain."

Despite these arguments the Armed Forces did integrate, and while integration did not reduce the physical risks of war, it did reduce the psychological pressures that Armed Forces personnel were under. Specifically it made better soldiers of Negroes and whites alike, for it helped build mutual confidence and respect between fighting men of both races where before had only been suspicion and distrust. The real source of racial tension and trouble in the previously segregated Armed Forces

had been the single fact of segregation, racial segregation itself.

Explaining the low efficiency of all-Negro units in combat, David G. Mandelbaum, Professor of Anthropology at the University of California at Berkeley, said:

> "the main reason for this is that the fact of segregation increases the lack of confidence in each other as Negroes, a distrust which is held and implanted by potent sections of the larger society, and under battle stress, when the demand for mutual support is greatest, this undermining of confidence sometimes collapses... their strength." Mandelbaum, David G., Soldier Groups and Negro Soldiers, 1952, University of California Press, Berkeley and Los Angeles, p.89-90.

As one hard fighting Negro Captain put it,

> "the trouble is ... all the psychological inhibitions ... (the Negro) has inherited through generations of living as a race apart -- the lack of faith in himself, lack of confidence in his own race -- take hold of him, and he is hard to handle." Saturday Evening Post, June 16, 1951, p.30-31, 139-141.

But segregation undermines the confidence of both races. It relentlessly and systematically keeps at a low level white opinion of Negro ability. It is the segregated status of the Negro that is pointed to by most whites as proof of inferiority. The institution itself serves to prove itself. This viciously circular reasoning has been termed "the self-fulfilling prophecy" by Robert K. Merton, eminent American sociologist. Merton, Robert K., (Social Theory and Social Structure, The Free Press, Glencoe, Ill., 1949, p.185.)

Indeed, according to Mandelbaum:

> "the self-aggravating and self-defeating cycle of segregation ... does not accomplish the expedient, short range goals of decreasing racial friction which it is supposed to achieve. Instead it frequently tends to increase such friction. And it is self-aggravating because officials frequently respond to the troubles intensified by segregation by increasing the restrictions of segregation."

The threat of violence and disorder is not pertinent. Even if desegregation of Alabama's penal institutions were to inevitably occasion some racial disturbance, no grounds exist to deny Negroes their constitutional right to be free from racial segregation.

In Cooper v. Aaron, 358 U.S. 1 (1958) the Supreme Court analyzed the various questions which the District Court might consider in determining what steps should be taken to advance integration. The Court excluded as a consideration "hostility to racial desegregation." Cooper v. Aaron, supra, p.7. The Court stated: "... the Constitutional rights of respondants are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." Cooper v. Aaron, supra, p.16. The Court then quoted from Buchanan v. Warley, 245 U.S. 60, 81 (1917):

> "It is urged that this proposed segregation will promote the public peace by preventing race conflict. Desirable as this is, and important as is the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

In conclusion, the Court stated: "thus law and order are not here to be preserved by depriving the Negro of their constitutional rights." Cooper v. Aaron, supra, p.16.

Cooper v. Aaron, supra, has been followed. See Hunt v. Arnold, 172 F.Supp. 847 (N.D.Ga. 1959). In Bush v. Orleans Parish School Board, 188 F.Supp. 916, 930 (E.D.La. 1960) the District Court noted "law and order are not here to be preserved by depriving the Negro children of their constitutional rights." In Griffin v. Prince Edward School Board, 377 U.S. 218, 231 (1964), the Court held:

> "Whatever non racial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race in opposition to desegregation do not qualify as constitutional."

It is clear that constitutional rights may not be derogated at the pleasure or convenience of the State.

In James v. Duckworth, 170 F.Supp. 342 (E.D.Va. 1959), the plaintiffs brought suit to enjoin enforcement of an ordinance and two resolutions cutting off funds for use of certain schools and grades in local school systems. The motion to dismiss was denied. The Court said:

> "... the main force of Council's argument ... is the threat of violence to persons and possible damage to school properties valued at many millions of dollars. The President of the Council testified that he had received fifty to one hundred anonymous telephone calls threatening violence to schools to which Negro children were assigned, and to schools attended solely by Negro children if permitted to remain open while previously all white schools were closed .... Even if the good faith of Council may be assumed, the argument falls by reason of the decided authorities holding that the preservation of the public peace cannot operate in such a manner as to cause constitutional rights to be sacrificed or yielded." Ibid., pp.350-1.

Of course, schools differ from prisons. But prisons do have a correctional function. One of their most important functions is the education or, perhaps more aptly, the re-education of inmates. For this reason Alabama's penal institutions do have educational programs. The constitutional right to be free from a governmentally imposed policy of racial discrimination is clear. The language of the school cases is apposite. See Edwards v. Sard, supra, and Singleton v. Board of Commissioners of State Institutions, supra. See also State Board of Public Welfare v. Meyers, 167 F.2d 765 (1961).

Principles of penology which are generally accepted. Plaintiffs contend that state enforced racial segregation in prisons and jails in Alabama not only violates constitutional law, but accepted principles of modern penology.

Daniel Glasser, the Director of the Ford Foundation Research Program in the Federal Correction system, stated that the history of the evolution of penology can be "conveniently summarized as a sequence of three "R's" ... Revenge, Restraint, and Reformation." Glasser, Daniel, The Effectiveness of a Prison System and Parole System, the Bobbs-Merrill Company, Inc., 1964, p.6. According to Glasser, this nation is in the last of these evolutionary stages, and the most distinctive contribution being made by the United States to international penology is its emphasis and investment in prisoner education and rehabilitation programs. Ibid. p. 260

The modern prison reform movement began in earnest in the United States in the mid 19th century. The reform movement broke with the older theories of criminology which emphasized severe discipline and isolation calculated to make men penitent. "... the new movement fostered efforts to achieve more positive changes in the offenders by education and by vocational training." Ibid. p.260. The new penologists felt that prisons and correctional institutions should be more than merely places where men are incarcerated and punished. Rather, they should be places where inmates are educated and if possible reformed so that upon their release they could take their places in society as useful citizens. See generally: Dressler, David; Practice and Theory of Probation and Parole; 1959; Columbia University Press; New York. See also: Readings in Criminology and Penology, Columbia University Press; New York and London, 1964.

It is patent that racial segregation in prisons flies in the face of the basic principles of modern penology. None but the most cynical would claim that racial segregation helps prepare inmates for life on the outside. The released inmate goes to live in a racially mixed world. This is increasingly a lesson of American life. He is poorly prepared for this experience by prison life which has taught him that the races must be kept apart. He has been taught by the prison system which has been his world and complete reality that the Negro and white races cannot live together, that the races are different, basically and essentially. This is sinister and even cruel preparation for men who must learn to live in a society struggling to solve racial problems.

If inmates in Alabama are being "educated", it is an education in reverse. For instead of learning to respect the law and the rule of law that governs the world beyond the bars of his cell, he learns, and especially the Negro inmate, only contempt for the injustice of the law and bitterness over the basic inequality of the law that forces him to live in segregated quarters, eat in a segregated dining room, sleep in a segregated cell block, exercise in a segregated prison yard, work on a segregated work detail and worship in a segregated prison chapel if one is available. "In whatever is done for the prisoner it must never be forgotten that he must be fitted to re-enter the everyday life of the community. Whatever is possible to fit him for this experiment in free life should be done." Henderson, Charles Richmond, Penal and Reformatory Institutions, New York, The Russell Sage Foundation, 1960, **at p. 232.**

If the Alabama prison system is to fulfill its obligation to the citizens of this state, and nation, to whom it daily sends released inmates, it must make an effort to prepare them for life in the real world, the world of whites and Negroes trying to resolve their actual and imagined differences amicably and openly.

The Cruel and Unusual Punishment Clause.

The Cruel and Unusual Punishment Clause of the Eighth Amendment is applicable to the States. Robinson v. California, 370 U.S. 660 (1962); Jordan v. Fitzharris, N.D. Calif, No. 44786, F. Supp. (1966).[1]

"Cruel and unusual punishment" is not static and unchanging. The phrase has grown as have our standards of civilization and enlightenment. In 1885, the Supreme Court acknowledged that:

> "what punishments may be considered as infamous may be affected by the changes of opinions from one age to another. In former times, being put in the stocks was not considered as necessarily infamous . . . But at the present day [it] might be thought an infamous punishment." Ex parte Wilson, 114 U.S. 417, 427 (1885).

The Court in Jordan v. Fitzharris,[2] discerned three approaches to the problem:

> "The first approach is to ask whether under all the circumstances the punishment in question is 'of such character . . . as to shock general conscience or to be intolerable to fundamental fairness.' Lee v. Tahash, 352 F. 2d 970, 972 (1965) Such a judgment must be made in the light of developing concepts of elemental decency. Weems v. U.S., supra, at 378; Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (opinion of Warren, C.J.); Rudolph v. Alabama, 375 U.S. 889 (1963) at 890 (dissenting opinion of Goldberg, J.). Secondly, a punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed. Weems v. U.S., supra; Robinson v. California, supra, at 676 (concurring opinion of Douglas, J.); Rudolph v. Alabama, supra, at 891 (dissenting opinion of Goldberg, J. ). Finally, a punishment may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim that is, when a punishment is unncessarily cruel in view of the purpose for which it is used. Weems v. U.S., supra, at 370; Robinson v. California, supra, at 677 (concurring opinion of Douglas, J.) Rudolph v. Alabama, supra, at 891 (dissenting opinion of Goldberg, J.)."

The California Court held that the use of so-called "strip cells" violated "elemental concepts of decency," Jordan v. Fitzharris,[3] and was thus cruel and unusual punishment prohibited by the Eighth Amendment of the Constitution of the United States.

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1. A copy of Jordan v. Fitzharris, supra, is attached hereto as Appendix A.

2. Appendix A, pp. 9-10.

3. Appendix A, pp. 11-12.

Racially segregated prison facilities are similarly a violation of elemental concepts of decency within the meaning of Jordan and Trop v. Dulles.

> " . . . [T]he basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, [citation omitted] and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." Ibid., pp. 101-102.

State enforced racial segregation, no matter what the painful history of that practice in this country has been, is for this age and generation a violation of elemental concepts of decency and a derogation of the dignity of man, Brown v. Board, supra; Jordan v. Fitzharris, supra; Trop v. Dulles, supra; Weems v. U.S., supra; The Civil Rights Act of 1964; Lee v. Tahash, supra . What constitute fundamental decency and the dignity of man " . . . must draw its meaning from the evolving standards . . . that mark the progress of a maturing society." Trop v. Dulles, supra, 102. The history of civil rights legislation, and the decisions of the courts, makes it too plain for argument that the practice of racial discrimination is a violation of the fundamental concepts of American democracy and the commitment of that democracy to the belief in the dignity and sanctity of each citizen. Racial discrimination in prisons, jails, and other detention facilities denies this fundamental commitment and is thus in violation of the Eighth Amendment.

Employment

Alabama statutes pertaining to state and local governmental employment are not facially unconstitutional.

The personnel system was instituted in Alabama in accordance with Amendment #88 to the Constitution of Alabama of 1901.

> Appointments and promotions in the civil service of this state shall be made according to merit, fitness and efficiency, to be determined, so far as practicable, by examination, which, so far as practicable, shall be competitive under such laws as the legislature may enact.

The constitutionality of the merit system was upheld in Heck v. Hall, 238 Ala. 274, 190 So. 280 (1939).

Racial discrimination may be subtle as well as obvious. It may occur in the application of a statute rather than on its face. Section 305 of Title 55, Code of Alabama (1940) Recomp. 1958 provides:

> . . . All persons who have been honorably discharged from the army . . . who served in the armed forces of the United States during the period of a war . . . shall have five points added to any earned ratings in examination for entrance to the classified service; provided, however, that such a person be a qualified voter in Alabama or has been a resident of this state for two years next preceding his or her application. . . . [Emphasis supplied]

Section 296, ibid., provides:

> . . Organization of the state personnel board. . . . Each member shall be a person over twenty-one years of age, of recognized character and ability, shall have been a bona fide resident and a qualified voter of this state for not less than five years next preceding his appointment . . . . [Emphasis supplied.]

The qualified voter requirements discriminate against Negroes, and deprive them of the equal protection of the law. Negroes in the State of Alabama have been systematically discriminated against as a class in the area of voter qualification. Negroes, as a class, simply have not been allowed to register as voters in Alabama. The Voting Rights Act of 1965 was in answer to this exclusion.[1]

Decisions are legion holding that Negroes may not be systematically excluded from serving on juries. A rationale of these cases is that Negroes do not receive fair treatment at the hands of all-white juries.

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1. See South Carolina v. Katzenbach, 383 U.S. 301 (1966). This court is familiar with numerous decisions in this and other Alabama Districts holding that Negroes have been unconstitutionally denied the right to vote. Indeed, the assignment of federal examiners to several Alabama counties has been deemed necessary.

It requires little imagination to conclude that a Negro will not receive equal treatment from exclusively white prison personnel. More importantly, white-only employment practices give an appearance of unfairness, an appearance no doubt aggravated by the confinement and subjugation implicit in prison practices.

The state employment system provides for appointing authority discretion:

> . . . Whenever a vacancy is to be filled by appointment, the appointing authority shall submit to the director a statement of the title of the position, and if requested by the director to do so, the duties of the position and desirable qualifications of the person to be appointed, and the request that the director certify to him the names and persons eligible for appointment to the position. The director shall thereupon certify to the appointing authority the name of the three ranking eligibles from the most appropriate register . . . . In the event that there does not exist an employment register which the director deems to be appropriate for the class in which the position is established, he shall prepare such a register within a reasonable time after receipt of the request of the appointing authority that eligibles be certified. Whenever an eligible has been certified to and rejected by appointing authorities three times, the director may remove the names of such person from the employment register. (Code of Alabama, Title 55, No. 307, 1958)

Although the statute itself does not compel discrimination, it does permit it.

Thus:

> Civil service regulations provide that selection must be made from among the highest three eligibles available for appointment, the so-called 'role of three.' If the hiring agency discovers that one is a Negro, it may hire one of the others. If all are Negroes, it may return the certificate and under certain circumstances request more names or fill the job by transfer, reinstatement, or promotion. (Employment, U.S. Commission on Civil Rights, 1961, Book 3, Part V, pp. 39-40)

In their 1961 report the U.S. Commission on Civil Rights recognized the manner in which an entrenched lily-white operation will perpetuate discrimination.

> In a program that permits segregated offices, selection of its own employees by race, and the processing of discriminatory job orders, it can reasonably be expected that some employees will use their positions to perpetuate their own private prejudices. (Ibid., p. 124)

The qualified voter provisions of Alabama law bar many Negroes who have not been allowed to register to vote from obtaining employment.

In People of the State of New York v. Office Temporaries, Inc. New York Supreme Court Special Term, Part II, No. 41159, [illegible] the court, in an action brought under the New York fair employment law, ordered the offending employment agency to:

> prepare a new form of personal registration card containing no space for identification by race, creed, color, or national origin. . . .

and not to

> solicit, accept, record, nor honor any specification by a customer limiting the selection of temporary office help on the basis of race, creed, color, or national origin. (Ibid., p. 827)

In Arnett v. Seattle General Hospital, 395 F. 2d 503, [illegible] the Washington Supreme Court, sitting en banc, found that where no Negro has ever been employed in the dietary department of the defendant during the twelve year regime of the chief dietician, the denial to the complainant of the opportunity to file an employment application constituted an unfair practice within the purview of the state's anti-discrimination law.

And in Kenosha County Department of Public Welfare v. Industrial Commission of Wisconsin, NE 2d 8 Race Rel. 585 (1963), a Negro woman took the Civil Service test of the State of Wisconsin and qualified for the position of caseworker. Of the three persons originally certified for the position, Miss Chambers was the only one who reported for the interview and was willing to work permanently, but she was not hired.

When another position of caseworker became available, no eligible person remained on the roster. Miss Chambers' certification had expired. Although the Kenosha County Welfare Department could have provisionally appointed her, it did not do so. The court held that the Kenosha County Department of Public Welfare practiced racial discrimination in violation of the provisions of Sec. 111.31-38 of the Wisconsin Fair Employment Law.

> It is not enough that a governmental agency hold to the specific requirements of the applicable civil service law in filling positions. On top of this the employing agency must comply with the specific provisions of the Fair Employment Law. All government agencies and bureaus must respect the law. (Ibid., p. 587)

Although these discriminatory employment cases involved fair employment statutes, it is clear that redress for employment discrimination may be secured under the Fourteenth Amendment and applicable civil rights statutes. (42 U.S.C. §1983) In Johnson v. Yielding, 165 F. Supp. 76 (N.D. Ala. 1958), suit was instituted by a Negro against members of the personnel board and its directors because, allegedly, they refused to allow him to take an examination for the position of police patrolman on accout of his race. The plaintiff alleged violations of the "equal protection" and "privileges and immunities" clauses of the Fourteenth Amendment, while seeking relief under 42 U.S.C. §1983, and the Federal Declaratory Judgment Act. Although the court held the action barred by a one-year statute of limitations, the second conclusion of law stipulated: "This suit arises under the Constitution and laws of the United States" (Ibid., p. 79) , the court stating that even in the absence of a fair employment statute a remedy for violation of constitutional rights in the area of employment discrimination lay under the applicable civil rights statute.

Todd v. Joint Apprenticeship Committee of Steel Workers of Chicago, 223 F. Supp. 12 (N.D. Illinois 1963); rev. 332 F. 2d 243 (7th Cir. 1964); cert. denied 380 U.S. 914, was a class action brough by three Negroes alleging systematic exclusion of Negroes from a craft of iron workers and from apprenticeship to that craft, resulti in exclusion from employment in constructing a federal office buildi The defendant union had never employed a Negro.

The court found that such systematic exclusion of Negroes from apprenticeship programs for training iron workers violated the plaintiffs' right to equal protection under the Fourteenth Amendment It is particularly significant that the court found a history of exclusion of Negroes by the defendant union and reasoned from this

context to conclude that in this particular instance the plaintiffs were denied their right to equal protection of the law.

In addition, the court recognized that mere failure of Negroes to apply for the apprenticeship program would not suffice to rebut the presumption of systematic exclusion.

> I find that the Negro community as such knew of this policy of the Joint Committee and the Union and that because of the inherent and patent futility of such action sent few application in recent years to the Joint Committee of the Union. (223 F. Supp. 12)

The failure of Negroes to apply for employment with correctional systems in Alabama could be attributed to this. But that failure, if it exists, is not relevant here.

The defendants--relying on the discriminatory practices of other state instrumentalities--cannot absolve themselves of the obligation of affording these plaintiffs their constitutional rights. Indeed, an order must be fashioned to provide for the non-discriminatory employment of prison personnel. The defendants should, if Negro applicants are otherwise unavailable, be allowed to go beyond the state merit system and local acts relating to civil service to seek employees.

## CONCLUSION

The mandate of equality accompanies Americans in their contact with state government. Equality before the law is the cornerstone of American democracy. To deny Negro prisoners the equal protection of law is to deny the equality guaranteed by the Fourteenth Amendment.

That a man should be confined in separate circumstances solely because of his race certainly constitutes a punishment forbidden by the Cruel and Unusual Punishment Clause of the Eighth Amendment.

This court should:

(1) Declare statutes requiring racial segregation in penal institutions unconstitutional.

(2) Order that steps be taken to affirmatively integrate these institutions and

(3) Order the defendants to employ prison personnel on a non-discriminetory basis and, if necessary to do this, excuse them from compliance with state merit system and civil service laws.

Respectfully submitted,

S/ Charles Morgan, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief for Plaintiffs on Richmond M. Flowers, as Attorney General of Alabama, Gordon Madison, as Assistant Attorney General of Alabama, and Walter Fletcher as Attorney for A. Melvin Bailey, Sheriff of Jefferson County, Alabama, by placing a copy of the same, properly stamped and addressed, in the United States Post Office at Atlanta, Georgia on this the 31st day of October, 1966.

s/ Laughlin McDonald

M. Laughlin McDonald
5 Forsyth Street, NW
Atlanta, Georgia

OCT 17 1966

To L.H. Then file Wank v. Lee complete

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ROBERT CHARLES JORDAN, JR.,
Plaintiff,
v.
C. J. FITZHARRIS, et al.,
Defendants.

No. 44786

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MEMORANDUM OPINION AND ORDER

This is a civil rights action in which the plaintiff claims to have been unconstitutionally subjected to cruel and unusual punishment. The action is brought under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986; the Court's jurisdiction is had under 28 U.S.C. §§ 1331 and 1343. Plaintiff prays for injunctive and monetary relief.

Plaintiff Robert Charles Jordan, Jr., is an inmate of the California Correctional Training Facility at Soledad. Named as defendants are the State of California, the Correctional Training Facility at Soledad, the Director of Corrections of the State of California,

the Superintendent of the facility at Soledad, and various subordinate officials at Soledad.[1]

The action was initially begun by the plaintiff acting on his own behalf and proceeding in forma pauperis. Thereafter, the court appointed Charles B. Cohler, Esq., of San Francisco, to represent Mr. Jordan in all further proceedings. Mr. Cohler's commendable zeal and devotion to the cause of the indigent plaintiff in large measure made possible the successful result.

Plaintiff's cruel and unusual punishment contention arises out of his confinement from July 9 until July 20, 1965, in a so-called "strip cell" at Soledad. The strip cells (6 in number) form part of the isolation section of the prison's maximum-security Adjustment Center.[2] Each strip cell measures approximately 6'-0" by 8'-4". The side and rear walls are solid concrete, as is the floor. The front wall is constructed of steel bars covered by a metal screen. Access is gained through a sliding barred door. A second front wall is located 2'-10" from the barred wall, thus forming a kind of vestibule between the cell proper and the corridor. Set into this otherwise solid wall are a 24"x36" barred and screened window opening and a hinged steel door with a 12" x 18" barred and screened window opening. The window openings in this outer wall and outer door can be closed off by means of a metal flap which is hinged at the bottom of each window and can be swung up and latched at the top of the window opening. Immediately outside of this outer wall is an

1 The court reserved ruling on a defense motion to dismiss the action as against the State of California and the Correctional Training Facility at Soledad. Desirable though it might be to have injunctive relief run against the state and the institution, it is apparent that they are not proper parties to this action. See Monroe v. Pape, 365 U.S. 167, 187-92 (1961); Williford v. California, 352 F.2d 474, 476 (9th Cir. 1965); United States ex rel Lee v. Illinois, 343 F.2d 120 (7th Cir. 1965).

2 See photographs appended to this Opinion.

8'-7 1/2" wide corridor which runs past the six strip cells, through a barred barrier with a locked door, past the eighteen isolation cells, through a "sally port" (a small rectangular, barred enclosure having two locked doors) and into another corridor where it terminates. In this latter corridor is located the officers' area. Thus the strip cells are placed at the opposite end of the wing from the officers' area and an officer must pass through three locked doors to get from his area to the strip cells. Across the corridor from the strip cells is the outer wall of the wing. This wall has barred windows which formerly contained glass but now are partially covered by sheet metal.

The interiors of the strip cells are entirely devoid of furnishings except as follows: Four of the strip cells have an ordinary commode toilet encased in concrete. The remaining two strip cells have a so-called "Oriental" toilet, i.e., a hole in the floor.[3] None of the toilets can be flushed by the occupant of the cell, but must be flushed from outside the cell by an officer or an inmate porter. The flushing mechanism is located in a tunnel immediately behind the row of strip cells.

Heat and ventilation are supplied to the strip cells through two ducts located high on the rear walls of the cells. The cells have no interior source of light. When the flaps on the outer wall are closed the cells are totally dark except for such light as may seep in through the cracks around the flaps and the outer door.

The strip cells, as described above, are the most secure and have the least facilities of any cells in the facility at Soledad. They represent the most

3. The cell in which plaintiff was confined during the period of time which forms the basis of this action was one of the four strip cells having a commode toilet.

extreme form of confinement the institution has to offer.

Plaintiff testified, and the records indicate, that he was placed in a strip cell on the evening of Friday, July 9, 1965. He remained continuously in the cell until the morning of Tuesday, July 20, 1965, except for a brief period on Tuesday, July 13, when he was removed from the cell, taken to a hearing before the Disciplinary Committee, and returned to the cell.

The amended complaint filed by Jordan, through his appointed counsel, particularized his grievances and charged substantially as follows:

> On or about July 9, 1965, plaintiff was placed in a special punishment unit at the Correctional Training Facility, known as a "strip cell" (hereinafter referred to as "strip cell"). Plaintiff was continuously confined in solitary confinement in said strip cell for twelve consecutive days.
>
> . . .
>
> During plaintiff's confinement in said strip cell, plaintiff was forced to remain in said strip cell with said flaps and door of the second wall closed. As a result, plaintiff was deprived of light and ventilation for twelve days, except that twice a day the door of the second wall was opened for approximately fifteen minutes.
>
> The interior of said strip cell is without any facilities, except that there is a raised concrete platform at the rear of the cell containing a hole to receive bodily wastes. There is no mechanism within the cell for "flushing" bodily wastes from this hole. "Flushing" is controlled by personnel of the Correctional Training Facility from the exterior of said strip cell. The hole was only "flushed" at approximately 8:30 a.m. and 9:00 p.m. on some of the twelve days plaintiff was confined in said strip cell.

During plaintiff's confinement in said strip cell, the strip cell was never cleaned. As a result of the continuous state of filth to which plaintiff was subjected, plaintiff was often nauseous and vomitted, and the vomit was never cleaned from the plaintiff's cell. When plaintiff was first brought to the strip cell, the floor and walls of the strip cell were covered with the bodily wastes of previous inhabitants of the strip cell. Plaintiff is informed and believes and on that basis alleges that said strip cell had not been cleaned for at least thirty days before plaintiff was confined therein.

Plaintiff was forced to remain in said strip cell for twelve days without any means of cleaning his hands, body or teeth. No means was provided which could enable plaintiff to clean any part of his body at any time. Plaintiff was forced to handle and eat his food without even the semblance of cleanliness or any provision for sanitary conditions.

For the first eight days of plaintiff's confinement in said strip cell, plaintiff was not permitted clothing of any nature and was forced to remain in said strip cell absolutely naked. Thereafter, plaintiff was given a pair of rough overalls only.

Plaintiff was forced to remain in said strip cell with no place to sleep but upon the cold concrete floor of the strip cell, except that a stiff canvass mat approximately 4 1/2 feet by 5 1/2 feet was provided. Said mat was so stiff that it could not be folded to cover plaintiff without such conscious exertion by plaintiff that sleep was impossible. Plaintiff is six feet and one inch tall and could not be adequately covered by said stiff canvass mat even when holding said mat over himself. The strip cell was not heated during the time that plaintiff was forced to remain there.

Plaintiff is informed and believes and on that basis alleges that plaintiff has been and may be subjected to confinement in said strip cell without the authorization of the Superintendent, the Deputy Superintendent, the Associate Superintendent, or anyone of comparable administrative rank; that lower-rank personnel of the Correctional Training Facility purport to have exercised and intend to exercise in the future broad discretion in confining plaintiff in said strip cell; that said lower-rank personnel purport to have the discretion to confine plaintiff in said strip cell for 60 consecutive days; and that there are no standards for the proper exercise of such discretion.

> On many occasions prior to July 9, 1965, plaintiff has been confined in said strip cell, plaintiff is continually living under the threat of repeated confinement in said strip cell, and plaintiff is constantly subject to confinement in said strip cell pursuant to purported disciplinary procedures as they presently exist and will continue to exist unless enjoined by this Court.
>
> Plaintiff has been denied adequate medical care prior to, during, and subsequent to said confinement in said strip cell, despite repeated oral and written requests for same made in good faith by or on behalf of plaintiff.
>
> Prior to and subsequent to said confinement in said strip cell, plaintiff has been forced to endure confinement in "O Wing" of the Correctional Training Facility without adequate protection from the raw outdoor elements, in that plaintiff's cell front offers no protection from the elements, being only bars, there are no window panes for the large window openings in the outside wall of the corridor which is directly outside plaintiff's cell, and there is insufficient artificial heat, if any, to combat the outdoor climatic conditions which prevail in plaintiff's cell.

Jordan, called as a witness on his own behalf, gave testimony which fortified the foregoing allegations. He testified categorically concerning the practices engaged in by the defendants. He was subjected to a lengthy and searching cross-examination by the two attorneys representing the defendants. His testimony is clear and convincing. (Tr. p. 368, et seq.)

More particularly, Jordan discharged the burden cast upon him with respect to the period of time he was confined in the strip cell; the fact that he was deprived of clothing for the period of time, at least for seven days; that he was required to sleep on a strong blanket ill adapted to the uses for which it was put; that the flaps were closed practically all of the time thus depriving him of both light and adequate ventilation in the cell; that the elements of cleanliness were likewise deprived him, to-wit, water, soap, towel, tooth brush, toothpaste, implements for cleaning the cell, and shower. (Tr. p. 378, et seq.)

It is evident from the foregoing narrative of Jordan's testimony that he was required to eat the meager prison fare in the stench and filth that surrounded him, together with the accompanying odors that ordinarily permeated the cell. Absent the ordinary means of cleansing his hands preparatory to eating, it was suggested by the prison consulting psychiatrist, Dr. Hack, that he might very well use toilet paper for this purpose plus his small ration of water, being two cups a day. (Tr. p. 597)

Regarding medical care: Jordan requested from time to time medical assistance through the medical officer, Dr. Kunkel. As evidence of the limited medical care provided, the official records demonstrate that Dr. Kunkel came into the wing where the strip cells are located and spent eight minutes on one occasion and ten minutes on another occasion, thus servicing the one hundred and eight inmates.[4]

On behalf of the plaintiff, the following inmate witnesses were called: Alfonso Esparza, Herman Alexander, Melvin Allison, Wendell Harris, Siegfried Porte and Warren Wells.[5]

At the request of the State the testimony of the foregoing witnesses was taken at the Soledad Facility, with the exception of Wells who is on parole and was heard in the courthouse in San Francisco.

It is to be observed that the inmates and their testimony were subjected to vigorous and searching

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4 Plaintiff's Exhibit No. 12

5 It may be observed parenthetically that Esparza and Wells were subjected to 58 days in the strip cell with continuity, save four days' removal over the Thanksgiving holiday.
Esparza refused to turn over his coveralls. He testified that as a result he was shot in the face with a tear gas gun.

cross-examination. Notwithstanding such scrutiny, the narratives contain the essentials of truth and are credible and convincing.

The Court during the course of the proceedings heard the following witnesses presented by the defendants: Dr. Edward Kunkel, Chief Medical Officer at Soledad; Robert Donnelly, Deputy Superintendent at Soledad; Dr. Raymond Hack, Psychiatric Consultant at Soledad; Terry Caldwell, Correctional Officer; Raul Mata, Correctional Officer; John Nash, Correctional Officer; George Johnston, Program Administrator; Alfred DeCarli, Correctional Counselor; Clemett Swagerty, Associate Superintendent; William Kiepura, Correctional Counseler; Robert Hoagland, formerly a Correctional Officer at Soledad, now a Correctional Program Supervisor at another institution; William Friedrick, Correctional Sergeant; Roland Lovett, Chief Engineer; and Cletus Fitzharris, Superintendent.

The trial itself, represented an intensely human drama of some precedential value. It may be noted that this is the first occasion that the United States District Court in this Circuit has undertaken to inquire into the procedures and practices of a State penal institution in a proceeding of this kind.

The legal principles applicable are not in serious dispute. The Cruel and Unusual Punishment clause of the Eighth Amendment is applicable to the states through the Due Process clause of the Fourteenth Amendment. Robinson v. California, 370 U. S. 660 (1962). The Civil Rights Act, 42 U.S.C. §1983, creates a cause of action for deprivations, by persons acting under color of state law,

of rights secured by the Constitution. See Monroe v. Pape, 365 U.S. 167 (1961). Persons confined in state prisons are within the protection of 42 U.S.C. §1983. See Cooper v. Pate, 378 U.S.546 (1964); Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963); Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963). The right to be free from cruel and unusual punishment is one of the rights that a state prisoner may, in a proper case, enforce under §1983. Talley v. Stephens, 247 F. Supp. 683 (E.D.Ark. 1965); United States ex rel Hancock v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963); Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963); Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965) (Dictum).

"What constitutes a cruel and unusual punishment has not been exactly decided." Weems v. United States, 217 U.S. 349, 368 (1910). This statement is as true today as it was in 1910. It is possible, however, to identify three general approaches to the question. See Rudolph v. Alabama, 375 U. S. 889, 889-91 (1963), (dissenting opinion of Goldberg, J.). The first approach is to ask whether under all the circumstances the punishment in question is "of such character ... as to shock general conscience or to be intolerable to fundamental fairness." Lee v. Tahash, supra, at page 972. Such a judgment must be made in the light of developing concepts of elemental decency. Weems v. United States, supra, at 378; Trop v. Dulles, 356 U. S. 86, 100-01 (1958) (opinion of Warren, C.J.); Rudolph v. Alabama, supra, at 890 (dissenting opinion of Goldberg, J.). Secondly, a punishment may be cruel and unusual if greatly disproportionate

to the offense for which it is imposed. Weems v. United States, supra; Robinson v. California, supra, at 676 (concurring opinion of Douglas, J.); Rudolph v. Alabama, supra, at 891 (dissenting opinion of Goldberg, J.). Finally, a punishment may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used. Weems v. United States, supra, at 370; Robinson v. California, supra, at 677 (concurring opinion of Douglas, J.); Rudolph v. Alabama, supra, at 891 (dissenting opinion of Goldberg, J.).

Defendants contend that the use of the "strip" or "quiet" cell is warranted in eliminating so-called "incorrigible" inmates from the rest of the inmates in the institution; that fighting, physical violence, throwing objects, vile, abusive and threatening language and epithets, sometimes coupled with overt conduct, call for stringent, strong and protective measures.

It is further contended by the defendants that the strip cells are used both as a preventive and punitive device. In some instances, it is pointed out, inmates with suicidal tendencies are incarcerated in such cells in order to prevent them from doing physical harm, either to themselves or to others. It may be noted that several inmates in the said strip cells were able to accomplish and consummate the suicide.

It appears that the cells in question were used to house those who are assertedly beyond the reach of ordinary controls and prison directives.

Usually the administrative responsibility of correctional institutions rests peculiarly within the province of the officials themselves, without attempted intrusion or intervention on the part of the courts. See, e.g., Hatfield v. Bailleaux, 290 F.2d 632, 640 (9th Cir. 1961); Childs v. Pegelow, 321 F.2d 487, 489 (4th Cir. 1963); United States ex rel Knight v. Ragen, 337 F.2d 425 (7th Cir. 1964).

However, when, 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. Cf. Talley v. Stephens, 247 F. Supp. 683 (E.D.Ark. 1965); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Gordon v. Garrison, 77 F. Supp. 477, 479-80 (E.D. Ill. 1948); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965). See generally, Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966); Redding v. Pate, 220 F. Supp. 124, 126-28 (N.D. Ill. 1963); United States ex rel Hancock v. Pate, 223 F. Supp. 202, 204-05 (N.D. Ill. 1963); Comment, 72 Yale L.J. 506 (1963).

In the opinion of the court, the type of confinement depicted in the foregoing summary of the inmates' testimony results in a slow-burning fire of resentment on the part of the inmates until it finally explodes in open revolt, coupled with their violent and bizarre conduct. Requiring man or beast to live,

eat and sleep under the degrading conditions pointed out in the testimony creates a condition that inevitably does violence to elemental concepts of decency.

The testimony further reflects that the security officers made no effort to remedy the situation, notwithstanding persistent and violent complaints on the inmates' part.

However, within recent date, and coincidental with the filing of the several actions herein by plaintiff, certain remedial conditions were established and maintained as hereinafter set forth.

Superintendent Cletus J. Fitzharris, Deputy Superintendent Robert Donnelly, Sergeant William T. Friedrick, and George F. Johnston are essentially dedicated career men. It should be observed that every courtesy was extended to the court and to its attaches in connection with the inquiry conducted at the Soledad facility. Further, that all records requested by the court or counsel were made available. However, there is a note of futility that seems to run through the pattern of their testimony. Superintendent Fitzharris commented as follows:

> Q. And would you say that the quiet cells described in your direct examination is a proper means of such control of noise?
>
> A. I don't know. I just don't know what is the proper means. The best we have so far. [6]

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6 Tr. p. 256, l. 16-20

A. I don't know, but I certainly -- nobody's happy with having to treat human beings like this, but some human beings can't be treated otherwise, that we know of.[7]

The futility may well have been generated as the result of understaffing and a lack of adequate personnel to service the Adjustment Center and the strip cells.

The memorandum from Assistant Superintendent Donnelly to Superintendent Fitzharris dated April 12, 1966, marked Plaintiff's Exhibit No. 16, gives confirmation to the problems implicit in understaffing:

> Those complaints which have come to our attention have emanated from the Adjustment Center, "O" and "X" wings, Central Facility. Without belaboring the point, some of the most hostile and dangerous inmates within the Department of Corrections are housed in these wings. In addition, these wings are understaffed and the men on lockup status receive little in the way of any kind of individual attention which, no doubt, increases their anger and complaints. (Italics ours)

At this juncture it should be observed that the Supreme Court of the State of California, through an unidentified Associate Justice, made inquiry of Administrator Richard A. McGee (and thence, of Director Dunbar) concerning certain questionable practices in view of accusations made by an inmate concerning treatment in the disciplinary unit.[8]

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7 Tr. p. 258, l. 5-7

8 Tr. pp. 477-478

It may be inferred, and it is certainly not denied, that the inquiry was coincident with the petitioner's application before the Supreme Court for a writ.

As a result of this inquiry the court requested the production of any and all memoranda and documents bearing upon the same. Superintendent Fitzharris submitted memoranda which have been marked in evidence as Plaintiff's Exhibits Nos. 14, 15 and 16. The memoranda are especially revealing as they bear upon the questionable practices more particularly alleged by plaintiff Jordan.

In the memorandum from L. M. Stutsman, Chief Deputy Director, to All Wardens, dated February 1, 1966, the following appears:

> Recently this entire matter was brought to the Director's attention through a writ submitted by an inmate in which many accusations were made concerning treatment in the disciplinary unit. The writ was denied by the court. Review however indicated some questionable practices which have been corrected with respect to strict adherence to rules and regulations. This memorandum is written to remind you again that each warden or superintendent must personally see to it that rules and regulations and procedures involving inmate discipline are strictly followed. It is considered part of the job of a warden or superintendent to not only keep himself informed in this area via reports and contacts with his staff, but also through first hand knowledge by visiting the disciplinary areas in his institution.

Further, in the memorandum submitted by Superintendent Fitzharris to the attention of Director Dunbar dated April 13, 1966, recognition is given to the plaints and grievances submitted by petitioner:

> In addition to items contained in Mr. Donnelly's report, I should point out that we have installed an automatic flushing device for the oriental toilets in the strip cells. This eliminates the possibility of staff becoming involved in other matters and not flushing the toilets with regularity. Provisions have been made for water and personal hygiene materials

to be available to the inmates in strip cells so that personal hygiene may be maintained. I apologize for the delay in the report. (Italics ours)

It is manifest from the foregoing excerpts, as well as the surrounding testimony, that certain radical changes and revisions were made in the practices surrounding incarceration in the strip cells. Whether the changes were made as a result of the petition filed in this court or before the Supreme Court is immaterial. It is fairly inferable that the revisions and corrections were made in meeting the criticism generated by the plaintiff's application before the Supreme Court of the State of California. The defendants deny that the revisions and corrections resulted from such inquiry and seemingly contend that they were to some extent spontaneous. The court is not inclined to this view.

It is perfectly apparent to this court that whether a man is confined in a strip cell, or in solitary confinement, he is entitled to receive the essentials for survival. The essentials for survival necessarily include the elements of water and food and requirements for basic sanitation.

The defendants themselves have given recognition to these basic requirements under the apparent compulsion of their directors and superior officers. It appears from the testimony that an inmate so incarcerated now receives a basin, pitcher of water, towel, tooth brush and toothpaste, toilet tissue, and is permitted to shower once a week.

The graphic testimony of the psychiatrist, Dr. Raymond L. Hack, fully exemplifies the reasons for supplying the said basic requirements. His testimony reads, in part, as follows:

THE COURT: All right, Doctor, will you pause for a moment and consider yourself inside one of the cells in question with the flaps up. Do you concede that there isn't any light in the cell, Doctor?

THE WITNESS: Yes.

THE COURT: It is absolutely dark.

THE WITNESS: Not quite, because these are not, as the so-called solitary confinement cells of former years where there was no light. There is a slight seepage of light.

THE COURT: Very slight.

THE WITNESS: Very slight.

THE COURT: Mindful of the conditions under which a man is confined in a cell in question, how do you propose he maintain his personal bodily cleanliness, his hands and the like?

THE WITNESS: He is provided with -- is provided with the toilet tissue. He is supposed to be removed to be -- he is supposed to be removed to be showered.

THE COURT: When? And how often?

THE WITNESS: I believe at least every five days was the minimum.

THE COURT: So for a period of five days, at least, his body, if he is stripped, and his hands equally, would be the subject of some degree of contamination. Isn't that correct?

THE WITNESS: Yes, but as --

THE COURT: Is it correct, Doctor, or is it not?

THE WITNESS: For a period of five days he possibly might be quite soiled.

THE COURT: Yes. And quite contaminated.

THE WITNESS: Yes.[9]

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THE COURT: Let's confine ourselves to the cell in question, to the degree of light, to the lack of cleanliness, to the lack of apparent facilities for a man to either bathe or wash his hands. I address the question again to you, Doctor, mindful of your constant surveillance

9 Tr. p. 597, l. 8, to p. 598, l. 13

over these cells or at least casual surveillance: Did you at any time during the course of your career make a recommendation regarding any device or facility that might be used by the inmate?

THE WITNESS: No devices or facilities. I have made the recommendation that he ought to be taken out and cleaned one way or another.

THE COURT: That the inmate ought to be taken out?

THE WITNESS: That the inmate ought to be taken out and the cell should be cleaned.

THE COURT: Was that prompted by a physical observation you made of any inmate?

THE WITNESS: Yes.

THE COURT: Will you state the name or identity of the inmate.

THE WITNESS: I don't know.

THE COURT: What was the condition of his body?

THE WITNESS: If I entered a cell and the cell smelled badly, I feel this is an unhealthful situation. As was made an effort at CMF, as I have alluded --.

THE COURT: Is it not true, notwithstanding the stench or smell, many of these inmates were permitted to and forced to eat their meals in that stench and odor?

THE WITNESS: I don't know as they were forced to. It is true that if they were going to eat, that they might have to eat under those circumstances.[10]

* * * * * *

Plaintiff requests that defendants be enjoined permanently from subjecting plaintiff to violations of 42 U.S.C. 1981, 1983, 1985 and 1986.

This relief should be granted, save and except as to Sections 1985 and 1986, for, as it appears in the case at bar, there has been no evidence that plaintiff has been denied equal protection of the laws such as is required by Sections 1985 and 1986, supra.[11]

10 Tr. p. 599, l. 24 to p. 601, l. 4

11 Collins v. Hardyman, 341 U.S. 651, 661 (1951); Joyce v. Ferrazzi, 323 F.2d 931, 932-33 (1st Cir. 1963).

If the defendants intend to continue with the use of the so-called "strip" or "quiet" cell as a device in the general plan of solitary confinement, then its use must be accompanied by supplying the basic requirements which are essential to life, and by providing such essential requirements as may be necessary to maintain a degree of cleanliness compatible with elemental decency in accord with the standards of a civilized community.

While the court will not undertake to specify the precise procedures which the officials must adopt if they are to meet the demands of the Constitution, the practices set out in the manuals relied upon by defendants would, if adopted and followed, meet the minimum standards required by the Eighth Amendment. The following excerpts are illustrative:

> c) Punitive segregation in a special punishment section or building. This section is usually not a part of the regular living quarters. Inmates confined in this area usually receive a restricted diet and a loss of privileges. They should be in a punishment status and kept there for comparatively brief periods. Ordinarily no inmate should be retained in punitive segregation on restrictive diet more than fifteen days, and normally a shorter period is sufficient. Those who fail to make an adjustment under such conditions can often be treated more effectively in special administrative segregation facilities. The punitive segregation section should not be utilized for indefinite or permanent segregation. The not uncommon practice of confining insane inmates there is indefensible, all insane inmates should be transferred to a mental hospital or medical-psychiatric treatment facility.
>
> The punitive segregation section and all the cells in it should be evenly heated and adequately lighted and ventilated. Artificial ventilation is usually necessary. High sanitary standards should be maintained, bathing facilities should be provided in the section and inmates permitted to bathe frequently. Most of the cells should contain a washbowl and toilet. It is necessary to omit this equipment from a few cells and assign them to inmates who persist in misusing the plumbing facilities. A few cells may have toilets that can be flushed only by the officer from outside the cell; these are either ordinary seat toilets or "Oriental type" toilets, which are openings level with the floor. Toilets which the occupant of the cell cannot flush need constant supervision by the officer.

Wholly dark cells should not be used and if there is a solid door on the cell, it should be so designed that it does not exclude all light. Natural or artificial lighting should be provided during normal hours of the day or evening in keeping with standards for regular living quarters. (Italics ours)

Punitive segregation cells should be so constructed that all parts are visible to the patrolling officer from the corridor. Such cells or at least some of them should be soundproofed for obvious reasons. Doors may be hollow with insulation in the hollow spaces. All efforts possible should be made to prevent the transmission of sound to the outside through ventilating shafts, ducts, etc.

Normally, inmates are not confined in cells with solid doors or placed on restricted diet unless they have created a disturbance while confined in standard cells in the segregation section. Occasionally they are put in cells of this type to prevent communication with other prisoners or to minimize noise from disturbances. Some institutions have solid fronts on all punishment cells, using wire glass or glass brick to admit some natural light and providing ample mechanical ventilation. The use of double doors with open grill gates supplemented by solid front doors, makes it possible to maintain better observation by leaving solid doors open except when necessary to control the noise of a disturbed or unruly inmate for temporary periods. View ports or windows of tempered glass should be provided in such cells to permit good supervision and to prevent mutilation or suicide.[12]

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The same housekeeping procedures will apply to the Adjustment Center as obtain in the general institution, except for disturbed and destructive inmates who will be handled as the situation indicates. This includes regular change of bedding, clothing, bathing and feeding.[13]

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12 Defendants' Exhibit E, Manual of Correctional Standards, The American Correctional Association, Third Edition, 1966, pp. 414-15. This manual, although assertedly not binding on the defendants, was introduced in evidence by them as an illustration of what is considered good practice, and defense counsel pointed out that the manual was largely written by California penal authorities.

13 Inmate Classification Manual, State of California Department of Corrections, Ch. V, §01(e), May, 1961.

Defendants of recent date, have undertaken to install certain basic essentials, i.e., a basin, pitcher of water, towel, tooth brush, toothpaste, toilet tissue, and automatic toilet flushes.

The injunctive relief contemplated should embrace at least the foregoing revisions in practice, and such others as may be compatible with the constitutional mandate proscribing against cruel and unusual punishment with particular reference to the foregoing excerpts from the rules and regulations.

The Court has considered plaintiff's request that damages be assessed against the defendants. Such request is denied.

The Court has concluded that the ends of justice will be served by the issuance of injunctive relief, as prayed, together with any and all costs laid out and expended on behalf of the above named plaintiff Jordan by his appointed counsel, Charles B. Cohler.

In view of the court's foregoing disposition granting injunctive relief, the petition for the writ of habeas corpus (No. 44309) will be dismissed coincident with the filing of the within memorandum opinion and order.

Findings, decree and injunctive relief may be prepared consistent with the foregoing.

DATED: SEPTEMBER 6, 1966.

GEORGE B. HARRIS

United States District Judge