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Youth Crime and Urban Policy: A View from the Inner City

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BOOK REVIEWS

THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL IDEAL. By Francis A. Allen. New Haven, Conn. and London: Yale University Press, 1981. Pp. xii, 132. $15.00.

*Reviewed by Louis A. Jacobs**

I. INTRODUCTION: A VIEW FROM THE TRENCHES[1]

In his most recent contribution Professor Francis Allen[2] suggests that the rehabilitative ideal can flourish only in a particular kind of society. He observes that today's American society lacks the nourishing characteristics that once fed that ideal; consequently, the ideal has withered. This argument is concisely and precisely constructed in *The Decline of the Rehabilitative Ideal*, a book derived from the 1979 Starrs Lectures on Jurisprudence at Yale Law School.

Rather than describe the extent of the decline, Professor Allen focuses on the nexus raised in the book's subtitle—penal policy and social purpose. As social purpose evolved (perhaps "devolved" is more accurate) in the United States, a parallel evolution away from the rehabilitative ideal occurred. In tracing that process, Professor Allen notes that "the modern decline of penal rehabilitationism cannot be fully explained by the persuasiveness of the logical cases arrayed against it."[3] He thoroughly analyzes those logical challenges and canvasses several potential routes to revitalizing the rehabilitative ideal. Throughout, the reasoning is clear, sources are abundant, and the insight offered is sharp. Consequently, one can commend the book as an enjoyable excursion into rehabilitation

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1. Professor Jacobs regularly litigates prisoners' rights cases and was counsel of record in both Rhodes v. Chapman, 452 U.S. 337 (1981), and Jago v. Van Curen, 102 S. Ct. 31 (1981).

2. Allen is Edson R. Sunderland Professor of Law of the University of Michigan Law School.

3. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL IDEAL 32 (1981).

policy guided by a wise and knowledgeable writer.

Beyond that analysis, however, the book suffers from Allen's failure to emphasize that forces other than those that take the form of logical arguments about appropriate penal policies and societal meanderings also play a part in the decline of the rehabilitative ideal. For example, a simplistic view of punishment, cavalierly summed up by Justice Relnquist's recent pronouncement that "[i]n short, nobody promised them a rose garden,"[4] has trumped the more sophisticated analysis Professor Allen draws. In addition, an empirical view of limited governmental resources and negative political clout renders even the most sympatbetic legislator, administrator, or judge incapable of actively promoting the rebabilitative ideal. Finally, a constitutional view of penology dictates that the social milieu must be resisted as a guide and replaced by a transcendent ideal rooted in the eighth amendment to the United States Constitution.[5]

These views of the rehabilitative ideal's decline ultimately are more instructive than those on which the book focuses. To address meaningfully the deepening American crisis of overcrowded, deteriorating, understaffed, and inadequately financed prisons,[6] these views must be explored fully. That Professor Allen has turned his attention elsewhere is unfortunate; for all its nuances, the book fails to grapple with less subtle—and less palatable—realities of both fact and law.

II. Of Rose Gardens and Country Clubs

The rehabilitative ideal presupposes a societal interest in doing more than simply wreaking vengeance on offenders. Professor Allen suggests that the most nourishing society will be one in which "there is strong and widespread belief in the malleability of human character and behavior" that is buttressed by "a sufficient consensus of values to make possible a working agreement on what

4. Atiyeh v. Capps, 449 U.S. 1312, 1315-16 (1981) (Rehnquist, Circuit J.) (opinion in chambers).

5. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

6. The Bureau of Justice Statistics indicates in its "Prisoners at Midyear 1981" bulletin that the nation now faces a record increase in the number of state and federal prisoners, with nearly 350,000 men and women incarcerated. Justice Assistance News, Nov. 1981, at 5. To date, "individual prisons or entire prison systems in at least 24 States bave been declared unconstitutional." Rhodes v. Chapman, 452 U.S. 337, 353 (1981) (Brennan, J., concurring) (footnote omitted).

it means to be rehabilitated."[7] On the other hand, a regimen devoted to "simplistic penological philosophy"[8] need not be one that rejects Professor Allen's construct. Instead, that society begins with "a recognition that prisoners are not to be coddled, and prisons are not to be operated as hotels or country clubs."[9] The rehabilitative ideal is irrelevant to the predominant vengeful purpose: "To the extent that such [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[10] In whatever manner that society views the efficacy of rehabilitation, a single-minded devotion bordering on spite fuels its approach to corrections. In fact, this motivation as a justifying factor for the quintessential counter-rehabilitative act—the death penalty—has received significant judicial support.[11]

Although Professor Allen recognizes this reaction to crime, he characterizes it as presenting "very little of intellectual interest,"[12]

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7. F. ALLEN, *supra* note 3, at 11.

8. Rhodes v. Chapman, 452 U.S. 337, 377(1981) (Marshall, J., dissenting) (noting "an alarming tendency toward" believing that deterrence will result "if we lock the prison doors and throw away the keys").

9. Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). One factor to which Professor Allen attributes the decline of the rehabilitative ideal is the "radical loss of confidence in its political and social institutions" suffered by the "post-Watergate world" of modern America. F. ALLEN, *supra* note 3, at 18-19. A penological dimension of that world is the public awareness that some former government officials were imprisoned at a facility with golf courses. The nearly illusory country club model became reality. *Cf.* Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring) ("Certainly, no one could suppose that the courts have ordered creation of 'comfortable prisons,' [citation omitted] on the model of country clubs.").

10. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

11. Roberts v. Louisiana, 428 U.S. 325, 354 (1976) (White, J., dissenting, joined by Burger, C.J., Blackmun and Rehnquist, JJ.); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion of Stewart, J., joined by Powell and Stevens, JJ.). For an analogous example of vengeance supplanting rehabilitation, see Rummel v. Estelle, 445 U.S. 263 (1980), in which the Court noted the

> state interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts [here, a life sentence for credit card fraud, a forged check, and obtaining money by false pretenses—crimes involving the total amount of $229.11] have shown they are simply incapable of conforming to the norms of society as established by its criminal law.

Id. at 276.

12. F. ALLEN, *supra* note 3, at 32. This intellectual disdain for a narrow view is clearly appropriate. Professor Allen elsewhere has noted that "the much argued view that moral retribution is the exclusive purpose of criminal justice need not detain us long. . . . Criminal justice, even in relatively simple societies, will be found to be multivalued and multipurposed." F. ALLEN, LAW, INTELLECT, AND EDUCATION 101 (1979) (footnote omitted). Disdain should not, however, motivate either dismissal of the appeal of such a view or inattention to

because he believes that these societal responses "compromise essentially irritated responses to the prevalence of crime and offer only an all-encompassing faith in the efficacy of coercion and repression."[13] Allen is correct to denigrate such an abiding faith, but Old Testament values[14] are more likely to motivate the true believer. As noted above, efficacy of punishment as a deterrent simply does not constitute the prevalent consideration—retribution is served no matter how inefficacious the penalty.

Parenthetically, one aspect of this approach resembles one societal nutrient that Allen says is needed to feed a rehabilitative ideal: the approach demands a corner on righteousness that requires belief in the malleability of human character and behavior. Unlike the faith in malleability that leads to a rehabilitative orientation, however, the imposition of harsh punishment does not serve primarily a societal interest in deterring that individual and, by example, others. Rather, it satisfies a societal thirst for a moral response. The "We-they" component of this response constitutes less an invitation for sinners to join the fold than a proclamation that morality is triumphant.

This simplistic view of punishment as retribution differs from the "just deserts" theory that recently has been gaining adherents and that Professor Allen keenly criticizes.[15] That theory, which turns on the perceived equality of offenders and law-abiding citizens, posits that an offender who violates the law is entitled to be treated with "equal concern and respect" as a citizen who has made a choice.[16] To the extent the rehabilitative ideal suggests the offender is sick—that is, not capable of making a mature and informed choice—it transgresses this fundamental precept.[17] Punish-

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its underlying fallacies.

13. F. ALLEN, *supra* note 3, at 32.

14. *Exodus* 21:24 (King James Version) ("Eye for eye, tooth for tooth, hand for hand, foot for foot.").

15. F. ALLEN, *supra* note 3, at 66-76. For a leading display of this model, see A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). Professor Allen apparently contrasts a retributive-based model with an assertion "that the state must not impose criminal sanctions on an accused *unless* his behavior is fairly subject to moral condemnation." F. ALLEN, *supra* note 12, at 102 (emphasis in original) (footnote omitted). In the former, the purpose of punishment is to serve moral blameworthiness; in the latter, the precondition for punishment is this culpability. Yet, surely the precondition exists in the former as well, and punishment also promotes that purpose under the latter regime.

16. R. DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

17. Professor Allen also thoroughly deflects the political argument that social, cultural, and economic conditions force offenders to break the law. F. ALLEN, *supra* note 3, at 37-41. Importantly, though, the "just deserts" model must assume an absence of such coercive conditions; otherwise, the inequality of condition renders the imposition of equal punish-

ment for vengeance purposes, on the other hand, contains no equality principle. Indeed, the degree of *mens rea*, not the offense itself, is the critical measure of the appropriate retribution against the defendant. While the offender deserves punishment because he made the wrong moral choice, the immorality of a particular offending choice renders that person less worthy than a nonoffender.

Subjecting the offender to punitive conditions generally will violate the notion of proportionality, the concomitant principle of the just deserts theory. That is, the offender's choice to violate the law generates a fair reward only when the punishment fits the crime. Punitive conditions of incarceration, however, are nondiscriminating with respect to the offense. Moreover, they may fall below the conditions to which a person worthy of equal respect and dignity is entitled. The just deserts theory's demands of equality and proportionality limit the retaliatory thirst of society; the imposition of discomfort, apart from that intrinsic to incarceration, overrides this governor and extracts an ounce of pain that calls into question the offender's status as an equal and molds the punishment to society's view of the offender's immorality.

Professor Allen also dismisses a social purpose of penal policy that would include the desire of the ruling class to preserve the political, economic, and social status quo.[18] Because the rationale for the position eloquently argued by Judge David Bazelon and others is so intuitively appealing, the initial reaction to Professor Allen's handling of this alleged policy justification is skepticism. Nevertheless, these two positions may be reconciled to afford each one validity. Judge Bazelon pinpoints the causes of crime—for example, the tragic social conditions of unemployment, ignorance, and discrimination—but he need not ascribe to society a desire to foster them. By the same token, a penal policy based "on the perception that all classes in the community have a stake in public order"[19] need not be cynical camouflage for repression. Therefore, in theory at least, Professor Allen rightly rejects an assertion that repression ineluctably flows from any penal policy applied to an

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ment unjust.

18. F. ALLEN, *supra* note 3, at 38-39. Professor Allen rejected this argument before: "a view of the police simply as an instrumentality of the wealthy bourgeoisie in a Marxist class struggle scarcely comports with the facts, present or past." F. ALLEN, THE CRIMES OF POLITICS: POLITICAL DIMENSIONS OF CRIMINAL JUSTICE 21 (1974).

19. F. ALLEN, *supra* note 3, at 38. Again, Professor Allen consistently proffers this point in his writing: "Fears of law enforcement abuse have sometimes led political liberals and radicals to underestimate the deleterious impact of crime on the lives of persons." F. ALLEN, *supra* note 18, at 14.

unequal society.

Nonetheless, a disturbing illusion about equality underlies the disclaimer of ruling-class rhetoric. The superficial equality of access to an "upper class" has supplanted a deeper equality of rights.[20] Thus, while all classes may find public order essential to basic functioning, the lower classes surely have a lesser stake in the form that public order has taken. For this segment of society, order is often too synonymous with oppression to exalt it. Order serves to guarantee equal access, but their status deprives them of the means to use that access effectively.[21] In this way a penal policy can be characterized fairly as one that serves a social purpose wedded to the ruling class, its natural beneficiaries.

Most alarming, however, is the tendency of the benefited class to assume that "true" equality exists among classes and, therefore, that those who violate laws linked peculiarly to lower class status are less deserving or less worthy persons. The trend toward vengeance as the central element of a penal policy could be traced to this assumption about the lower class. In the context of a rising demand for revenge, the invocation of rose gardens and country clubs represents more than mere repressive propaganda.[22] Behind

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20. The typical illustration of this dichotomy comes from Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." J. BARTLETT, FAMILIAR QUOTATIONS 655 (15th ed. 1980). *Compare* Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting) (equal protection clause does not prevent "the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich"), *with* Washington v. Davis, 426 U.S. 229, 248 (1976). In *Washington*, the Court stated,

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. (footnote omitted). The debate is protracted and currently subject to ample analysis by capable commentators. *See, e.g.*, Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-6 (1977).

21. Based on his writings and reputation, Professor Allen seems quite sympathetic to the plight of those for whom equal access is merely a formal right and not a substantive reality. *See, e.g.*, ATTORNEY GENERAL'S COMM. ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE, POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10 (1963) (F. Allen, Chairman), ("While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."). This conclusion stops short, however, of the implicit question raised by Judge Bazelon's critique—must government also minimize the influence of poverty on its definition of justice? To accord the impoverished defendant all the procedural guarantees of an indisputably fair trial is meaningless when the substantive reach of the law unfairly preys on the defendant's poverty.

22. F. ALLEN, *supra* note 3, at 62. Professor Allen dismisses this aspect of vengeance as

the metaphors hides a retributive thrust against a rehabilitative ideal that seems but a luxurious frill not directly related to either penal policy or social purpose. This thrust demands thorough analysis.

III. Of Slicing Smaller Pies

Professor Allen, an astute observer of political processes,[23] does not consider scarce fiscal resources and lack of political clout significant contributing factors to the decline of the rehabilitative ideal.[24] By relegating these factors to a secondary role, he apparently assumes that a society in which the basic nourishing constructs existed would be able to weather any incremental decline caused by these factors.

The realpolitick throughout statehouses today, though, is that notwithstanding even a singular devotion to the rehabilitative ideal, the resources are not there for such a low political priority. The Justice who established rose gardens as a jurisprudential standard was more realistic when, in rejecting judicial activism, he observed, "There is no reason for courts to become the allies of prison officials in seeking to avoid unpleasant prison conditions when the executive and legislature of the State have decided that only a certain amount of money shall be allocated to prison facilities."[25]

Admittedly, governments have limited funds and prisoners have few ward heelers, but these realities do not really affect the lack of consensus about rehabilitative techniques and human character at the core of Professor Allen's thesis. He notes that legislators need to go through the motions of prison reform[26] and that rehabilitative idealists must temper their fervor with fiscal sensi-

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"a kind of nostalgia" steeped in "the values of discipline, vigor, and self-confidence largely lacking in contemporary American society." *Id.* (footnote omitted). Those values only partially explain the righteousness that fuels vengeance and, by labeling their product repressive, Professor Allen assumes that a predominantly punitive regime would be inappropriate. The assumption deserves further analysis, however, especially when the retributive portion of corrections increasingly is asserted as a primary penal goal.

23. *See, e.g.*, F. Allen, *supra* note 12, at 103; Allen, *The Law as a Path to the World*, 77 Mich. L. Rev. 157, 163 (1979).

24. He believes that the splintering of a consensus about the efficacy of rehabilitation has been caused by the debasement of rehabilitative efforts due in part to underfunding. F. Allen, *supra* note 3, at 54-56.

25. Atiyeh v. Capps, 449 U.S. 1312, 1318 (1981) (Rehnquist, Circuit J.) (opinion in chambers); *see* Rhodes v. Chapman, 452 U.S. 337, 356-57 (1981) (Brennan, J., concurring).

26. F. Allen, *supra* note 3, at 79, 85.

tivity.[27] In addition, he identifies a ratio of insensitivity to minority prison population[28] and a studied public apathy.[29] Allen's scattered observations, however, diminish the central nature of political allocation of limited resources.

First, the rehabilitative ideal just does not come cheaply. Basic "[c]onfinement of prisoners is unquestionably an expensive proposition."[30] Also, the resources necessary to fashion a rehabilitated offender, or for that matter to accomplish more than a warehousing function, swell the costs. When fiscal belt-tightening permeates politics, the demand that governmental expenditures for prisons be cut to the quick is irresistible. Moreover, this demand distorts the societal view of where the core expenditure lies. Thus, any penal policy that goes beyond mere custody becomes suspect more because of the social purpose of deflating costs than because of the purpose of adequately dealing with offenders. The debate is misguided even though versed in penological rather than fiscal items.

Second, potential recipients vying for governmental resources present claims that are neither easy to compare nor politic to resist.[31] This conflict is especially true when those recipients need the funds to function even minimally; otherwise, for example, public schools may close or sewers overflow. Third, "the political powerlessness of inmates"[32] stacks the deck against them in this contest for resources. Not only are they barred from any acceptable means of imprinting the political process,[33] but they are also

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27. *Id.* at 53.

28. *Id.* at 30-31.

29. *Id.* at 81; *see* Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring). Public ignorance may disguise that apathy. In Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978), the Court manipulated that disguise: "We cannot believe that the good people of a great state approved the prison situation demonstrated by the evidence in this case." *Id.* at 288.

30. Rhodes v. Chapman, 452 U.S. 337, 357 (1981) (Brennan, J., concurring) (citing an average cost per prisoner of constructing space to be at least $25,000).

31. The simplistic retributive approach pressures politicians away from the rehabilitative ideal. "In the current climate, it is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health." *Id.* at 377 (Marshall, J., dissenting).

32. *Id.* at 358 (Brennan, J., concurring).

33. Few prisoners can escape the conclusion that rioting jars apathy. *See, e.g.*, AMERICAN CORRECTIONAL ASSOCIATION, CAUSES, PREVENTIVE MEASURES, AND METHODS OF CONTROLLING RIOTS AND DISTURRANCES IN CORRECTIONAL INSTITUTIONS (1970); Serrill & Katel, *The Anatomy of a Riot*, CORRECTIONS, Apr. 1980, at 7 (New Mexico maximum security prison riot leaving 33 inmates dead and 200 others beaten or raped). From the prisoners' and society's vantage points, however, riots ultimately are counterproductive in both the short and long run. Tighter security, a further diminished physical plant, and public outrage at the prisoners rather than the exacerbating conditions generally follow.

without champions to whose voices politicians will listen. Reformers are regarded as idealists, prison administrators as seldom sympathetic,[34] and lobbyists as interested in construction rather than rehabilitation.[35]

Last, the plight of the "conscientious prisons officials"[36] exemplifies the determinative nature of the political struggle over dwindling resources. These officials convinced the courts that they had "the most expertise in this field"[37] and should be given "appropriate deference"[38] when their views were "not unreasonable"[39] and had "not been conclusively shown to be wrong."[40] The discredited hands-off era of federal court passivity had returned.[41] How much deference should be afforded, however, when the expert's views have been ignored by the state legislature or the executive? Prison officials tend to favor the pursuit of a rehabilitative ideal.[42] To the extent they inform social policy, then, the conditions that Professor Allen deems requisite for a healthy ideal to emerge are prevalent. Nonetheless, the ideal fades, not for lack of consensus, but for lack of power and money.

Moreover, the constitutional value of comity, which initially triggered the deference paid to prison officials, has retained vitality. Although a state once was "not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget,"[43] the courts may now at least recognize in passing "the effect of inflation on the resources of States and communities."[44] The way in which a state structures delivery of its services in light

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34. Rhodes v. Chapman, 452 U.S. 337, 358 n.7 (1981) (Brennan, J., concurring) (some officials are demonstrably insensitive).

35. J. MITFORD, KIND AND USUAL PUNISHMENT 187 (1973).

36. Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring).

37. Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring).

38. *Id.* at 125.

39. *Id.* at 135.

40. *Id.* at 132.

41. Bell v. Wolfish, 441 U.S. 520, 562 (1979); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

42. *See* Rhodes v. Chapman, 452 U.S. 337, 375 (1981) (Marshall, J., dissenting) ("There is not a shred of evidence to suggest that anyone who has given the matter serious thought has ever approved, as the majority does today, [such] conditions of confinement . . . .").

43. Pugh v. Locke, 406 F. Supp. 318, 330-31 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *accord* Campbell v. Cauthron, 623 F.2d 503, 508 (8th Cir. 1980); Smith v. Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980).

44. Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981).

of budgetary constraints constitutes a decision to which comity would suggest great deference is owed.[45]

No fine distinctions anchored in societal incompatibility with the bases for a rehabilitative ideal need attend the real impact on that ideal of politics and scarce resources. Those factors are not side issues to the debate over a penal policy; rather, they affect dynamically the social purpose that shapes that policy and should receive their due.

IV. Of Broad and Idealistic Concepts

Social theorists often treat corrections in this country as if the only governing framework is that imposed by logical analysis of historical and empirical data. The Constitution, however, restricts the range of penologists by prohibiting cruel and unusual punishments.[46] The definitions of these punishments should not be tied solely to any current societal consensus. For the restriction to be constitutional in nature it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[47] While the eighth amendment has been touted as protecting "broad and idealistic concepts of dignity, civilized standards, humanity, and decency,"[48] prevailing law suggests that some impairment of rehabilitative opportunities does "not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishment."[49]

Two questions arising from this position are keenly relevant to Professor Allen's reliance on societal consensus: (1) must pain be inflicted before the eighth amendment may be invoked, and (2) how is a court to know what pains a prisoner? Pain is clearly not the sole element in the constitutional definition of punishment. It is not a sufficient condition, since school children may be severely

45. National League of Cities v. Usery, 426 U.S. 833, 853 (1976).

46. U.S. Const. amend. VIII; *see supra* note 5.

47. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). Precisely because "it is a *constitution* we are expounding," McCullocb v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original), a component of construction must be recognition that "[t]his provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *Id.* at 415 (emphasis in original).

48. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

49. Rhodes v. Chapman, 452 U.S. 337, 348 (1981) ("job and educational opportunities diminished marginally" is simply a "delay of these desirable aids to rehabilitation"); *see, e.g.*, Newman v. Alabama, 559 F.2d 283, 287 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) ("Failure of prison authorities to provide a rehabilitation program does not by itself constitute cruel and unusual punishment.") (citation omitted).

beaten by teachers or administrators without running afoul of the eighth amendment's concern with criminal punishment.[50] Nor is pain in that sense necessary to the eighth amendment's ban on conditions "grossly disproportionate to the severity of the crime" warranting imprisonment.[51] Indeed, even as the Supreme Court focused on the absence of pain due to limited rehabilitation programs, it wrote of eighth amendment coverage for "unquestioned and serious deprivations of basic human needs"[52] and denial "of the minimal civilized measure of life's necessities."[53]

Constitutional punishment reaches further than merely to the pain usually associated with physical suffering. The threshold constitutional ban is criminal punishment, not pain. Thus, the Supreme Court recognized that "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards."[54] Although the Supreme Court thought it "would have to wrench the Eighth Amendment from its language and history" to reach an impairment of rehabilitation opportunities,[55] a significant impairment or flat denial could readily be found violating those evolving broad and idealistic concepts, if this nexus to pain is eliminated and replaced with a broader concept of deprivation. Rather than transgress the fair meaning of the eighth amendment, this interpretation would be consistent with the constitutional stature of those concepts: "a principle to be vital must be capable of wider application than the mischief which gave it birth."[56]

Professor Allen's thesis ties the rehabilitative ideal to a societal consensus, while the eighth amendment, when released from a restrictive preoccupation with pain, invites society to overcome its transient consensus and to reach higher. In this way, the eighth amendment serves as a floor below which today's society may not go. Without such a countermajoritarian operation, the constitutional prohibition largely would be eviscerated because the punish-

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50. Ingraham v. Wright, 430 U.S. 651, 685 (1977) (White, J., dissenting).

51. Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Proportionality is, however, "largely within the discretion of the punishing jurisdiction." Rummel v. Estelle, 445 U.S. 263, 285 (1980).

52. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

53. *Id.*

54. Hutto v. Finney, 437 U.S. 678, 685 (1978). The context of the quote is significant. It follows a recognition that "more than physically barbarous punishments" are covered hy the eighth amendment. *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

55. Rhodes v. Chapman, 452 U.S. 337, 348 (1981).

56. Weems v. United States, 217 U.S. 349, 373 (1910). While the framers' conception may have been focused on pain, the concept of the eighth amendment is not so static. *See* R. DWORKIN, *supra* note 16, at 34 (1977).

ments legislated and administered generally reflect societal consensus.[57] Professor Allen thus draws the constitutionally wrong conclusion from a lack of societal consensus on rehabilitation and malleability of human behavior. The ideal has not declined; rather, the commitment has flagged as the means have failed.

Professor Allen's theory is likewise assailable on the second question about the relationship between a rehabilitative ideal and the eighth amendment. If one assumes that pain is a prerequisite to relief under the amendment, one must also determine how to measure pain. The Supreme Court believes that the level of pain transgresses cruel and unusual boundaries when an amalgam of factors, only one of which is rooted in societal consensus, has been applied. Both "objective factors,"[58] garnered from "history [and] the action of state legislatures,"[59] and subjective, judicial knowledge must be used.[60] Notably, expert penologists (and even social theorists) may provide "helpful and relevant" evidence about a constitutional minimum.[61] This evidence "cannot weigh as heavily in determining contemporary standards of decency as 'the public attitude toward a given sanction.' "[62] Still, those experts can significantly "help the courts to understand the prevailing norms against which conditions in a particular prison may be evaluated."[63]

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57. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations from legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.

Muller v. Oregon, 208 U.S. 412, 420 (1908).

58. Rummel v. Estelle, 445 U.S. 263, 274 (1980).

59. Rhodes v. Chapman, 452 U.S. 337, 346-47 (1981) (citing Gregg v. Georgia, 428 U.S. 153, 176-87 (1976) (joint opinion)).

60. "[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a punishment. Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion). Notwithstanding the appropriate role of judicial knowledge and prudence, "Eighth Amendment judgments should neither be or appear to be merely the subjective views" of judges. Rummel v. Estelle, 445 U.S. 263, 274 (1980) (citing Coker v. Georgia, 433 U.S. at 592 (plurality opinion)). This struggle between judicial subjectivity and constitutional rigidity is perennial in jurisprudence. *See, e.g.*, Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring). Justice Frankfurter observed,

> These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.

61. Rhodes v. Chapman, 452 U.S. 337, 348-49 n.13 (1981).

62. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion)).

63. Rhodes v. Chapman, 452 U.S. 337, 364 n.12 (1981) (Brennan, J., concurring).

If the prevailing norm arises from strict majoritarianism, then the eighth amendment becomes, as argued above, a weak protector of prisoners' rights. Even were a public opinion poll on societal consensus to dictate what broad and idealistic concepts are now served by the eighth amendment that poll must be structured to account for public knowledge of prison life[64] and consensus on ideals, not resiguation to realities. The key question for the constitutional pollster must be "to what, as a society, do we aspire" and not "for what, as a society, will we settle." Professor Allen's explanation of the decline of the rehabilitative ideal does not account for a constitutionally derived brake on any societal consensus about the types of pain that are cruel and unusual.

V. Conclusion: The Near Future

Professor Allen correctly asserts that "no new paradigm has emerged with the potency once displayed by the rehabilitative ideal to dominate thought, excite imagination, and impel social action."[65] Given this vacuum, he predicts that the rehabilitative ideal will have some future vitality, particularly because penal policy has a "pragmatic and eclectic character."[66] This vitality, however, depends on the determinative nature of the factors asserted in this Book Review: an emphasis on retribution, the political allocations of dwindling resources, and the transcendent ideal of the eighth amendment. Using these factors the decline is no less precipitous nor the future more reassuring. Nonetheless, for those like Professor Allen who share the ideal, the decline may be better staunched if the debate is better directed.

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64. *Cf.* Gregg v. Georgia, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) ("[T]he opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.") (footnote omitted). The constitutional pollster would be seeking public reaction, not knowledge, of prison life; thus the poll might be skewed unless the public were aware of both prison conditions like violence, idleness, tension, and psychological problems and their effect on human beings. *See, e.g.*, MacCormick, *Adult Correctional Institutions in the United States*, in Justice, Punishment, Treatment: The Correctional Process 133, 138 (L. Orland ed. 1973) (prison life can become "monotonous and meaningless, and only those with mental and moral stamina can escape the deteriorating and often degenerating effects").

65. F. Allen, *supra* note 3, at 66.

66. *See id.*

YOUTH CRIME AND URBAN POLICY: A VIEW FROM THE INNER CITY. Edited by Robert Woodson. American Enterprise Institute for Public Policy Research, 1981.

*Reviewed by Diana R. Gordon**

> I'm crazy about gangs because I like the sense of collective action. Unions can't even get together, but people in gangs do. We tried to figure out what a gang is, and it is really this. A gang isn't just a group that the police are after, because the police are a gang, and the boy scouts are a gang. The difference is, one is funded and one isn't. If you're funded, you're not a gang; if you're unfunded, then you are one. . . . We never call ourselves that anyway; we call ourselves families, in the sense of our knowing that we belong to each other.[1]

Nizam Fattah, a member of the Inner City Roundtable of Youth (ICRY) and a former street gang leader, has captured in this statement the essence of what many scholars and activists, ranging across the political spectrum, have begun to suggest: part of the solution to the problem of violent street crime must come from within the neighborhoods and not through external official measures.

One does not expect to be mesmerized by a book entitled *Youth Crime and Urban Policy: A View from the Inner City.* Yet this volume, compiled from the proceedings of a May 1980 conference sponsored by the American Enterprise Institute for Public Policy Research (AEI) proves to be a powerful testament to the plight of the dweller in America's crime-plagued inner-city neighborhoods. Because Robert Woodson has edited the comments of the conference's participants with a light hand, the book gives the reader the power of voices from the street—voices of people who are trying daily to stem the tide of despair, decay, and crime that surrounds them. Not only do the conference participants display a compelling ability to describe their surroundings, but they also use their observations to suggest possible solutions to the problem of inner-city crime and violence.

Scholars repeatedly point to the breakdown of social controls in the United States (and other Western countries) as a major

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1. YOUTH CRIME AND URBAN POLICY: A VIEW FROM THE INNER CITY 39 (R. Woodson ed. 1981) [hereinafter cited as YOUTH CRIME AND URBAN POLICY].

cause of violent crime. Yet serious students of social pathology only recently have begun to suggest that this trend might be reversible without harsh official repression. For example, Freda Alder, a criminologist at Rutgers University, reports that her studies indicate that the crime rate is lowest in countries in which informal social controls, such as the family, are the strongest.[2] Charles E. Silberman, who devoted a lengthy book[3] to the causes and effects of American street crime, reaches a similar conclusion. Silberman writes that "the ultimate source of order is not coercion but custom and habit."[4] He further suggests that a number of community programs, similar to those represented at the AEI conference, are building up the "internal controls"—the sense of community that can perhaps reduce and prevent crime.[5] Woodson, who edited the conference transcript for this book, writes: "It is time to move . . . toward a realization that some of the answers to mental health, crime and other social problems already exist within the neighborhoods themselves and within their indigenous institutions, both formal and informal."[6]

The hope for internal solutions to the urban crime problem arises in large part from the work of a number of small community programs organized by those plagued by violent crime and its effects on their neighborhoods. These programs thrive under what many would find the most difficult of circumstances—little or no funding, untrained staffs, and, frequently, official resistance. Yet they involve inner-city young people in something constructive the youths believe in, reinforcing—and sometimes creating—the unity and support that characterize successful families. They often try to change the targets of gangs, not break them up.

Despite these obstacles, the programs continue to survive, seemingly feeding on all this adversity. Indeed, the adversity can create a sense of community, and the determination of the neighborhood groups to help themselves may give special force to their efforts. For instance, gang-related killings are down in Philadelphia, where the "House of Umoja" has been in operation for a decade.[7] The House of Umoja is a self-styled African "family" in West

2. F. Adler, Synnomy: Ten Countries with the World's Lowest Crime Rate (1981) (unpublished report for the United Nations Crime Prevention and Criminal Justice Branch).

3. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1978).

4. *Id.* at 428.

5. *Id.* at 429-46.

6. R. WOODSON, A SUMMONS TO LIFE xiv-xv (1981).

7. YOUTH CRIME AND URBAN POLICY, *supra* note 1, at 74.

Philadelphia with a membership of more than 500 youths.[8] In addition, the delinquency rate among juveniles in the La Plaza section of Ponce, Puerto Rico, declined 7.2 percent over the past ten years—at least partly because of the activities of the Dispensario San Antonio.[9]

This book's strength is the insights the conference participants bring to the problems of urban crime. Representatives of nine community groups from six cities met at this extraordinary conference for presentations and discussions of gang problems and the gangs' contributions to the positive and peaceful force behind grassroots neighborhood programs. The book does not contain the angry, one-dimensional perspective of the community activists of the 1960's, struggling for "maximum feasible participation" in a program that still really belongs to the government. Many in these programs acknowledge their need for help from outside sources—professionals, for example—but they never undervalue the abilities of their neighbors. V.G. Guinses, of the Los Angeles group, SEY YES (Youth Enterprise Society), noted that "street knowledge" as well as professional training is important:

> We would prefer a youngster who has our own degree, what we call a master's degree of street knowledge. If a kid has this degree, we want him. If the parents have a master's degree in street knowledge, we want them. This is the knowledge we have worked with and built our program with. I am not knocking other degrees, because they are valuable, too. With both degrees, we can meet our problem.[10]

In using this street experience to develop their programs, the people who speak out in this book recognize contradictions. They find both great weakness and great strength in the social structures of their communities. David and Falaka Fattah, for example, put together their knowledge of the strength of the African family and of the breakdown of many modern urban black families to become the parents of the House of Umoja, a family that simultaneously subsumed and rechanneled Philadelphia gangs.[11]

Lack of professional assistance, however, is not the groups' main difficulty. Most of their problems, they say, stem from the lack of an adequate economic base. Financial success is required to improve their communities and the lives of their children. Over

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8. *Id.* at 31-34.

9. *Id.* at 21. The Dispensario is a dispensary of health services, recreation, tutoring, job training, and other services for a poor neighborhood in Ponce, Puerto Rico.

10. YOUTH CRIME AND URBAN POLICY, *supra* note 1, at 24.

11. *Id.* at 31-32.

and over the group leaders express material ambitions, embracing financial success as "the American dream." Darryl (Tee) Rodgers of SEY YES articulates a view shared by many others:

> Brothers, gangdoms, everybody in America wants the same thing. They want some cash in their pocket. They want a job they can go to, knowing they are going to get paid and have some advancement in it. They want a Seville. They want a house somewhere. This is what everybody wants.[12]

These programs are working for that economic base. The Fattahs, who are working on the development of a mall, say that "[o]ur boys' town is going to be 50 percent economic development and 50 percent social programs."[13] ICRY in New York manufactured tee shirts with graffiti art on them, and Nizam Fattah talks optimistically about the business: "We hoped that in five or ten years we would make so much money that we could close down the welfare arm and move into an area where we might really be able to take our place in America's economic society."[14]

Rooting for these articulate, dedicated entrepreneurs, one also feels their frustration in facing the almost insurmountable obstacles that stand in the way of their dreams. The groups' emphasis on self-help may be fashionable, and President Reagan may have exhorted American corporations to take up the slack in those areas in which employment and social welfare programs have been curtailed. The kind of cooperation and assistance from business that will make these programs economically self-sufficient, however, will not come easily. The professionals at the conference obviously encouraged the leaders of these programs to express their frustrations with the regulations and red tape of government programs—after all, a conservative think tank hosted the meeting. Despite those frustrations, the program leaders have relied on public stipends to launch their first business ventures. Young people who had CETA[15] jobs in La Playa, for example, planted four acres of coffee.[16] Now that the CETA well is dry, can the neighborhood coffee business make it on its own?

At one point in the conference, Woodson questions one of the participants who had decided "to stop using my gang influence in a

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12. *Id.* at 109.

13. *Id.* at 33.

14. *Id.* at 38.

15. Comprehensive Employment and Training Act, 29 U.S.C. §§ 801-999 (1976, Supp. III 1979 & West Supp. 1982).

16. YOUTH CRIME AND URBAN POLICY, *supra* note 1, at 20.

negative way, but use it to establish peace."[17] Woodson asks, "What is it that made a difference in his life? What made him exchange one kind of power base for a different kind of power base, while still maintaining himself within his original group?"[18] The questions contain the answer, to a degree. The programs we hear about in this book appeared to the young people who joined them to hold out promise of "a different kind of power base"—a base of connections and supports that derives and reinforces the unity of the gang but partakes of the success of the legitimate entrepreneur.

Prior to this conference, the charisma of the program leaders, the excitement of working toward common goals, and the embryonic successes of the business enterprises were enough to keep hopes high and faith strong; but shadows loomed. When asked what their organizations needed, the participants cited jobs, funding, and more jobs. Continued belief in the possibility of these alternative bases of support will require steady growth both in the programs' influence and in their economic viability. Surely the need for funding has only grown since 1980, while its prospect of being met has diminished. Growth for this part of the society appears very unlikely in the immediate future. One is disheartened when one thinks of what may become of these programs if sufficient assistance—from business, foundations, or even the government—is not forthcoming. As David Fattah put it:

> Many of the problems that a lot of the youths have, that we have, are there because we don't have money. A lot of times when you can spend that extra hour talking to a youth, showing that youth that your position is correct, it can be completely undercut, because the only person he sees with some money is somebody who is pushing heroin. That has an overriding influence.[19]

By bringing these program leaders together and letting them tell their own stories, Woodson is trying, as he puts it, to "penetrate the policy apparatus,"[20] to convince those who can help that community crime prevention is worth their investment. One cannot imagine a nobler piece of work, but will the policy apparatus pay any attention? The solution will require more Woodsons and more Fattahs. It will probably—and sadly—require more juvenile crime as well. The public seems inclined to recognize only the worst in its poor, dark-skinned youth. Support from political lead-

17. *Id.* at 79.
18. *Id.* at 116.
19. *Id.* at 120.
20. *Id.* at 122.

ers for indigenous community development—whether private or public—hardly exists.

Society ignores the inner-city voices in this book at its peril. A Washington subway graffito reads, "I hurt, therefore I hate." This hatred is one of the pressures that fuels youth crime. In the long run, it will take more than togetherness and pride to overcome the hurt.