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DO CRIMINAL OFFENDERS HAVE A CONSTITUTIONAL RIGHT TO REHABILITATION?*

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I. THE RIGHTS MODEL OF REHABILITATION

Although the concept of rehabilitation[1] has profoundly shaped American sentencing and correctional policies, a constitutional right to rehabilitation remains unrecognized by the United States federal courts. In sharp contrast, a number of European nations include rehabilitation as a constitutional mandate.[2] Further, customary international law establishes a duty of rehabilitation as expressed, for example, in the 1955 United Nations Minimum Rules for the Treatment of Prisoners and the American Convention of Human Rights.[3]

The extraordinary diffusion in the United States of indetermi-

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[1] To avoid a complex terminological discussion, the word "rehabilitation," widely accepted in the Anglo-American literature, will be used as a synonym of reform, reentry, re-education, re-socialization, habilitation or socialization. It will also be used as the equivalent of reintegration, which is generally limited to the after-release and community-based efforts of readaptation into society.

[2] *See* COSTITUZIONE [COST.] art. 27 (Italy); CONSTITUCIÓN [CONST.] art. 25, 1 (Spain). *See also* Judgment of June 5, 1973, Bundesverfassungsgericht (W. Ger.), 35 Bundesverfassungsgericht [BVerfGE] 202. For an analysis of the Argentine Constitution, see E. ZAFFARONI, 1 TRATADO DE DERECHO PENAL 63-65 (1983); Rotman, *Dogmática y Política Criminal en la Interpretación del Articulo 51 del Código Penal*, REVISTA LA LEY (Buenos Aires) (1981); Rotman, *Resozialisierungstendenzen im argentinischen Strafgesetzuch*, 91 ZSTW 475-98 (1979).

[3] *See infra* section X, "Customary International Law." On the influence of the new social defense movement on the genesis of this law, see M. ANCEL, LA DÉFENSE SOCIALE NOUVELLE 98-106 & 259 (1981); Rotman, *La Politique du Traitement a la Lumière de la Troisième Edition de la Défense Sociale Nouvelle*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 573 n.3 (1983).

nate sentencing[4] and its associated parole system was the corollary of the wholesale acceptance of what Francis Allen called the rehabilitative ideal.[5] Yet, in this particular sentencing context, rehabilitation is often seen by critics as working against individual rights. In fact, a pretense of rehabilitation has often been used to protract incarceration unduly or to mask overly intrusive treatment methods, such as the administration of constitutionally-inadmissible drug therapies.[6] Although excessive penalties are not inherent in indeterminate sentencing and parole was originally conceived as a means of shortening the period of incarceration,[7] a misuse of the rehabilitative concept helped to produce the opposite result. Likewise, it was a travesty of rehabilitation that allowed the development of various intrusive behavior modification techniques to obtain compliance from particularly unruly inmates.[8]

The association of rehabilitation with policies opposed to individual freedoms is also evident in a series of judicial decisions that invoked a rehabilitative aim to justify the abridgement of the in-

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[4] In a broad sense, indeterminate sentencing refers to any sentence of confinement in which the actual term to be served is not known at the time of the judgment but will be subject, within a considerable range, to the later decision of a parole board or other sentencing authority. *See* Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29 (1972).

[5] F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981).

[6] *See* N. KITTRIE, THE RIGHT TO BE DIFFERENT 340-71 (1971); J. MITFORD, KIND AND USUAL PUNISHMENT 127-30 (1973).

[7] Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 303 (1974).

[8] In Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973), the court held that a program of aversive conditioning in the form of nauseating injections for minor infractions was cruel and unusual punishment. In Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973), aversive therapy consisting of the administration of a "breath-stopping" drug was said to raise serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes. Privacy was protected in Kaimowitz v. Dep't of Mental Health of Michigan, No. 73-19434-AW (Wayne County, Mich. Cir. Ct. 1973), which held unconstitutional psychosurgery on involuntarily detained persons. A major behavior modification program was the Special Treatment and Rehabilitation Training Program (START) established by the United States Bureau of Prisons at the federal hospital in Springfield, Missouri. START aimed to produce institutional adjustment of maladaptive prisoners from other federal prisons. Based on positive reinforcement, it excluded intrusive methods such as drugs, psychosurgery and aversive conditioning. The program was nevertheless discontinued because it included punitive procedures without the corresponding due process safeguards. *See* Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974). Another example, the therapeutic milieu established in the federal penitentiary at Marion, Illinois, was discontinued because of its coercive aspects and as the result of the inmates' resistance. *See* M. NIETZEL, CRIME AND ITS MODIFICATION 127-29 (1979); V. WILLIAMS, DICTIONARY OF AMERICAN PENOLOGY 63-65 (1979); Carlson, *Behavior Modification in the Federal Bureau of Prisons*, 1 NEW ENG. J. PRISON L. 155, 164-65 (1974); Rothman, *Behavior Modification in Total Institutions*, 5 HASTINGS CENTER REP. 17-24 (1974).

mates' basic rights. At the same time, a diametrically opposed view of rehabilitation has been used in prisoners' rights litigation to bolster the very rights curtailed by a repressive use of the concept. In several cases, for instance, the two competing meanings of rehabilitation sustained divergent opinions within the same United States Supreme Court decision. In *Wolff v. McDonnell*,[9] the majority opinion held that the application of due process safeguards, such as permitting confrontation and cross-examination, to the deprivation of "good time," would hinder rehabilitative goals. Conversely, the dissenting opinion concluded that greater procedural fairness enhances rehabilitation. In *Procunier v. Martinez*,[10] the majority justified a regulation authorizing prisoner mail censorship on the basis of the governmental interest in rehabilitation. Justice Marshall saw the regulation as thwarting a rehabilitative function—namely diminishing the crippling and "artificial increase of alienation"—by restricting communication with the outside world. On the one hand, the idea of rehabilitation is used to justify disciplinary goals and paternalistic state intervention, while on the other, it serves to advance basic prisoners' rights, such as due process and free speech in the mentioned cases, as well as health or religion in other decisions.[11] This confusing ambivalence of the rehabilitative concept must be clarified before analyzing the plausibility of a right to rehabilitation in the United States.

Two contradicting models of rehabilitation—one authoritarian and paternalistic in nature and the other humanistic and liberty-cen-

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9 Wolff v. McDonnell, 418 U.S. 539, 562 (1974)(Marshall, J., concurring in part and dissenting in part). The majority opinion considered that if disciplinary proceedings were to comply with constitutional requirements, it "would. . . make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution." *Id.* at 563. This reasoning expresses a coercive concept of rehabilitation opposed by Justice Marshall's opinion. Quoting Morrissey v. Brewer, 408 U.S. 471, 484 (1972), he underlined the negative effect on rehabilitation of the feelings of powerlessness and frustration resulting from arbitrariness. *Wolff*, 418 U.S. at 589 (Marshall, J., concurring in part and dissenting in part). A basic hurdle to rehabilitation is "the concept of a prisoner as a nonperson and the jailer as an absolute monarch." *Id.* at 597 (Marshall, J., concurring in part and dissenting in part).

10 Procunier v. Martinez, 416 U.S. 396, 413 (1974).

11 In Nicholson v. Choctaw County, Alabama, 498 F. Supp. 295 (S.D. Ala. 1980), rehabilitation was considered to reinforce the first amendment's arguments supporting the free exercise of religion. In Barnett v. Rogers, 410 F.2d 995, 1002 (D.C. Cir. 1969), religion was considered as subserving the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality. The right to health, protected in various decisions based on the totality of prison conditions, was specifically related to rehabilitation in Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977), and in Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), where a healthy habilitative environment was declared constitutionally mandated.

tered[12]—underlie the contradictory statements of the Supreme Court regarding the functions and significance of the rehabilitative goal. The first model is in fact a subtle version of the outdated repressive model of corrections. In this view correctional treatment is essentially a technical device to mold the personality of offenders and obtain their compliance with a predesigned pattern of thought and behavior. Such "rehabilitation" is easily downgraded to a mere instrument of institutional discipline and tends to resort to brainwashing methods incompatible with the individual's right to privacy.

The second model, which stems from an anthropocentric outlook, places no faith in individual transformation through subtly imposed paradigms. It assumes instead that significant change can result only from the individual's own insight and uses dialogue to encourage the process of self-discovery. This model does not rely on idealistic preaching to reintegrate offenders to a hostile society. Instead, humanistic rehabilitation offers inmates a sound and trustworthy opportunity to remake their lives. Thus, this model seeks to awaken in inmates a deep awareness of their relationships with the rest of society, resulting in a genuine sense of social responsibility.

The humanistic model of rehabilitation affirms the concept of prison inmates as possessors of rights. This legal status generates feelings of self-worth and trust in the legal system and favors the possibility of self-command and responsible action within society. This conception ultimately leads rehabilitative efforts toward the paradigm of the inmate as a full-fledged citizen.[13] The prisoners' legal status reinforces their eventual participation in the shaping and governing of society. Thus, prisoners' rights can be qualified, using Ely's terminology, as representation-reinforcing.[14] This continuum of rights culminates in the right to rehabilitation, which can

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12 Rotman, *Latest Trends in Crime Policy and Their Effect on Sentencing*, in PROCEEDINGS OF THE FIFTH INTERNATIONAL COLLOQUIUM OF THE INTERNATIONAL PENAL AND PENITENTIARY FOUNDATION 76 (1982). On the humanistic model of rehabilitation, see also Rotman, *L'Evolution de la Pensée Juridique sur le But de la Sanction Pénale*, in 2 ASPECTS NOUVEAUX DE LA PENSÉE JURIDIQUE 163-76 (Mélanges Ancel ed. 1975); Rotman, *Le Sense de l'Individualisation Judiciaire*, 2 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 437-44 (1977).

13 Conrad, *Reintegration: Practice in Search of Theory*, in REINTEGRATION OF THE OFFENDER INTO THE COMMUNITY 21 (1973).

14 Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978). In Ely's constitutional interpretation, the commitment to representative democracy, as opposed to a majoritarian republicanism, includes recognition of an exceptional class of positive rights. According to Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 669-85, these include rights to the indispensable means of effective participation in the institutional system itself. Basic education, for example, does not amount to participation in the sense that acts of voting do, but it is a prerequisite to achieving the guaranteed democratic representation.

be formulated as the right to an opportunity to return to society with an improved chance of being a useful citizen and of staying out of prison. This right requires not only education and therapy, but also a non-destructive prison environment and, when possible, less-restrictive alternatives to incarceration. The right to rehabilitation is consistent with the drive towards the full restoration of the civil and political rights of citizenship after release.[15]

The inclusion of rehabilitation in the sphere of individual rights does not necessarily exclude it as a goal of state penal policies. Such a right, however, requires a penal policy that maintains scrupulous respect for the dignity of prisoners and provides for the genuine fulfillment of their basic human needs, which go beyond mere physical survival. But even in the absence of such initiative from the state, a right to rehabilitation makes the performance of rehabilitative services legally enforceable, allowing the courts to intervene in the case of administrative reluctance.[16] According to Dworkin's distinction between rights and social goals,[17] the description of rehabilitation as a right implies granting the rehabilitative claim a "certain threshold weight against collective goals in general." This transforms such a right into a "political trump," creating an area of exception against state punitive policies. It therefore replaces purely vindictive justice with a constructive approach of social reintegration.

The denial of rehabilitation and the consequent lack of concern for the future life of the offender amounts to a passive and indifferent acceptance of the inevitable deterioration brought about by life in the institution. Imprisonment itself jeopardizes other rights different from those forfeited through the commission of a crime and the consequent criminal punishment. Moreover, a large majority of inmates are socially handicapped offenders who need basic support in the areas of education, job-training and fundamental social learning. Their social handicap is considerably aggravated by the stigma

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15 *See* J. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 23-30 (1983).

16 F. CULLEN & K. GILBERT, REAFFIRMING REHABILITATION 263 (1982). Cullen and Gilbert have proposed a state obligation to rehabilitate through administrative accountability and parole contracts. They also advocate the exercise of political and moral pressure. The fact that judicial intervention has vastly improved the quality of prison life, *see* Comment, *Confronting the Conditions of Confinement: An Expanded Role for the Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 389 (1977), does not preclude other forms of action to further humanistic rehabilitative policies. "Though courts and litigation will always remain vital [to the rights movement]," David J. Rothman "proposes to devote new attention to legislative and administrative concerns." Rothman, *Afterword*, in DOING GOOD 184 (1981).

17 R. DWORKIN, TAKING RIGHTS SERIOUSLY 92 (1980).

of a criminal record, requiring additional efforts from social agencies to support the arduous process of social reintegration.

Those basic human needs create the moral basis to institute a legal duty of the state to counteract the effects of disabling criminal punishment, particularly when applied to offenders with a flawed socialization process, and to establish a correlative right of the criminal offender to rehabilitation. This right demands from the state an affirmative care and a positive contribution to the welfare of the inmates, counteracting the harms of imprisonment. Rehabilitation in this sense means a state effort to prevent and neutralize the unwanted harmful side effects of its own punitive intervention[18] as well as to respond to the human challenge posed by the extremely socially-deprived offender.

II. Obstacles to a Right of Rehabilitation: The Principle of Less Eligibility and the "War Theory" of Crime

Earlier in the history of imprisonment, unnecessary pains and deprivations were deliberately added to incarceration. Such afflictive purpose permeated the various forms of "carcere duro" and "durissimo," the irons and chains, hard labor, and the publicly humiliating forms of penal servitude. The concern for specific deterrence—that is, the desire to make the experience of punishment dreadful—was even more important than the economic interest in exploiting the convict's labor. The underlying assumption that prison itself was insufficient punishment was mirrored in the forms of unproductive and punitive work represented by the tread mill, the crank and the shot-drill.[19]

The limitation of imprisonment to mere loss of liberty is a hallmark of modern civilized punishment. This stage is not reached simply by banning those primitive forms of additional punishment. To avoid the harmful effects of incarceration on the mental and so-

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[18] Besides the general depersonalizing impact of closed institutions described in E. Goffman, Asylums: Essays on the Social Situation of Mental Patients and Other Inmates 1-124 (1961), some specific side-effects of imprisonment demanding a counteracting action are the following: increased tendency to recidivism due to the creation of criminogenic inmates' social systems; victimization resulting from assaults or harassment by prisoners; various physical and psychological effects of prison stress; "gross deterioration and permanent scarring of . . . mental, emotional and behavioral integrity." *See* DeWolfe & DeWolfe, *Impact of Prison Conditions on the Mental Health of Inmates*, 1979 S. Ill. U.L.J. 479, 507. *See also* R. Johnson & H. Toch, The Pains of Imprisonment (1982). These effects are exacerbated with the current overcrowding of prisons. *See* Gaes, *The Effects of Overcrowding in Prison*, 6 Crime & Justice 95-146 (1985); *Our Crowded Prisons*, 478 The Annals AAPSS (Nat'l Inst. of Corrections ed. 1985); Edna McConnell Clark Foundation, Overcrowded Time (1982).

[19] G. Ives, A History of Penal Methods 188-94 (1970).

cial health of the inmate, some positive action towards rehabilitation is essential.

Such action, which includes improvements in prison conditions and in the economic opportunities of prisoners, encounters a serious obstacle in the principle of "less eligibility." Formulated by Bentham in 1791, this principle holds that "saving the regard due to life, health and bodily ease, the ordinary conditions of a convict doomed to punishment" shall not be made "more eligible than that of the poorest class of citizens in a state of innocence and liberty."[20] Bentham's consideration of life, health and bodily ease mitigates the extreme consequences of the principle of less eligibility. To apply the principle strictly would mean maintaining prison conditions less favorable than those found in the worst slums or, in extreme situations, to push prisoners to the limits of starvation.

In modern democratic societies, where freedom is the highest value, neither catastrophic social or economic conditions could make imprisonment attractive, however humane or civilized it might be, nor neutralize its intrinsic deterrent potential. Though a few derelicts may commit minor offenses to obtain jail shelter during the winter, it is highly unlikely that the rehabilitative prospectives of a correctional institution would diminish the deterrent effect of a long-term stay or motivate anyone to commit a felony. Even in times of crisis, the general population will derive the stimulus for life from a margin of personal freedom, which is denied to prisoners. To prevent their wholesale deterioration while institutionalized, inmates must be offered a substitute for freedom.[21]

Conversely, under dictatorships, where the population at large has already been considerably deprived of its freedom, there is a tendency to make the prisoner "feel his position by other means."[22] It is therefore not surprising that during the Eleventh International Penal and Penitentiary Congress, which met in Berlin in 1935, the delegation of a totalitarian Germany strongly adhered to the principle of less eligibility, demanding that the "prisoner's standard of life should not be superior to that of the poorest citizen."[23] In contrast, the English and Norwegian delegations stressed the abysmal differences between the lives of the free population and of those suffering the depressing effects of imprisonment, which made it "essential

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20 J. BENTHAM, PANOPTICON OR THE INSPECTION HOUSE: POSTCRIPT (part II) (1791).

21 H. MANNHEIM, THE DILEMMA OF PENAL REFORM 70 (1939).

22 *Id.* at 71.

23 PROCEEDINGS OF THE XITH INTERNATIONAL PENAL AND PENITENTIARY CONGRESS 135 (1937).

that a counterpoise should be found."[24] The English report emphasized that the privation of liberty itself is the greatest of evils, to which Mannheim added, on the basis of expert opinion, that the length of imprisonment is more dreaded than its harshness.[25] There is, of course, a common-sense relationship between a country's economy and its prison standards, but that does not condone an "artifically contrived" principle of less eligibility or, as Mannheim calls it, of "non superiority."[26]

The "intellectually and morally bankrupt"[27] principle of less eligibility still appeals to many and is connected with the resurgence of law and order policies. Correctional officers use it both as a moral justification for their contemptuous attitude towards inmates and as a strategy to control them. The concept also appeals to the popular imagination, especially when the mass media and politicians arouse feelings of fear and insecurity through exaggerated reports of the upsurge of violent crime. In the correctional field, as Sherman and Hawkins point out, "[t]he dangers and inequities of a policy that follows too closely the shifts in vox populi are obvious enough to scare us all."[28]

Rising crime rates and a one-sided concern for the victims of crime have often been invoked in an attempt to revamp past repressive models. A "war theory" of crime has been developed, whose ethic "conceives of the offender as an alien and in doing so induces a regression to primitive conceptions of penal justice."[29] In America, such attitudes influenced the unsuccessful penal policies of the last decade. Tough determinate sentencing provoked the rise of prison populations to the extreme of "severe overcrowding, diminished services and heightened potential for violence."[30]

Law and order policies since the mid-1960s have demanded security for the citizen at home, at the workplace and in the streets, an obviously legitimate objective. Such policies were flawed, however, in that they assumed that the failure of the criminal justice system was due to the expansion of rights and procedural safeguards for accused criminals. In fact, many social, demographic and economic factors contributed to the upturn in crime rates.[31] Another defect of

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24 H. MANNHEIM, *supra* note 21, at 68.

25 H. MANNHEIM, *supra* note 21, at 71.

26 H. MANNHEIM, *supra* note 21, at 70.

27 A. RUTHERFORD, PRISONS AND THE PROCESS OF JUSTICE 94 (1984).

28 M. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA 18 (1981).

29 F. ALLEN, *supra* note 5, at 38.

30 F. CULLEN & K. GILBERT, *supra* note 16, at 151; E. CURRIE, CONFRONTING CRIME 33 (1985).

31 On the impasse created by the failure of repressive policies combined with opposi-

these policies was the "legal superstition"[32] that a harsh execution of prison sentences would prevent the inmate from relapsing into crime. Yet the belief in education through rigor and severity has long been abandoned in the fields of animal training and child rearing.[33] Besides, there is no evidence that milder forms of imprisonment increase criminality.[34] In fact, it was precisely the ineffectiveness of the severe classical forms of imprisonment that inspired late nineteenth century reform efforts to mitigate their harshness. While harsh punishment had not been able to prevent an alarming increase of recidivism, the general belief in its effectiveness barred all true rehabilitative possibilities.

The law and order movement tends to ignore the lessons of the past. Even in the eighteenth century, Blackstone and Montesquieu indicated that the certainty of punishment is more important to deterrence than its severity. Likewise, Beccaria's famous essay demonstrated the overriding importance of the promptness, certainty and inexorability of punishment, and its proportion to the crime committed.[35] His utilitarian arguments were so convincing that they rendered obsolete most of the earlier scholarly science based on a belief in exemplary cruel punishment. Today's champions of increased punishment have far too easily brushed aside the insights of the Enlightment.

III. THE RELATIONSHIP BETWEEN THE PRINCIPLE "*NULLUM CRIMEN, NULLA POENA, SINE LEGE*" AND THE RIGHT TO REHABILITATION

To oppose a right to rehabilitation is to ignore the due process limitation to criminal sanctions embodied in the principle "*nullum crimen, nulla poena, sine lege*," inherited in substance from the Magna Carta,[36] first expressed in positive law in the post-Enlightment codification and applied today with few exceptions in all major legal systems of the world. This principle implies not only that conduct

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tion to a liberal crime policy that had never really been tried, see Rotman, *Latest Trends in Crime Policy*, *supra* note 12, at 75; E. CURRIE, *supra* note 30, at 12-20.

32 G. ARZT, DER RUF NACH RECHT UND ORDNUNG 64 (1976).

33 *Id.* at 65.

34 *Id.*

35 C. BECCARIA-BONESANA, AN ESSAY ON CRIME AND PUNISHMENTS 28-32, 47, 74-77 & 93-96 (rev. ed. 1953)(2d Am. ed. 1819).

36 The Magna Carta's provision had only a procedural significance, although accomplishing the same function. The formulation of the Latin rule with its full modern meaning is due to Anselm Feuerbach in the first edition of his Textbook on Criminal Law (1801). On the origins of the principle, see V. KREY, KEINE STRAFE OHNE GESETZ 37-47 (1983); E. ZAFFARONI, *supra* note 2, at 139. *See* H. BERMAN, LAW AND REVOLUTION (1983)(finding its origins in twelfth century eclessiastical law).

cannot be considered criminal unless defined as such by the law before the conduct occurs but also that no punishment beyond what was prescribed by the pre-existent law can be imposed. Although not expressly stated in the Constitution, this principle is embodied in the prohibition of ex-post facto laws and bills of attainder and in the fifth and fourteenth amendments.[37] "Just as there must be a declaration of the law's intention to make an act a crime, so its punishment must be promulgated through the same process."[38] The legislative duty to provide fair warning of punishable conduct extends, as an element of due process, to the nature and severity of the prescribed punishment. Due process of law is also violated when imprisonment includes punitive ingredients not specified by statute. This interpretation coincides with the principle established by a United States District Court in Florida that "the courts have the duty to protect prisoners from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by the court."[39]

According to the "*nullum crimen, nulla poena, sine lege*" principle, the only valid purpose of imprisonment is to punish according to the law, however tautological this statement may appear. The notion of legal punishment considerably limits the possibility of adding punitive elements, whatever their motivation, to incarceration. The deterrent function of criminal law must flow from the normative threat of punishment and may not be left to the discretion of administrative authority. When the legislators wanted to make imprisonment a particularly excruciating experience, they clearly expressed that intention through laws embodying the now largely abolished forms of hard labor or penal servitude. In this regard, the Select Committee of the House of Lords defined in 1863 the plight of the convicted as "hard labour, hard fare, and hard bed." In opposition to this idea of increasing punishment by adding extra suffering to imprisonment, later scholars proclaimed that "offenders are sent to prison as punishment, not for punishment."[40] This policy is mirrored in the international movement for the unification of prison sentences, which sought to abolish publicly humiliating and

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37 *See* Bassiouni, *The Sources and Limits of Criminal Law in the United States*, 3 & 4 REVUE INTERNATIONALE DE DROIT PÉNAL 301, 350 (1975).

38 *Id.* at 351.

39 Miller v. Carson, 401 F. Supp. 835, 864 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977). *See also* Barnes v. Virgin Islands, 415 F. Supp. 1218 (D.V.I. 1976).

40 Ancel, *L'abolition de la peine de mort et le problème de la peine de remplacement*, in Studies in Penology Dedicated to the Memory of Sir Lionel Fox 9 (M. Lopez-Rey & C. Germain eds. 1964)(quoting Alexander Paterson)(footnote omitted).

afflictive forms of imprisonment and to reduce imprisonment solely to loss of liberty. The question was first introduced during the International Penitentiary Congress of London and further debated in the next Congress which met at Stockholm in 1878.[41] In *Barnes v. Virgin Islands*,[42] the district court reflected the viewpoint of enlightened modern penology when it wrote that "a convicted person is not sent to a penal institution to receive additional punishment. . . the fact of incarceration is the punishment."[43]

The "*nulla poena, nullum crimen, sine lege*" principle has been invoked against an abusive notion of rehabilitation, which led to excessively discretionary sentencing practices.[44] Today this same principle can be used as a legal pillar to support a constitutional right to rehabilitation. If imprisonment itself is the punishment, the unchecked harmful effects of incarceration on the mental and social health of the inmate represent illegal additional punishment. Institutionalization in an alienating and depersonalizing environment, without opportunities to combat degeneration or foster positive human development, is a source of various harmful effects that play no part in the design of legal sanctions. The law threatens citizens with imprisonment as the consequence of criminal conduct; that is where the deterrent function of the legal norm should stop. The law expects the citizen to foresee the loss of liberty prescribed by statute but not the additional horrors of incarceration that are not intended by law. The only way to prevent or compensate for such unjustified deprivations is to carry out a positive program of rehabilitative action.

Rehabilitation does not oppose the measure of deterrence inherent in legal punishment. It strives only to maintain punishment within its legal limits, counteracting its unwarranted consequences. There is thus no basis for proposing deterrent policies as a novel substitute for rehabilitation, for deterrence has always been the essence of criminal law. A right to rehabilitation does not contradict the deterrent effect of criminal sanctions as long as they do not exceed the limits marked by the due process of law. Indeed, a basic function of rehabilitation is to prevent and counteract such abuses.

IV. Rehabilitation and the Purpose of Imprisonment

Traditionally, rehabilitation has been considered one of the

41 Bureau de la Commission Pénitentiaire Internationale, Le Congrès Pénitentiaire International de Stockholm 139-70 (1879).

42 415 F. Supp. 1218 (D.V.I. 1976).

43 *Id.* at 1224.

44 M. Frankel, Criminal Sentences 3 (1973).

purposes of imprisonment on the mistaken assumption that incarceration itself could be rehabilitative. This fallacy arose from a misapplication of the notion of monastic penance to the first penitentiaries. Isolation, which together with labor and prayer were basic ingredients of the monastic notion of penance, proved to have disastrous consequences on the inmates of the nineteenth century penitentiaries. However, the identification of imprisonment with rehabilitation survived this failure. This distortion contributed to the crisis of rehabilitative policies in the 1970s. But rehabilitation is still tied up with imprisonment in another sense: the harms of imprisonment demand a counteractive rehabilitative action. Accordingly, modern rehabilitation has become either a force counteractive to imprisonment or a constructive search for an alternative social reaction to crime. It attempts not only to transform the desocializing prison environment but also to replace, as far as possible, institutional confinement with noncustodial alternatives.

Although rehabilitation is not the purpose of imprisonment, it may well be a goal of corrections as a whole. In fact, rehabilitation is the overriding goal of a humanistic correctional system that seeks to minimize the harmful side-effects of state punitive intervention. In such a system, rehabilitation not only satisfies the social interest of enlightened crime prevention but also constitutes a right of the offender as a human being. Although prisons themselves constitute a major obstacle to rehabilitation, they also force any civilized society into rehabilitative undertakings. "Unless we return to a prison system where we lock people up, throw away the key, and slide gruel under the door, the prison will have to have a program."[45] A correctional system "without socialization offerings nor interest in treatment means, in fact, de-humanization and regression."[46]

Halleck and Witte deny that it is possible to create a benign prison environment without trying to rehabilitate offenders. To endure the restrictions of prison life without bitterness and aggressiveness, they explain, the offender must have hope and a sense of significance.[47] Correctional workers share this psychological need. In this context, Irwin emphasizes that dismantling the rehabilitative idea will hurt the morale of correctional officers by depriving them of a justifying philosophy that gives their work purpose and dig-

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45 R. CARLSON, THE DILEMMAS OF CORRECTIONS 105 (1976).

46 G. KAISER, *Resozialisierung und Zeitgeist*, in FESTSCHRIFT FÜR THOMAS WÜRTENBERGER 371 (1977).

47 Halleck & Witte, *Is Rehabilitation Dead?*, 23 CRIME & DELINQ. 372, 378 (1977).

nity.[48] In modern American mega-prisons, meaningful rehabilitative action to counteract the negative effects of imprisonment should be accompanied by action at the social and cultural levels to eradicate institutional violence, neutralize the action of organized gangs, avoid the formation of prison subcultures and overcome racial conflict.[49] Rehabilitation also requires a sentencing policy that relieves the present inhuman overcrowding of prisons.

V. THE RIGHTS MODEL AND THE RELEVANCE OF REHABILITATIVE EFFECTIVENESS

Recent criticisms of rehabilitative programs have focused on their alleged ineffectivenes. The claim of ineffectiveness has not only been used as an independent argument against rehabilitative policies but has reinforced criticisms of a different nature. Those responsible for rehabilitative policies responded hesitantly at first to these charges, but new empirical findings have now changed the direction of the intellectual tide. More sophisticated research revealed serious weaknesses in the data and methodology used by the detractors of rehabilitation, undercutting their conclusion that "nothing works."[50] The result was a considerable improvement in evaluative disciplines with significant effects on the quality of the new rehabilitative programs.[51] Although no longer seen as a universal panacea, rehabilitation has been proven effective under certain conditions for certain categories of offenders. Today rehabilitation implies a differential strategy with various levels of effectiveness.

The significance of rehabilitation, however, goes beyond this

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[48] Irwin, *The Changing Social Structure of the Men's Prison*, 8 CORRECTIONS & PUNISHMENT 21, 32 (1977).

[49] On the possibilities and strategies of neutralizing prison violence, community-based delinquency prevention programs, provision of new opportunity structures and institutional and community change in general, see A. MILLER & L. OHLIN, DELINQUENCY AND COMMUNITY (1985). On need to focus on new loci of intervention (e.g., the family, the school, the workplace, the community), see NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS 135-73 (S. Martin, L. Sechrest & R. Redner eds. 1981); E. CURRIE, *supra* note 30, at 224-78. The need to direct socializing efforts not only to individuals but also to their social environment was recognized in *The Revision of the Minimum Program of the International Society of Social Defense*, BULL. INT'L SOC'Y SOC. DEFENSE 26 (English-French ed. 1984). On coping with gangs at the institutional level, see Conrad, *Who's in Charge? The Control of Gang Violence in California Prisons*, in CORRECTIONAL FACILITY PLANNING 135-47 (1979).

[50] This conclusion was derived mainly from an erroneous interpretation of Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 THE PUB. INTEREST 22 (1974).

[51] *See* R. ROSS & P. GENDREAU, EFFECTIVE CORRECTIONAL TREATMENT (1980); Gendreau & Ross, *Offender Rehabilitation: The Appeal of Success*, FED. PROBATION 45 (1981).

empirical dispute. Making support for rehabilitation contingent upon its effectiveness has rendered it more vulnerable to empirical absolutists and other opponents. If rehabilitation is recognized as a right, its value no longer hinges exclusively on its effectiveness.

A theoretical inquiry into the relevance of rehabilitative effectiveness should consider rehabilitation from two perspectives: as a right of the offender and as a governmental interest. The traditional one-sided view of rehabilitation as a governmental instrument to attain social goals led to an overemphasis on the question of its effectiveness. This view was associated with an authoritarian notion of rehabilitation in which society is the only acting force and individuals, lacking any initiative, are mere passive recipients of such action. Like deterrence or incapacitation, rehabilitation was regarded as a social policy dictated without consideration for the offenders personal life. The real difference between specific deterrence and rehabilitation lies in the means by which the ends are achieved. Enhancing the human potentialities of the offender is a specific feature of rehabilitation, whereas the punitive approach relies on fear or the aversion of pain.

The rights model, in contrast, views rehabilitation from the perspective of the offender without losing sight of the societal impact of rehabilitation. Where rehabilitation is conceived as a right, effectiveness becomes a secondary consideration and no longer encroaches upon other priorities related to the needs of individual offenders and to the requirements of their actual sociopsychological improvement. According to the rights model, learning activities, dialogue, social interaction and psychotherapy are provided without calculating their likelihood of ultimate success or guaranteeing their effectiveness.

A right to rehabilitation, however, includes the right to minimum standards of seriousness and quality in the performed services. In this respect, a certain degree of efficacy is inherent in any serious rehabilitative undertaking. Such efforts should be likely to improve on offenders' ability to live a crime-free life, enrich their skills, or improve their psychological condition according to the state of the art in psychotherapy. But the existence and force of the right is not dependent on the cost-effectiveness of its exercise or on any particular outcome.

Viewed from the perspective of society, rehabilitation is part of governmental planning and social policy. At this level, evaluation plays an undeniably important role. It is a legitimate governmental concern to report tangible results to taxpayers, but the real value of accurate evaluation goes far beyond this rendering of accounts. Im-

proved evaluation research will provide indispensable feedback to ongoing or future rehabilitative efforts. This guiding function is essential for critical policy decisions. Empirical research on sanctions, for example, may make it possible to adopt humane and less intrusive penal policies if they can be shown to be as effective as harsher ones.

When rehabilitation is seen as a right of the offender, its independence from its outcome becomes evident. Obsessive questioning of rehabilitation's effectiveness is understandable if it is merely a governmental interest. The rights perspective encourages a shift in the focus of concern. The effectiveness of rehabilitation would still be of interest, but would not be of overriding importance. Instead, one will ask how much it matters and in what ways.

VI. Consequences of the Recognition of a Right to Rehabilitation

In America, through a misapplication of the medical model of corrections, rehabilitation has strengthened the power of the state to act with oppressive paternalism, and it has increased the discretion of judicial and administrative sentencing authorities, and the power of correctional agencies. Without denying a legitimate governmental interest in rehabilitation, the emergent conception of rehabilitation as a right of the offender affirms a positive position for the individual in relation to the state. Rehabilitation is no longer seen as a generous initiative, a benevolent concession of the state or governmental policy dictated by considerations of social revenue. Instead, the rights model views rehabilitation from the perspective of the offender—as the culmination of a continuum of rights guaranteeing the dignity of human beings confronted with criminal conviction.[52]

The recognition of rehabilitation as a right of the prisoner not only grants rehabilitative undertakings a specific due-process protection, but demands momentous changes in the sentencing and correctional systems. For instance, it requires both new legal guidelines for the sentencing authorities or an improvement of the present ones to reduce overcrowding, which is incompatible with rehabilitation,[53] and a considerable expansion of community-based alternatives to imprisonment. It is possible that neither sentencing reforms nor community programs will totally alleviate overcrowd-

[52] Rotman, *La Protection des Droits de l'Homme en Matière Pénale dans le droit Argentin et Latino-Américain*, 47 Revue Internationale de Droit Pénal 83, 84 (1976).

[53] *See* Capps v. Atiyeh, 495 F. Supp. 802, 811 (D. Or. 1980).

ing. Even so, a right to rehabilitation will mean that new prisons must meet stringent qualitative standards incompatible with a purely incapacitation-oriented approach to construction. On the whole, a strict implementation of the right to rehabilitation will reduce the present excessive reliance on imprisonment as a form of punishment in the United States.

Some may fear that recognizing rehabilitation as a constitutional right will mean less surveillance of institutionalized offenders, with harmful results. True, rehabilitation introduces into the prison educational and treatment staff often unconcerned with the questions of custody, but the development of trust in incarcerated human beings within a rehabilitation-oriented institution warrants a relaxing of custodial standards. The liberty-centered notion of rehabilitation implied in the rights model is clearly detached from the disciplinary goals of the institution. Rehabilitative efforts can thus no longer be perverted through their use as manipulative devices. This clear distinction between rehabilitation and discipline does not deny the importance of order and security in correctional institutions. Further, discipline problems would most likely diminish in a rehabilitation-centered institution where staff and inmates are devoted to a meaningful goal. Discipline is maintained even when the development of trust between inmates and custodians leads to the granting of different forms of furloughs and work release. Another possible objection is that a right to rehabilitation may impose unreasonable budgetary pressures on taxpayers. Federal court rulings have held that monetary considerations are insufficient to override constitutional demands.[54] Moreover, the reduced cost of appointing correctional officers and nonprofessional staff in rehabilitation-oriented activities should be considered,[55] as well as the long-term potential gains derived from the reduction of recidivism.

While admitting the paramount importance of rehabilitation, the Supreme Court has consistently abstained from holding it to be included in the Bill of Rights. Even the most progressive federal judges, responsible for far-reaching transformations in state penal institutions, have hesitated to take this ultimate step which could result in drastic innovations in the criminal justice system and trans-

[54] Rozecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968); *Barnes*, 415 F. Supp. at 1227.

[55] For an account of Ringe Prison in Denmark, see Rotthaus, *Das dänische Staatsgefängnis in Ringe—ein Gegenmodell zur Sozialtherapeutischen Anstalt?*, in SOZIALTHERAPIE UND BEHANDLUNGSFORSCHUNG 99 & 102 (1980). On the involvement of prison officers in treatment activities, see Gray, *The Therapeutic Community and Evaluation of Results*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 330 (1973); Rotthaus, *Schwierige und gefährliche Gefangene im englischen Strafvollzug*, in SOZIALTHERAPIE UND BEHANDLUNGSFORSCHUNG 105 (1980).

form the nature of imprisonment in the United States. Although hinting that the sociological theory of rehabilitation may eventually "ripen in constitutional law,"[56] the federal courts have denied the existence of a constitutional right to rehabilitation, at least in a positive form. The courts have, however, already attributed an essential role to rehabilitation in the overall prison environment. They have in effect acknowledged the right to rehabilitation in a negative form—the right to counteract the deteriorating effects of imprisonment. The courts have also granted the prisoner a limited right to psychiatric treatment. These openings in the present body of law, as well as the other avenues of interpretation that will be explored in this article, should provide ample support for the right to rehabilitation "when [the courts] decide to recognize it."[57]

VII. Lack of Rehabilitation as Cruel and Unusual Punishment

Although the federal courts have not explicitly recognized a positive right to rehabilitation, they have assigned the rehabilitative idea a significant role in the constitutional analysis of the conditions of confinement. The eighth amendment's prohibition against cruel and unusual punishment is the linchpin of such promising interpretative developments. The notion of cruel and unusual punishment, dating from the Magna Carta of 1215, was given a broader meaning in the United States. It was not merely a prohibition of excessive punishment, but also an exclusion of torture and of any particularly cruel mode of inflicting punishment.

Until the late 1960s the "hands-off"[58] doctrine ruled out any interference by the judiciary in prison administration. A prisoner, who in 1871 was characterized by a court as "a slave of the State,"[59] had scarcely any rights despite progressive reforms in other aspects of criminal law and procedure. Even the increasing importance attributed by the courts to the rehabilitative aim, as in the landmark decision *Williams v. New York*,[60] did not open the gates of the penitentiary to judicial scrutiny. To the contrary, penal institutions were abandoned to the unchecked power of their adminstrators, who

56 Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). *See also* J. Palmer, Constitutional Right of Prisoners 179 (1985).

57 Dwyer & Botein, *The Right to Rehabilitation for Prisoners—Judicial Reform of the Correctional Process*, 20 N.Y.L.F. 273, 274 (1974).

58 This expression was first used in Fritch, Civil Rights of Federal Prison Inmates 31 (1961), *quoted in*, Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963).

59 Ruffin v. Commonwealth, 82 Va. (21 Gratt.) 790, 796 (1871).

60 Williams v. New York, 337 U.S. 241, 248 (1949).

were entitled to pursue whatever punitive or despotic methods they chose to apply. The courts intervened in only a few extreme cases. Violation of the cruel and unusual punishment proscription resulted, however, in a few isolated though important decisions in the 1940s and 1950s. One particularly significant decision and notorious case, *Johnson v. Dye*,[61] involved a Georgia chain gang. The plaintiff had escaped from the gang and was arrested in Pennsylvania.[62] He there applied for a writ of habeas corpus, alleging brutal treatment from the Georgia prison officers and danger to his life if he returned to the chain gang.[63] The district judge denied him habeas corpus relief, and the Court of Appeals for the Third Circut reversed.[64] For the first time a federal court declared that a prison environment entailed the infliction of cruel and unusual punishment.[65] The flexible interpretation of the eighth amendment led to the condemnation not only of physically barbarous punishments,[66] but also, as early as 1910, of punishment grossly disproportionate to the severity of the crime.[67]

In the 1960s, the prisoners' rights movement, centered on the activist position of the Supreme Court, transformed the pariah status of the prisoner into that of a legal person. The eighth amendment played a key role in this process, rapidly becoming "one of the new frontiers in creative constitutional law."[68] Although the amendment had long been considered applicable only to federal activity, in 1962 the Court held that state statutes providing cruel and unusual punishments violated both the eighth and the fourteenth amendments.[69] The dynamic nature of the eighth amendment was expressly emphasized by a 1958 ruling that the proscription's meaning must be drawn "from the evolving standards of decency that mark the progress of a maturing society."[70] The flexibility of the clause precludes a specific definition that could thwart its broadening significance "as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes,

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61 175 F.2d 250 (3d Cir.), *rev'd*, 338 U.S. 864 (1949).

62 *Id.* at 251.

63 *Id.* at 252.

64 *Id.* at 252-53 & 257.

65 *Id.* at 255. *See* L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 143 (1975).

66 *E.g.*, Wilkerson v. Utah, 99 U.S. 130, 135 (1878).

67 Weems v. United States, 217 U.S. 349 (1910).

68 L. Berkson, *supra* note 65, at xiii.

69 Robinson v. California, 370 U.S. 660, 666 (1962).

70 Trop v. Dulles, 356 U.S. 86, 101 (1958).

more humane."[71]

In the 1970s, judicial decisions interpreted the eighth amendment clause as contemplating a purposive inquiry into prison conditions to measure them against permissible penal goals.[72] In *Gregg v. Georgia*,[73] the Court established that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."[74] The means-end test of prison conditions is premised on the belief that nontrivial deprivations or restraints in addition to incarceration must be justified by their contribution to the achievement of legitimate penal objectives. If arbitrary, such deprivations or restraints constitute a violation of the cruel and unusual punishment clause.[75]

Since the 1970s, the application of the cruel and unusual punishment clause to penitentiaries was the basis of judicial challenges to state penal systems. The first of these cases, *Holt v. Sarver*,[76] was brought by inmates of a correctional institution in Arkansas in 1970.[77] After an exhaustive evidentiary hearing, reflected in a detailed memorandum opinion, the district judge concluded that conditions and practices in the Arkansas penitentiary system were such that confinement itself amounted to cruel and unusual punishment "even though a particular inmate may never personally be subjected to any disciplinary action."[78]

The absence of meaningful rehabilitation programs was an essential element in the *Holt* decision. The district judge was unwilling to hold that the Constitution required the institution to run a "school, or provide vocational training, or other rehabilitative facilities and services which many institutions now offer."[79] However, the judge expressly stated that "the absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation."[80] The absence of a meaningful rehabilitation program alone

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71 Holt v. Sarver, 309 F. Supp. 362, 380 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

72 Feldberg, *Confronting the Conditions of Confinement: An Expanded Role for the Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 393 (1977).

73 428 U.S. 153 (1916).

74 *Id.* at 183.

75 Feldberg, *supra* note 72, at 395.

76 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

77 309 F. Supp. at 364.

78 *Id.* at 373.

79 *Id.* at 379.

80 *Id.*

did not rise to constitutional relevance, rather it constituted "a factor in the overall constitutional equation"[81] when this absence aggravated an already degrading and criminogenic prison environment.

After *Holt v. Sarver*, prisoners' challenges to prison systems proliferated. This led to decisions introducing comprehensive institutional reforms, although their unsatisfactory implementation often resulted in embroiled litigation. Various decisions emphasized the rehabilitative element in assessing overall prison conditions against the eighth amendment's standard.[82] In some cases the courts even threatened to close the institution as a means of overcoming administrative resistance.

In *Pugh v. Locke*,[83] the district court determined that prison conditions were so debilitating that they necessarily deprived inmates of any opportunity to rehabilitate themselves, or even to maintain skills already possessed.[84] Without recognizing a positive right to rehabilitation, the decision nevertheless stated that "a penal system cannot be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration."[85]

Rehabilitation plays a dual role in the "totality of conditions" analysis of correctional institutions. On the one hand, the lack of rehabilitative programs is one of the elements making prison conditions unconstitutional; on the other hand, the inmates' opportunities to rehabilitate themselves or to maintain skills already possessed serves as a yardstick against which the constitutionality of the cumulative effect of prison conditions is measured. The "totality of conditions" approach seemingly views rehabilitation as one element relevant only in the aggregate of prison conditions. The absence of rehabilitation often indicates unconstitutional conditions, but its presence is not required when other factors are satisfactory. In other words, rehabilitation seems to be reduced to a series of pro-

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81 *Id.*

82 Rehabilitative considerations were included in Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala.), *cert. denied sub nom.* Newman v. Alabama, 438 U.S. 915 (1978); Barnes v. Virgin Islands, 415 F. Supp. 1218, 1227 (D.V.I. 1976); Miller v. Carson, 401 F. Supp. 835, 900 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977); James v. Wallace, 382 F. Supp. 1177 (N.D. Ala. 1974); Taylor v. Sterrett, 344 F. Supp. 411, 415 (N.D. Tex. 1972), *aff'd in part, vacated in part, and remanded*, 499 F.2d 387 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975).

83 406 F. Supp. 318 (M.D. Ala.), *cert. denied sub nom.* Newman v. Alabama, 438 U.S. 915 (1978).

84 *Id.* at 326.

85 *Id.* at 330.

grams directed towards counteracting the harmful effects of the institution on the inmates. These programs become constitutionally mandatory when, without them, institutional flaws are sufficiently serious to make confinement cruel and unusual punishment.

The role of rehabilitation, however, does not stop there. According to the case law developing the "totality of conditions" concept, the cumulative effect of prison conditions is unconstitutional when they make it impossible to maintain acquired social skills or continue efforts towards self-rehabilitation.[86] Here the courts employ the concept of rehabilitation as a gauge of the totality of prison conditions. According to *Laaman v. Helgemoe*,[87] the unconstitutionality lies in the unnecessary and wanton infliction of pain caused by recidivism and future incarceration made probable by the overall conditions of the prison. Prison conditions are thus constitutional only when they make deterioration not inevitable and recidivism not likely and when efforts toward self-rehabilitation are possible. A constitutional right to rehabilitation thus encompasses the right to a rehabilitative prison environment, which is one that does not make degeneration probable or self-rehabilitation impossible.

Laaman v. Helgemoe represents one of the most significant applications of the eighth amendment to the totality of prison conditions. The *Laaman* decision is significant both for its comprehensiveness and far-reaching constitutional analysis. *Laaman*, the result of a civil rights class action brought by inmates of the New Hampshire state prison against prison officials,[88] concerned medical care, work, visitations, mail, education, rehabilitation and a general attack on the conditions of confinement at the prison.[89] A considerable number of these conditions were alleged to be intolerable. For example, the medical services were deficient and threatened the lives and health of the inmates, the physical plant was inadequate, the cells were insalubrious and the lack of work offerings forced the prisoners into stultifying idleness.[90] Unreasonable restrictions on visitations prevented inmates from maintaining their community ties and family bonds.[91] Mentally disturbed prisoners endangered others because of the lack of mental health facilities.[92] Moreover, rehabilitative

86 *See* Dawson v. Kendrick, 527 F. Supp. 1252, 1315 (S.D. W. Va. 1981); Miller v. Carson, 401 F. Supp. 835, 900 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977); James v. Wallace, 382 F. Supp. 1177 (N.D. Ala. 1974).

87 437 F. Supp. 269 (D.N.H. 1977).

88 437 F. Supp. at 269 & 275.

89 *Id.* at 275.

90 *Id.* at 276-323.

91 *Id.* at 298-300.

92 *Id.* at 289-91.

programs and classification of inmates were lacking.[93]

District Judge Bownes' decision in *Laaman* was based on an extensive study of the prison conditions and included 75 separate orders to correct them.[94] In addition, his constitutional analysis improved the existing body of law built around the "totality of conditions" approach[95] by appraising them through the eighth amendment test set forth in *Gregg v. Georgia*[96] and subsequently applied in *Estelle v. Gamble*.[97] According to this test, the unconstitutionality lies in punishment involving the "unnecessary infliction and wanton infliction of pain."[98] In *Laaman*, it was established that the prison conditions were bound to result in "physical, mental or social degeneration" and were "counterproductive to the inmates' efforts to rehabilitate themselves."[99] An institution "where degeneration is probable and self-improvement unlikely would cause unnecessary suffering in the form of probable future incarceration."[100] "Punishment for one crime, under conditions which spawn future crime and more punishment, serves no valid legislative purpose and is so totally without penological justification that it results in the gratuitous infliction of suffering' in violation of the eighth amendment."[101] In short, the violation of the eighth amendment was found to be the result of the cumulative effect of various negative prison conditions threatening "the physical, mental and emotional health and well-being of the inmates and/or creating a probability of recidivism and future incarceration."[102] Judge Bownes emphasized that the institution's intolerable conditions lacked penological justification and conflicted with the state's correctional goals. He pointed out that the penological goal of rehabilitation was expressly required by the New Hampshire Constitution, statutory provisions and judical pronouncements.[103] While he qualified those provisions as statements of general purpose and intent which did not create substantive rights, he pointed out that "New Hampshire espouses reform as a primary goal of its correctional system."[104]

In this manner, *Laaman* established a negative indirect right to

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93 *Id.* at 300-01.
94 *Id.* at 275-304.
95 *See* Note, *The Right to Rehabilitation:* Laaman v. Helgemoe, 6 BLACK L.J. 303 (1978).
96 428 U.S. 153 (1976).
97 429 U.S. 97 (1978).
98 *Gregg*, 428 U.S. at 173.
99 437 F. Supp. at 318.
100 *Id.* at 316.
101 *Id.*
102 *Id.* at 323.
103 *Id.* at 315.
104 *Id.*

rehabilitation as a consequence of a right not to degenerate. In consonance with precedent, this right includes the freedom to attempt rehabilitation or the "cultivation of new socially acceptable and useful skills and habits"[105] and the provision of adequate mental health care.[106] The corresponding obligation of the state to provide opportunities to stave off degeneration and to minimize impediments to reform is measured through the totality of the conditions of confinement. Remedial orders must be issued by the courts when these "conditions create an environment in which it is impossible for inmates to rehabilitate themselves—or to preserve skills and constructive attitudes already possessed—even for those who are inclined to do so."[107]

In this connection, following precedent[108] and the prisoner's right to work under New Hampshire statutes, the court ordered the prison administration to institute work opportunities and vocational training[109] "in order to minimize degeneration and succor what rehabilitative attempts were being made by inmates."[110]

The *Laaman* decision also held that unreasonable restrictions on visitations violates the eighth amendment when "failure to allow inmates to keep their community ties and family bonds promotes degeneration and decreases their chances of successful reintegration into society."[111] The court also ordered the establishment of a classification system as " 'absolutely necessary, if effective rehabilitation is to take place.' "[112] Such a classification system was to be used for the application of specific educational, vocational and rehabilitative programs. The provision of adequate mental health care was also a relevant rehabilitative element considered in the court's decree.[113]

As a means of advancing the rights of prisoners, the "totality of conditions" approach has encountered some setbacks in recent years. The Supreme Court decison in *Rhodes v. Chapman*[114] has proven that this approach is a "double-edged sword."[115] In the

105 *Id.* at 316.
106 *Id.* at 319.
107 *Id.* at 317 (quoting Pugh v. Locke, 406 F. Supp. 318, 326 (M.D. Ala.), *cert. denied sub nom.* Newman v. Alabama, 438 U.S. 915 (1978)).
108 *E.g.*, Barnes v. Virgin Islands, 415 F. Supp. 1218, 1228 (D.V.I. 1976).
109 437 F. Supp. 269, 329 (D.N.H. 1977).
110 *Id.* at 318.
111 *Id.* at 320.
112 *Id.* at 319.
113 *Id.* at 324.
114 452 U.S. 337 (1981).
115 Comment, *Federal Intervention in State Prisons: The Modern Prison-Conditions Case*, 19 HOUSTON L. REV. 931, 947 (1982).

concurring opinion of Justices Brennan, Blackmun and Stevens, double-celling was seen as one condition among many to be considered when determining the constitutionality of the cumulative effect. Following the reasoning of *Laaman*, the Court stated that the "touchstone" of the eighth amendment inquiry is "the effect upon the imprisoned."[116] This rationale conceded that favorable conditions—adequate shelter, food, protection and opportunities for education, work and rehabilitative assistance—compensated for, and ultimately offset, the harsher condition of double-celling. This interpretation could lead to the incorrect conclusion that some positive aspects of a prison can compensate for conditions that are clearly unconstitutional in and of themselves, such as horrendous overcrowding,[117] racial discrimination,[118] and the everyday occurence of serious prison violence.[119] The fact that some violations of the eighth amendment result from an aggregate effect of several conditions does not mean that the observance of constitutional norms regarding a certain number of conditions can legitimate other conditions that alone are unconstitutional. The danger of such a mistaken inference demands a more precise definition of the role of rehabilitation in the "totality of conditions" approach.

True, the lack of rehabilitative efforts is more visible when prison conditions descend to their lowest levels of squalor and degradation, but it would be totally discordant with a liberty-centered concept of rehabilitation to assert that the existence of a rehabilitation program could render intolerable deprivations constitutional. To consider, for example, that a vocational training program could legitimate the existence of cells infested with vermin demonstrates ad-absurdum the vulnerability of such an argument. Within the "totality of conditions" approach, rehabilitation is not to be traded-off against flaws that have a specific remedy (e.g., cleaning the facilities) but is intended to counteract the overall harmful effects of institutionalization such as depersonalization or loss of self-determination. A rehabilitation-oriented institution depends less on particular programs than on improvements in overall prison conditions that reduce the level of desocialization or dehabilitation. Rehabilitation is necessary even in well-functioning institutions as a consequence of

116 *Rhodes*, 452 U.S. at 364.

117 *See Pugh*, 406 F. Supp. at 323.

118 *Id.* at 325.

119 Note, Laaman v. Helgemoe*: Degeneration, Recidivism and the Eighth Amendment*, 3 VT. L. REV. 229, 243, 248 (1978)(quoting *Pugh*, 406 F. Supp. at 323; Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971)).

incarceration alone. Between the filth and squalor described by John Howard in the eighteenth century[120] and the modern problem-solving communities within walls[121] there is a continuum of harmfulness and deterioration. Where to draw the line that makes the absence of positive rehabilitative attempts unconstitutional depends on those "evolving standards of decency that mark the progress of a maturing society."[122] Besides, the *Rhodes v. Chapman* view that some favorable conditions could compensate for the constitutional violation of others loses sight of the fact that a primary goal of rehabilitative endeavors is to fortify the legal status of prisoners. A genuine rehabilitative concept therefore can never be used as a pretext to justify the abridgement of prisoners' basic rights.

Another judicial trend adverse to the recognition of rehabilitation as a right departs from the "totality of conditions" approach. Some lower federal courts have recently denied that the cumulative effect of several conditions violates the eighth amendment in cases where no single condition is violatory.[123] This interpretation tends to undermine the significance attached by precedent to the lack of rehabilitation, insofar as the absence of rehabilitation alone was not considered unconstitutional. As a result the failure of prisons to provide rehabilitative programs loses its potential to contribute to the totality of conditions liable to violate the eight amendment. This step back from the progressive interpretation of the eighth amendment jeopardizes the limited role recognized for rehabilitation since *Holt v. Sarver*.[124] Moreover, these decisions indicate a return to the hands-off policy that endangers the totality of prisoners' rights. This perilous judicial retreat coincides with the short-sighted satisfaction of the court in *Newman v. Alabama*[125] which held that stultifying and deteriorating prison life is constitutional so long as shelter, sanitation, medical care, and personal safety are provided.[126] This ruling ignores the nature of human needs.

A constitutionally permissible prison environment includes a right to rehabilitation in the indirect form of inmates' rights not to degenerate or to be impaired in their own rehabilitative efforts. The

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120 J. Howard, The State of Prisons (1777).

121 *See, e.g.*, H. TOCH, THERAPEUTIC COMMUNITIES IN CORRECTIONS (1980).

122 Trop v. Dulles, U.S. 86, 101 (1958).

123 Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982), *cert. denied sub nom.* Franzen v. Duckworth, 107 S. Ct. 71 (1986); Wright v. Rushen, 642 F.2d 1129, 1132 (9th Cir. 1981), *aff'd in part, rev'd in part, and vacated in part sub nom.* Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986).

124 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. (1971).

125 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 460 U.S. 1083 (1983).

126 *Id.* at 292.

question of whether such a negative right entitles a prisoner to claims for specific programs was answered negatively by the Supreme Court of Washington in *Bresolin v. Morris*.[127] However, the dissenting opinion in that case warrants analysis as an important contribution to an alternative constitutional doctrine.

The majority decision rejected a writ of mandamus ordering the transfer of a prisoner to a drug addiction treatment program at a state hospital.[128] An inmate of the state correctional institute at Walla Walla brought the action.[129] The inmate sought to compel the Secretary of the Department of Social and Health Services to establish and maintain a drug treatment program at the institution.[130] Because the needed facilities would have been very expensive, the legislature enacted a law making the establishment of a drug treatment program discretionary instead of mandatory.[131] In the meantime, the petitioner found an alternative form of relief through transfer to another hospital.[132] Nevertheless, the great public relevance of the questions involved in the case persuaded the court to consider it.[133]

The majority rejected the notion that the eighth amendment gave prisoners a right to rehabilitative treatment for psychological dependence on drugs.[134] The court ruled that a prisoner does not have a right to rehabilitation and denied that the failure to rehabilitate amounts to cruel and unusual punishment.[135] The court based its ruling on the United States Supreme Court's decision in *Procunier v. Martinez*,[136] which considered rehabilitation a "governmental interest" and not an enforceable right.[137] The court also rested on a "realist" view of the prison situation, a skeptical appraisal of the results achieved by drug rehabilitation programs and an assumption that rehabilitation as a whole is ineffective.[138]

In his dissent, Justice Utter applied the idea of an indirect right to rehabilitation in the sense of a right to avoid deterioration.[139] On this basis he would have affirmed the prisoner's constitutional right

127 80 Wash. 2d 167, 558 P.2d 1350 (1977).
128 *Id.* at 174, 558 P.2d at 1354.
129 *Id.* at 168, 558 P.2d at 1350.
130 *Id.*, 558 P.2d at 1350.
131 *Id.*, 558 P.2d at 1351.
132 *Id.* at 169, 558 P.2d at 1351.
133 *Id.*, 558 P.2d at 1351.
134 *Id.* at 174, 558 P.2d at 1354.
135 *Id.*, 558 P.2d at 1354.
136 416 U.S. 396 (1974).
137 *Id.* at 404-06.
138 *Id.* at 404-05.
139 80 Wash. 2d at 175, 558 P.2d at 1354 (Utter, J., dissenting).

to a specific drug rehabilitation program, deeming its absence a violation of the eighth amendment.[140] Justice Utter also relied on sociological data. Instead of accepting that imprisonment inevitably brings harmful consequences, Justice Utter affirmed a peremptory duty of the state to counteract these consequences.[141] He underlined the responsibility contracted by the state by placing an inmate with an addictive personality in a closed setting where his addiction is exacerbated by an atmosphere of apparently uncontrollable dealing in and use of drugs.[142] In *Estelle v. Gamble*, regarding the right of prisoners to medical treatment in general, the Supreme Court recognized that " 'it is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.' "[143] This duty of care for the prisoner, Justice Utter argued, is all the more pressing when an individual psychologically addicted to the use of narcotic drugs is placed in a situation of "continued explosive degeneration," inherent to state institutions, "creating thus a great likelihood that such individuals will do further injury to society when they are eventually released."[144]

Justice Utter stated that the relief requested in the case did not require, as the majority insisted, that the court recognize a constitutionally-based, broad right to rehabilitation.[145] The factual framework of the case presented a narrow, albeit important, issue concerning the constitutional right of inmates with addictive personalities to be protected from physical and mental harm resulting from confinement in an institution in which they are unavoidably exposed to unlawful narcotics. In this case, the lack of a drug treatment program implied the deprivation of needed medical care, which includes the healing of the mind. Such deprivation represents suffering beyond that of incarceration, thus constituting cruel and unusual punishment. The right to a specific treatment intended to avoid the intensification of an individual's psychological addiction is another instance of the right to counteract the degenerative effects of penal institutions. In the *Laaman* decision mentioned above,[146] this right represents a negative right to rehabilitation.

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140 *Id.*, 558 P.2d at 1354 (Utter, J., dissenting).

141 *Id.*, 558 P.2d at 1354 (Utter, J., dissenting).

142 *Id.* at 175-76, 558 P.2d at 1354-55 (Utter, J., dissenting).

143 429 U.S. 97, 104 (1978)(quoting Spicer v. Williams, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

144 80 Wash. 2d at 175, 558 P.2d at 1356 (Utter, J., dissenting).

145 *Id.*, 558 P.2d at 1356 (Utter, J., dissenting).

146 *See supra* notes 87-113 and accompanying text.

VIII. The Right to Psychological and Psychiatric Treatment as Part of the Right to Rehabilitation

The recognition of a limited right of prisoners to psychological and psychiatric treatment is represented at the federal level by the leading case of *Bowring v. Godwin*.[147] This right stems from a progressive interpretation of the eighth amendment and "is also premised upon notions of rehabilitation and the desire to render inmates useful and productive citizens upon their release."[148]

According to the combined doctrine of *Estelle v. Gamble*[149] and *Gregg v. Georgia*,[150] untreated medical needs constitute an "unnecessary and wanton infliction of pain" that infringes on the right guaranteed by the eighth amendment. In *Bowring*, the Fourth Circuit formulated a test to determine when those needs should entitle a prisoner to psychological and psychiatric treatment. The court stated that if a physician or other health care provider, exercising ordinary care at the time of observation, concluded with reasonable medical certainty that the petitioner's symptoms evidenced a serious disease or injury, that such "disease or injury was curable or might be substantially alleviated, and that potential for harm to petitioner by reason of delay or denial of care would be substantial,"[151] then the prisoner had a right to treatment.

The *Bowring* decision recognized rehabilitation as a paramount goal of the corrections system even though it is not mandated by any particular constitutional provision.[152] The Court also stated that this judicial recognition helped establish the right, based on the eighth amendment, to psychological treatment.[153] Psychotherapy is

147 551 F.2d 44 (4th Cir. 1977).

148 *Id.* at 48.

149 429 U.S. 97 (1976).

150 428 U.S. 153 (1976).

151 551 F.2d 44, 47 (4th Cir. 1977). An interesting application of this doctrine is contained in an action initiated by an amended petition for a writ for habeas corpus filed by an inmate seeking a Depo-provera drug treatment to control his deviant sexual disorders. McDonald v. Bronson, No. 84-32654 (Conn. Sup. Ct. Tolland Jud. Dist., Rockville Nov. 30, 1984). The petitioner claimed that the denial of such treatment by Connecticut violated the eighth amendment as applied to the states through the fourteenth amendment. Petitioner's Memorandum of Law at 13-18, McDonald v. Bronson, No. 84-32654 (Conn. Sup. Ct. Tolland Jud. Dist., Rockville Nov. 30, 1984). A settlement was reached with the State, through which Depo-provera was provided. Voluntary consent does not always appear with such clarity as in *McDonald*. In some special cases, Depo-provera appears to be the only option left that might allow sex offenders to live in society, and it might thus be incorporated into the right to rehabilitation. On ethical problems, guidelines for informed consent and selection of candidates, see Comment, *Sex Offenders and the Use of Depo-provera*, 22 San Diego L. Rev. 565 (1985).

152 551 F.2d 44, 48 (4th Cir. 1977). *See* Pell v. Procunier, 417 U.S. 817 (1974).

153 *Bowring*, 551 F.2d at 48. *See* Note, *Prisoners Rights*—Bowring v. Godwin*: The Limited*

a principal ingredient of a modern rehabilitative concept, especially when applied to mentally disordered offenders. The concept of medical necessity on which the *Bowring* decision is based includes psychological disorder in its broader sense and thus confers the status of a right on this important aspect of rehabilitation.

Arguments similar to those of *Bowring* were used as a basis for a 1978 decision of the Supreme Court of Alaska. The court established that William Rust, a prisoner in custody of the Division of Corrections, was entitled to receive treatment for his dyslexic condition.[154] At sentencing, the superior court found that the defendant Rust needed reading therapy and vocational training and that his confinement should take place in an area where his family lived.[155] Furthermore, the court affirmed its continuing jurisdiction of the matter in order to supervise its accomplishment and to redress failure to provide special conditions.[156] Shortly after the superior court's entry of judgment, however, Rust was classified to be sent to a different unit not meeting the conditions recommended in the sentence.[157] The sentencing court denied Rust's motion seeking an immediate order to the Division of Corrections to modify this classification.[158] The court held that it lacked the legal authority to issue such an order.[159] Rust appealed this decision but it was confirmed by the Supreme Court of Alaska.[160] The Supreme Court declared that the matter of prisoners' classifications was committed by statutory provisions to the discretion of the executive branch and was not subject to the review or control of the courts.[161] Rust's claims for the treatment of his dyslexic conditions, however, were accepted.[162] The matter was consequently remanded to the superior court for further proceedings to determine the seriousness of the prisoner's disease or injury.[163] If necessary, he was to have the right to receive treatment and to be transferred to a newly-assigned unit.

The arguments presented in this decision are significant in their connection with the right to rehabilitation. The court stressed that Rust was sentenced under police power for a limited period and

Right of State Prisoners to Psychological and Psychiatric Treatment, 56 N.C.L. REV. 612, 614 (1978).

154 Rust v. State, 582 P.2d 134 (Alaska 1978).

155 *Id.* at 135.

156 *Id.*

157 *Id.* at 136.

158 *Id.*

159 *Id.*

160 *Id.* at 144.

161 *Id.* at 137.

162 *Id.* at 143.

163 *Id.* at 144.

with full due process safeguards.[164] That is, his case should not be treated as entirely analogous to those of people such as juveniles and mental patients confined under a *parens patriae*[165] rationale. The Supreme Court of Alaska, however, affirmed that there is a public obligation to care for persons deprived of their liberties and cited the numerous precedents considering the lack of adequate food, clothing, shelter, medical care facilities and staff as constitutional violations of the eighth and fourteenth amendments.[166] The tests to determine when those needs should entitle one to treatment were derived from *Bowring v. Godwin*.

Besides the right to treatment derived from the eighth amendment and from the common law duty of care for the prisoner, "who cannot by reason of the deprivation of his liberty care for himself,"[167] the right to treatment for certain categories of offenders has also been premised on the fourteenth amendment. This approach originated in lower courts' decisions in the field of mental health.[168] Treatment in these cases needs to compensate for the restriction of procedural safeguards resulting from the indeterminate confinement of these offenders with alleged therapeutic purposes. The absence of the "quid pro quo" of treatment was seen as a violation of the due process clause of the fourteenth amendment. Courts have recognized this right to treatment not only for involuntarily committed patients but also for juvenile offenders and offenders with mental disorders. These include sexual psychopaths[169] and persons convicted under "guilty but mentally ill" statutes.[170] The rationale of the above-mentioned courts for extending a fourteenth

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164 *Id.* at 140.

165 *Id.* at 139-40.

166 *Id.* at 139-43.

167 *Estelle*, 429 U.S. at 104 (quoting Spicer v. Williams, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

168 *See* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 131 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, remanded in part, reversed in part sub nom.* Wyatt v. Aderholt, 503 F.2d. 1305 (5th Cir. 1974). The Supreme Court, however, refused to affirm a constitutional right to treatment for mentally ill patients and expressly left the question unsettled. O'Connor v. Donaldson, 422 U.S. 563 (1975). The Supreme Court only recently recognized a right to a minimally adequate training and habilitation for the mentally retarded. Youngberg v. Romeo, 457 U.S. 307 (1982). *See also* Rotman, *Rechtliche Voraussetzungen der Behandlung geistesgestörter Straftäter in den Vereinigten Staaten*, in FESTSCHRIFT FÜR GÜNTER BLAU 555-72 (1985).

169 *E.g.*, Humphrey v. Cady, 405 U.S. 504 (1972); Ohlinger v. Watson, 652 F.2d 775 (9th Cir. 1980).

170 *See* Comment, *Punishment Versus Treatment of Guilty But Mentally Ill*, 74 J. CRIM. LAW & CRIMINOLOGY 428, 456 n.2 (1983). In Fentiman, *Guilty But Mentally Ill: The Real Verdict is Guilty*, 26 B.C.L. REV. 601, 652 (1985), the author points out that "[i]n practice, the psychiatric treatment accorded [these] inmates tends to be either minimal or nonexis-

amendment right to treatment to mentally disordered and juvenile offenders is that "whenever the provision of care and treatment is part of the purpose for confinement, such must be accorded consistent with due process."[171] Some decisions have considered that a rehabilitative purpose of confinement must be inferred whenever the term of sentence is indefinite.[172] Although these decisions were made in the context of sexual psychopath statutes, the same rationale could be applied to the indeterminate sentencing[173] of all prisoners.

IX. Arguments Based on the Equal Protection Clause

The affirmation of a constitutional right to rehabilitation based on equal protection assumes that the prisoner maintains all basic rights not incompatible with incarceration.[174] The leading case, *Coffin v. Reichard*,[175] holds 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.[176] The courts have determined that although lawful incarceration brings about the withdrawal or limitation of many privileges and rights, "it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the fourteenth amendment follow them into prison and there protect them from unconstitutional action on the part of prison authorities."[177] The equal protection clause has been successfully invoked to remove inequalities within the prison system based on race,[178] sex,[179] and differential treatment when not justified by valid circumstances.[180]

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tent." Denial of their constitutional right to treatment is one of the bases on which the author questions the constitutionality of the "guilty but mentally ill" statutes. *Id.* at 615.

171 Rone v Fireman, 473 F. Supp. 92, 119 (N.D. Ohio 1979).

172 Ohlinger v. Watson,, 652 F.2d 775 (9th Cir. 1980); Slotkin v. Brookdale Hosp. Center, 357 F. Supp. 705 (S.D.N.Y. 1972).

173 *See* Frankel, *supra* note 4, at 28-34.

174 *See* Hudson v. Palmer, 468 U.S. 517, 547-48 (1984)(Stevens, J., concurring in part and dissenting in part).

175 143 F.2d. 443 (6th Cir. 1944).

176 *Id.* at 445.

177 Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd mem.*, 390 U.S. 333 (1968).

178 *Id.*

179 *See* Note, *Women's Prisons: An Equal Protection Evaluation*, 94 Yale L.J. 1182-1206 (1985).

180 *See* Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968)(upholding differences of treatment but recognizing the possibility of a violation of equal protection).

Morales v. Schmidt,[181] although reversed on appeal,[182] opened an important line of argument to support a constitutional right to rehabilitation. The district court held that the equal protection clause applies not only within the group of persons convicted of a crime, but also to governmental treatment that distinguishes this group from the general population.[183] The governmental differentiation between those convicted of a crime and those not convicted of a crime "should not escape the judicial scrutiny borne by other governmental classifications for the purpose of differential treatment."[184] The court decided that if the distinction between the two classes bears upon an individual interest considered to be "fundamental," then the burden will be upon the government to show a compelling state interest in the differential treatment.[185] In short, convicts and the general public were assimilated in their rights to the equal protection of law. Commenting on this decision, Dwyer and Botein asserted that "[d]epriving prisoners of rehabilitation. . . would deny them equal protection if an almost identical right to rehabilitation applies to similarly situated non-prisoners."[186]

The *Morales* approach is premised on the assumption that rehabilitation, as a method of public protection, is a primary correctional goal. To withold rehabilitation therefore would be inconsistent with the governmental purpose of imprisonment. According to Dwyer and Botein's reasoning, the right to rehabilitation based on equal protection is also bolstered by the affirmation of a right to treatment benefitting a disadvantaged sector of the general population.[187] This sector is composed of nonprisoners deprived of their liberty and "officially. . . in need of services."[188] This right to treatment, coinciding to a considerable extent with the right to rehabilitation, disproves the counterargument that the general public lacks such a right. Thus, the assumed presence of a treatment group within the general public is used as an equal protection argument against the denial of rehabilitation to prison inmates. The denial of rehabilita-

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181 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973).

182 Morales v. Schmidt, 489 F.2d 1335 (7th Cir. 1973). The district court decided that conviction was sufficient justification for differential treatment of prisoners without requiring a demonstration of "compelling state interest." *Id.* at 1341-42.

183 340 F. Supp. at 549-50.

184 *Id.* at 550.

185 *Id.*

186 Dwyer & Botein, *supra* note 57, at 284.

187 In spite of the promising legal developments at the time Dwyer and Botein wrote their article, the Supreme Court later refused to rule on the question whether mental patients have a constitutional right to treatment. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

188 Dwyer & Botein, *supra* note 57, at 285.

tion deprives prisoners of equal protection because the general public has such a right. By removing a prisoner's ability to find appropriate treatment services, "a prison arguably incurs the responsibility of making these services available."[189]

The existence of a treatment group within the general population is used only as a supplemental argument in Dwyer and Botein's analysis.[190] The primary reference in the equal protection argument is the general public. This is important because it means that the right to rehabilitation does not depend on the existence of a right to treatment, a question left unsettled by the Supreme Court.[191] Rather, the right depends on the recognition that the offender is a citizen whose rights have been withdrawn or limited to a degree required by legitimate penal goals. This is consistent with the notion that convicted persons are "not sent to a penal institution to receive additional punishment: the fact of incarceration itself is the punishment."[192] Furthermore, the idea of equal protection is extended by Dwyer and Botein to require that prisons use the least-restrictive alternative, as in treatment cases within the general population.[193] In their equal protection argument, Dywer and Botein also demand a liberal construction of state constitutional and statutory provisions which establish rehabilitation as a right of prisoners.[194] They relied in this argument on *Rouse v. Cameron*,[195] which stressed the duty of the state to provide rehabilitative services to persons denied the possibility of seeking them on their own.

Dwyer and Botein assimilate rehabilitation and treatment to a large extent yet they concede that the two concepts are not synonymous.[196] Their interpretative efforts point toward the many ways these concepts overlap. A broader application of the equal protection clause as an argument for establishing a constitutional right to rehabilitation, however, should go beyond a strict therapeutic model of rehabilitation. In medicine, disease is no longer seen as an exclusively biochemical or neurophysiological process. Quite the contrary, it is now considered a problem of living, and therapy means a concern with the totality of human life.[197] Psychiatry has

189 Dwyer & Botein, *supra* note 57, at 285.
190 Dwyer & Botein, *supra* note 57.
191 *See* O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).
192 Barnes v. Virgin Islands, 415 F. Supp. at 1219.
193 Dwyer & Botein, *supra* note 57, at 286-89.
194 Dwyer & Botein, *supra* note 57, at 288.
195 373 F.2d 451 (D.C. Cir. 1966).
196 Dwyer & Botein, *supra* note 57, at 284 n.60.
197 Engel, *The Need for a New Medical Model: A Challenge for Biomedicine*, 196 SCI. 132 (1977).

also moved toward a more integrated approach including the social dimension of the patient's life.[198]

It was precisely the input of social psychiatry in corrections that gave rise to the most important rehabilitative experiments of the twentieth century conducted by a number of European social therapeutic institutions.[199] The rich spectrum of theory and research generated in various scientific disciplines regarding the idea of socialization created a significant conceptual framework to guide rehabilitative endeavors. Based on an understanding of human development since early childhood, the social learning approach made it possible to design surrogate forms of socialization to be applied in correctional institutions and community-based programs. The recent emphasis on the possibilities of adult socialization[200] favors the conception of corrections as a social learning and educational undertaking. The evolution of therapeutic approaches to mentally disordered offenders towards a social learning model[201] also reinforces this view of corrections.

Psychotherapeutic treatment is only one component of the current concept of rehabilitation which encompasses a series of socialization offerings, and integrates a learning process directed to overcoming a variety of social and psychological insufficiencies. These range from deep psychological conflict that prompts aggressive behavior to a lack of skills that prevents the individual from entering the labor market. Rehabilitation today encompasses meaningful work and education as well as treatment.[202] Furthermore, the recognition of the prisoner as a possessor of rights has a secondary rehabilitative effect. Many of the prisoner's basic rights allow him to maintain social relations with the world outside or increase his or her feeling of dignity and self-worth.

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198 Burch & Burch, *The Congestive Heart Failure Model of Schizophrenia*, 241 J. A.M.A. 1925 (1979).

199 *See, e.g.*, R. EGG, STRAFFÄLLIGKEIT UND SOZIALTHERAPIE (1984); G. KAISER, H. KERNER & H. SCHÖCH, STRAFVOLLZUG 282-94 (1977); K. ROTTHAUS, H. SCHWIND & G. BLAU, STRAFVOLLZUG IN DER PRAXIS 70-77 (1976); Dünkel, Nemec, & Rosner, *Organisationstrukur, Behandlungsmassnahmen und Veränderungen bei Insassen in einer sozialtherapeutischen Anstalt*, 69 MSCHRKRIM 1-21 (1986); Rotman, *El Tratamiento Socioterapéutico de Delincuentes en la Clínica Dr. Henri van der Hoeven*, in CONGRESO PANAMERICANO DE CRIMINOLOGIA (Buenos Aires) (1979); Rotthaus, *Sozialtherapie in der Justizvollzugsanstalt Gelsenkirchen*, ZTSTRVO 2-12 (1981); Rotthaus, *Die neue Dr.-van-der-Hoeven-Kliniek in Utrecht*, 61 MSCHRKRIM 126-34 (1978).

200 *See* J. KAGAN, THE NATURE OF THE CHILD 12 (1984); Brim, *Adult Socialization*, in SOCIALIZATION AND SOCIETY 185 & 195-96 (J. Clausen 1968).

201 *E.g.*, F. DÜNKEL, LEGALBEWÄHRUNG NACH SOZIALTHERAPEUTISCHER BEHANDLUNG 134-39 (1980).

202 The importance of skill training as a rehabilitative option is underlined by Halleck & Witte, *supra* note 47, within the category of opportunity-changing programs.

The application of the equal protection clause to a global rehabilitative concept should consider the various component elements of rehabilitation, involving therapy, education and social learning. If prisoners should have the same rights as other citizens, except when a compelling governmental interest in public protection absolutely demands otherwise, the scope of the equal protection inquiry is enlarged considerably. An equal protection inquiry should first determine the extent to which education, work, vocational training, therapy or any other rehabilitative component has become a legally enforceable right of the public. The second stage of the inquiry should determine whether the exercise of such rights can be legitimately curtailed or abolished because one is imprisoned.

The question then arises whether the concept of legal punishment can be limited to deprivation of freedom. Rejecting this limitation is equivalent to accepting all the deteriorating effects caused by sterile warehousing in an atmosphere of idleness and potential violence. Denying the prisoner's right to counteractive measures amounts to a definition of punishment that includes the reversion of human development, the loss of capacity and of mental and social health. Such a concept of punishment could never claim to be civilized. If punishment is to conform to its overt legal objectives, the state must guarantee the equal protection of inmates' basic rights. Meaningful rehabilitative programs must be developed to counteract the degrading and socially detrimental situation of incarcerated prisoners. This legal obligation of the state should correspond to the rights of inmates to education, vocational instruction and maintenance of acquired skills, mental health and remunerated work in the same way they belong to other citizens.

In the search for an equal protection argument for a constitutional right to rehabilitation, it is important to remember that state constitutions can be supplemental sources of constitutional protection.[203] Rehabilitation is included in the bill of rights of a number of state constitutions[204] which are thus a direct source of the constitutional right in question. In addition, another fundamental state right, the right to education,[205] is a part of the rehabilitative structure. Its hierarchical position in the legal system offers a new basis

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203 Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 18 U. TOL. L. REV. 465, 475 (1985).

204 *See infra* section XI, "State Constitutions."

205 Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 103 (1982)(stating that "[e]ducation is the most obvious candidate for treatment under a fundamental state rights approach because, as previously indicated, almost all state constitutions have explicit educational guarantees and several state courts have held that education is a fundamental state right.").

for strict scrutiny in federal equal protection review.[206] Thus, classifications impinging upon such rights, such as the category of convicted imprisoned offenders, could violate the equal protection clause if they are not adequately compensated for by rehabilitative services as education, re-education or basic vocational training.

Like the disabled, many criminal offenders suffer from social handicaps. This similarity suggests another application of the equal protection theory. Here comparative law offers an important precedent in the recognition of a constitutional right to rehabilitation via equal protection. The Constitutional Court of the Federal Republic of Germany, in the *Lehbach* case[207] declared it an active duty of the state to rehabilitate criminal offenders based on the general constitutional duty of the state to protect and care for the socially disadvantaged (*Sozialstaatsprinzip*).[208] The decision was premised on a view of criminal offenders as psychologically handicapped and consequently in need of resocialization-oriented compensatory action.[209] The assimilation of prisoners and former convicts to the vast group of those handicapped in personal and social development creates a new perspective for future applications of the equal protection theory to the rehabilitation of criminal offenders. Such an interpretation should introduce into the constitutional equation the social welfare and rehabilitation programs to which the disabled are entitled.

One could also view a right to rehabilitation as a right to minimum protection, following the strategy developed by Michelman for "instances in which individuals have important needs or interests which they are prevented from satisfying because of traits or predicaments not adopted by free and proximate choice."[210] In those cases the equal protection clause is used as a textual base for litigation inspired or shaped by minimum-protection thinking.[211]

A right to minimum protection should be founded on the correlative duty of the state to satisfy certain basic wants resulting from its punitive action but unrelated to the legitimate goals of legal punishment. The denial of opportunities for rehabilitation, at either the educational, labor or therapeutic level, inevitably degrades the warehoused offender. Such nefarious consequences of imprison-

206 *Id.* at 92-107.

207 Judgment of June 5, 1973, Bundesverfassungsgericht (W. Ger.), 35 BVerfGE 202. *See supra* note 2.

208 Art. 20, ¶ 1, of the Fundamental Law.

209 Judgment of June 5, 1973, Bundesverfassungsgericht (W. Ger.), 35 BVerfGE 202.

210 Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 35 (1969).

211 *Id.* at 33 n.78.

ment play no part in the legal design of criminal sanctions, and the offender cannot be supposed to have foreseen them before committing a crime. The lack of all positive assistance is equivalent to throwing the prisoner into a state of social deprivation exceeding the normal consequences of liberty deprivation. His or her situation would be similar to that of the impecunious person who "is denied access of certain goods or activities because of some trait or situation which he is powerless to change currently and which is not the result of any decision freely made by him in the proximate past."[212] In subjecting a human being to criminal punishment, the state must guard against exceeding the legal scope of its repressive task. The only way to prevent or compensate for unjustified deprivations is to carry out a positive program of rehabilitative action.

X. Customary International Law

International law, applied as part of domestic United States law, is another source of constitutional interpretation supporting a right to rehabilitation. This principle, which includes the application of customary international law by American courts, was established by the Supreme Court in 1900 in *The Paquete Habana*.[213] According to this decision, "when there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and the usages of civilized nations; and as evidence of these, to the works of commentators, . . . for trustworthy evidence of what the law really is."[214]

Customary international law is defined by the Statute of the International Court of Justice as a "general practice accepted by law" and binding on the world community.[215] Customary international law demands (1) a "concordant practice by a number of States, (2) and [their belief] that an action is required by, or consisent with, international law."[216] In this regard, human rights advocates have sought recognition of a right to education by invoking customary law expressed in international instruments as a source of human rights law.[217] In cases of a gap in constitutional protections, "fundamental human rights norms as established by traditional sources of

212 *Id.* at 33.

213 The Paquete Habana, 175 U.S. 677 (1900).

214 *Id.* at 700.

215 Comment, Plyler v. Doe *and the Right of Undocumented Alien Children to a Free Public Education*, 2 B.U. Int'l L.J. 513, 523 (1984)(citing Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, art. 338(1)(a)).

216 *Id.*

217 *See id.*; Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*,4 Hous. J. Int'l L. 39, 53 (1981).

customary international law may be used to help fill the lacunae with substantive principles."[218]

Bilder believes that international standards are more likely to be invoked to protect "peripheral and less generally accepted types of alleged rights" than to protect the "core" civil and political rights which are already covered by domestic law. He further points to the positive influence of subtler factors, such as national pride in a human rights tradition. "A United States court may be reluctant to expressly find that United States domestic law protecting human rights has significant gaps' which it can fill only by drawing on international law sources, or that the United States has something to learn in this regard from other nations."[219]

In *Lareau v. Manson*,[220] the court used customary international law as a basis for declaring the overcrowded conditions of the Hartford Community Correctional Center in violation of the eighth amendment.[221] The United Nations Standard Minimum Rules for the Treatment of Prisoners were cited as a significant "expression of the obligations to the international community of the member states of the United Nations, . . . and as part of the body of international law (including customary international law) concerning human rights which has been built upon the foundation of the United Nations Charter."[222] In fact, the Standards Minimum Rules had been adopted as a preamble to the Administrative Directives to the Connecticut Department of Corrections. Although the Rules are not necessarily applicable in the United States, the court considered them "an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind."[223]

The Standard Minimum Rules were also invoked by the Supreme Court of Oregon in its decision that the search of male prisoners by female corrections officers violated Oregon's constitutional prohibition against cruel and degrading punishment.[224] The court stated that the case involved the application of Oregon's bill of rights, stating that laws for the punishment of crime shall be

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218 Christenson, *supra* note 217, at 55.

219 Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1, 9 (1981).

220 Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980), *aff'd in part and modified in part*, 651 F.2d 96 (2d Cir. 1981).

221 507 F. Supp. at 1187-88 n.9.

222 *Id.* at 1188.

223 *Id.*

224 Sterling v. Cupp, 290 Or. 603, 625 P.2d 123 (1981).

designed for reformation, and not for "vindictive justice."[225] This interpretation is reinforced by both the Universal Declaration of Human Rights and the Standard Minimum Rules, which also establish rehabilitation as an essential aim of the penitentiary system.[226]

A variety of sources strongly support the existence of a right to rehabilitation based on customary international law. The United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955, provide in article 58:

> The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

In other articles this document prescribes detailed guidelines for an individualized and integral rehabilitative action.[227] The United Nations International Covenant on Civil and Political Rights, in force since 1976, establishes that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."[228] The American Covention of Human Rights, entered into in 1978, provides that "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of prisoners."[229]

XI. State Constitutions

Several state constitutions can serve as a significant source for the constitutional status of a right to rehabilitation. During the 1960s, the Supreme Court relied on the federal Constitution to initiate more comprehensive protection of the rights of people. But after the Court's retreat from political activism during the 1970s, the states' bills of rights gradually regained their prominent role. The principle of federalism is being used to expand rights, and state judges are scrutinizing state constitutions in order to create a body of civil liberties going beyond current interpretations by the Supreme Court.

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225 *Id.* at 616, 625 P.2d at 128.

226 *Id.* at 622 n.21, 625 P.2d at 131 n.21.

227 The United Nations Standard Minimum Rules for the Treatment of Prisoners, *contained in, Report on the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (U.N. Pub., No.: 1956.iv.4).

228 The United Nations International Covenant on Civil and Political Rights, art. 10, § 3 G.A. Res. 2200 (xxi), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967).

229 The American Convention of Human Rights, art. 5, § 6 O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1978).

The matter of rehabilitation is incorporated into the bills of rights of several state constitutions among their fundamental guarantees and safeguards. The Constitution of New Hampshire, in effect since 1784, establishes:

> All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do those of murder and treason. Where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.[230]

With this emphatic conclusion the provision reinforces the utilitarian arguments used to support humane punishment. The provision not only denounces the injustice of sanguinary laws, but invokes the reformative nature of criminal punishment. It thus links the sentencing goals with a concept of reform inspired in a philanthropic, religious and humanitarian tradition. In the late eighteenth century, the idea of rehabilitation represented a barrier against the fearsome arbitrariness of the pre-Enlightenment exemplary punishment. Beccaria's humanistic and rational considerations on the legislative meting out of punishment were extended by the Constitution of New Hampshire to the correctional field. But reform also had an evangelical content, going beyond utilitarian calculation. In 1850, Thorton, a delegate to Indiana's Constitutional Convention, based his attack on the death penalty on precepts of the Gospel and affirmed that "[t]he sole object of criminal punishment, after securing society, is to reform, not to exterminate the offender."[231]

In the nineteenth century, the requirement of rehabilitation was included in the constitutions of Oregon, Indiana, Wyoming, and Montana. According to Elbert F. Allen, these were simple embodiments of common law principles.[232] The Oregon Constitution goes far beyond the eighth amendment's prohibitions, providing that punishment be based on "principles of reformation, and not of vindictive justice."[233] The same language is used by the Constitution of Indiana providing that "the penal code shall be founded on the

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230 N.H. CONST. art. 18.

231 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1382 (1850).

232 Allen, *Sources of the Montana State Constitution*, MONTANA CONSTITUTIONAL CONVENTION 1971-1972 (Research Memorandum 4) 2 (1972).

233 OR. CONST. art. I, § 15.

principles of reformation, and not of vindictive justice."[234] Likewise, the Constitution of Wyoming commands that "[t]he penal code shall be framed on the human principles of reformation and prevention."[235] The expression "vindictive justice," originally included in the draft, was struck during debate as superfluous.[236] Delegate Hoyt explained that the proposed section provided an "indication toward humane methods."[237]

The same question arose in Montana's 1889 Constitution. The draft of its section 23 orginally read: "Laws for punishment of crime shall be founded on the principle of reformation and prevention, and not of vindictive justice."[238] David M. Durfee moved to strike the section, contending that it did not mean anything.[239] Hiram Knowles eloquently underlined the significance of the provision.[240] He said that it meant to substitute the view of making the offender a "better man" for the "preposterous proposition" of punishing him in a spirit of revenge and that the section showed that the country belonged "to the advanced age in regard to the matter."[241] Durfee insisted on striking the provision he considered to be superfluous. Walther M. Bickford defended Knowles' contention, emphasizing that punishment should not be inflicted in a vindictive spirit, "but in a spirit of prevention, and for the purpose of preventing the recurrence of the same crime, and that, as a civilized nation, we had some respect and something in common with the rest of the world."[242] The provision was finally adopted with the following words: "Laws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death."[243]

Modern provisions can be found in the 1972 Montana Constitution and in the constitutions of Alaska and Illinois. Under the heading "Rights of the Convicted," the Constitution of Montana provides that "laws for the punishment of crime shall be founded on the principles of prevention and reformation. Full rights are re-

234 IND. CONST. § 18.
235 WYO. CONST. art. I, § 15.
236 JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 719-20 (1893).
237 *Id.* at 719.
238 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, MONTANA 124-25 (1921).
239 *Id.* at 125.
240 *Id.*
241 *Id.*
242 *Id.* at 126.
243 MONT. CONST. art. III, § 24 (1889).

stored by the termination of state supervision for any offense against the state."[244] The Constitution of Alaska adds to the cruel and unusual punishment prohibition the following command: "Penal administration shall be based on the principle of reformation and upon the need to protect the public."[245] The Illinois Constitution establishes that "all penalties shall be determined both according to the seriousness of the offense and with the objective to restore the offender to useful citizenship."[246]

Especially when included in the bill of rights, such provisions are highly significant. They shape penal legislation and are a source of individual guarantees equivalent to the prohibition against cruel and unusual punishment. Occasionally, other clauses can be found prescribing humane or healthy conditions of imprisonment. For instance, the Delaware Constitution includes an appendix to the prohibition against cruel punishments, determining that "in the construction of jails a proper regard shall be had to the health of the prisoners."[247] Similarly, the Constitution of Tennessee commands that "the erection of safe and comfortable prisons, the inspection of prisons and the humane treatment of prisoners, shall be provided for."[248] The same language governing the physical conditions of prisons and the treatment of offenders was placed in the Constitution of Wyoming.[249] Other rights granted by state constitutions impose a pattern or style on eventual rehabilitative undertakings. These are the right to privacy[250] and the right of conscience,[251] which exclude from treatment any form of brainwashing or ideological imposition. According to such rights, rehabilitative action should respect the privacy of individuals and not curtail, but rather intensify, their capacity for self-determination.

XII. Non-Constitutional Sources of a Right to Rehabilitation

The state's duty to try to rehabilitate convicted prisoners can emerge from a statute or contract or from a situation that endangers the mental or social integrity of the prisoner through particularly grievous forms of imprisonment. The corresponding right of the

244 Mont. Const. art. III, § 24.
245 Alaska Const. § 12.
246 Ill. Const. art. I, § 11.
247 Del. Const. § 11.
248 Tenn. Const. § 32.
249 Wyo. Const. art. 16.
250 *E.g.*, Alaska Const. § 22.
251 *E.g.*, Cal. Const. § 4; Ga. Const. ¶ XVIII; N.H. Const. art. 4.

inmate can be enforced through administrative litigation or tort claims against prison authorities.

In some states an enforceable right to rehabilitation could be derived from general statements of the purposes of the correctional system or general directives to the correctional system as how to treat the inmates (e.g., Massachusetts,[252] South Carolina,[253] Rhode Island,[254] New Jersey,[255] New York,[256] Washington,[257] or Montana[258]).[259] The Interstate Agreement on Detainers Act[260] establishes a right of prisoners to uninterrupted and unimpeded rehabilitation.[261]

Another possible source of a rehabilitative obligation on the part of the state is parole contracts, in which the inmate and parole authority agree upon a release date on the condition that the inmate completes certain obligations including rehabilitation programs. Cullen and Gilbert point out that the very existence of a contract system puts pressure on correctional officers to improve treatment services,[262] and they advocate mandatory contracts obligating the state to rehabilitate.[263] "Mutual agreement programs" have proliferated in state prison and parole systems and are also being applied in probation programs.[264] These comprise a variety of negotiations in which correctional authorities commit themselves to provide the rehabilitative resources that allow inmates to fullfil the conditions of their release.[265]

A third source of the duty to rehabilitate springs from the very fact that the state imprisons individuals. Imprisonment in America today is an intrinsically dangerous situation. It demands from the state a positive action to avert potential harm to prisoners' mental,

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252 MASS. ANN. LAWS ch. 24, § 1(e)-(f) (Law. Co-op. 1981).

253 S.C. CODE ANN. § 24-1-20 (Law. Co-op. 1976).

254 R.I. GEN. LAWS § 42-56-31 (1984).

255 N.J. STAT. ANN. §§ 30:1B-6, 30:4-91.1, -91.3, -91.6, -92 (West 1981).

256 N.Y. CORRECT. LAW ch. 43, ¶ 136 (McKinney 1968).

257 WASH. REV. CODE §§ 72.08.101, 72.64.010, 72.01.150, 72.62.010 (1982).

258 MONT. CODE ANN. § 53-1-201 (1985).

259 On the process through which rehabilitative services have gradually come to be seen as rights rather than privileges, see R. HARDY & J. CULL, INTRODUCTION TO CORRECTIONAL REHABILITATION 21 (1923).

260 18 U.S.C. ¶ 2 (1982).

261 *See* Gray v. Benson, 458 F. Supp. 1209 (D. Kan. 1978).

262 F. CULLEN & K. GILBERT, *supra* note 16, at 271.

263 *Id.* at 273.

264 Glaser, *Protocol for Mutual Agreement Programs in Parole Release*, in PROBATION, PAROLE AND COMMUNITY CORRECTIONS 269 (1984).

265 Research on the effectiveness of parole contracts has not yet provided conclusive results. *See* H. ALLEN, C. ESKRIDGE, E. LATESSA & G. VITO, PROBATION AND PAROLE IN AMERICA 255 (1985).

social and physical health. In some cases imprisonment amounts to placing inmates in closed environments where they are exposed to unlawful trade in and use of hard narcotics.[266] In others the harm may be a permanent deterioration of the personality or a dramatic loss in social capacity and skills. In all cases imprisonment creates a situation of need that the prisoners alone, deprived of their liberty by state action, cannot handle. In creating a dangerous situation, the state has assumed not only a duty of care but an obligation to prevent specific harms connected with such situations. An atmosphere of imminent danger to physical well-being and of acute reversion of human development not only infringes upon constitutional provisions but creates, whenever an identifiable harm can be determined, the possibility of civil and even criminal liabilities.

In this context, it is useful to apply the general category of derivative liability developed by Fletcher in comparative criminal law.[267] Unlike the "direct" liability of the standard cases of perpetration, derivative liability arises either from a failure to prevent a harm that the law seeks to prevent or from forms of behavior accessorial to criminal acts committed by others.[268] Fletcher distinguishes derivative liability for failure to avert harm both from direct liability for breach of a universal statutory command and from the breach of a general duty of care in cases of negligent causation of harm.[269] This distinction between negligence and intentional derivative liability is all the more important in view of the restrictive interpretation of recent Supreme Court decisions on governmental responsibility for civil rights violations.[270]

Permitting harm to occur is a source of liability only when there is a personal duty to render assistance.[271] Futhermore, the context of the relationship between the actor and the person in jeopardy, and the particular circumstances of the case need to be considered in determining, whether "the failure to avert harm is as egregious a wrong as causing the particular harm."[272] Inaction may be liable omission if the previous action of the actor created the danger to the potential victim. Persons that knowingly create the need for aid have a duty to prevent harm. Under certain circumstances inaction

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266 Bresolin v. Morris, 88 Wash. 2d 167, 175-76, 558 P.2d 1350, 1354 (1977)(Utter, J., dissenting).

267 G. FLETCHER, RETHINKING CRIMINAL LAW 581-682 (1978).

268 *Id.* at 583.

269 *Id.* at 586.

270 *See* Whitley v. Albers, 106 S. Ct. 1078, 1084 (1986); Daniels v. Williams, 106 S. Ct. 662, 667 n.3. (1986).

271 G. FLETCHER, *supra* note 267, at 604.

272 *Id.* at 605.

renders person with the knowledge as liable as if they had caused the results by committing an intentional deed. This liability can only be avoided by a positive action neutralizing the dangerous situation created. Following this line of reasoning, the state would be liable for all harmful effects of incarceration exceeding the lawful scope of deprivation of liberty unless it took clear action directed towards counteracting those effects. Such actions should consist largely of rehabilitative undertakings.

XIII. CONCLUSION

To subject inmates to the harmful effects of imprisonment without allowing them any possibility of counteracting these harms is additional and unlawful punishment. Without opportunities for rehabilitation at the educational, labor or therapeutic levels, the warehoused offender inevitably deteriorates. Because penal servitude and hard labor have been abolished, imprisonment in a modern civilized society consists only of the deprivation of liberty. To administer such legal punishment without unwarranted side-effects requires rehabilitative action. This effort cannot be reduced to a discrete set of programs, but should create a rehabilitative environment through the reorganization of the correctional institution and its linkage, so far as possibile, with the community through various forms of furloughs and pre-release programs. Efforts to avoid the pernicious effects of incarceration find their ultimate expression in the creation of noncustodial alternatives to incarceration. The most promising field for rehabilitative undertakings lies in the community.

Modern rehabilitative policies represent a challenge to the fantasy that the dark side of society can be forgotten and that its deviants can be simply packed off to prisons. But rehabilitative action should not remain merely a goal of governmental policies, however enlightened and humanistic. Rehabilitation will be fully realized only when it is recognized as a right of the offender, independent of utilitarian considerations and of transient penal strategies. Viewed as the culmination of a continuum of offenders' rights, rehabilitation can no longer serve as a pretext for discretionary abuse on the part of sentencing and correctional authorities. To the contrary, a right to rehabilitation reinforces the legal status of the sentenced offender and requires sentencing and correctional policies compatible with rehabilitative prison conditions. Because of its deep connection with the essence of criminal punishment, the right to rehabilitation has a paramount constitutional significance. Thus, a constitutional right to rehabilitation has been included in the bill of rights of vari-

ous countries and is one of the basic principles of customary international law.

While denying the existence of a constitutional federal right to rehabilitation, American courts have acknowledged it in a negative way as the right to counteract the deteriorating effects of imprisonment. The courts have also granted the prisoner a limited right to psychiatric and psychological treatment. Arguments based on the eighth and fourteenth amendments, as well as the application of customary international law, reveal the existence of an implicit right to rehabilitation in the United States Constitution. Full recognition of this rehabilitative mandate, reinforcing existing provisions in state constitutions and in statutory law, would earn the United States a place in the penological vanguard of nations that have decided to combat crime at the highest civilized level.