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Constitutional Law -- The Eighth Amendment and Prison Reform

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or controversy" requirement in Article III of the Constitution.[73] Thus, rather than significantly increasing the volume of litigation, *Trafficante's* promise of merely allowing tenants to do directly what they had previously been required to do indirectly may be one of the more persuasive, if as yet unarticulated, factors encouraging the Court to extend the *Trafficante* rationale to analogous situations.

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Constitutional Law—The Eighth Amendment and Prison Reform

The conditions within many American prisons have made the penal system a national disgrace. From time to time crisis situations have erupted, and the public has been made aware of the desperate need for reform of the practices and conditions of confinement of prison inmates. In the past several years the courts, and especially the lower federal courts, have begun to take a more active role in ameliorating abject prison conditions. The primary constitutional theory underlying these suits has been the eighth amendment prohibition against the infliction of cruel and unusual punishment.[1] Two recent cases, *Baker v. Hamilton*[2] and *Inmates of Boys' Training School v. Affleck*,[3] have emphasized the importance of social rehabilitation in finding the conditions of juvenile confinement unlawful. These cases suggest that in the future the eighth amendment might serve as the constitutional foundation for the precept that lawful confinement of adults as well as juveniles requires rehabilitative services. Although this possibility seems unlikely at the present time, the trend in the eighth amendment cases does provide a potential avenue for courts to follow if the essential purpose of the criminal justice system were to be changed from punishment to reformation. This note will discuss the evolution of the eighth

73. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972); Baker v. Carr, 369 U.S. 186, 204-08 (1962).

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. 345 F. Supp. 345 (W.D. Ky. 1972).

3. 346 F. Supp. 1354 (D.R.I. 1972).

amendment as a device for prison reform[4] and will suggest that rehabiliation for the prisoner should be a right.

The text of the eighth amendment of the Constitution was taken from the English Bill of Rights of 1689.[5] The original purpose of the article was to eliminate the executions and tortures practiced by the Stuart monarchy. It was incorporated into the United States Constitution in 1791 after being adopted in nine colonial constitutions.[6] Initially and throughout the nineteenth century,[7] the amendment was interpreted to prohibit extreme forms of corporal punishment. The Supreme Court in *In re Kemmler*[8] found certain punishments to be manifestly cruel and unusual. Among these were crucifixion, burning on the stake, and breaking on the wheel.[9] A significant change in interpretation came in 1910 with *Weems v. United States.*[10] In that case the Supreme Court forbade infliction of *cadena temporal,*[11] a Spanish version of hard labor, upon a man convicted in the Philippines of falsifying entries in government records because the punishment was out of all proportion to the seriousness of the crime. The term of punishment was fifteen years. The Supreme Court held this statutory penalty unconstitutional under the Philippine bill of rights, which contained a prohibition against "cruel and unusual punishment."[12] *Weems* expressly recognized that this concept is flexible and responsive to social norms.[13]

Several other tests for determining whether a particular punishment is cruel and unusual have been suggested since the *Weems* decision. By far the more frequently recognized standard is to inquire whether the penalty administered "shocks the general conscience of

4. For a thorough treatment of the historical development of the "cruel and unusual" prohibition see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

5. "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." 1. W. & M. 2, c.2, § 10.

6. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

7. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

8. 136 U.S. 436 (1890).

9. *Id.* at 446-47.

10. 217 U.S. 349 (1910).

11. *Id.* at 364.

12. *Id.* at 365, 367-68.

13. The majority stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense," *id.* at 367, while also noting, "The clause of the Constitution . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378. It should be noted that the former notion of proportionality first appeared in the dissent to O'Neil v. Vermont, 144 U.S. 323, 340 (1892).

civilized society."[14] Another measurement, proposed by Justice Goldberg in *Rudolph v. Alabama*,[15] would gauge the relationship between the punishment inflicted and the penal aim sought to be achieved.[16] In *Trop v. Dulles*[17] Chief Justice Warren noted that the eighth amendment was not static and that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[18] These standards are at once vague and flexible.

Historically, the judiciary has been reluctant to involve itself in the operation of the correctional system on either the state or the federal level. The courts largely appear to believe that they have satisfied their responsibilities under the law once a decision has been rendered. Several reasons have been offered to support this "hands off" policy.[19] One prevalent explanation is based on the principle of the separation of powers:

> [I]nasmuch as Congress has placed control of the federal prison system under the Attorney General, and inasmuch as the control of a state prison system is vested in the Governor or his delegated representative, a federal court is powerless to intervene in the internal administration of this executive function even to protect prisoners from the deprivation of their constitutional rights.[20]

Another explanation is that the courts lack expertise in the field of penology and feel that they should leave corrections to knowledgeable prison administrators. Finally, the reluctance to become involved is sometimes explained by a fear that intervention will subvert internal prison discipline and therefore harm the criminal justice system.[21]

Slowly jurists have begun to realize that the courts and the prisons are components in a continuous system of administration of justice and that the court's responsibility continues beyond sentencing. Courts have found that prison regulations should not always supersede

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14. *E.g.*, Williams v. Field, 416 F.2d 483, 486 (9th Cir. 1969); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).

15. 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting); *accord*, Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966).

16. The Court in Robinson v. California, 370 U.S. 660, 667 (1962), held that imprisonment for the crime of "being" a drug addict was cruel and unusual.

17. 356 U.S. 86 (1957).

18. *Id.* at 101.

19. For the origin of this denomination *see* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 n.4 (1963).

20. Comment, *The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions*, 48 N.C.L. REV. 847, 849 n.8 (1970).

21. *See, e.g.*, Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969).

the personal rights of the convict.[22] Consequently, the Supreme Court in *Johnson v. Avery*[23] rejected the "hands off" policy in 1969. The abject conditions existing in the prisons and the mounting pressures for prison reform have led to this result.

Before reaching the question of the prisoner's right to rehabilitation it is important to examine the current eighth amendment cases that have found the daily living conditions within prisons to be "cruel and unusual." The most significant recent decision in this field is *Holt v. Sarver*,[24] in which the conditions at the Arkansas state prison farms were found to violate the eighth amendment. In that case the use of severely crowded open barracks, isolation cells, the trusty guard system[25] and corporal punishment, the lack of supervision, and the existence of unrestrained inmate brutality combined to make the operation of the state system cruel and unusual.[26]

The *Holt* court approached the problems of the Arkansas prisons in a comprehensive fashion. First, the court viewed the dictates of the eighth amendment as applying to the rights of the prison population as a whole and not solely to the treatment of one specific inmate.[27] Secondly, the general living conditions in the facilities, rather than any one practice of the administrators, were determined to constitute cruel and unusual punishment. Thirdly, the test of unlawful incarceration required the objectionable conduct to be "confinement . . . char-

22. The court in Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 225 U.S. 887 (1945), stated, "A prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion."

23. 393 U.S. 483, 486 (1969).

24. 309 F. Supp. 362 (D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1970). *But cf.* Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968) (per curiam). *Wilson* found that work camps per se did not constitute cruel and unusual punishment. The important decision of Robinson v. California, 370 U.S. 660 (1962), incorporated the eighth amendment through the fourteenth amendment and made it applicable to the states.

25. The use of a particular trusty guard system was also found violative of the eighth amendment in Roberts v. Williams, 456 F.2d 819, 828 (5th Cir. 1971). *Contra*, George v. Sowers, 268 So. 2d 65 (La. App. 1972).

26. 309 F. Supp. at 372-82.

27. It appears to the Court, however, that the concept of "cruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual. In the Court's estimation confinement itself within a given institution may amount to cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subjected to any disciplinary action.

Id. at 372-73.

acterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people . . . ."[28] That standard was recognized as changeable but would "broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes, more humane."[29] Fourthly, the court adopted a continuing role in the supervision of the state penal institutions. After declaring that conditions in the Arkansas prison system constituted cruel and unusual punishment, the court ordered the state to improve the physical conditions and the supervisory practices at each work camp. The court specified that the Commissioner of Corrections was to submit a plan to ameliorate conditions and added what it considered to be minimal guidelines for operating prison facilities. As a sanction for noncompliance with the order, the court threatened to enjoin the use of the two work farms altogether. In addition, the court was to monitor the progress on a continuing basis by requiring periodic reports of prison conditions. Finally, recognizing both the financial burden of effecting such an extensive modification and the reluctance of the executive branch to appropriate funds, the court placed ultimate responsibility for change on the Commissioner of Corrections.[30] Obviously the *Holt* court viewed the absolute "hands off" policy as obsolete.

A year after the *Holt* decision an Ohio court encountered a similar situation in *Jones v. Wittenberg*.[31] The inmates of the Lucas County Jail, as a class, brought a federal civil rights action[32] alleging that severe overcrowding of the facility, inadequate sanitary conditions, poor interior lighting, inferior food and medical services, and improper custodial supervision had subjected them to cruel and unusual punishment. The district court agreed and found conditions constitutionally unacceptable.[33] In his subsequent order the trial judge listed the specific conditions to be improved and set the time within which the remedial action was to be taken.[34] The major difficulty confronting the

28. *Id.*

29. *Id.* at 380.

30. Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

Id. at 385.

31. 323 F. Supp. 93 (N.D. Ohio 1971).

32. *Id.* Most actions are brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970).

33. 323 F. Supp. at 99.

34. The size of the jail population, the interior lighting, the number and quality

court was to determine the source of funds for the project. Aware that the judiciary has no inherent power of taxation, the court ordered the sheriff and other officials to reallocate their budgeted funds to effect the enumerated rehabilitative changes.[35] The court was to retain continuing jurisdiction over the matter so that "the changes of methods and practices required will not be abandoned, forgotten, or neglected, but [will] become permanently established."[36]

In *Hamilton v. Schiro*[37] the prisoners of Orleans Parish Prison secured an injunction forbidding the operation of the prison facility. The living conditions within the institution were so inhumane and physically dangerous that the court, rather than attempt to fashion relief to reform the prison, enjoined its use altogether. The trial judge concluded his opinion tersely:

> Prison life inevitably involves some deprivation of rights, but the conditions of the plaintiff's confinement in Orleans Parish Prison so shock the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment . . . .[38]

The destructive conditions of inhumane prison confinement were comprehensively assessed in *Gates v. Collier*.[39] In that case, brought by the prisoners at the Mississippi State Prison at Parchman as a class action,[40] the court found conditions to be unlawful under state law[41] as well as under the eighth amendment. The opinion granted injunctive and declaratory relief to the plaintiffs. The cruel and unusual punish-

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of guards and other personnel, diet and food service, sanitation and personal hygiene, medical treatment, communications with visitors and attorneys, and available reading material were all included in special parts of the court order. Jones v. Wittenberg, 330 F. Supp. 707, 714-20 (N.D. Ohio 1971).

35. *Id.* at 713.

36. *Id.* at 721.

37. 338 F. Supp. 1016 (E.D. La. 1970). In addition, the court determined that suits under 42 U.S.C. § 1983 did not require the exhaustion of available state remedies as a necessary condition precedent to federal court action. *Id.* at 1019; *accord,* Wilwording v. Swenson, 404 U.S. 249 (1971); Monroe v. Pape, 365 U.S. 167 (1961).

38. 338 F. Supp. at 1019. In the court's "Findings of Fact," the adverse conditions of the prison were enumerated. It was noted that there were 900 prisoners in the space built for 400, that six to eight inmates inhabited a cell 13 feet by 8.5 feet by 7.5 feet in size, that sanitation facilities were inoperable, mattresses were never cleaned, exercise was only permitted once in twenty or thirty days, and that the kitchen, sanitation, and shower system were infested with rats, mice, and roaches. *Id.* at 1016-18.

39. 349 F. Supp. 881 (N.D. Miss. 1972).

40. The prisoners at Parchman brought suit under 42 U.S.C. §§ 1981, 1983, 1985, 1994 (1970).

41. MISS. CODE ANN. §§ 7930, 7942, 7959, 7968 (Supp. 1971).

ment found in *Gates* was composed of two parts: the deleterious effects of inhumane living conditions and the danger of prisoner mistreatment by armed trusty guards and other inmates.[42] The court carefully noted that public and official apathy regarding the state of incarcerated prisoners was a cause of the deficiencies at Parchman.[43] Basing its authority to act on the need to protect the constitutional rights of the prisoners, the court specifically set out the physical and administrative improvements required to meet constitutional standards and established the time in which to make them.[44] In addition, the order required prompt submission of a comprehensive plan for the guidance of future improvements.[45] The court was to retain jurisdiction over the project indefintely. Fortunately for the *Gates* court, the matter of funding was not a serious problem because of the immediate availability of federal assistance.[46]

Judge Keady in the *Gates* case expressed what had been an implicit development in the previous cases when he recognized that prisoners have a constitutional right to "adequate provision for their physical health and well-being . . . ."[47] The eighth amendment prohibition had traditionally been interpreted as forbidding certain intolerable practices. But imprisonment generally was not considered to be a proscribed punishment. The courts in the cases surveyed have had little difficulty in drawing the analogy between objectionable physical punishment and inhumane imprisonment conditions. The application of the cruel and unusual punishment standard in each case has established minimal requirements for lawful confinement. But surprisingly, the

42. The problem of inhumane living conditions was described in the court's findings in these terms: "The housing units at Parchman are unfit for human habitation under any modern concept of decency. The facilities at all camps for the disposal of human and other waste are shockingly inadequate and present an immediate health hazard." 349 F. Supp. at 887. As to the competency of the trusty guards the court stated, "Penitentiary records indicate that many of the armed trusties have been convicted of violent crimes, and that of the armed trusties serving as of April 1, 1971, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders." *Id.* at 889.

43. *Id.* at 888.

44. *Id.* at 898-903.

45. *Id.* at 903-04.

46. The notoriety of the case had attracted sufficient federal interest to warrant a commitment to the Parchman prison of one million dollars by the Law Enforcement Assistance Administration of the United States Department of Justice. *Id.* at 892.

47. *Id.* at 894. This has been recognized previously by courts but apparently never utilized to guarantee prison rights. "The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty." Johnson v. Dye, 175 F.2d 250, 256 (3d Cir. 1949), *rev'd per curiam on other grounds*, 338 U.S. 864 (1949).

historically vague constitutional prohibition has been used to secure extremely specific levels of decency for the treatment of convicts. Furthermore, the eighth amendment cases have delineated affirmative rights for prisoners.[48]

On the perimeter of the evolving eighth amendment theory of prisoner rights is the question of whether the denial of rehabilitative activities constitutes cruel and unusual punishment. This problem has not been squarely faced although several courts have placed vocational training among those factors to be considered in determining the constitutionality of prison conditions.[49] But no court, as yet, has invalidated a penal system solely because of the absence of rehabilitative programs.[50]

However, the lack of social rehabilitative programs was an important factor in two recent cases concerning juveniles. In *Inmates of Boys' Training School v. Affleck*[51] officials had transferred "problem" inmates from the Boys Home to maximum and medium security adult prison facilities and occasionally to the solitary confinement cells located there. The court enjoined the use of the adult prison for the non-criminal juvenile population of the Home. The opinion stressed the purpose of juvenile confinement, which under Rhode Island law is "instruction and reformation."[52] Because rehabilitation was the reason for confinement

48. A common issue in many eighth amendment cases is the adequacy of medical care. There has been a proliferation of cases finding that denial of medical care to individual prisoners violates the eighth amendment. *See* United States v. Fitzgerald, 466 F.2d 377, 380 (D.C. Cir. 1972); Newman v. Alabama, 349 F. Supp. 278, 280-81 (M.D. Ala. 1972); Lopez-Tijerina v. Ciccone, 324 F. Supp. 1265, 1268 (W.D. Mo. 1971); Owens v. Alldridge, 311 F. Supp. 667, 669 (W.D. Okla. 1970); Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

49. Jones v. Wittenberg, 323 F. Supp. 93, 97 (N.D. Ohio 1971).

50. Even the court in *Holt v. Sarver* refused to go that far:

> This Court knows that a sociological theory or idea may ripen into constitutional law; many such theories and ideas 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.

309 F. Supp. at 379.

51. 346 F. Supp. 1354 (D.R.I. 1972). None of the youths in the Boys' Training School had been adjudicated as criminals. They comprised five classifications: 1) those committed by their parents, 2) those awaiting trial, 3) those convicted of delinquency, 4) those found to be wayward, and 5) those determined to be neglected or dependent. *Id.* at 1369.

52. R.I. GEN. LAWS ANN. §§ 13-4-1, -13, -15 (1956). Also the court noted that "[t]he Rhode Island legislature, in establishing its juvenile justice system, has specifically directed that it have rehabilitative, nonpenal, goals." 346 F. Supp. at 1364.

of juveniles, the court concluded that the conditions constituting cruel and unusual punishment need not be as grave as those found in the prior adult criminal imprisonment cases. The court in *Affleck* determined that the mixing of juveniles with the adult prison population was especially destructive of any attempt at reform. While access to reading matter, fresh air and exercise, educational and vocational training, outside visitors, and recreational diversion were all mentioned as being vital to the development of the youths, the court primarily based its decision on placing the youths in the same areas with the criminal adults. Although the eighth amendment was used to protect detained juveniles from the harshness of the physical conditions present in the criminal justice system, the court did not find an explicit right to those services and amenities thought necessary for effective rehabilitation.

Baker v. Hamilton[53] held that the selective confinement of juveniles within the criminal county jail for "shock value"[54] did in fact constitute cruel and unusual punishment. Citing the dilapidated physical condition of the jail, the lack of exercise and recreation, and the absence of any rehabilitative value in jail confinement, the court ordered the referral practice to cease. Once again, the fact that the county jail "is a penal institute designed primarily for punishment rather than rehabilitation"[55] weighed heavily. *Baker* did not provide a well-defined test for measuring impermissible confinement conditions for juveniles, but it did note that the severity of circumstances need not be as dire as those necessary for court action in an adult case.

The application of the eighth amendment in both of these juvenile confinement situations was closely limited to the physical conditions of the holding facility. Although rehabilitation was not required by the dictates of the Constitution, it was explicitly recognized as a duty by state statute.[56] These cases have underscored the judicial awareness of the importance of rehabilitation as the primary objective of the juvenile reformative process. This recognition reflects the accept-

53. 345 F. Supp. 435 (W.D. Ky. 1972).

54. *Id.* at 349.

55. *Id.* at 352. The fact that non-criminal juveniles were being placed into contact with hardened adult offenders was considered especially counter-rehabilitative since the juveniles, in the opinion of an expert witness, seek to identify with the older inmates and would learn the criminal trade. *Id.* at 348. In Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), the court solely based its decision to force the closing of the Manida youth facility on the grounds that the institution presented a physical danger to its inhabitants. Rehabilitative treatment of the juveniles was not mentioned. *Id.* at 597.

56. 346 F. Supp. at 1367; 345 F. Supp. at 351.

ance of the theories of child psychologists and sociologists[57] and serves as a repudiation of the concept of penal juvenile confinement. Unfortunately, theoreticians for adult treatment have not met such a favorable response.

Modern penologists[58] have recognized social retraining of the adult criminal as the ultimate objective of the prison system and have discarded prior notions of deterrence, retribution, and isolation as the fundamental purposes for confining inmates. The changing emphasis views the prison as a place of correction rather than punishment—one which administers treatment instead of inflicting revenge.[59] Many rehabilitative theories are currently being discussed but few, if any, have been empirically examined.[60] Consequently, there is no unanimity in approaching the task of reforming the American criminal. Every scheme hopes to return the inmate to society as a well-adjusted and productive individual who will not subsequently re-enter prison. Spiraling crime rates[61] and staggering prisoner recidivism[62] have made the public and correctional officials painfully aware that the existing retributive system of punishment is not properly serving society.[63] Although popular opinion acknowledges the logic of attempting to reform criminals, no effective citizen's movement has yet mobilized to attack the problem and lobby for change. Extensive inmate rehabilitation pro-

57. Gough, *The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS L.J. 182 (1971); Note, *Non-Delinquent Children in New York: The Need for Alternatives to Institutional Treatment*, 8 COLUM. J.L. & SOC. PROB. 251 (1972).

58. *E.g.*, R. CLARK, CRIME IN AMERICA 220 (1970); CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 175-227 (R. Gerber & P. McAnany eds. 1972); J. MARTIN & D. WEBSTER, SOCIAL CONSEQUENCES OF CONVICTION 216-223 (1971); Leopold, *What's Wrong With the Prison System*, 45 NEB. L. REV. 33 (1966).

59. "The function of punishment must accordingly be directed to its social purpose . . . . [I]t is the future and not the past, not the crime committed, that sets the goal and the purpose sought." R. SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT 9 (1913).

60. One novel proposal combines the economic incentive of self-interest with prisoner reform. This amalgam of social work and business principles rewards socially desirable behavior with credits towards an early release. *See* Williams & Fish, *Rehabilitation and Economic Self-Interest*, 17 CRIME & DELINQUENCY 406 (1971).

61. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 22-31 (1967).

62. R. CLARK, *supra* note 56, at 215; N. MORRIS, THE HABITUAL CRIMINAL 1-29 (1951); Robison & Smith, *Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971).

63. MODEL PENAL CODE § 102(c) (Proposed Official Draft 1962). For a list of states recognizing the reformatory purpose of punishment see Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 U. CIN. L. REV. 650, 676 n.136 (1970).

grams would demand significant amounts of public funds. At present popular commitment to prison reform has not yet guaranteed humane living conditions, so there is no reason to believe that rehabilitation would be more favorably received.

Until now the eighth amendment has been used to forbid brutal forms of punishment and incarceration under abusive conditions. In order to establish rehabilitation as a protected right, confinement for purposes other than rehabilitation, even under decent conditions, must be declared "cruel and unusual." Such a step would represent a fundamental modification in the conventional view of the role of institutionalized punishment. The prior developments in eighth amendment theory have not necessitated elemental alterations in the criminal justice system. They have only accomplished reform by forcing the system to operate in the manner in which it was originally intended, yet without excessive cruelty. As such, these cases presented limited issues for the courts to deal with. State and federal statutes would undoubtedly be necessary to establish rehabilitation as the acknowledged purpose of the correctional system. If they were enacted, the court's primary concern would be the proper administration of the statutory objectives. With this statutory foundation, the judiciary might use the eighth amendment to secure rehabilitative treatment as a right. Secondarily, the constitutional principle might also establish rehabilitation as the paramount purpose of a criminal justice system in a recalcitrant jurisdiction. Here the amendment could be utilized to instigate change rather than to enforce stated goals. As long as society determines that punitive incarceration is a tolerable and desirable manner in which to manage the problems posed by criminal offenders, the eighth amendment will do little to provide for rehabilitation. The amendment's application merely reflects existing social notions of decency towards prisoners. Only when the public replaces the presently held penal objectives with the reformative purposes proposed by penologists will an affirmative role for the amendment exist.

The eighth amendment is currently being used to secure the right to humane living conditions for prisoners in various parts of the country. Whether public sensibilities will become enlightened to the point where the reformative nature of corrections is recognized remains a matter for conjecture. In any case, the courts have shown themselves to be ill-equipped for the task of managing and upgrading the American prison system. One major impediment is the lack of funds. Because of the separation of powers, the judiciary has limited authority to com-

pel the executive to increase the funding allotment for the penal system. To a large degree, the effectiveness of judicial intervention in the area of prison reform is circumscribed by the courts' inability to marshall financial commitments for that purpose. But the major difficulty confronting the courts and those who envision social rehabilitation as a constitutional right lies in changing the public conceptualization of the penal system. The eighth amendment can only reflect the normative values of the American people. The future of the eighth amendment rests not so much with thoughtful jurists but rather with an informed and concerned public.

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Constitutional Law—Evidence—Testimonial Reprieve for Newsmen in Civil Litigation

Until recently newsmen appeared to be fighting a losing battle to obtain a privilege to withhold confidential sources and information in legal proceedings. By mid-1972 only eighteen states had statutes granting an evidentiary privilege to newsmen,[1] and the Supreme Court had decided in *Branzburg v. Hayes*[2] that newsmen enjoy no first amendment right to withhold information from grand juries. After *Branzburg*, several newsmen who refused to divulge their sources were held in contempt, and a few journalists[3] were jailed.[4] Several news-

1. ALA. CODE tit. 7, § 370 (1960); ALASKA STAT. §§ 09.25.150, 09.25.160 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West, 1966); ILL. ANN. STAT. ch. 51, §§ 111-19 (Smith-Hurd Supp. 1972); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. ANN. § 421.100 (1969); LA. REV. STAT. §§ 45:1451-54 (Supp. 1970); MD. ANN. CODE art. 35, § 2 (1971); MICH. STAT. ANN. § 28.945(10) (1954); MONT. REV. CODES ANN. §§ 93-601 to -602 (1964); NEV. REV. STAT. § 49.275 (1969); N.J. STAT. ANN. §§ 2A-84A-21,29 (Supp. 1969); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (Page 1953); PA. STAT. ANN., tit. 28, § 330 (Supp. 1970).

2. 408 U.S. 665 (1972), reporting the disposition of three cases: Branzburg v. Pound, 461 S.W.2d 345 (Ky.), *cert. granted sub nom.* Branzburg v. Hayes, 402 U.S. 942 (1971); *In re* Pappas, 358 Mass. 614, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971); and Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971).

3. Throughout this note, "journalist" appears interchangeably with the terms "newsman" and "reporter." The term "newsman" encompasses persons involved in all phases of journalism, including news reporting and editing. Whether a privilege should extend also to college newspaper reporters and editors or to authors of current