The Role of the Eighth Amendment in Prison Reform

The traditional American approach to crime control focuses on strengthened police forces and increased arrests, without parallel emphasis on improved corrections. However, the possibility of controlling crime without effective correctional systems seems small given the extremely high rate of recidivism among released inmates. Although the costs of processing recidivists through the criminal justice system and the economic losses of their victims are high, more significant are the untold social costs of physical injury and community insecurity attributable to the failure of correctional systems. Though it is possible to isolate certain explanations for criminal behavior—a criminal's sense of isolation from the cultural and financial mainstream of society, his sense of identity with other criminals, and his occasional inability to adopt the norms of any social group—American correctional systems

1 N. Morris, From the Outside Looking In: Or the Snail's Pace of Penal Reform 22-24 (U.S. Dept' of Justice, Law Enforcement Assistance Administration 1970).


3 R. Clark, supra note 2, at 215; Note, supra note 2, at 684-85.


do little, if anything, to combat these causes of criminality. More often than not, they contribute to them.  

The failure of legislatures and prison administrations to correct these conditions has increasingly involved the judiciary in the problem of prison reform. More specifically, the courts have been asked to interpret the eighth amendment prohibition against cruel and unusual punishment as a mandate for judicial intervention. This comment briefly examines the obstacles to legislative and administrative action, and then focuses on the eighth amendment as a means to achieve prison reform.

I. THE POTENTIAL FOR LEGISLATIVE AND ADMINISTRATIVE REFORM

Legislative attempts to improve rehabilitation traditionally have been stopgap measures, and legislative power over correctional systems has been characterized by unrealized potential. Existing correctional systems, legislatively established, do little more than conceal criminals from the sight of the civil constituency, and the protection they afford is at best temporary. Traditional "reform" legislation has achieved only minimal improvements, such as requiring logbooks for the recording of punishment, allowing annual inspection by state governors, and providing for the availability of clergy. Only rarely, as in the Wisconsin Huber Law, has significant correctional reform been initiated.

7 "Traditional prisons, jails, and juvenile institutions are highly impersonal and authoritarian. Mass handling, countless ways of humiliating the inmate in order to make him subservient to rules and orders, special rules of behavior designed to maintain social distance between keepers and inmates, frisking of inmates, regimented movement to work, eat, and play, drab prison clothing, and similar aspects of daily life—all tend to depersonalize the inmate and reinforce his belief that authority is to be opposed, not cooperated with. . . Such an attitude is, of course, antithetical to successful reintegration." PRESIDENT'S COMM’N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 11 (1967) [hereinafter cited as TASK FORCE REPORT].

8 PRESIDENT'S TASK FORCE ON PRISONER REHABILITATION, REPORT: THE CRIMINAL OFFENDER—WHAT SHOULD BE DONE? (1970) [hereinafter cited as PRISONER REHABILITATION REPORT].

The much debated issue of whether rehabilitation can be achieved within the confines of prison walls, or only by prisoner involvement in the outside community is beyond the scope of this comment.

9 In adopting Act 50 of 1968, Ark. Stat. Ann. § 46-100 (Supp. 1969), the Arkansas legislature recognized training and rehabilitation to be essential objectives of their correctional system. However, in declaring that Arkansas' prisons imposed cruel and unusual punishment, and were therefore unconstitutional, a federal district court felt impelled to observe that such legislation has "not had any significant impact on the distinctive characteristics of the Arkansas penal system." Holt v. Sarver, 309 F. Supp. 362, 369 (E.D. Ark. 1970). See also N. Morris, supra note 1, at 22-24.

10 See note 2 supra; KEY ISSUES, supra note 5, at 4-10.

through legislation. Even in these instances the legislation is often limited to “enabling” provisions which leave implementation to correctional administrators or courts.

It is as controller of the purse that legislatures have had the greatest opportunity to aid prison reform; in that role, too, they have failed. Nationwide, less than $1.5 billion was appropriated to prison systems last year—a fraction of the sum appropriated to the police sector of the criminal justice system. Moreover, ninety-five per cent of the funds allocated to corrections go toward physical custody and confinement of prisoners, building maintenance, and salaries for custodial guards. Only five per cent remains for prisoner “upkeep”—health, social services and general rehabilitative programs.

The failure of legislatures to establish rehabilitation programs can be attributed to a number of factors. First, although the eighth amendment might be interpreted to compel the establishment of rehabilitative programs, scholars and jurists have traditionally interpreted that amendment merely to prohibit certain forms of punishment. Second, even if an affirmative duty to rehabilitate had been perceived, the very

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12 Wis. Stat. Ann. ch. 56, § 56.08 (Supp. 1970). The Huber Law establishes a work release program which allows prisoners to work in the free community during the day, and return to jail at night.

13 See, e.g., id. §§ 56.08, 56.065.


15 See The Shame of Prisons, TIME, Jan. 18, 1971, at 50. See also Velde, A Shot in the Arm of Corrections, Fed. Probation, Sept., 1970, at 28. In 1970 the Law Enforcement Assistance Administration allotted 51% of its funds to police and 26% to corrections. Chicago Daily News, Mar. 2, 1971, § 1, at 1. Ramsey Clark has observed that when budget reductions become necessary in the Department of Justice budget, the federal prison allocation has usually been the first to be cut by Congress. R. CLARK, supra note 2, at 217-18.

16 R. CLARK, supra note 2, at 213.

17 U.S. Const. amend. VIII states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

18 “No doubt delegates to the conventions, in providing against cruel punishment, had largely in mind . . . being drawn or dragged to the place of execution, emboweling alive, cutting off the hands or ears, branding on the face or hand, slitting the nostrils, placing the prisoner in the pillory, the ducking, the rack, and the torture, and, as in Spanish countries, crucifying.” Davis v. Berry, 216 F. 413, 417 (S.D. Iowa 1914). Indeed, as late as 1966, a federal district court found that naked confinement in solitary at forty degrees “was not so exceptional or extreme in nature as to override the defense that matters of prison discipline are within the discretion of prison officials.” Roberts v. Peppersack, 256 F. Supp. 415, 431 (D. Md. 1966). See In re Kremler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1876); Ruak v. Schooley, 211 F. Supp. 921 (D. Colo. 1962); Blythe v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961). See generally Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 Calif. L. Rev. 839 (1969); Note, The Cruel and Unusual Punishment Clause and the Substantive Law, 79 Harv. L. Rev. 685 (1966); Revival of the Eighth Amendment: Development of Cruel Punishment Doctrine by the Supreme Court, 16 Stan. L. Rev. 996 (1964).
nature of the legislative process inhibits prison reform through legislation. As representative bodies, legislatures are naturally sensitive to public opinion, and that opinion historically has been unsympathetic to prison reform. The common sentiment is that imprisonment is a means of punishment, rather than an occasion for rehabilitation.\(^\text{19}\) This sentiment is often reflected in supposedly "reform" legislation, which usually authorizes simply the building of "bigger and better" prisons.\(^\text{20}\)

A third restraint on legislative reform is that prisoners and the small lobby groups active in prison reform often lack the necessary economic and political power to influence legislative action.\(^\text{21}\) Because of constituents' demands that criminals be confined out of sight, the entire correctional apparatus lacks visibility.\(^\text{22}\) Thus, when competing for budgetary priority, prison reform is not likely to fare well against the demands of more visible and vocal elements within society.\(^\text{23}\)

Fourth, once the amount of total financial resources available for crime prevention is determined, legislators evidently believe that the most efficient allocation of the crime-prevention tax dollar requires emphasis on increased police effectiveness rather than correctional reform.\(^\text{24}\) The pressures between these two uses of funds are most pronounced at the municipal and county level, where city councils and

\(^{19}\) In a recent Gallup poll fully three-quarters of the sample felt that the most serious failure of the criminal justice system was that criminals do not receive sufficient punishment. Goldman & Holt, \textit{supra} note 2, at 39. A recent Harris poll disclosed that 59\% of those questioned were not willing to sustain a raise in taxes to fund correctional programs. \textit{Joint Comm'n on Correctional Manpower and Training, The Public Looks at Crime and Corrections} 7-10 (1968).

\(^{20}\) Goldman & Holt, \textit{supra} note 2, at 27, 34. In contrast to the traditional proclivity for spending scarce correctional funds on gothic fortresses, the President's Task Force on Prisoner Rehabilitation now recognizes the desirability of promoting community-based correctional facilities. \textit{Prisoner Rehabilitation Report, supra} note 8, at 12.

\(^{21}\) N. Morris, \textit{supra} note 1, at 28-50; Mattick & Aikman, \textit{supra} note 14, at 117.


\(^{23}\) See note 21 \textit{supra}.

\(^{24}\) See note 15 \textit{supra}.
county boards must finance municipal and sheriff's police, as well as city and county jails.\textsuperscript{25}

A final limitation derives from the vicissitudes of administrative implementation. Even where prison reform legislation is interpreted broadly by the judiciary, it must be implemented by often recalcitrant prison administrators. As a result, implementation of legislation authorizing rehabilitation is generally tenuous and uninspired.\textsuperscript{26}

The responsibility for prisoner custody has, until recently, been left almost entirely to correctional administrators.\textsuperscript{27} Traditionally, these administrators have been trained as law enforcement or custodial officers, and have had neither the opportunity nor the inclination to obtain professional training in the treatment of prisoners.\textsuperscript{28} However, with increased awareness of correctional failures has come a gradual trend toward the appointment of correctional administrators with backgrounds in the social sciences and related fields.\textsuperscript{29} Concurrent with this movement toward professionalism in prison administration, various prison reforms, potentially supportive of rehabilitation, have emerged. Experimental prison governance programs,\textsuperscript{30} treatment classification,\textsuperscript{31}

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\item See, e.g., ILL. REV. STAT. ch. 24, §§ 11-1-3, 11-3-1; ch. 34, § 432; ch. 74, § 24 (1969).
\item See notes 40 & 42 infra.
\item See note 52 infra. See also Jacob, Prison Discipline and Inmate Rights, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227 & n.1 (1969).
\item J. Edgar Hoover stated in Patriotism and the War Against Crime, an address given before the annual convention of the D.A.R. (April 23, 1936):

I warn you to stay unswerving to your task—that of standing by the man on the firing line—the practical, hard-headed, experienced honest policemen who have shown by their efforts that they, and they alone, know the answer to the crime problem. That answer can be summed up in one sentence—adequate detection, swift apprehension and certain, unrelenting punishment. That is what the criminal fears. That is what he understands, and nothing else, and that fear is the only thing which will force him into the ranks of the law-abiding. There is no royal road to law enforcement. If we wait upon the medical quacks, the parole pandermers, and the misguided sympathizers with habitual criminals to protect our lives and property from the criminal horde, then we must also resign ourselves to increasing violence, robbery, and sudden death.

\item H. Barnes & N. Teeters, New Horizons in Criminology 539 (1951); Clemmer, A Beginning in Social Education in Correctional Institutions, FED. PROBATION, Mar., 1949, at
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group-related treatment, and increased educational and vocational training both within and without prison walls are among the reforms now sponsored by many professional correctional administrators. Nonetheless, the extent of administration sponsored programs for rehabilitation remains inadequate.

There are several possible reasons for the limited administrative initiative for significant rehabilitative programs. First, as noted earlier, prison reform has not been a popular cause, and appointed correctional administrators cannot successfully maintain meaningful prison reform without the support of those who control their tenure. Further, correctional administrators must act within the constraints imposed by statutory and judicial law. Federal and state codes of corrections establish a general framework within which administrators must operate. This framework is then subject to the additional limitation of inadequate appropriations. At the county level, the number of guards and other personnel whom correctional administrators may hire often is determined by the circuit court, while salaries are determined by the county board. Thus, newly appointed correctional administrators, who may assume their responsibilities with a high sense of professionalism, too often find their plans for reform thwarted by legislators and

32-25. See AM. PRISON ASS'N, COMMITTEE ON CLASSIFICATION AND CASE WORK, HANDBOOK ON CLASSIFICATION IN CORRECTIONAL INSTITUTIONS 2 (1947).


34 See KEY ISSUES, supra note 5, at 8; N. Morris, supra note 1, at 22-24. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), notes that while the Arkansas Penitentiary Board regulated the manner in which corporal punishment might be administered, it declined to abolish its use entirely.

35 See note 19 supra. "There does seem to be one problem that all institutions face: the conflicting orientation of the public. . . . Confronted with these contradictory pressures, correctional personnel frequently must decide which to translate into practice and which to honor in public statements. They are like repertory actors, who must vary their performance according to the expectations of a moody and unpredictable public. By and large, they have attempted to resolve this problem by satisfying the more fundamental demands of security by means of concrete action and the demands for increased liberality by means of public statements." R. Korn & L. McCorkle, CRIMINOLOGY AND PENOLOGY 470 (1959).

36 See notes 14-16 supra.

37 See People ex rel. Walsh v. Board of Comm'rs of Cook County, 379 Ill. 293, 74 N.E.2d 503 (1947).
other governmental officials who are unsophisticated in rehabilitative theory.  

The traditional internal organization of prison administration presents a further inhibition to reform. The chain of command in prisons is firmly established in theory: wardens and senior administrators formulate policy, which is relayed to guard captains and, through them, to lower echelon guards, who have the most direct contact with and control over prisoners. It is doubtful that policies and instructions of wardens and senior administrators can filter down to prisoners without interference from guards. This interference may be particularly dangerous if guards fear that reform will eliminate their jobs or limit the discretionary powers to which they have become accustomed. An additional internal constraint is the lack of adequately trained professional staffs. For example, all correctional systems combined employ only fifty full-time psychiatrists, and fifteen of these are employed by the federal system, which holds only four per cent of all prisoners. Even where trained staffs exist, serious conflicts with non-professional staff members, who may have a different view of the proper function and operation of a correctional system, often arise. Finally, correctional reform is often considered by public officials to be a secondary responsibility. County jails are usually under the super-

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38 See Key Issues, supra note 5, at 20-21.
41 Id.
42 See N. Morris, supra note 1, at 30, 36; L. Ohlin, Sociology and the Field of Corrections 17 (1956); Mattick & Aikman, supra note 14, at 113.
43 Of all correctional employees, only 2.4% are either psychologists, social workers, or counselors; only 3.5% are academic or vocational teachers. Task Force Report, supra note 7, at 180. According to The Shame of Prisons, supra note 15, at 49, the Indiana State Prison, which houses 1,800 felons, employs only 27 rehabilitation workers; thus, "the idea of job training is absurd." See Illinois Jails, supra note 28, at 255-87; Key Issues, supra note 5, at 61; Velde, supra note 15, at 24.
44 The Shame of Prisons, supra note 15, at 53.
45 Garabedian, supra note 19, at 4-6; Weber, Conflicts Between Professional and Non-Professional Personnel in Institutional Delinquency Treatment, 48 J. Crim. L.C. & P.S. 26 (1957). It should also be noted that similar conflicts may arise between political and non-patronage personnel.
46 "Preliminary data from a survey of local jails in Illinois by the University of Chicago's Center for Studies in Criminal Justice indicate that in a significant number of county and city jails, the sheriffs and their deputies, or the police authorities, who are responsible for the jails, spend 10% or less of their time doing any jail work." Mattick & Aikman, supra note 14, at 112. See Illinois Jails, supra note 28, at 255-56.
vision of the sheriff, a local law enforcement officer whose prime task is to patrol streets and highways. The division of the sheriff's time and loyalties between his roles as correctional administrator and law enforcer cannot be conducive to effecting meaningful rehabilitation. Further, in some states, sheriffs who are responsible for county jails are limited in the number of terms they can hold office. Thus, even if a sheriff becomes experienced and knowledgeable as a penal administrator, he is soon replaced.

Since effective correctional reform is unlikely to come, at least in the immediate future, from legislators or administrators, immediate responsibility must rest with the judiciary.

II. THE ROLE OF THE JUDICIARY

The traditional role of the judiciary in correctional matters was merely to interpret statutes and to review a narrow range of administrative actions. Even in these cases, the judiciary granted only limited relief to specifically named inmate-plaintiffs. Whenever judicial intervention threatened to step beyond these narrow bounds, it aroused a plethora of objections, which led eventually to a policy of "hands-off."
In recent years, however, the judiciary has indicated a willingness to go far beyond its traditional role. Many leaders of the correctional reform movement have expressed hope that judicial intervention based on an expanded interpretation of the eighth amendment would at least initiate meaningful rehabilitation. The traditional absence of effective judicial intervention has been attributed both to the procedural limitations associated with the most common forms of action utilized by inmate-plaintiffs—habeas corpus, mandamus, and statutory and common law tort claims—and to the judiciary's philosophic commitment to the "hands-off" doctrine. Both stumbling blocks to judicial intervention began to crumble in the mid-1960's, with the emergence of section 1983 derived from the Civil Rights Act of 1871 as an effective inmate remedy, and the realization that some judicial intervention, if not ideal, was nonetheless necessary. Although recent cases have largely put an end to the older procedural arguments against the use of section 1983 to protect inmates, new arguments have emerged which question the scope of the rights—such as are illegally confined. See Banning v. Looney, 213 F.2d 771 (9th Cir. 1954); Note, Constitutional Rights of Prisoners, supra note 51; Note, Beyond the Ken of the Courts, supra note 51.

"[T]here are increasing signs that the courts are ready to abandon their traditional hands-off attitude. . . ." TASK FORCE REPORT, supra note 7, at 83. See text at notes 93-96 infra.


See note 52 supra. See also Note, Judicial Intervention in Prison Administration, 9 WM. & MARY L. REV. 178 (1967).


In Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), the court proscribed certain types of solitary confinement as cruel and unusual punishment while acknowledging the possibility that a flood of suits might result from its decision. See Lee v. Washington, 390 U.S. 660 (1962), extended the eighth amendment's scope to include protection against state action. Cooper v. Pate, 378 U.S. 546 (1964) (per curiam), rev'g 324 F.2d 165 (7th Cir. 1963); Jackson v. Bishop, 401 F.2d 571 (8th Cir. 1968); Hamilton v. Schiro, C.A. No. 69-2442 (E.D. La., June 25, 1970); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); Commonwealth ex rel. Bryant v. Hendrick, No. 1567 (Ct. of C.P. for Philadelphia County, Sept. 1970).

Robinson v. California, 370 U.S. 660 (1962), extended the eighth amendment's scope to include protection against state action. Cooper v. Pate, 378 U.S. 546 (1964) (per curiam), rev'g 324 F.2d 165 (7th Cir. 1963), appeared to reject the abstention doctrine in prisoner cases initiated under the Civil Rights Act. Houghton v. Scranton, 392 U.S. 639 (1968) (per curiam), ended any doubt that exhaustion of state remedies in prisoner cases was unnecessary in § 1983 proceedings. Washington v. Lee, 390 U.S. 393 (1968), recognized that prisoner's constitutional rights could not be stifled by a defense of administrative expertise. See Note, supra note 58.
due process and freedom from infliction of cruel and unusual punishment—sought to be enforced under section 1983.61

In light of recent cases62 seeking a judicial declaration that prison conditions detrimental to rehabilitation constitute cruel and unusual punishment, the scope of the eighth amendment's prohibition has become particularly relevant. The immediate incentive to the passage of the eighth amendment was a desire to prevent the recurrence of such torturous punishments as pillorying, disemboweling, decapitation and drawing and quartering.63 Indeed, a number of early cases implied that only punishment physically barbarous in nature was subject to the proscription of the amendment.64

In 1910, however, the Supreme Court revitalized the prohibition against cruel and unusual punishment in Weems v. United States.65 In that case, the Court held that the eighth amendment "... is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by human justice."66 The Court stated in dictum67 that the drafters of the amendment must have realized "that there could be exercises of cruelty by laws other than those which inflict bodily pain or mutilation."68

While paying lip-service to the eighth amendment's potential for growth, courts generally have refused to apply the Weems de-emphasis of physical brutality in the prison context,69 perhaps because Weems dealt with sentencing rather than treatment. Therefore, conduct by correctional officers has often been considered exempt from the eighth amendment unless bodily punishment of such character as to shock general conscience has been imposed on an inmate.70 Indeed, in three

61 See text at notes 105-11 supra.
64 See note 18 supra.
65 217 U.S. 349 (1910).
66 Id. at 378.
67 Weems was sentenced to cadena temporal or "hard and painful labor."
68 217 U.S. at 372.
70 Id.
recent cases\textsuperscript{71} declaring particularly barbarous\textsuperscript{72} solitary confinement procedures unconstitutional under the eighth amendment, the courts preferred to emphasize the physical brutality of the treatment rather than to rest their decisions on a broad interpretation of the amendment. The courts avoided any suggestion that excessive degradation of inmates in the absence of physical brutality might constitute cruel and unusual punishment.\textsuperscript{73}

Under the physical brutality requirements, a totally non-physical deprivation, such as lack of an effective rehabilitation program, could not be condemned as a violation of the eighth amendment. As early as 1958,\textsuperscript{74} however, the Supreme Court began eating away at the physical brutality requirement. In that year, the Court held, in \textit{Trop v. Dulles},\textsuperscript{75} that punishment can be cruel and unusual even though non-physical. Unfortunately, the applicability of this holding in \textit{Trop} to correctional treatment has been limited,\textsuperscript{76} perhaps because \textit{Trop} involved an original sentence rather than subsequent treatment in a correctional institution. However, since it is unclear whether different standards of cruel and unusual punishment should apply to correctional officials than to legislatures and sentencing courts, the language of the Supreme Court is too compelling to dismiss lightly. Identifying the "basic concept underlying the eighth amendment [as] nothing less than the dignity of man,"\textsuperscript{77} Chief Justice Warren condemned punishment by expatriation in the following terms:

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72 In all three cases, the courts' holdings were based on factual situations similar to that of \textit{Wright}, where the inmate-plaintiff was stripped of all clothing and exposed to sub-freezing cold for a substantial period of time, was deprived of the basic elements of hygiene such as soap and toilet paper, and was confined in an isolation cell which was filthy, without adequate heat, and virtually barren. These debasing physical conditions, the court in \textit{Wright} ruled, "offended more than some fastidious squeamishness, or private sentimentalism." \textit{Wright v. McMann}, 387 F.2d 519 (2d Cir. 1967).

73 The \textit{Hancock} court denounced the physical punishments as "particularly barbaric." 301 F. Supp. at 792. The \textit{Wright} court declared them to be "subhuman." 387 F.2d at 526. The \textit{Jordan} court found them to be "shocking and debased." 257 F. Supp. at 680.

Although \textit{Wright} discussed non-physical mental suffering, the court explicitly recognized such suffering to be caused by the physical conditions alleged to exist. Therefore, the position adopted by Hirschkop & Millemann in \textit{The Unconstitutionality of Prison Life}, 55 Va. L. Rev. 795, 819 (1969), to the effect that \textit{Wright} "utilize[d] the eighth amendment to outlaw sophisticated and subtle non-physical forms of punishment," would appear to be an inaccurate appraisal of where the law stood after \textit{Wright}.

74 The earlier (1910) \textit{Weems} de-emphasis of physical brutality was strictly dictum, since the sentence at issue was one for "hard and painful" labor.


76 See note 69 supra.

77 356 U.S. at 100.
There may be involved no physical mistreatment, no primitive tortures. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development. ..

The first case to emphasize non-physical aspects of punishment in a correctional context was *Jackson v. Bishop*.79 In *Jackson* the Court of Appeals for the Eighth Circuit cited both physical brutality and lack of rehabilitative potential as relevant factors in condemning the use of the whip under the eighth amendment. *Jackson* departed from the mainstream of earlier cases in two respects. First, the plaintiffs successfully asserted a substantive claim for freedom from infliction of cruel and unusual punishment in the context of what the court regarded to be a class action. *Jackson* thereby began to undermine the traditional limitation that only named inmates could sue. Elimination of this restriction would facilitate the review of general prison conditions, such as lack of rehabilitative treatment, by expanding the scope of prison experiences which a court might consider relevant. Second, *Jackson* considered the lack of rehabilitative potential in determining whether the punishment was cruel and unusual. In declaring use of the whip unconstitutional, the court stated:

> Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. . . . It frustrates correctional and rehabilitative goals . . . . Whipping creates other penological problems and makes adjustment to society more difficult.80

Thus, lack of rehabilitative potential, although intertwined with the traditional concept of physical brutality, began to emerge as a relevant factor under the eighth amendment.

In *Sostre v. McGinnis*,81 a 1971 decision, the Second Circuit considered the constitutionality of solitary confinement in excess of fifteen days. Although the court was unwilling to condemn such treatment as cruel and unusual merely because it might find it to be “personally repugnant,” the court did announce three “objective sources” upon which a cruel and unusual finding might be based: “historic usage . . . practices in other jurisdictions . . . and public opinion.”82 The court

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78 Id. at 101.
79 404 F.2d 571 (8th Cir. 1968).
80 Id. at 580.
82 Id. slip op. at 1660 (emphasis in original).
then declined to condemn Sostre's treatment as cruel and unusual, largely due to the prevalence of similar practices in other jurisdictions.

However, the court's three-pronged test suggests that definitions of cruel and unusual punishment are subject to popular vogue. Thus, under the Second Circuit's approach, as progressively more states begin to experiment with programs for rehabilitation, the lack of such programs could come to constitute cruel and unusual punishment.

As the movement to soften the physical brutality requirement gained momentum, courts began gradually to recognize the need to expand the concept of cruel and unusual punishment. The most important of these decisions was *Holt v. Sarver,*83 which declared in a class action that the entire Arkansas penitentiary system, as then operated, constituted cruel and unusual punishment.85 The Arkansas system consisted of two work farms where inmates supposedly labored in the fields raising agricultural products to be sold for the benefit of the state. However, inmate labor was often contracted out to personal friends of the wardens and members of the parole board, and inmates were forced to work on projects returning no revenue to the state. The system offered no program of rehabilitation and made no attempt to prepare inmates for release. The system did not even employ correctional workers, and armed inmate "trusties"86 were often used to guard other inmates. No overt effort was made to protect inmates from possible assaults.87

Though *Trop* and *Jackson* both could be taken to indicate a softening of the traditional physical brutality test, it was not until *Holt* that the lack of meaningful rehabilitation became as significant as examples of physical brutality against specific inmate-plaintiffs. The court recognized that *Holt,* "unlike earlier cases . . . which involved specific prac-


85 The *Holt* court granted both declaratory and injunctive relief to the plaintiffs. First, the court declared that confinement in the Arkansas Penitentiary System under existing conditions amounted to constitutionally prohibited cruel and unusual punishment. Second, the Commissioner of Corrections was ordered to make a prompt and reasonable start toward eliminating the conditions which caused the court to condemn the system, and to implement his efforts with all reasonable diligence. The Commissioner was given slightly more than one month to submit a report and plan to the court showing what had been done up to that time to meet the requirements of the court, and a timetable of what was planned for the future. The court retained jurisdiction.

86 "The trusties run the prison . . . The extent of Arkansas' reliance on trusties is apparent when it is realized that there are only 35 free world employees at Cummins in ostensible charge of slightly less than 1,000 men. Of those 35 only eight are available for guard duty, and two of them are on duty at night." 309 F. Supp. at 373.

87 Id. at 366-67.
tices and abuses alleged to have been practiced upon Arkansas convicts, amounts to an attack on the system itself." Concerning the elimination of the need for examples of physical brutality against named inmate-plaintiffs, the court stated:

"[C]ruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual... [C]onfinement itself within a given institution may amount to a cruel and unusual punishment... even though a particular inmate may never personally be subject to any disciplinary action.

The court was, however, ambiguous concerning the constitutional status of a right to rehabilitative treatment. On the one hand, the court listed "Lack of a Rehabilitative Program" as one of five factors, which, when combined, amounted to cruel and unusual punishment:

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... [T]he absence of rehabilitation services and facilities... remains a factor in the overall constitutional equation before the Court.

On the other hand, when the court came to appraise the independent significance of "Lack of a Rehabilitative Program," it stated:

[Does the Constitution require a program of rehabilitation or forbid the operation of a prison without such a program?... This Court knows that a sociological theory may ripen into constitutional law; many such theories and ideals have done so. But this Court is not prepared to say that such a ripening has occurred as yet as far as rehabilitation of convicts is concerned. Given an otherwise unexceptional penal institution, the Court is not willing to hold that confinement in it is unconstitutional simply because the institution does not operate a school, or provide vocational training, or other rehabilitative facilities and services which many institutions now offer.

*Holt* is important in two respects. First, it recognized that the lack of

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88 *Id.* at 365.
89 *Id.* at 372-73.
90 The other factors considered relevant by the court were "The Trusty System," "Life in the Barracks," "The Isolation Cells" and "Other Prison Conditions."
91 309 F. Supp. at 379.
92 *Id.* at 379.
a meaningful program of rehabilitation is significant in adjudging punishment to be cruel and unusual when, in the absence of rehabilitative programs, conditions and practices exist which actually militate against reform and rehabilitation.\textsuperscript{93} If, as penologists say, conditions and practices in most prisons tend to increase the propensity of inmates to commit crimes upon release,\textsuperscript{94} then the \textit{Holt} approach would strike down as unconstitutional under the eighth amendment confinement in almost any prison lacking a meaningful program of rehabilitation. Second, \textit{Holt} did not rule that the lack of a meaningful rehabilitation program could never have independent constitutional significance. Rather, the court implied just the opposite in observing that many sociological theories and ideas “had ripened” into constitutional law, but that rehabilitation of convicts had not done so as yet.\textsuperscript{95} The court thus recognized that social necessity can raise to constitutional status factors which previously were not so enshrined. The continued failure of our correctional system to effect meaningful rehabilitation may impel the constitutional “ripening” which the court recognized concerning other sociological theories and ideas. Indeed, the court noted that basing a finding of cruel and unusual punishment upon general prison conditions, rather than upon physical brutality directed against named inmate-plaintiffs, was itself a ripening which had occurred under the eighth amendment.\textsuperscript{96}

Similar evolution of social necessity has led to judicial intervention in instances where states failed to provide for treatment of the mentally ill or where applicable statutes were unnecessarily vague. In such instances, courts have intervened to guarantee the right to treatment. In \textit{Rouse v. Cameron},\textsuperscript{97} for example, the Court of Appeals for the District of Columbia Circuit ruled that the District’s Hospitalization of the Mentally Ill Act\textsuperscript{98} granted a person committed to a mental institution as criminally insane a statutory “right to treatment,” and the right to be released if such treatment is not forthcoming. Although the \textit{Cameron} court based the right to treatment on statutory grounds, it acknowledged that the failure to provide meaningful treatment gives rise to

\textsuperscript{93} See text at note 86 supra.


\textsuperscript{95} See text at note 87 supra.

\textsuperscript{96} “However constitutionally tolerable the Arkansas system may have been in former years, it simply will not do today as the Twentieth Century goes into his [sic] eighth decade.” 309 F. Supp. at 381.

\textsuperscript{97} 373 F.2d 451 (D.C. Cir. 1966).

significant constitutional questions. In Mason v. Superintendent of Bridgewater State Hospital\textsuperscript{99} and Eidinoff v. Connolly\textsuperscript{100} a right to treatment was found under the due process and equal protection clauses of the fourteenth amendment. The importance of the "mental treatment" line of cases becomes evident when one realizes that the institutions involved in these cases were penitentiary-hospitals.

Moreover, the expanding right to treatment has not been restricted to the mentally ill. In Sas v. Maryland\textsuperscript{101} the Court of Appeals for the Fourth Circuit ruled that habitual criminals classified as "defective delinquents" had the right to treatment, and in In re Elmore\textsuperscript{102} and Creek v. Stone\textsuperscript{103} the right to treatment was extended to juvenile delinquents. It would appear that the logical continuation of this trend would extend the right to treatment to adult inmates. The rationale of the cases in which the right to treatment was granted to the criminally insane was that the purpose of involuntary hospitalization is not punishment but treatment. Similarly, as far back as 1870, the American Prison Association recognized that the purpose of incarceration was not punishment but rehabilitation:

To assure the eventual restoration of the offender as an economically self-sustaining member of the community, the correctional program must make available to each inmate every opportunity to raise his educational level, improve his vocational competence and skills, and add to his information meaningful knowledge about the world and society in which he must live.\textsuperscript{104}

Although the judiciary seems to be on the brink of a major breakthrough in the area of prison reforms, there are several factors which severely inhibit the potential achievements of judicial intervention. The most direct limitations involve the relief which the judiciary can grant. Courts cannot, for example, appropriate funds or command legislatures to do so. As stated in Holt:

The Court has recognized heretofore the financial handicaps

\textsuperscript{100} 281 F. Supp. 191 (N.D. Tex. 1968).
\textsuperscript{101} 334 F.2d 606 (4th Cir. 1964).
\textsuperscript{102} 382 F.2d 125 (D.C. Cir. 1967).
\textsuperscript{103} 379 F.2d 106 (D.C. Cir. 1967).
under which the Penitentiary system is laboring, and the Court knows that Respondent cannot make bricks without straw.\textsuperscript{105}

Further, judicial proceedings, with their common law tradition of narrow issue formulation and adversary argument, are not ideally suited to develop workable blueprints for prison reform.\textsuperscript{108} Compounding these already severe limitations on the ability of courts to formulate relief is the judiciary's lack of expertise in penology. Finally, the burden of supervising and enforcing relief sufficient to ameliorate anti-rehabilitative conditions may overly burden the judicial process.\textsuperscript{107}

Limitations upon the granting of relief are not the only factors which may inhibit judicial reform. The last decade has seen an increase in penal litigation challenging traditionally discretionary powers of correctional personnel.\textsuperscript{108} If the judiciary continues to address itself to issues formerly within the zone of administrative discretion, such as programs for rehabilitation, there is a possibility that hostility on the part of correctional administrators toward a more active judicial role would frustrate the purpose of judicial intervention.\textsuperscript{109}

A further limitation upon judicial intervention is the dampening effect judicially-imposed requirements for reform might have on executive and legislative initiative. A hint of this appeared in \textit{Holt}:

\begin{quote}
Let there be no mistake in the matter; the obligation of the Respondents [correctional administrators] to eliminate existing unconstitutionalities does not depend upon what the Legislature may do or upon what the Governor may do. . . .\textsuperscript{110}
\end{quote}

While the court's desire to grant swift relief was admirable, it must be recognized that such language could be used by some legislators and governors as an excuse for ignoring their responsibility for prison re-

\textsuperscript{105} 309 F. Supp. at 382.
\textsuperscript{106} In \textit{Morris v. Travisano}, 310 F. Supp. 857 (D.R.I. 1970), the court found it necessary to assume the role of mediator between prison administrators and attorneys for inmate-plaintiffs over the question of classification. The court conducted conferences “both in the adversarial atmosphere of the courtroom” and “in the negotiational climate of the court chambers.” \textit{Id.} at 858. The court also took the unique action of soliciting inmate opinion on the suggested regulations concerning classification prior to their implementation.

\textsuperscript{107} The \textit{Holt} court, however, was not intimidated by these burdens. It required defendant prison administrators to submit “a report and plan showing what, if anything, they have done . . . to meet the requirements of the Court, and what they plan to do, and when they plan to do it. If the initial report is approved, the Court may require additional reports from time to time and may require specific information in certain areas.” 309 F. Supp. at 385.


\textsuperscript{109} See generally Kimball & Newman, \textit{supra} note 29.

\textsuperscript{110} 109 F. Supp. at 385.
form. Once the judiciary has granted initial relief, whatever public demand exists for correctional reform may be satisfied. As public interest vanishes, so may legislative and executive action. In such a situation, judicial relief intended only as a precursor to more substantial legislative and executive reform may become terminal.

Finally, the potential superficiality of a judicial declaration that lack of meaningful rehabilitation constitutes cruel and unusual punishment must be considered. It certainly would be insufficient to rule that the Constitution requires rehabilitative treatment if the result of such a ruling were simply to close the books on the problem. The more difficult and demanding issues are to determine just what constitutes a meaningful program of rehabilitation, whether it can be implemented inside traditional prison walls or only in a supervised free community setting, and who shall solve such problems. Before the judiciary takes the bold step of establishing rehabilitative treatment as a constitutional right, it must ask itself how far it wishes to go, how far its penal knowledge enables it to go in implementing any such ruling, and what the consequences would be if it were simply to so rule and do nothing more.

CONCLUSION

Correctional reform is a necessary prerequisite to effective crime control, and meaningful attempts at rehabilitation are, therefore, worth the effort. For, when they reach fruition, they reduce crime, reduce the cost of confining prisoners, and reduce the cost of the overall criminal justice system. However, the lack of an informed public and the interdependence of legislatures, prison administrations and courts present significant obstacles to reform. Until we recognize the obstacles, blueprints for correctional reform cannot unleash whatever crime-preventive and rehabilitative potential the criminal justice system may be capable of offering.

111 Key Issues, supra note 5, at 5-6.