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Peter Dwyer

Michael Botein
New York Law School, michael.botein@nyls.edu

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THE RIGHT TO REHABILITATION FOR PRISONERS—JUDICIAL REFORM OF THE CORRECTIONAL PROCESS

PETER DWYER AND MICHAEL BOTEIN***

> If in a past generation crime became rampant west of the Pecos, good citizens opined that the way to curb it was to hire more law-enforcement officers to bring in more outlaws, dead or alive. I am afraid our thinking today is no more sophisticated than the frontier thinking of a century ago. . . .
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> This frantic, panicky pouring of more resources into police agencies—the maw of the criminal-justice system —this preoccupation with ingestion rather than digestion, is reminiscent of the famed pelican whose beak holds more than his belly can. It is as irresponsible, thoughtless and mischievous as the overfeeding of babies to stop them from crying.‡
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> Bernard Botein, 1900-1974.

I. INTRODUCTION

At the present time, this country's correctional process functions somewhat like an inefficient sewage treatment plant. It continually takes new human beings whom society has discarded and, after a recycling process, merely returns them in the same condition or worse. For so long as the correctional process fails to correct, it can neither alter its product nor improve the social environment.

Just as society needs the correctional process to protect itself against individuals whom it deems dangerous, prisoners need rehabilitation in order to reclaim their rightful roles in society.

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* Assistant Professor of Criminal Justice—Coppin State College. A.B., Brown University, 1966; J.D., Cornell Law School, 1969; LL.M., George Washington National Law Center, 1973.

** Associate Professor of Law—Rutgers University School of Law. B.A., Wesleyan University, 1966; J.D., Cornell Law School, 1969; LL.M., Columbia University, 1972.

‡ B. BOTEIN, OUR CITIES BURN WHILE WE PLAY COPS AND ROBBERS 10-11 (1972).

But prisons simply do not do the job. Since the conventional political processes have produced no significant reform, the courts must intervene and recognize a right to rehabilitation for prisoners.

Courts have toyed with a grand "right to rehabilitation," but have implemented only a narrow right to psychiatric treatment.[1] Although psychiatric treatment is definitely part of rehabilitation, rehabilitation is broader than mental health. Indeed, the most difficult part of recognizing the right to rehabilitation is defining it. Every human being is unique and needs a different form of help. Generally, rehabilitation is any action which allows a prisoner to rejoin society successfully, without impinging on his civil rights or society's civilized senses.

To a very real extent, courts must invent the "definition" of rehabilitation as they go along by tailoring the remedy to each prison and prisoner. The courts have provided this type of protection to other basic rights for years and, more recently, to some prisoners' rights.[2] The creation of the right to rehabilitation, therefore, depends largely upon judicial intervention in the correctional process.

II. REHABILITATION—THE RIGHT

Currently, the courts do not recognize the right to rehabilitation. Their attitude springs from practical, rather than legal considerations. Despite its recent activism, the judiciary will not base rights on social scientists' latest brain-storms. The courts will not recognize the right to rehabilitation until it has been validated by thorough observation and legitimized by general acceptance. This recognition in turn depends upon a more informed public attitude toward those who somehow deviate from societal norms.

But the courts will find ample doctrinal basis for the right to rehabilitation when they decide to recognize it. First, courts have increasingly required psychiatric treatment for those who are civilly confined rather than criminally imprisoned. Second, an emerging line of cases supports an equal protection right to rehabilitative treatment for prisoners. Finally, the cruel and unusual punishment clause[3] has recently been used to provide an imposing repository of rights for prisoners.

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1. *See* pp. 275-81 *infra.*
2. *See, e.g.,* pp. 299-300 *infra.*
3. U.S. CONST. amend. VIII.

A. *Analogy to Non-prisoners in the "Treatment" Group*

The courts have held that a number of non-prisoner groups have a right to treatment. As extreme social deviants, members of these groups resemble criminals in terms of their public image and the government's attitude toward them. Combined with general acceptance of the "treatment" philosophy for them, their similarity to prisoners should encourage courts to apply the same rationale to prisoners. These non-prisoner "treatment" cases highlight several legal bases for the right to rehabilitation.

In *Rouse v. Cameron*,[4] the District of Columbia Circuit required treatment for a criminal defendant who had been civilly committed after having been found not guilty because of insanity. While recognizing that imprisonment without treatment raised serious due process questions,[5] the court placed primary reliance on a District of Columbia statute entitling mental patients to psychiatric care and treatment.[6]

Rouse might have used a procedural due process argument because mental patients stand to lose their freedom, but do not receive the same due process safeguards as criminals. Accordingly, they should get some other advantage as compensation; otherwise, their confinement would be nothing more than imprisonment without procedural due process. Treatment is the *quid pro quo* which justifies mental patients' limited due process rights.

Rouse also raised an equal protection issue which could stand on its own or supplement the procedural due process argument.[7] While both mental patients and criminals are confined involuntarily, criminals receive elaborate procedural safeguards. *Parens patriae* treatment for patients arguably justifies the disparity. Thus, unless treatment is provided, there is no legitimate equal protec-

4. 373 F.2d 451 (D.C. Cir. 1966).

5. The court also referred to a possible issue of eighth amendment cruel and unusual punishment. *Id.* at 453.

6. D.C. CODE ENCYCL. ANN. § 24-301(d) (1973) states:

> If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

The court said that continued failure to provide care and treatment was not justified by insufficient staff or facilities. 373 F.2d at 457. Dobson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967) later applied a similar District of Columbia statute, D.C. CODE ENCYCL. ANN. § 21-562 (1973), to mental patients who were not criminal defendants.

7. 373 F.2d at 453.

tion basis for giving mental patients more limited procedural rights than criminals.

Other courts have applied precisely these arguments in slightly different forms. Both a federal and a state court have found a right to treatment based on due process and equal protection.[8] And *Wyatt v. Stickney*[9] cited *Rouse* to establish a due process right to treatment.[10] The court used the procedural due process reasoning of *Rouse* and dealt with equal protection and substantive due process as well. It held that civil commitment has no rational relation to legitimate legislative purposes unless treatment is provided, since the state's only interest in civil commitment is furtherance of its *parens patriae* power.[11]

The courts have also upheld statutes allowing indefinite commitment of sexual psychopaths because the goal of the statutes was found to be treatment rather than punishment.[12] A New York court recognized the right to treatment of an indefinitely committed sex offender,[13] and a Michigan court found the same right under a sexual psychopath statute, rejecting outright the state's claim that confinement was sufficient treatment.[14]

Courts have recognized treatment rights for juveniles as well. The District of Columbia Circuit noted that a child in a receiving home is entitled to adequate psychiatric care.[15] Somewhat later, the same court found that a truant child may not be detained without adequate psychiatric treatment.[16] In both decisions the court relied on a District of Columbia statute which provides that when

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8. Eidenoff v. Connolly, 281 F. Supp. 191 (N.D. Tex. 1968); Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 233 N.E.2d 908 (1968).

9. 325 F. Supp. 781 (M.D. Ala. 1971).

10. *Id.* at 784. The court in *Wyatt* went on to discuss the constitutional necessity of treatment.

> Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense . . ."

Id., quoting Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960).

The court further stated:

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.

325 F. Supp. at 785.

11. *Cf.* 325 F. Supp. at 785.

12. *E.g.*, Millard v. Cameron, 373 F.2d 468, 472-73 (D.C. Cir. 1966).

13. People v. Wilkins, 23 App. Div. 2d 178, 259 N.Y.S.2d 462 (4th Dep't 1965).

14. *In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958).

15. Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967).

16. *In re* Elmore, 382 F.2d 125 (D.C. Cir. 1967).

a child is removed from his home the court must supply custody, care, and discipline as close as possible to that which the parents should give.[17] The court found necessary psychiatric treatment to be within the meaning of the statute.[18]

In construing a Rhode Island statute[19] almost identical to the District of Columbia's, however, a federal district court based its decision not on the statute alone, but on mental patients' procedural due process and equal protection rights.[20] The court noted that juveniles actually receive fewer procedural safeguards than criminals because of the state's *parens patriae* goal of protecting and rehabilitating juveniles. It held that due process and equal protection require rehabilitation since, otherwise, there would be no rational basis for depriving juveniles of adults' procedural rights.[21] The court also found the cruel and unusual punishment clause[22] applicable to juveniles despite the ostensibly non-punitive character of juvenile confinement.[23] This case, thus, went well beyond its predecessors by finding a general constitutional right to rehabilitation, rather than a narrow statutory right to psychiatric treatment.

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17. D.C. CODE ENCYCL. ANN. § 16-2316(3) (1973) states:
> [W]hen the child is removed from his own family, the court shall secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents.

18. 382 F.2d at 127. In *In re* Tsesmilles, 24 Ohio App. 2d 153, 265 N.E.2d 308 (1970), the court found rehabilitation to be the sole statutory purpose for commitment of teenage felons "to a maximum security institution operated by the department of mental hygiene and correction . . . ." *Id.* at 155, 265 N.E.2d at 310, *quoting* OHIO REV. CODE ANN. § 2151.355(E) (Page Supp. ____). (Section 2151.355(E) was amended in 1973 and the above quoted phrase now reads: "to an institution operated by the Ohio youth commission . . . ." OHIO REV. CODE ANN. § 2151.355(E) (Page Supp. 1973).)

19. R.I. GEN. LAWS ANN. § 14-1-2 (1969) states:
> The purpose of this chapter is to secure for each child under its jurisdiction such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; to conserve and strengthen the child's family ties wherever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal and, when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

20. Inmates v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

21. 346 F. Supp. at 1364-67.

22. U.S. CONST. amend. VIII.

23. 346 F. Supp. at 1366. As part of the remedy the court ordered psychiatric counseling for juvenile inmates and said that after more testimony it would order a general rehabilitation plan. As in other cases, this court stressed that continued

Many state statutes also require special treatment for defective delinquents. For example, the Maryland Defective Delinquent Act allows indefinite commitment of anyone who "evidences a propensity toward criminal activity, and . . . [has] intellectual deficiency or emotional unbalance . . . ."[24] The statute allows a person to be confined after a judicial hearing if convicted of felonies, serious misdemeanors, violent crimes, some sex offenses, or more than two crimes punishable by imprisonment.[25] The Fourth Circuit found the Act constitutional on its face, but held that lack of treatment for treatable inmates would constitute a denial of equal protection.[26] The court said that the prospect of treatment is the only justification for handling curable defective delinquents differently from other convicts. Absent treatment, it stated, the Act would discriminate unjustifiably against curable defective delinquents.[27]

The treatment group rationale should apply to prisoners. But in order to do so, the courts must recognize the similarities between these two groups. Realistically, the consequences of confinement are the same for members of both groups. The courts already view loss of freedom as a heavy deprivation in itself,[28] and the physical conditions of confinement are often as bad for

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abuse of the juveniles could not be excused on the ground "that the representatives of the state were doing the best they could." *Id.* at 1374.

In United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971) the court found that crowding and misapplication of resources at the Lorton Youth Center frustrated the mandatory language of the District of Columbia Youth Corrections Act, 18 U.S.C. §§ 5011-14, 5025 (1970), requiring authorities to provide rehabilitation for youths. The court, in addition to referring to the statute, spoke generally about the need to rehabilitate youthful offenders, implying that the eighth amendment requires it: "The Constitution, the Youth Corrections Act, and the conscience of a civilized society require that youth offenders receive firm but effective opportunity for treatment and realistic rehabilitation." 336 F. Supp. at 983.

24. MD. ANN. CODE art. 31B, § 5 (1971).

25. *Id.* § 6a.

26. Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), *dismissed on remand,* 295 F. Supp. 389 (D. Md. 1969), *aff'd sub nom.* Tippett v. Maryland, 436 F.2d 1153 (4th Cir.), *cert. granted sub nom.* Murel v. Baltimore City Criminal Court, 404 U.S. 999 (1971), *cert. dismissed,* 407 U.S. 355 (1972).

27. *Id.* at 513-14. It could be argued that the indefinite sentence of defective delinquents is only a form of the typically more severe sentences given to multiple offenders under habitual offender statutes. But the statute can still be attacked on the ground that the eighth amendment forbids indefinite confinement without treatment. Also, the purpose of the statute is clearly to rehabilitate, not to increase severity of punishment for incorrigibles.

28. For instance, Rouse v. Cameron stressed this problem in connection with mental patients. 373 F.2d at 455.

non-prisoners as for prisoners.[29] Moreover, the treatment group's prospect of indefinite commitment and its subjection to so-called therapies—such as lobotomy, electroshock, and aversion therapy—may be worse than anything criminals encounter.[30] Finally, the stigma of confinement is as great for the "treatment" group as for prisoners.

In re Gault[31] rejected the distinction between *parens patriae* power and punishment. In extending the procedural due process safeguards of criminal procedure to juvenile offenders, the Supreme Court found that the similarity in the actual conditions of confinement of prisoners and juvenile offenders is more important than the difference in purported purposes of confinement.[32] In *Heryford v. Parker,*[33] the Tenth Circuit also found the use of a "civil" label irrelevant in proceedings for commitment of retarded and disturbed juveniles. Regardless of its purpose, the court said, potential confinement requires procedural due process.[34] At least one federal judge has stated flatly that any confinement is punishment from the viewpoint of the person confined.[35]

The final step in the application of this doctrine to prisoners may come when courts abandon the notion that members of the treatment group are confined *prospectively* because of their potentially anti-social future, while criminals are confined *retrospectively* because of their demonstrably anti-social past. Correctional theory is actually more prospective than it might first appear. The public expects further misconduct from convicts, as evidenced by its pressure to lock them up. Indeed, this expectation of further

29. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

30. In fact, these treatments might constitute cruel and unusual punishment. *See* note 171 *infra.*

31. 387 U.S. 1 (1967).

32. *Id.* at 27-28.

33. 396 F.2d 393 (10th Cir. 1968).

34. *Id.* at 396.

In State *ex rel.* Bernal v. Hershman, 54 Wis. 2d 626, 196 N.W.2d 721 (1972), the court said placement of a juvenile offender in his mother's custody is analogous to the probation of an adult. Therefore, when faced with the revocation of his status, the juvenile is entitled to the same procedural protection as an adult. *Id.* at 630, 196 N.W.2d at 724.

35. The court in Cross v. Harris, 418 F.2d 1095, 1101 (D.C. Cir. 1969) stated: "Incarceration may not seem 'punishment' to the jailors, but it is punishment to the jailed." Similarly, in Specht v. Patterson, 386 U.S. 605, 608 (1967), the Supreme Court found the use of labels irrelevant in connection with commitment proceedings under the Colorado Sex Offender Act, COLO. REV. STAT. ANN. §§ 39-19-1 to -10 (1963).

misconduct is basic to all accepted correctional theories. The rationale for isolating prisoners from the public, thus, rests on a desire to protect the public from their further misdeeds. This theory also assumes that the convict might repeat his crimes unless discouraged by the possibility of a stay in prison. Likewise, the rationale for rehabilitation is avoidance of further misconduct. The only correctional theory which lacks a prospective element is retribution, and many courts now take a dim view of this theory.[36]

Some cases have applied the treatment philosophy to hybrids of treatment and imprisonment situations. In *Sas v. Maryland*[37] the prison was styled as therapeutic, but the plaintiffs were labelled criminals and were subjected to punishment. They differed from other criminals, if at all, because of their incorrigibility or mental illness. Although *Sas* interpreted the Maryland Defective Delinquent Act[38] as designed primarily for isolation and secondarily for treatment, the court still required the state to treat the treatable inmates.[39] This attitude demonstrates that a court might extend a right to rehabilitation to other prisoners without the need to establish rehabilitation as the *main* reason for confinement. Rehabilitation would only have to be one of several mandatory correctional goals, rather than the sole objective.

Thus, courts have moved correctional theory in the direction of rehabilitation by recognizing realistically the similarities between prisoners and members of the treatment group, similarities the courts can use to extend the right of rehabilitation to prisoners. Previously, except for the justification of both groups' confinement for the public safety, they were far apart in theoretical emphasis. Though treatment philosophy stresses rehabilitation, prison cases gave it only a minor role until recently. An early Virginia case set the tone by describing convicts as "slaves of the state," with no rights but those which the state chooses to confer.[40] Many cases

36. *See* p. 282 & note 48 *infra*. *See also* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

37. 334 F.2d 506 (4th Cir. 1964). In Tippett v. Maryland, 436 F.2d 1153, the court stressed the hybrid character of Patuxent. Patuxent was a medically-oriented institution whose purpose was treatment, and commitment to it was by a civil, rather than a criminal, proceeding. The court called it an encouraging approach to rehabilitation of criminals, and intimated that without adequate treatment there would be serious constitutional problems with Patuxent. *Id.* at 1158 & n.18.

38. MD. ANN. CODE arts. 31B *et seq.* (1971).

39. 334 F.2d at 516.

40. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

still reflect this view.[41] Thus, criminal law's traditional focus on punishment stressed goals which were ostensibily irrelevant to the treatment philosophy. Since prisoners received only their just desserts, prison security and disciplinary measures could be extremely harsh. Retribution and deterrence were the main goals; rehabilitation was expendable if it conflicted with administrative convenience, security needs, or other penal interests.

B. *Equal Protection*

Recent prison cases have replaced the "slave" theory with the view, first enunciated in *Coffin v. Reichard,*[42] that prisoners retain all civil rights except those expressly taken by law or those whose removal is necessary to the attainment of legitimate penal goals.[43] The impact of this shift depends upon the judicial interpretation of "necessary" and "legitimate" penal goals. With regard to first amendment rights some courts have defined the terms very favorably for prisoners. For example, the First Circuit found no necessity which could justify state limitations on inmates' rights to correspond with news media about prison conditions.[44]

Morales v. Schmidt[45] took *Coffin* to the furthest extreme yet. The district court there began from the premise that convicts and the general public are entitled to the same rights. Depriving

41. *Cf.* Pell v. Procunier, 417 U.S. 817, 822 (1974) (deterrence is important function of the corrections system); Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (retribution still has a legitimate place in criminal law); Rudolph v. Alabama, 375 U.S. 889, 891 (Goldberg, J., dissenting), *denying cert.* to 275 Ala. 115, 152 So. 2d 662 (1963) (deterrence and rehabilitation are legitimate penal goals); Benton v. Reid, 231 F.2d 780, 782 (D.C. Cir. 1956) (purpose of prisons is the punishment of criminals); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied,* 406 U.S. 958 (1972) (retribution may be one, but not the sole, penal goal).

42. 143 F.2d 443 (6th Cir. 1944).

43. *Id.* at 445.

44. Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).

On the same question, Burnham v. Oswald, 342 F. Supp. 880, 887 (W.D.N.Y. 1972), formulated the rigorous test of "a clear and present danger of breach of the security, discipline or orderly administration of the institution. . . ." And in a context closely related to prisons, Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971) found that parolees retain all rights of free speech unless the government can show specific, highly likely dangers of misconduct by the parolee.

However, several recent Supreme Court decisions have evidenced a somewhat more conservative attitude towards prisoners' first amendment rights. *See* Wolff v. McDonnell, ____ U.S. ____ (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

45. 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd,* 489 F.2d 1335 (7th Cir. 1973).

convicts of rights, the court held, is a discrimination subject to the same equal protection test as singling out other groups of citizens for deprivations. With relatively unimportant privileges, the government needs to show only a reasonable relation between the deprivation and a legitimate governmental purpose.[46] But when *fundamental* individual rights are at stake, the government must demonstrate a compelling interest which it is advancing in the least disruptive way.[47]

The court applied this general framework to its analysis of restrictions on prisoners. It found the main governmental interest in corrections to be protection of the public, which it accepted as a compelling state interest. It viewed the other usually accepted purposes of prisons—isolation of offenders from the public, infliction of hardship to deter convicts, deterrence of others through present convicts' sufferings, and rehabilitation[48]—not as correctional goals, but as mere strategies to achieve the basic goal of public protection. Indeed, it saw prison itself as a substructure for implementing these four basic strategies. Prison rules and regulations were simply the measures which prisons need to function.[49]

This approach was unique because most other courts had viewed deterrence, rehabilitation, and confinement as ultimate penal goals. Other courts had assumed that the justification of the prison's existence was not an issue in prisoners' rights suits.[50]

Though *Morales* accepted protection of the public as a compelling state interest, it held that the other strategies are constitutional only when pursued in a permissible manner—*i.e.*, when a restriction actually protects the public, is implemented in the least onerous way, and preserves human dignity.[51] Thus, although a particular strategy might be constitutionally acceptable per se, it can be applied only sparingly.

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46. 340 F. Supp. at 550.
47. *Id.*
48. The court found revenge to be a goal of dubious legitimacy. *Id.* at 551 n.6.
49. *Id.* at 553.
50. *See, e.g.*, Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).
51. For example, even though deterrence might be highly effective if prisons provided elaborate psychological and physical tortures, the court was

> inclined to the view that deterrence can constitutionally justify little more than physical confinement itself and a relatively spartan regime within the prison in terms of the amenities.

Morales v. Schmidt, 340 F. Supp. at 552.

The *Morales* decision, however, was reversed on appeal.[52] The Seventh Circuit decided that for purposes of equal protection convicts do not retain all the rights of other citizens,[53] and that a right can be fundamental for general citizens but not for prisoners. The court did not hold, however, that every state interest justifies restrictions on prisoners.[54] The court of appeals dealt only with correspondence rights and deliberately excluded consideration of inmate correspondence to courts, lawyers, and public officials.[55] This exclusion gives future courts the opportunity to include selectively other rights in the group of fundamental interests.

Although it did not adopt the district court's radical view of prisons, the Seventh Circuit showed that it would, nevertheless, protect prisoners' rights.[56] It rejected the government's desire for a return to the "hands off" doctrine, and noted that

> a district court should scrutinize closely the justifications offered by the state for the limitation. Its review must "be more than an obeisance to a warden's asserted expertise . . . ."[57]

The court retreated only to the level of other progressive decisions and left the door open to new prisoners' rights. If nothing else, the district court demonstrated that the judiciary can adopt a radical view of prisoners' rights. Indeed, other cases show that courts can treat prisoners as inferior to other citizens and still defend inmates' rights vigorously.[58]

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52. Morales v. Schmidt, 489 F.2d 1335 (7th Cir. 1973).

53. The *Morales* court also stated:

> The Supreme Court has indicated that the constitutional limitations on governmental actions differ depending on the role in which the government is acting in a particular case. This is so despite the fact that each situation might involve the same constitutional interest of the affected individuals.

Id. at 1342.

54. *Id.* at 1343.

55. *Id.* at 1339 n.6.

56. For instance, the court cited Morrissey v. Brewer, 408 U.S. 471 (1972) for approval of "traditional" parole conditions. *Id.* at 1342. It is likely that the court of appeals would also approve the "traditional" general format of prisons.

57. 489 F.2d at 1343. *But see* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

58. For instance, Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969), dealing with Black Muslims' rights to religious freedom, stated that

> the mere fact that government, as a practical matter, stands a better chance of justifying a curtailment of fundamental liberties where prisoners are

Under an approach somewhat less radical than that of the *Morales* district court, a court could abandon general society as the frame of reference and require that prisoners receive the same care as members of the treatment group. A court could find that prisoners and members of the treatment group are similarly situated in all fundamental respects: they share loss of liberty, conditions of confinement, and social stigmatization. A court could recognize that, in reality, members of the treatment group, like prisoners, are confined with considerable punitive effect.

Courts could follow the *Morales* equal protection theory to find that rehabilitation, as a method of public protection, is the primary correctional goal.[59] Depriving prisoners of rehabilitation, therefore, would deny them equal protection if an almost identical right to rehabilitation applies to similarly situated non-prisoners.[60] Since rehabilitation would be a primary penal purpose, depriving prisoners of rehabilitation would not be reasonably related to the governmental purpose of imprisonment. If prisoners have a fundamental interest in anything, they have it in rehabilitation, es-

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involved does not eliminate the need for reasons imperatively justifying the particular retraction of rights challenged at bar. Nor does it lessen governmental responsibility to reduce the resulting impact upon those rights to the fullest extent consistent with the justified objective.

Id. at 1000-01. Thus, the court found freedom of religion to be a first amendment right of prisoners which the state could limit only upon a showing of "compelling state interest" and employment of the "least restrictive alternative." *See also* Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971).

One court required a compelling state interest to justify limitation of prisoners' religious freedom, freedom of speech and association, and freedom from racial classification. Landman v. Royster, 333 F. Supp. at 644. The *Landman* court then went on to observe that some states "have not shown such remarkable success in achieving any . . . valid penological end . . . ." *Id.* It noted that courts would "inquire as to the need for such sacrifices and the reality of the claimed [state] benefits." *Id.* at 653.

59. *See* Taylor v. Sterrett, 344 F. Supp. 411, 420 (N.D. Tex. 1972). Brown v. Peyton, 437 F.2d at 1230-31, found that:

[o]ne of the principal purposes of incarceration is rehabilitation. . . .

. . . .

. . . Prison authorities have a legitimate interest in the rehabilitation of prisoners, and may legitimately restrict freedoms in order to further this interest, where a coherent, consistently-applied program of rehabilitation exists. . . .

In the recent case of Procunier v. Martinez the Court said: "The identifiable governmental interests . . . [include] the rehabilitation of the prisoners." 416 U.S. at 412.

60. *Cf.* Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970). Although treatment is not synonymous with rehabilitation (it probably implies a greater medical orientation and sometimes a higher degree of mental disorder), the con-

pecially when lack of rehabilitation greatly hinders reintegration into society. Thus, the government would find it more difficult to show that it has a compelling interest and is pursuing it by the least onerous means.

The *Morales* approach does not rely upon, but is bolstered by, this analogy to the treatment group. As a disadvantaged sector of the non-criminal population, the treatment group with its right to treatment emphasizes prisoners' deprivation.

Indeed, the very existence of the treatment group also belies any argument that denial of rehabilitation does not deprive prisoners of equal protection because the general public has no such right. The treatment group is just non-prisoners who are officially found in need of services, deprived of their freedom and, thus, entitled to such services. The general public, therefore, has an affirmative right to treatment under at least certain circumstances.

Unlike a prisoner, the ordinary citizen is not affirmatively restrained from seeking rehabilitation; at worst, his circumstances prevent him from obtaining services. By removing a prisoner's ability to find appropriate services, a prison arguably incurs the responsibility of making these services available. Indeed, the courts have recognized the validity of the military's providing such services.[61]

The *Morales* equal protection formulation has several advantages over the treatment analogy. The treatment cases do not have a unifying legal theory.[62] Using the treatment group as the primary reference in an equal protection argument creates difficulties,

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cepts overlap in many respects. For example, both can include psychiatric treatment and psychological counseling, social work services, occupational therapy, and job training. Additionally, some treatment cases have already dealt with rehabilitation. The *Affleck* court demonstrated its intention to order a full program of rehabilitation. 346 F. Supp. at 1374. The *Alsbrook* court also ordered rehabilitation. 336 F. Supp. at 979.

61. *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 226 n.10 (1962). The military, by limiting access to civilian religious services and the clergy, incurs the burden of providing its own services and clergy. Crawford, *Prisoner's Rights—A Prosecutor's View*, 16 Vill. L. Rev. 1055, 1065-66 (1971). *See generally* Figinski, *Military Chaplains—A Constitutionally Permissible Accommodation Between Church and State*, 24 Md. L. Rev. 377 (1964).

62. Reference to the "treatment" group relies on an array of legal arguments patched into a more technicality-based conclusion. The best arguments will fail if the court has not yet changed its basic approach to prisoners. For instance, McLamore v. State, 257 S.C. 413, 186 S.E.2d 250 (1972) held that there is no constitutional duty to rehabilitate prisoners, so the state can give as much or little rehabilitation as it pleases. But the right-privilege distinction is not conclusive.

since the treatment group is a continually changing body which still has fewer rights than the general public. By using the general public as their frame of reference, courts would lay the groundwork for extending many other civilian rights to prisoners.

The *Morales* theory also promotes continuity in prison reform by completing the prisoner's advancement from a "slave of the state" to a citizen who loses only those rights whose taking is essential to achieve legitimate penal goals. By following the progression of prison cases and confronting the crucial issue of prison reform—the courts' basic attitudes towards prisoners—*Morales* encourages the development of a coherent body of law regarding prison's legitimate ends and permissible means.

Like *Morales*, the treatment group cases indicate that courts should require prisons to show that they have used the least restrictive alternative, and not just that they have a compelling state interest.[63] Most observers have assumed that the two criteria are inseparable, since they have been used together. As Singer points out, however, they are conceptually distinguishable.[64] A court might allow a state to limit prisoners' rights when merely a rational state interest is involved, but it might still require the state to employ the least restrictive alternative in pursuing that interest. *Bullock v. Carter*[65] advocates "close scrutiny" of a state's means for pursuing "legitimate" as opposed to "compelling" interests.[66]

Goldberg v. Kelly, 397 U.S. 254 (1969) suggested that even if a state need not extend the privilege, once it does, it cannot extend it discriminatorily.

The *McLamore* court also cited the high cost to the state of having to provide rehabilitation for all prisoners. This expense argument, typically used against the granting of many prisoners' rights, can be countered. First, in the long run it would be cheaper to rehabilitate criminals than to confine them. Second, all prisoners need not receive the most expensive rehabilitation programs. The court apparently assumed that an expensive rehabilitation program for one prisoner would force the state to be as elaborate for all prisoners, regardless of the other prisoners' needs. Finally, the court chose not to draw on ample authority for the proposition that mere considerations of convenience and cost cannot limit prisoners in the exercise of their constitutional rights.

63. *Compare Morales with* Dixon v. Jacobs, 427 F.2d 589, 597 (D.C. Cir. 1970) *and* Covington v. Harris, 419 F.2d 617, 623-24 (D.C. Cir. 1969) *and* Lake v. Cameron, 364 F.2d 657, 659-61 (D.C. Cir. 1969). *See generally* Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 55-64 (1972).

64. Singer, *supra* note 63, at 58.

65. 405 U.S. 134 (1972).

66. *Id.* at 144.

The *Morales* court of appeals might have intended a similar standard when it limited the use of the "compelling state interest," but still called for "close scrutiny" of state imposed limitations on prisoners' rights. 489 F.2d at 1341. Landman

The treatment group cases, therefore, could extend the least restrictive alternative standard to deprivation of prisoners' physical freedom. Indeed, several treatment cases have applied precisely this standard in determining the kind of treatment required. In several cases the District of Columbia Circuit relied upon a local statute in requiring the government to show that it was using the mildest possible form of confinement, and the court at least implied a constitutional basis for its conclusion.[67]

The courts also could apply the least restrictive alternative standard to broader areas of convicts' lives.[68] If a court determined that prisoners and treatment group members were similarly

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v. Royster, 354 F. Supp. 1292, 96-97, 99 (E.D. Va. 1973) insisted on the least drastic deprivation of prisoners' rights, although the court did not specifically espouse across-the-board application of the "compelling state interest" standard.

67. *See* Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966); Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969). The *Covington* court implied a constitutional basis for its conclusion:

> The new legislation apart, however, the principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty justifiable only when the respondent is "mentally ill to the extent that he is likely to injure himself or other persons if allowed to remain at liberty." A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.

Id. at 623. Dixon v. Jacobs, 427 F.2d 589 (D.C. Cir. 1970) cited *Lake* to show that the "least restrictive alternative" was a legitimate issue in the habeas corpus petition of a patient who had been hospitalized after an acquittal on the insanity plea. *Id.* at 597 n.27.

It might be argued that *Dixon* was clearly meant to apply only to civil commitment. *See, e.g.*, Singer, *supra* note 63, at 62. The court seemed to have specified that criminal commitment was distinguishable from the present case.

> It is clear on this record that disputed issues of fact and law [exist] . . . . Confinement of the mentally ill rests upon a basis substantially different from that which supports confinement of those convicted of crime. . . . Confinement of the mentally ill . . . depends not only upon the validity of the initial commitment but also upon the continuing status of the patient.

427 F.2d at 595. But this conclusion is not inevitable. Judge Bazelon, who wrote the majority opinion, has argued elsewhere that the confinement of civil and criminal mental patients is indeed very similar. *See, e.g.*, Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 748-49, 752-53 (1969). Further, the distinction appears to have been mainly intended to justify the court's jurisdiction in the matter, rather than to exclude the "least restrictive alternative" test from being applied to criminal confinement. The court apparently was dealing only with the question of *when* the patient can raise the issue, and not *whether* he can.

68. Of some help in making the connection is Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971), in which the court found the principle of the least restrictive alternative applicable to the confinement of pre-trial detainees. While pretrial detainees are in theory entitled to more extensive rights than convicts, this case shows that at least one court felt competent to apply the principle to broad areas of prison life.

situated, the treatment group's right to greater physical freedom would apply equally to prisoners.[69] This requirement would open up a right to rehabilitation for all convicts thereby released to the community.[70] Besides having the same access to community rehabilitation programs as other citizens, they would benefit further because most community-based corrections projects lean heavily toward rehabilitation.

Finally, the simplest application of equal protection would be to require a liberal construction of state constitutional and statutory references to rehabilitation for prisoners[71]—just as *Rouse* did for members of the treatment group. One problem with cases decided under even very liberal state statutes is that they usually arise in state courts, which are often more conservative than federal courts. Nevertheless, a state court could give liberal construction to treatment statutes. A variation of the statutory argument relies upon the avowed purpose of correctional statutes—the protection of the public. The reasoning is simply that since almost all pris-

69. Singer argues that most convicts could be on non-prison status without extra danger to the community. Singer, *supra* note 63, at 79-81.

70. The Supreme Court has further said that a primary purpose of parole is already recognized to be rehabilitation. Probation, too, stresses the goal of rehabilitation. Morrissey v. Brewer, 408 U.S. 471 (1972).

71. *E.g.*, ILL. CONST. art. I, § 11; MONT. CONST. art. III, § 24; N.C. CONST. art. XI, § 2; N.H. CONST. pt. 1, art. 18; ORE. CONST. art. I, § 15; WYO. CONST. art. 1, § 16; CAL. PENAL CODE §§ 1-2022,-2032 (West 1970); N.Y. CORREC. LAW § 136 (McKinney Supp. 1973); R.I. GEN. LAWS ANN. § 13-31 (Supp. 1973); TEX. PENAL CODE § 1.02 (Vernon 1973).

Delaware provides for a "Department of Correction . . . to provide for the treatment, rehabilitation and restoration of offenders as useful, law-abiding citizens within the community." DEL. CODE ANN. tit. II, § 6501 (Supp. 1971). The Commissioner is directed to provide for "[t]he custody, study, training, treatment, correction and rehabilitation of persons committed to the Department." *Id.* § 6517(3). And prisoners

> shall be dealt with humanely, with effort directed to their rehabilitation, to effect their return to the community as safely and promptly as practicable. The Commissioner shall establish the following programs: . . . education, including vocational training; work; case work counseling and psychotherapy . . . .

Id. § 6531.

N.Y. CORREC. LAW § 136 (McKinney Supp. 1973) provides that "each prisoner shall be given a program of education which, on the basis of available data, seems most likely to further the process of socialization and rehabilitation." Arkansas' statutes recognize rehabilitation as an essential part of its correctional system. ARK. STAT. ANN. §§ 46-100, -116 (Cum. Supp. 1973). And the California Penal Code declares that the main purpose of San Quentin and Folsom prisons "shall be to provide confinement, industrial and other training, treatment, and care to persons confined therein." CAL. PENAL CODE §§ 1-2022, -2032 (West 1970).

oners return to society, society has an interest in insuring their rehabilitation. Courts and penologists increasingly recognize that the correctional system merely delays or even increases a prisoner's ultimate harm to society unless it provides rehabilitation. Without effective rehabilitation programs, prisons do not fulfill their statutory mandate to implement society's statutory right to self-defense.[72]

C. *Cruel and Unusual Punishment*

Prison administrators were, until recently, virtually immune from the limitations of the cruel and unusual punishment clause.[73] Courts used the slave of the state theory to avoid acting on all but the most serious violations of prisoners' rights, such as severe physical brutality.[74] Indeed, as late as 1967, the Second Circuit

72. It has been suggested that "societal self defense" is a basis for the treatment cases and that these cases provide support for applying the same rationale to criminal rehabilitation. *See* Comment, *A Statutory Right to Treatment for Prisoners: Society's Right of Self Defense*, 50 NEB. L. REV. 543 (1971). But while the treatment cases recognized the social benefits of treatment, they focused primarily on the patient's individual rights.

Dictum in Tippett v. Maryland shows judicial recognition of rehabilitation's benefits to society:

> The result [of lack of rehabilitation], of course, is a grave wrong for those convicts who could be helped by getting help. It is a grave wrong to society, which must suffer their continued depredations when released from prison until they are confined again.
>
> The interests of society and of the prison population demand the sort of innovative reappraisal of our correctional institutions . . . for which Chief Justice [Burger] has pled.

436 F.2d at 1158.

Unfortunately, however, only a few statutes provide explicitly for such a concept. Self-defense often commingles with goals of custody, security, and detention. Moreover, if a statute includes a societal right to self-defense, it usually will also stress rehabilitation—in language which courts would be more likely to rely on.

Language like Vermont's is probably most useful in providing statutory support for the *Morales* premise that the basic goal of corrections is protection of society. VT. STAT. ANN. tit. 28, § 1(a) (Cum. Supp. 1974) states:

> The department of corrections . . . shall have the purpose of developing and administering a correctional program designed to protect persons and property against offenders of the criminal law and to render treatment to offenders with the goal of achieving their successful return and participation as citizens of the state and community, to foster their human dignity and to preserve the human resources of the community.

73. U.S. CONST. amend. VIII; *see* Furman v. Georgia, 408 U.S. 238, 241 (1972); Robinson v. California, 370 U.S. 660, 667 (1962).

74. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871); *cf.* Weems v. United States, 217 U.S. 349, 368 (1910). Courts unswervingly followed this with the notable exception of Trop v. Dulles, 356 U.S. 86, 101 (1958), which dealt with loss of citizenship as a punishment.

broke radically new ground merely by finding solitary confinement unconstitutional in some situations.[75] The general shift away from the slave of the state theory, however, has increased the viability of the cruel and unusual punishment clause.

Despite its limited use, the clause is an appropriate vehicle for creating a right to rehabilitation. First, the courts have always stressed the clause's flexibility.[76] In *Furman v. Georgia*,[77] Justice Marshall advocated perhaps its most flexible interpretation. Because of its dependence on society's evolving standards, he found stare decisis to be of limited use in construing the clause. Both Justice Marshall and Justice Brennan maintained that the Court should not interpret the clause simply in terms of "conventional wisdom," but rather that it should make an independent judgment in light of conventional wisdom.[78] In creating a right to re-

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75. Wright v. McMann, 387 F.2d 519, 525-26 (2d Cir. 1967). *See also* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

76. In Weems v. United States the government contended that the clause referred only to extreme tortures which were already prohibited when the Constitution was written. But the Supreme Court said:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. . . .

217 U.S. at 373.

> The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.

Id. at 378. In *Weems* the clause was violated because the punishment was far out of proportion to the crime.

Trop v. Dulles, 356 U.S. at 100-01, reiterated *Weems's* position on the flexibility of the clause. The Court stressed interpretation in light of "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. This doctrine has been restated in various forms by subsequent cases, including Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) [hereinafter cited as *Holt I*], *on rehearing*, 309 F. Supp. 362 (E.D. Ark. 1970) [hereinafter cited as *Holt II*], *aff'd*, 442 F.2d 304 (8th Cir. 1971), which said: "the concept of cruel and unusual punishment is a flexible and expanding one . . . ." 300 F. Supp. at 827.

77. 408 U.S. 238 (1972).

78. Mr. Justice Marshall noted that:

> [A] penalty that was permissible at one time . . . is not necessarily permissible today. . . .
>
> The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. . . .
>
> . . . [U]nless a very recent decision existed, *stare decisis* would bow to

habilitation, a court would thus be free to transcend the lowest common denominator of public opinion.

This view obviously gives courts extreme latitude. The Supreme Court of California took precisely this approach and disregarded stare decisis in holding the death penalty unconstitutional.[79] That court also discounted several commonly accepted indices of public opinion, such as polls, legislative enactments, and appellate decisions.[80] According to the court, these factors do not demonstrate public acceptance of the death penalty. This approach (independent judgment in light of conventional wisdom) allows a court to apply its own legal judgment to contemporary social values and to use its own methods to determine those values.[81] Even without such an extreme approach, the clause is highly maleable because of its inconsistent history. The very vagueness of its standards makes the clause exceptionally open to "judicial legislation." Since the courts have only recently made extensive use of the clause, they have developed few criteria for interpreting its broad language. Alternatively, because the clause's extreme flexibility makes it suitable for innovation, courts may

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changing values, and the question of the constitutionality of capital punishment . . . would remain open.

Id. at 329-30.

Other opinions in *Furman* resemble Justice Marshall's in their focus on changing values. Mr. Justice Brennan referred to statistics indicating that public acceptance of the death penalty had decreased. *Id.* at 295-300.

79. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied,* 406 U.S. 958 (1972).

80. The court stated:

> Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it even-handedly applied to a substantial proportion of the persons potentially subject to execution. Although the death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency. . . .
>
> What our society does in actuality belies what it says with regard to its acceptance of capital punishment.

Id. at 648-49, 493 P.2d at 894, 100 Cal. Rptr. at 166.

81. This position contrasts with the more conventional view of Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied,* 405 U.S. 978 (1972) which looked to historic usage, practices of other jurisdictions, and present public opinion to determine whether a punishment violated the standards of a civilized society. *Id.* at 191.

view it as a carte blanche and use it with great caution. The courts can create some order, however, by building on the clause's recently increased application to conditions of confinement, particularly those challenges to over-all conditions in local jails. These cases have considered lack of rehabilitation as one factor comprising cruel and unusual punishment, although no decision has rested squarely on this question.[82]

A few courts have applied the clause more directly. In *Holt II*,[83] the plaintiffs alleged that there were atrocities throughout the Arkansas penal system—*e.g.*, assaults, corrupt inmate trusty guards, bad physical conditions, and lack of rehabilitation programs. The court ordered the state to correct these deficiencies, holding that confinement under these conditions is cruel and unusual punishment.[84] Despite its boldness, however, *Holt II* still limited itself to the physical conditions of confinement. The court specifically stated that the mere lack of rehabilitative programs does not constitute cruel and unusual punishment. Lack of rehabilitative programs was one mark against the prisons, however, and encouraged the court to conclude that such punishment was cruel and unusual.[85] The decision noted: "This court knows that a sociological theory or idea may ripen into constitutional law;

82. Some recent cases include Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972), which found that pre-trial detainees are subjected to cruel and unusual punishment when they are held in filthy solitary confinement with no exercise or rehabilitation. Hamilton v. Schirro, 338 F. Supp. 1016 (E.D. La. 1970), *ordered sub. nom.* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1973) found that crowding, assaults, bad food, and the like made confinement in a Louisiana prison cruel and unusual punishment. Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) was a similar case dealing with pre-trial detainees in Arkansas. In Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971), however, the court did not find cruel and unusual punishment in the case of similar complaints about New York City's "Tombs." The court said that conditions were not so outrageous as in other cases, and the administration was working diligently to remedy the situation. McLamore v. State, 257 S.C. 413, 186 S.E.2d 250 (1972) raised the issue of rehabilitation and cruel and unusual punishment, but the court focused on equal protection, and merely concluded that there was "no constitutional duty" to provide rehabilitation.

83. 309 F. Supp. at 379. The court stated that:

> 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.

84. *Id.* at 385.

85. The court observed that:

> The absence of an affirmative program of training and rehabilitation may

many . . . have done so. . . ."[86] Other courts have also indicated that confinement without rehabilitation is constitutionally invalid.

In *Newman v. Alabama*[87] the court held the whole Alabama prison system unconstitutional, on the ground, primarily, that it provided inadequate medical and psychiatric care. The court stressed the fact that more than half the prison population was in serious need of psychiatric treatment, and came close to the proposition that all prisoners have a right to mental health care.[88] Indeed, the court felt it "tautological that such [lack of] care is constitutionally inadequate,"[89] and in its decree specifically ordered the prison system to hire a psychiatric staff.[90]

The eighth amendment can support a right to rehabilitation in several ways. First, the courts might decide that evolving standards of society now require that right, as evidenced by the consensus of penal experts in favor of rehabilitation and the trend toward increased rights in all areas of prisoners' lives.[91] This argument certainly would arouse caution in the courts, since it requires broad judgments about society's values. But even if the courts relied on a narrower rationale, this approach would support the basic thrust of their decision.

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have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation.

Id.

86. *Id.* On appeal, one judge maintained that the court should keep jurisdiction over the penal system until it provided rehabilitation programs. 442 F.2d at 310 (Lay J., concurring). And in Jones v. Wittenberg, 330 F. Supp. 707, 717 (N.D. Ohio 1971), *aff'd sub. nom.*, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), the court held that a county jail could correct constitutional deficiencies only by including work or study release programs.

The most direct statement regarding rehabilitation and cruel and unusual punishment came in a concurring opinion of the court of appeals in Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971). The judge explained that no prison which lacked rehabilitation programs, however modern or well-staffed, could avoid the degradation of its inmates which constitutes cruel and unusual punishment. Citing the district court's opinion, the judge said: "Until immediate and continued emphasis is given to an affirmative program of rehabilitation the district court should retain jurisdiction." *Id.* at 310.

87. 349 F. Supp. 278 (M.D. Ala. 1972).

88. *Id.* at 284-86.

89. *Id.* at 284.

90. *Id.* at 286.

91. Several justices in Furman v. Georgia, 408 U.S. 238 (1972), took a similar route when they presented evidence of increased public opinion which favored the application of the eighth amendment to the death penalty. *E.g.*, *id.* at 305 (Brennan, J., concurring).

Second, the courts might hold that lack of rehabilitation is cruel and unusual because it combines with other prison conditions to militate against reform. Most prisons would be vulnerable to this argument since they are underfunded, antiquated, and overcrowded.[92] Where a government lacks the funds for entirely new facilities, courts may accept less expensive rehabilitation programs as a cure for the constitutional infirmity.

In a third and broader argument, the courts might conclude that even relatively well-run prisons prevent reform unless they include extensive rehabilitation programs. Judge Lay noted recently that "[i]mprisonment in buildings of newly laid brick with the most rigid security will not alleviate the depravity and criminality which are fostered by the Arkansas prison system."[93] An extension of this reasoning would lead to the conclusion that incarceration is counter-productive, with or without rehabilitation programs. Prettyman found that the Patuxent Institution has had little success in combating recidivism, despite its effort at rehabilitation.[94]

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92. In Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) the court observed:

> Too many prisoners serve their allotted time and are released into society with the same predisposition to anti-social conduct as they had before their arrests. In all too many instances, imprisonment serves the converse of the rehabilitative purpose, converting good prospects for rehabilitation into hardened criminals.

Id. at 1158

Possibly the most striking evidence of prison's negative effect is found in a study of recidivism among prisoners released from Florida's prisons following Gideon v. Wainwright, 372 U.S. 335 (1963). That case declared the right of indigent defendants in a state criminal prosecution to have counsel. Rather than retry all those prisoners who had been convicted without counsel, the state simply released them. The study found that their recidivism rate was only one-half that of the other prisoners who served their full sentences. *See* Singer, *supra* note 63, at 84-85.

93. Holt v. Sarver, 442 F.2d 304, 310 (8th Cir. 1971), *noted in* 36 MO. L. REV. 576 (1971). Without meaningful working and learning situations, boredom and a sense of futility might cause an otherwise adequate program to break down. Increased tension, for instance, might lead to assaults.

Plaintiffs in Campbell v. McGruder, Civ. No. 1462-71 (D.D.C., filed *sub nom.* Campbell v. Rodgers, July 22, 1971), a currently pending suit seeking sweeping improvements in the District of Columbia jail, make a similar argument, citing various behavioral studies which demonstrate the detrimental effects of prolonged confinement. *Cf.* 1 PRISON L. REP. 60, 62 (1971). Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied,* 405 U.S. 978 (1972) also used this argument regarding the effects of continued solitary confinement, citing psychiatric evidence of the damage caused by long-term confinement without outside stimulation.

94. *See* Prettyman, *The Indeterminate Sentence and the Right to Treatment,* 11 AM. CRIM. L. REV. 7 (1972).

A fourth approach to determining whether a punishment is cruel and unusual focuses on the question whether the punishment serves any valid correctional purpose. If rehabilitation were viewed as the basic penal goal—or, at least one of several such goals—then a punishment would be cruel and unusual unless it substantially furthered rehabilitation.[95]

Finally, Justice Brennan set up a number of sub-tests in *Furman v. Georgia* to determine whether a punishment is "degrading to the dignity of man."[96] He maintained that although a punishment may not be clearly unconstitutional under any one test, a marginal score on all tests could make it cruel and unusual.[97] Thus, lack of rehabilitation might violate the eighth amendment by virtue of its questionable value under all previously mentioned tests.

D. *The Fulfillment of Judicial Responsibility*

The courts can also base a right to rehabilitation on their power to assure that their sentences are carried out.[98] In *United States v. Alsbrook*[99] the United States District Court for the District of Columbia intervened in the operation of a youth center on the ground that its general article III judicial powers extended to the correctional process. The court also found statutory support for its jurisdiction and rejected lack of funds as a defense.[100]

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95. Cases on other aspects of prison life may be relevant to this argument. Morales v. Schmidt states that the constitutionality of prison restrictions depends on whether the restriction bears a rational relationship to a justifiable purpose of the state. 489 F.2d at 1343. If rehabilitation were to be viewed as the only justifiable purpose of imprisonment, then incarceration without rehabilitation might be regarded as an eighth amendment violation. In Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971), a prisoner sought an injunction against prison officials for restricting his right to practice his religious beliefs. The *Brown* court stated that "devotion to one's religious beliefs . . . . make[s] one a more ethical, intelligent, useful member of society," *id.* at 1230, and that "[o]ne of the principal purposes of incarceration is rehabilitation and rehabilitation is a moral and intellectual process." *Id.*

96. 408 U.S. at 271-81. Justice Brennan characterized the present death penalty as an "unnecessary infliction of suffering." *Id.* at 281. *See also* Trop v. Dulles, 356 U.S. at 101; Weems v. United States, 217 U.S. at 366.

97. 408 U.S. at 282.

98. *See* Spaeth, *The Courts' Responsibility for Prison Reform*, 16 VILL. L. REV. 1031 (1971).

99. 336 F. Supp. 973 (D.D.C. 1971).

100. *Id.* at 980. The court noted:

> [A]s an Article III Court under the Constitution, this court is vested with the "judicial power of the United States." This is a grant of inherent authority to direct action which is found essential to the continued effec-

In *Commonwealth ex rel. Carroll v. Tate,*[101] the somewhat unusual plaintiffs were judges of the Philadelphia Court of Common Pleas. They sought mandamus to compel the city council to appropriate more money for the city's jails. The Superior Court awarded almost two and one-half million dollars.[102] The Pennsylvania Supreme Court affirmed, saying that as a co-equal branch of government the judiciary can protect its ability to fulfill its basic responsibility—"the efficient and expeditious administration of Justice."[103] The court held that the threshold question was whether the funds were "reasonably necessary,"[104] but once that was shown, even Philadelphia's serious financial problems could not excuse the legislature from providing the funds.[105] This approach resembles *Wyatt's* warning that mental patients have a greater claim on state funds than do public works projects.[106]

Both cases arguably differ in some respects from ordinary prison situations. *Alsbrook* may be distinguished on the ground that it dealt with youthful offenders rather than adult criminals; the court was particularly concerned with youthful offenders because the statutory framework stressed the court's *parens patriae* role in their rehabilitation. *Carroll* may be distinguishable on the ground that many inmates were pre-trial detainees rather than convicts. Since they were still in the trial process, the court might have had a greater interest in their rights than those of convicts. Courts are usually more solicitous of pre-trial detainees since they have not yet been convicted and are not yet being punished.

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tive functioning of the Federal Courts. The Court's supervisory powers must be exercised to this end. Unless adequate facilities are made available, the court's role in sentencing becomes merely advisory and it loses the "judicial power" to enforce its orders to commitment under the Act.

Id.

101. 442 Pa. 45, 274 A.2d 193, *cert. denied,* 402 U.S. 974 (1971).

102. *Id.* at 50, 274 A.2d at 196.

103. *Id.* at 53, 274 A.2d at 197. The court noted that

the power to tax involves the power to destroy . . . . A legislature has the power of life and death over all the Courts and over the entire Judicial system. Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated and the Legislature could make a mockery of our form of Government with its three co-equal branches . . . .

Id. at 57, 274 A.2d at 199.

104. *Id.* at 54, 274 A.2d at 198.

105. *Id.* at 56, 274 A.2d at 199.

106. 344 F. Supp. at 377.

Nonetheless, both cases should apply to convicted adult prisoners. The *Alsbrook* court's constitutional power to supervise its sentences is equally applicable to adult convicts. And the Pennsylvania Supreme Court's reference to the "administration of justice" apparently included convicts as well as pre-trial detainees; the Philadelphia jails contain convicts, and the opinion did not distinguish between the two groups.

Thus, if a court determined rehabilitation to be a mandatory correctional goal, rehabilitation would become a basic sentencing goal. A prison's failure to supply rehabilitation would then violate the court's sentencing order as much as does a premature release today.[107] This theory would not be available, however, to courts which clearly lack supervisory power over particular prisons, so that a federal court could not intervene in a state prison.

More important, courts might shun a theory which allows any branch of government to demand "reasonably necessary" funds, fearing it will claim vast sums for whatever it deems "reasonably necessary."[108] This extension would represent a very substantial and unlikely broadening, however, of the sentencing power theory. In any case, a carefully constructed concept of "reasonable necessity" could avoid most such problems.

III. REHABILITATION—THE REMEDY

A. *Policy Problems*

Courts have been slow to recognize prisoners' rights, partially because of a reluctance to infringe on the prerogatives of prison officials. For years courts deferred to administrators in the deter-

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107. State *ex rel.* Murphy v. Superior Court, 30 Ariz. 332, 246 P. 1033 (1926) held a jailor in contempt of court for violation of the sentencing order because he released a prisoner before the sentence expired. See Ridgway v. Superior Court of Yavapai County, 74 Ariz. 117, 245 P.2d 268 (1952).

108. Perhaps San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973), forecloses such a possibility of suits by the executive seeking funds for many broad services provided by the government. Possibly, then, for many municipal services, the executive would have to show extreme conditions before its inability to provide the services reached constitutional dimensions.

Also relevant is Dandridge v. Williams, 397 U.S. 471, 487 (1970), which noted that

> the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

While this statement affirms the power of the other branches vis-a-vis the courts, it also shows that individuals do not have an unqualified right to such services. This

mination of the measures necessary for prison management and effective rehabilitation. The theory was that the administrators, not the courts, were experts in the field.

Judge Bazelon recently pointed out, however, that courts review highly technical determinations by other agencies, such as the Interstate Commerce Commission, even though courts also lack specific expertise in these areas.[109] If courts can function with such esoteric agencies, presumably they can do the same with prisons. Judge Bazelon's approach has prevailed in recent prisoners' rights cases. Courts no longer accept at face value administrators' pleas of "convenience," "security," and "rehabilitative necessity" to justify virtually any prison regulation.[110]

It might be argued that courts cannot set standards for rehabilitation, since to do so involves judgments on every phase of prison life, such as physical and psychological environment, proper educational programs, psychological counseling, and vocational rehabilitation. Still broader questions arise as to whether these programs can be carried out in prison at all, or whether new community-based detention facilities are required. In recent years, however, the courts have proved to be quite competent in handling problems of similar complexity. After all, in *Brown v. Board of Education*[111] the Supreme Court undertook part of the task of liberating Black people from a centuries-long badge of slavery. In doing so, the Court gave great discretion to the federal district courts in fashioning practical remedies.[112]

Aside from the question of determining standards, the most difficult hurdle for the courts is the enforcement of the right to rehabilitation. Courts well know the difficulties in obtaining funds for broad prison overhaul; they are understandably reluctant to

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limitation further differentiates the possible demands of the executive branch. While both branches could base their demands on their inherent right to fulfill their basic functions, the courts would have the added aspect of acting to implement services, e.g., rehabilitation, to which individual citizens have an unqualified right.

109. Bazelon, *Implementing the Right to Treatment,* 36 U. CHI. L. REV. 742, 743 (1969).

110. *But cf.* Procunier v. Martinez, 416 U.S. 396 (1974):

> [T]he problems of prisons in America are complex . . . Most require expertise, comprehensive planning, and the commitment of resources . . . For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.

Id. at 404-05 (footnote omitted).

111. 347 U.S. 483 (1954), *aff'd on rehearing,* 349 U.S. 294 (1955).

112. 349 U.S. at 299-301.

provoke full-scale confrontation with co-equal or even inferior branches of government. Moreover, the courts are wary of becoming mired in making extensive and detailed changes in prisons because of the extremely complex relationships between administrators, guards, inmates, and the public. The courts have been willing to clash with federal, state, and local governments, however, on basic issues such as voting and civil rights.[113] Moreover, in these battles courts have wielded a powerful and diverse array of weapons. They have hardly been reluctant to intervene in complex administrative structures. As will be noted later, a court can reduce its need for expertise as well as the possibility of confrontation by casting upon prison systems the burden of formulating specific rehabilitation plans.[114]

Neither of these problems, however, is insurmountable. Several cases have already dealt with problems similar to those a court would face in enforcing a right to rehabilitation. An analysis of them will show the practicalities of the situation.

B. *Judicial Responses*

In *Rouse v. Cameron*[115] the District of Columbia Circuit formulated broad guidelines for an adequate treatment program. The court did not require the hospital to show that its program would actually cure or improve the patient, "but only that there [was] a bona fide effort to do so. . . ."[116] The hospital had to provide "treatment which is adequate in light of present knowledge."[117]

The court was aware that no clear definition of adequate treatment exists. It still felt that it could render a reasoned decision based on the best available information.[118] The court indicated that an adequate treatment program must consider each patient's needs and review them periodically. The court also suggested

113. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
114. *See* pp. 300-02 *infra*.
115. 373 F.2d 451.
116. *Id.* at 456.
117. *Id.*
118. The court noted that:

> It has been said that "the only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." But lack of finality cannot relieve the court of its duty to render an informed decision. Counsel for the patient and the government can be helpful in presenting pertinent data concerning standards for mental care, and . . . the court may appoint independent experts. Assistance might be obtained from such sources as

creation "of permanent or rotating panels of experts" to advise on treatment standards.[119]

Wyatt v. Stickney[120] implemented many of the *Rouse* guidelines. The *Wyatt* court stated that involuntarily committed mental patients "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. . . ."[121] The court gave the institution six months to reach minimum constitutional treatment standards. The institution was to propose minimum treatment standards and to report its progress in implementing those standards.[122]

After the hospital filed its report six months later, it was found that the institution had failed to remedy the constitutional defects.[123] The court found a number of "dehumanizing conditions," such as lack of privacy, overcrowding, and fire hazards. The ratio of qualified staff to patients was so low that the court found effective treatment to be impossible. After criticizing the lack of individual treatment plans for each patient, it held a hearing for the parties and numerous amici curiae to propose treatment standards and present expert testimony.[124] As a result of the hearing the court adopted detailed minimum standards.[125]

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the American Psychiatric Association, which has published standards and is continually engaged in studying the problems of mental care. . . .

Id. at 457, *quoting* Greenwood v. United States, 350 U.S. 366, 375 (1956) (footnotes omitted).

119. 373 F.2d at 457 n.35.

120. 325 F. Supp. 781 (M.D. Ala. 1971).

121. *Id.* at 784.

122. *Id.* at 785-86.

123. Wyatt v. Stickney, 334 F. Supp. 1341, 1344 (M.D. Ala. 1971).

124. 344 F. Supp. 373 (M.D. Ala. 1972). The amici included the United States, the American Ortho-psychiatric Association, the American Civil Liberties Union, and the American Association on Mental Deficiency.

125. 344 F. Supp. 387, 391-92, 395-407.

Under the heading of *Humane Psychological and Physical Environment,* the court enumerated a number of rights. These included: liberal visitation and telephone rights, unrestricted rights to visit with attorneys and private mental health professionals, and unrestricted correspondence rights with attorneys, private physicians, courts, and government officials. The court defined standards and procedures for administration of medication as well as for the imposition of physical restraint and isolation. *Id.* at 399-402. The court forbade the employment of drastic treatment measures or the use of patients as subjects for experiments without the prior meaningful consent of the patient or his representative. Patients were also to receive adequate care for any physical ailments. *Id.*

Regarding the institutions' physical plants, the court required that they be designed to afford patients with comfort and safety, promote dignity, and ensure privacy. The facilities were required to be designed to make a positive contribution

The court's initial order and threat of further action apparently had a strong positive impact on the hospital. Later, in a memorandum to the court,[126] the amici curiae noted a number of improvements. They reported that new officials had shown a strong desire to upgrade the hospitals[127] and that the new management's high caliber would attract other qualified personnel.[128] Perhaps most significantly, it noted that a marked decrease in patients accompanied a sharp increase in staff.[129]

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to the efficient attainment of the treatment goals of the hospital. The court established the kind and numbers of staff which must be provided, and required the hospital to provide on-going training for non-professional staff. It provided for the examinations of all new patients and set up detailed requirements for individualized treatment plans for each patient. *Id.* at 404-06.

The court created a human rights committee for each of the three defendant facilities. *Id.* at 394. These standing committees were in effect ombudsmen for the operation of the hospitals, and a source of relief for patients who felt that their rights were being infringed. Periodic reports to the court by the committees have been a primary source of information for the court, plaintiffs, and amici, and thus have greatly increased the hospitals' accountability.

The court rejected the plaintiffs' motion for an injunction against further commitments to the institutions until the institutions provided adequate treatment. But the court retained jurisdiction and required another six months' progress report. *Id.* It made clear that plaintiffs' requests for further relief might still be implemented. The court specifically stated that it would appoint a master if the hospitals did not comply with the order, and it strongly implied that other measures might be taken as well. *Id.* at 393.

126. Memorandum In Support Of Motion To Require Defendants To File Further Reports Of Compliance With This Court's Order Of April 13, 1972, at 2, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

127.

> [T]he new management team, led by Commissioner Aderholt, appears anxious to comply with the standards at an early date. . . . [T]he morale has improved. The Searcy Committee has stated that the court's Order "has triggered exciting improvements throughout the entire hospital and has initiated an esprit de corps that is stimulating the entire institution toward achieving the goals."

Id. at 4.

128. According to the memorandum, "salary scales have been increased by 15%." *Id.* at 3.

129. The memorandum noted, however, that defendants still had a long way to go before reaching complete compliance. *Id.* at 2. In general, the amici found that the broad improvements which had been made were still incomplete and concrete steps were still needed actually to deliver adequate treatment to the patients. They cited as the most pressing issue the fact that many patients were hospitalized who should not have been. *Id.* at 5.

> On the other hand, Dr. Roos stated that there were serious problems remaining: 1) "the physical plant is generally inept and ill-suited to implementation of current concepts of training and education"; 2) there is serious overcrowding; 3) there is still an "alarming dearth of training and developmental programming" in spite of greatly improved staffing; 4) dehumanizing practices are still prevalent, especially in wards housing the severely and

If courts can deal with the complexities of institutions for the mentally ill and retarded, presumably they can deal with prisons. Indeed, *Holt II*[130] followed the *Wyatt* approach in holding that the entire Arkansas penal system constituted cruel and unusual punishment. The *Holt* court ordered the prison to produce plans for implementing the court's guidelines, while it retained jurisdiction and ordered periodic progress reports.[131]

Because of the similarities between *Wyatt's* institutions and those of *Holt*, *Wyatt's* methods of determining and enforcing standards could be instrumental in implementing a right to rehabilitation. A court could adopt almost *in toto Wyatt's* method of setting standards for the medical and psychiatric aspects of prison rehabilitation. Courts could use similar expert testimony to determine standards for physical conditions, psychological environment, and educational as well as occupational programs.[132] The *Holt* court in fact used just such reports and expert testimony.

As for enforcement of the right to rehabilitation, *Wyatt* and the *Holt* cases indicate that courts can influence prison administrators significantly. Publicity and the threat of further sanctions seem to be potent factors.[133] After *Holt II*,[134] the Arkansas legis-

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profoundly retarded individuals; 5) "the proposed unitization now underway is questionable", and 6) "no long-range plan or specific objectives for Partlow could be isolated" in spite of the overall state plan which embodies many of the contemporary trends in mental retardation.

Id. at 5 (unnumbered footnote).

130. 309 F. Supp. 362.

131. *Id.* at 385.

132. Many relevant organizations, so far as expert testimony is concerned, are listed in the COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS, published jointly in 1972 by the American Bar Association Commission of Correctional Facilities and Services and the Council of State Governments. The Compendium contains contributions from: Advisory Commission on Intergovernment Relations; American Bar Association Project on Standards for Criminal Justice; Correctional Association (whose standards were adopted by the court in Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) as minimum standards for confinement in isolation cells); American Law Institute; National Advisory Commission on Criminal Justice Standards and Goals; National Conference of Commissioners on Uniform State Laws; National Council on Crime and Delinquency; National Institute of Law Enforcement and Criminal Justice; National Sheriff's Association; and the ABA Resource Center on Correctional Law and Legal Service.

133. Sympathetic prison officials can point to the threat of sanctions to buttress their requests to legislatures for more money. There should also be considerable publicity value when, for instance, it is found that more money is spent by the state on beauty pageants and football stadiums than on prisons. *See* Drake, *Enforcing the Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587, 607-09 & n.79 (1972).

134. 309 F. Supp. 362.

lature convened an extraordinary session and appropriated an additional four million dollars for the correctional system.[135] Similarly, an analogue of the human rights committee in *Wyatt*[136] could report to the court and evaluate progress. For example, in *Campbell v. McGruder*[137] the court appointed the District of Columbia Public Defender as counsel for any inmate who complained about jail conditions. The Public Defender has acted as a type of ombudsman, working out the problems of individual inmates. In combination with the court's requirement that plaintiffs' expert witnesses have free access to jail, this system has greatly increased the visibility of the jail's internal workings and has led to several contempt proceedings against jail personnel for violation of the court's preliminary injunction and orders.[138]

Wyatt's threat to take "other measures" shows that courts can restructure prisons as well as hospitals. For instance, the court considered ordering the state to sell non-productive land to finance the reforms.[139] A court simply might appoint overseers to guide prison operations, much like the master which the *Wyatt* court threatened to appoint.[140]

Jones v. Wittenberg[141] illustrates how courts can develop and enforce detailed standards for major prison reform.[142] The court found an Ohio jail outstandingly bad from every standpoint,[143] and ordered a hearing to determine remedies for the situation. After

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135. 36 MO. L. REV. 576, 584 (1971).

136. 325 F. Supp. 781, 783; note 125 *supra*.

137. Civil No. 1462-71 (D.D.C., filed *sub nom.* Campbell v. Rodgers, July 22, 1971). *See generally* 1 PRISON L. REP. 60 (1971).

138. *E.g.*, Landman v. Royster, 354 F. Supp. 1292 (E.D. Va. 1973).

In Hamilton v. Landrieu, 351 F. Supp. 549, 555 (E.D. La. 1972), the court stated that failure to comply with its orders to change and upgrade prison and prison life at Orleans Parish Prison might result in the institution of contempt proceedings against the defendants.

139. 344 F. Supp. at 393.

140. *Id.* at 392-93.

141. 330 F. Supp. 707 (N.D. Ohio 1971).

142. For example, in Garrison v. Hickman, Civil No. 2280 (W.D. Mo., filed June 7, 1972), the court ordered the county to propose regulations for mail privileges, inmate conduct, and minimum due process in disciplinary proceedings. The court also required defendants to submit minimum standards for clothing, health care, hygiene and exercise. Finally, the court enjoined the use of solitary confinement except for suicidal or otherwise self-destructive prisoners, and imposed specific procedural requirements for authorization of solitary. *See* 1 PRISON L. REP. 257, 258 (1972).

143. 323 F. Supp. at 95-99. Among conditions cited by the court were broken down and unsanitary plumbing, overcrowding, insufficient number of guards, unsanitary

the hearing five months later, the court laid down specific steps for the defendants.[144]

The court first addressed the problem of financing necessary improvements. It conceded that the legislature controlled taxation and that the courts could not order it to raise money, but decided that it could order the Sheriff to redistribute funds already allocated to him. The court thus ordered the defendants to transfer funds currently spent on police services for county areas which already had local police protection.[145] The court required the defendants to formulate specific plans, with estimates of the cost, time, and personnel required for implementation. These plans were required to meet the court's detailed specifications in a wide variety of areas.

Most significantly, the court allowed only thirty days to develop a scheme for classifying prisoners according to their needs in many areas, such as crisis intervention, group or individual counseling, educational or vocational training, employment, and family needs.[146] Indeed, the court said that it would not accept a plan unless it included work or study release programs.[147]

The court followed the common practice in prison cases of allowing the defendants to propose their own plans. This technique obviously reduces the friction between a court and other governmental entities. Indeed, the federal courts have preferred this method in voting and civil rights cases.[148] In light of both practical politics and theoretical expertise, a court presumably would use a similar strategy in enforcing a right of rehabilitation.

Another federal court simply had inmates and officials negotiate their differences, and adopted the resulting standards of conduct in its decree.[149] A similar tactic is to recognize inmate

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and nutritionally deficient food, "primitive" health care facilities, and inadequate visitation rights. The court also found a total absence of "social services, exercise, recreation, reading, rehabilitation, or any other human resources to meet human needs." *Id.* at 97. Discipline was found to be arbitrarily administered and the usual method of punishment was confinement in something resembling a medieval dungeon.

144. 330 F. Supp. at 707.

145. *Id.* at 712-13. The court of appeals later found this to be a legitimate, carefully considered way of raising funds. 456 F.2d at 856.

146. 330 F. Supp. at 717.

147. *Id.*

148. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 586 (1964).

149. Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

unions in order to encourage inmates and officials to bargain collectively over working and living conditions.[150]

The courts have thus established a number of effective and precedential tactics for enforcing the rights of the treatment group and prisoners. By proceeding carefully, calling upon experts, and placing the burden of planning on prison administrators, the courts could establish a right to rehabilitation as well. Though the goal of rehabilitation is admittedly less than precise, it is no more vague than the concept of adequate treatment in hospital cases.

C. *Enforcement Procedures*

1. Contempt

Civil contempt may be of some value as an enforcement tool. *Landman v. Royster*[151] found prison officials in civil contempt for failure to implement procedural safeguards in disciplinary proceedings. The court found a continuing pattern of isolating prisoners without hearings either before or after confinement, in violation of a previous order. Giving defendants the benefit of every doubt, the court did not find that they willfully thwarted

150. So far, inmates in New York, Massachusetts and Delaware have applied for recognition as unions, and courts have at least allowed them to proceed. *See* 1 PRISON L. REP. 252 n.7, 313 (1972).

In one union case, Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972), the United States Court of Appeals for the Second Circuit affirmed the right of prisoners and attorneys to correspond by mail regarding their efforts to form an inmate union in Green Haven Prison. The court was receptive to the concept of inmate unions, saying:

> There is nothing in federal or state constitutional or statutory law of which I am aware that forbids prison inmates from seeking to form, or correctional officials from electing to deal with, an organization or agency or representative group of inmates concerned with prison conditions and inmates' grievances. . . .
>
> . . . .
>
> The formation of a prisoners' "union," even in its nonrhetorical sense, does not strike me as a proposal totally unacceptable to society. Indeed, unless positive steps are taken by "management"—the correctional authorities themselves—to meet legitimate grievances, radically to change a system that is at least one hundred years behind the times, and wholly to alter what Chief Justice Burger has referred to as the tendency "to regard all criminals as human rubbish," one may surmise that inmate "unions" or at least some form of collective inmate representation, are inevitable. Social progress may be slow in forthcoming, but . . . the history of organized labor in the United States, is not all that inept or far-fetched an analogy.

Id. at 1245-46 (footnotes omitted).

151. 354 F. Supp. 1292.

its order. It did hold them in civil contempt, however, which requires only failure to comply, regardless of good faith. Since it deemed imprisonment unnecessary for future compliance, the court imposed a $25,000 fine jointly and severally on all defendants. It suspended the fine, however, on the condition that they take all necessary steps to implement the order.[152]

In *Campbell v. McGruder*[153] the plaintiffs sought criminal contempt, which would have resulted in imprisonment, but they could not meet the necessary standard of proof. Criminal contempt will likely be of little use to prisoners since they find themselves on the defendant's own territory, and are thus at a great disadvantage in proving the administrators' intent beyond a doubt.[154]

2. Release

Several courts have threatened to release or transfer prisoners who were confined under unconstitutional conditions. In *Hamilton v. Love*[155] the court said:

> If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.[156]

Although *Hamilton* dealt with pre-trial detainees, its reasoning should apply to convicts as well.

Indeed, in *Hodge v. Dodd*[157] the court found that a jail violated the eighth amendment because it was a fire trap, cramped, and dirty. Since repair costs would have been prohibitive, the court assumed the administrators would build a new jail and ordered them to keep no more prisoners in the old jail. While

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152. *Id.* at 1301-02.

153. Civil No. 1462-71 (D.D.C., filed *sub nom.* Campbell v. Rodgers, July 22, 1971). *See also* 1 PRISON L. REP. 278, 279 (1972).

154. The potential of civil contempt was also shown in Theriault v. Carlson, 353 F. Supp. 1061 (N.D. Ga. 1973). There the district court found in civil contempt the director of the Federal Bureau of Prisons, the Bureau's head chaplain, and other officials, for their interference with inmates' practice of their religion— "The Church of the New Song." The court, saying it was no excuse that the defendants were acting on advice of counsel, decided, however, to defer punishment until the underlying issues in the case had been decided on appeal.

155. 328 F. Supp. 1182 (E.D. Ark. 1971).

156. *Id.* at 1194. This language was also quoted in Brenneman v. Madigan, 343 F. Supp. 128, 139 (N.D. Cal. 1972).

157. 1 PRISON L. REP. 263, 264 (1972).

administrators may assume that they can meet threats to close prisons by finding alternative facilities at some future time, the language of cases like *Hamilton*[158] indicates that some courts might release inmates if administrators do not promptly provide improved alternative facilities.

The remedy of habeas corpus and the result of the exclusionary evidence rule support the legitimacy of outright release. Both procedures often free convicts who appear to be dangerous. Nevertheless, the courts release them because enforcement of constitutional rights is more important than potential danger to the public. The issue of guilt or innocence is overshadowed by the state's duty to exercise its power lawfully.[159]

Further support for release comes from the chain gang cases. *Johnson v. Dye*[160] freed a chain gang prisoner who had been brutalized. Although the Supreme Court reversed per curiam,[161] at least one case has interpreted the Court's reason to be merely failure to exhaust state remedies, rather than any fundamental disagreement with release as a remedy.[162]

Although courts will doubtless try other enforcement techniques before resorting to release, the remedy is not without precedent. It finds support in strong dicta in several important prison and treatment cases.[163]

3. Damages

Finally, a number of prisoners have sought damages for their unconstitutional treatment.[164] But such actions do not appear to

158. 328 F. Supp. at 1194. *See also* Brenneman v. Madigan, 343 F. Supp. at 139.

159.

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But . . . "there is another consideration— the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of its own existence.

Mapp v. Ohio, 367 U.S. 643, 659 (1961) (citations and footnotes omitted). *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

160. 175 F.2d 250 (3d Cir. 1949).

161. 338 U.S. 864 (1949).

162. Johnson v. Matthews, 182 F.2d 677, 682 n.22 (D.C. Cir.), *cert. denied*, 340 U.S. 828 (1950).

163. *E.g.*, Rouse v. Cameron, 373 F.2d at 458-59; Hamilton v. Love, 328 F. Supp. at 1194.

164. *See* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

be a promising method of institutional reform. In suits for compensatory damages, each plaintiff must show actual damages. This requirement precludes any realistic possibility of a class action. While plaintiffs need not prove actual damages in order to obtain punitive damages,[165] they must demonstrate that officials displayed a clear pattern of intentional abuse, or at least a callous disregard for inmate safety.[166] Since prison conditions are poor even when administrators are conscientious, it would be exceedingly difficult for plaintiffs to meet so strict a standard. If they could, however, damage actions would be a highly effective remedy—especially if prison officials were not indemnified. The realistic possibility of paying large sums out of one's own pocket would probably have an immediate deterrent effect.

D. *Limits of Enforcement*

The converse side of a right to rehabilitation is that it might give convicts all the liabilities and none of the benefits of the treatment group. Convicts should not be burdened with the old treatment rationalization that courts will not scrutinize administrators' decisions closely since they are trying to "help" the patients. The courts must apply the due process rights of the treatment group, as well as all recently recognized prisoner's rights, to prisoners. Administrators must follow procedural safeguards in decisions strongly affecting prisoners' rehabilitation interests.[167]

There is also some danger that prisons will adopt the rehabilitation model only on a cosmetic level. This danger is shown all too clearly in the history of the Patuxent Institution. Despite the legislature's good intentions and strong financial support,[168] Patuxent has been criticized repeatedly as a prison with little effect on recidivism.[169] Some authorities question the possible efficacy of any rehabilitation-oriented prison.[170]

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165. Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir. 1965).

166. *See generally* Note, 44 S. CAL. L. REV. 1060, 1071-76 (1971).

167. In Paola v. Cupp, 11 Ore. App. 43, 500 P.2d 739 (1972) prisoners challenged their termination from a rehabilitation program as violative of their procedural rights. The court dismissed the action, finding legislative intent to exempt all actions by the Corrections Division relating to rehabilitation programs, including termination therefrom, from state procedural safeguards. *Id.* at 46-47, 500 P.2d at 740-41.

168. Tippett v. Maryland, 436 F.2d 1153, 1157 (4th Cir. 1971), cites the extraordinary state investment in Patuxent.

169. Prettyman, *supra* note 94, at 7-12.

170. *See* Singer, *supra* note 63.

A more serious danger, however, is that the correctional system might become an instrument of a "therapeutic state," in which prisoners would be made to conform simply so that they no longer upset society.[171] Without some standard of human dignity, rehabilitation will become brainwashing. Rehabilitation must be the kind defined by *Morales*—alteration of behavior by voluntary positive inducement rather than by infliction of sanctions.[172]

One method of avoiding the therapeutic state is to subject rehabilitation programs to the same hard scrutiny as other measures which limit inmates' freedom. At least one court has taken this kind of hard look at the related problem of a mental patient's right to refuse treatment because of religious beliefs. In *Winters v. Miller*[173] the court applied the compelling interest standard of the equal protection cases to the state's treatment of a patient over her religious objections. The court held that the right to refuse treatment on religious grounds applies to all patients, even those committed as mentally ill; only a separate finding of incompetence can defeat the individual's right to refuse.[174]

A broader right might rest upon the right to privacy recognized in *Griswold v. Connecticut*[175] and *Stanley v. Georgia*.[176] *Stanley* applied the right to privacy in terms more relevant to the right to refuse rehabilitation. In upholding the right of citizens to possess pornography, the Court said that a state may not premise legislation on the desirability of controlling a person's private thoughts.[177] Thus, a court could find privacy to be fundamental for

171. The dangers of the therapeutic state are illustrated by the experimentation done in California under a "progressive" statute which provided for development of treatment for criminals. Among the treatments administered was aversion therapy, which involved injection of a drug which left the inmate conscious, but completely paralyzed, each time he misbehaved. Even his ability to breathe was lost, so that artificial respirators had to be applied. While an inmate was in such a state, the "therapist" would repeat over and over that he ought not to do whatever he had done. Clearly this process and other "treatments" like lobotomy and electroshock present serious questions of cruel and unusual punishment which must not be avoided simply because they are styled as "treatment." Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972).

172. *See* 340 F. Supp. at 552-53.

173. 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

174. *Id.* at 71.

175. 381 U.S. 479 (1965) (marital privacy).

176. 394 U.S. 557 (1969).

177. *Id.* at 566.

inmates and prohibit unwanted "rehabilitative" intrusions into inmates' minds.

The cruel and unusual punishment clause also might bar drastic "therapeutic" intrusions on inmates' minds and bodies. Involuntary lobotomy, shock therapy, and aversion therapy may offend society's sense of human dignity. Moreover, procedural due process should give an inmate the opportunity to demonstrate that a particular rehabilitation plan would do him no good. The prison context presents a problem for any right to refuse, however, because of the difficulty in determining whether participation in rehabilitation programs is truly voluntary. If an inmate's only alternative to participation is idle confinement in inferior quarters or loss of parole opportunities because of lack of cooperation, then he is still forced into rehabilitation programs.

One crude safeguard against forced consent would be specific procedures to insure informed consent before subjecting inmates to any severe treatment. *Wyatt* required this consent before patients could participate in experiments, shock therapy, and other extreme measures.[178]

IV. Conclusion

This country cannot cure its crime problem solely through prison reform. Too many other factors contribute to crime; prison is only the last stop in a criminal justice process which comes into play only after much damage has been done. But while prison reform without social change would change little, social change would avail little without prison reform.

The possibility of either depends on how people feel about each other. The right of convicts to rehabilitation hinges on society's attitude toward nonconforming members. If we see their personality differences as an accusation of our own values, we will retaliate against them. If we separate their truly destructive acts from those that are merely threatening, however, we can eliminate simply the behavior rather than the whole person. The "radical" notion that social deviants are people has taken hold slowly in the law. It was this notion which allowed the courts in the treatment cases and *Morales* to accept the long-standing legal arguments for patients' and prisoners' rights.

178. 344 F. Supp. at 400-02.

Convicts need a healthy environment, safe from the threat of physical harm. They also need a humane atmosphere and meaningful activity which will not hinder their successful reintegration into society. But there is no consensus on how to reach these conditions.

One possible way is to have a right to rehabilitation which simply modifies the present prison format to include healthy as well as secure physical facilities, and educational, vocational, or psychological rehabilitation programs. The treatment cases provide precedent for such a right and indicate its efficacy. The mixed results of institutions like Patuxent, however, indicate that extensive development in that direction could leave society with an albatross of concrete and steel.

This situation might be avoided by a rigorous judicial application of the least restrictive alternative standard. Convicts would retain as many civil liberties as possible, and government efforts might take the flexible form of community-based services rather than large institutions.

The potential dangers of an openly declared right to rehabilitation—*i.e.*, the permanent commitment of massive resources to unproved rehabilitation techniques and the advent of the therapeutic state—makes the *Morales* equal protection theory a more rational alternative. It reflects the philosophy that convicts are citizens and entitled to the same rights as others, except when public protection absolutely demands otherwise. It does not raise the issue of limited civil rights, which is still too prevalent in prison and treatment contexts. *Morales* would also ensure a humane environment for convicts, and would put rehabilitation programs in their proper perspective by allowing convicts to participate voluntarily in a spectrum of programs substantially similar to those available to the public. The least drastic alternative test would prevent the needless development of massive and inflexible institutions.

Whatever its form, the right to rehabilitation means choosing action over inaction. Action can bring bad as well as good results. But so long as the potential good is far better than the status quo, and the bad is avoidable, society should not let possible failure determine its actions.

The evidence to date indicates that courts can implement a right to rehabilitation without creating either extreme chaos or a therapeutic state. If anything, the treatment and prisoners' rights cases may have had too little, rather than too great, an impact.