THE RIGHT TO REHABILITATION: *LAAMAN V. HELGEMOE*

Most [prison] policy is formulated in a bureau that operates under the heading Department of Corrections. But what can we say about these asylums since none of the inmates are ever cured. Since in every instance they are sent out of the prisons more damaged physically and mentally than when they entered. Because that is the reality.

*George Jackson**

I. INTRODUCTION

On July 1, 1977, the United States District Court for the District of New Hampshire decided *Laaman v. Helgemoe*,[1] a case which earlier had been referred to by that court as "the most comprehensive law suit ever brought against the [New Hampshire State] prison."[2] This decision joins a growing body of precedent which assumes the authority of federal courts to examine the totality of conditions of confinement in penal institutions.[3] Despite the intervention of federal courts, prisoners have not been given a constitutional right to be rehabilitated so that they may re-enter society as functioning citizens upon release from confinement. However, in *Laaman*, the court made important statements regarding prisoners' interests in rehabilitation. This Note will summarize the development of prisoners' rights, analyze *Laaman* and assess its impact on the right to rehabilitation. Justifications for a constitutional right to rehabilitation will be discussed, and proposals for defining its scope will be presented.

II. DEVELOPMENT OF PRISONERS' RIGHTS

In an 1871 case, *Ruffin v. Commonwealth*,[4] prisoners were referred to as "slaves of the state" who had no rights except those granted by the state. For almost a hundred years punishment and revenge were heavily stressed as goals of penal institutions, with prisoners viewed as receiving just deserts.[5] Gradually, prisons came to be known as correctional systems,

---

* G. JACKSON, SOLEDAD BROTHER 30 (Bantam ed 1970).

1. 437 F. Supp. 269 (D.N.H. 1977), *appeal docketed*, No. 77-1459, 1460 (1st Cir. Oct. 25, 1977).

2. Laaman v. Perrin, 435 F. Supp. 319, 322 (D.N.H. 1977).

3. *See* cases collected in Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. CIV. RIGHTS CIV. LIB. L. REV. 367, 369-70 n.12 (1977).

4. 62 Va. (21 Gratt) 790, 796 (1871).

5. The attitude of the times was characterized by Justice Douglas in Wolff v. McDonnell, 418 U.S. 539 (1974):

> Our prisons are just now beginning to work their way out of their punitive heritage. The first American penitentiary was established in Philadelphia in 1790; it contained 24 individual cells for the solitary confinement of hardened offenders. . . . Under this 'Pennsylvania System' the prisoner was continuously confined to solitary and all communication was forbidden, with the exception of religious advisors and official visitors. . . . New York experimented with this approach but found it too severe, and adopted instead a compromise solution known as the 'Auburn' or 'silent' system, in which inmates were allowed to work in shops with others during the day, although under a strict rule of silence, and then returned to solitary confinement at night. Prisoners were

rather than penal systems, and new pronouncements were made by the courts regarding penal objectives. For instance, in 1949, the United States Supreme Court declared that "retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[6] Thus, the way was paved for prison reform and modern penological theory.

Even as attitudes changed, federal courts were reluctant to interfere with state institutions and exercised restraint under the "hands-off" doctrine.[7] Application of that doctrine resulted in "denial of jurisdiction over the subject matter of petitions from prisoners alleging some form of mistreatment or contesting some deprivation undergone during imprisonment," and reflected a judicial attitude that "courts [were] . . . without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[8] Justifications for the "hands-off" policy include lack of judicial expertise, separation of judicial and executive powers, fear of undermining prison discipline, avoiding conflicts and confrontations with prison administrators hostile to interference, and federalism.[9]

In the late 1960's and early 70's judicial attitudes changed in response to prisoners' efforts to improve the conditions of confinement through litigation. This change was explicitly endorsed by the Supreme Court in 1974: "[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[10]

With the apparent demise of the "hands-off" policy, prisoners were confronted with another roadblock: the necessity to establish the existence of constitutionally guaranteed rights. A 1948 Supreme Court statement was a

---

marched around in military lock-step with their eyes cast on the ground, and the violation of any rules resulted in the immediate infliction of corporal punishment by the guards.

Id. at 598-99 (Douglas, J., dissenting) (citations omitted). See also D. DUFFE & R. FITCH, AN INTRODUCTION TO CORRECTIONS: A POLICY AND SYSTEMS APPROACH 117-24 (1976); DWYER AND BOTEIN, *The Right to Rehabilitation for Prisoners—Judicial Reform of the Correctional Process*, 20 N.Y.L.F. 273 (1974); J. KLEINIG, PUNISHMENT AND DESERT (1973).

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

7. For a good historial analysis and critique of the hands-off doctrine, *see* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) [hereinafter cited as *Beyond the Ken*]. The phrase is said to have originated in FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961) (document prepared for the Federal Bureau of Prisons). *Beyond the Ken, supra* note 7, at 506 n.4. *See also* Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971); Note, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. L. REV. 352 n.3 (1975).

8. *Beyond the Ken, supra* note 7, at 506 (quoting Banning v. Looney, 213 F.2d 771 (10th Cir. 1954), *cert. denied*, 348 U.S. 859 (1954).

9. *See Beyond the Ken*, supra note 7; Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); Ginsberg, *A New Perspective in Prisoners' Rights: The Right to Refuse Treatment and Rehabilitation*, 10 J. MAR. J. PRAC. & PROC. 173 n.3 (1976) [hereinafter cited as *The Right to Refuse Treatment and Rehabilitation*]; Note, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. L. REV. 352 n.3 (1975).

10. Procunier v. Martinez, 416 U.S. 396, 405-06 (1974). But other language in the opinion seems to suggest that the "hands-off" policy still exists. *Id.* at 404-05.

frequent barrier. In *Price v. Johnston*[11] the Court noted that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[12] Fortunately, courts began to recognize that the loss of privileges and rights was not complete, and "it is now well settled that a prisoner does not shed his basic constitutional rights at the prison gate."[13]

Prisoners now have the right to certain basic necessities, including reasonably adequate food, clothing, shelter, and sanitation.[14] In addition, courts have recognized prisoner's rights in the areas of racial discrimination,[15] access to courts,[16] religion,[17] procedural due process,[18] medical care,[19] and more recently, psychiatric care.[20] However, conditions can be imposed on some of these rights.[21] Moreover, rehabilitation is not considered to be a constitutional right. In fact, some courts have explicitly stated that the right does not exist and have failed to recognize it as such under any circumstances.[22] While denying its status as a right, some courts order rehabilitation programs when other infirmities are present.[23] Based on a finding that the overall conditions of the prison constitute cruel and unusual punishment in violation of the eighth amendment, such decisions represent what one

11. 334 U.S. 266 (1948).

12. *Id.* at 285.

13. Finney v. Ark. Board of Corrections, 505 F.2d 194, 211 (8th Cir. 1974). For a catalogue of rights now recognized, *see* authorities collected in Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

14. Newman v. Ala., 559 F.2d 283, 286 (5th Cir. 1977).

15. Prisoners are guaranteed freedom from invidious racial discrimination under the equal protection clause of the fourteenth amendment. Lee v. Washington, 390 U.S. 33 (1968) (*per curiam*): *Accord*: Jackson v. Goodwin, 400 F.2d 529 (5th Cir. 1968); Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966).

16. Bounds v. Smith, 430 U.S. 817 (1977); Johnson v. Avery, 393 U.S. 483 (1969); Younger v. Gilmore, 404 U.S. 15 (1971). *See also* Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L. Q. 219, 242-44 (1977).

17. Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964).

18. Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Haines v. Kerner, 404 U.S. 519 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Screws v. United States, 325 U.S. 91 (1945). *See also* Morrisey v. Brewer, 408 U.S. 471 (1972)(parolees).

19. Estelle v. Gamble, 429 U.S. 97 (1976); Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). (applying Estelle v. Gamble). *See generally* Neisser, *Is There A Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV 921 (1977).

20. Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977).: Newman v. Ala., 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Finney v. Ark. Board of Corrections, 505 F.2d 194 (8th Cir. 1974). In Bowring, the Fourth Circuit stated that there was no distinction between the right of medical care for physical ills and that for psychological ills and that Gamble, 429 U.S. 97 (1976), applies to psychiatric care as well.

21. Prisoners' rights under the Due Process Clause, for instance, carry certain restrictions, as indicated in Wolff v. McDonnel, 418 U.S. 539, 556 (1974); Meachum v. Fano, 427 U.S. 215 (1976); Montain v. Haymes, 427 U.S. 236 (1976); and Moody v. Daggett, 429 U.S. 78 (1976). *See also* Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L. Q. 219, 227-33 (1977), for a discussion of how prisoners' due process rights have been limited by recent Supreme Court decisions. *See also* Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977), regarding limitations on the right to receive psychiatric treatment.

22. In Newman v. Ala., 559 F.2d 283 (5th Cir. 1977), the Fifth Circuit held that the "failure of prison authorities to provide a rehabilitation program, by itself does not constitute cruel and unusual punishment. . . ." *Id.* at 291.

23. Mitchel v. Untreiner, 421 F. Supp. 886, 895 (N.D. Fla. 1976); Barnes v. Gov't of V.I., 415 F. Supp. 1218, 1226 (D.V.I. 1976); Bowring v. Godwin, 551 F.2d 44, 48 n.2 (4th Cir. 1977); French v. Heyne, 547 F.2d 994 (7th Cir. 1976); Pugh v. Locke, 406 F. Supp. 318, 330 (N.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

commentator has called the "totality of conditions" approach.[24]

Some courts have carefully stated that the mere absence of rehabilitative efforts could *not* alone constitute cruel and unusual punishment in violation of the eighth amendment.[25] *Holt v. Sarver*[26] is illustrative. The *Holt* court found that the overall practices and conditions in the Arkansas penitentiary system, including the "absence of a *meaningful* rehabilitation program . . ." rendered the entire system unconstitutional under the eighth amendment.[27] In so holding, the court noted:

> 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. That, however, is not quite the end of the matter. . . . [T]he absence of rehabiltiation services and facilities . . . remains a factor in the overall constitutional equation . . . .[28]

The significance of *Holt* is that the court highlighted the importance of rehabilitation while discussing the totality of prison conditions. The court stated that "the absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation."[29] Since 1970, other courts have followed *Holt*, and recognized the need for rehabilitative efforts by correctional institutions.[30] Seven years later, *Laaman* has made another significant contribution by recognizing rehabilitation as an important goal of penology.

III. THE LAAMAN OPINION

Laaman V. Helgemoe was brought under 42 U.S.C. § 1983[31] to improve

24. Robbins and Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 906 (1977).

25. *See* cases cited in note 23 *supra*. *See also* Robins and Buser, *supra*, note 24.

26. 309 F. Supp. 362 (E.D. Ark. 1976), *aff'd*, 442 F.2d 304 (8th Cir. 1971). Litigation challenging the Arkansas prison system began with Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965), and Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated and remanded*, 404 F.2d 571 (8th Cir. 1968). The first Holt case was decided in 1969, Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (*Holt I*), and has continued to engage the federal courts through a series of hearings and appeals. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (*Holt II*), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973 (Holt III) *aff'd and rev'd in part sub nom*; Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

27. 309 F. Supp. at 380 (emphasis added).

28. *Id.* at 379.

29. *Id.*

30. *See e.g.*, Barnes v. Gov't of V.I., 415 F. Supp. 1218, 1227 (D.V.I. 1976); Pugh v. Locke, 406 F. Supp. 318, 330 (1976), *aff'd and remanded sub nom.*, Newman v. Ala., 559 F.2d 283 (5th Cir. 1977); Finey v. Ark. Bd. of Corrections, 505 F.2d 194, 201 (8th Cir. 1977); Finney v. Ark. Bd. of Corrections, 505 F.2d 194, 201 (8th Cir. 1974); Taylor v. Sterrett, 344 F. Supp. 411, 419-20 (N.D. Tex.) *modified*, 499 F.2d 367 (1972), *cert. denied*, 420 U.S. 983.

31. 437 F. Supp. 269, 275. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

the living conditions, treatment and programs available at the New Hampshire State Prison (NHSP). Originally the suit was instituted by plaintiff Laaman, in his seventh action against NHSP,[32] to challenge its emergency lockup of the prison. After the court appointed counsel, Laaman's action was consolidated with that of other plaintiffs, and the case was then certified as a class action under the Federal Rules of Civil Procedure. Thus, the lawsuit encompassed issues concerning the legality of the lockup, visitation and mail privileges, work, education and rehabilitation opportunities, harassment of the named plaintiffs, and the overall conditions and practices at NHSP.[33]

In a lengthy opinion Judge Bownes held that the conditions and treatment accorded prisoners at NHSP violated the Eighth Amendment.[34] The court entered a wide-ranging order to ameliorate the many unconstitutional conditions found at NHSP. In order to improve rehabilitation at the facility, NHSP was order to develop and implement a classification system, provide protection from violence and aggression, and provide meaningful work opportunities, vocational training, services and programs, visitation privileges and mail privileges.[35]

In laying the constitutional foundation for its holding, the court stated that the eighth amendment applies not only to cruel and unusual punishment against the physical body, but to the entire person as well.[36] The court then recognized two tests established by the United States Supreme Court in *Gregg v. Georgia*[37] for determining the constitutionality of a punishment under the Eighth Amendment. Under *Gregg*, a punishment is excessive and thus unconstitutional if it is "grossly out of proportion to the severity of the

32. For Laaman's prior suits, see Laaman v. Perrin, 435 F. Supp. 319, 322 n.1 (1977). Described by the court as an "able, prolific and often successful jailhouse lawyer," since his commitment to NHSP in June 1972, Laaman engaged in such activities as writing writs and operating a legal clinic for prisoners. 435 F. Supp. at 322. The court also noted:

> He has served as an elected inmate representative since 1973 when he helped establish a formal grievance procedure, and has continuously acted informally as a spokesperson and mediator for other prisoners. He has been an officer in the New England Prisoners' Association and has attempted to establish a prisonwide newspaper at NHSP . . . . Laaman is popular among the inmates and evidences a genuine concern for them . . . [H]e writes personal letters for the semi-literates, speaks on behalf of men who can't talk, and demands the things he feels are right and needed. He is disliked by the staff . . . (and) is seen as a leader in the inmate culture, and as a rude, demanding vociferous rebel.

Id. at 322.

33. 437 F. Supp. at 275.

34. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The prohibition against cruel and unusual punishment was held to apply to the States through the due process clause of the fourteenth amendment in Robinson v. California, 370 U.S. 660 (1962). For the history of the eighth amendment, *see* Ingraham v. Wright, 430 U.S. 651 (1977); Gregg v. Georgia, 428 U.S. 153, 168-173 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring); Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

35. 437 F. Supp. at 325-31.

36. *Id.* at 307.

37. 428 U.S. 153 (1976).

crime"[38] or it "involve[s] the unnecessary and wanton infliction of pain."[39]

Regarding the second test, it was stated in *Gregg* that: "The Court also must ask whether (a punishment) comports with the basic concepts of human dignity at the core of the amendment. . . . [T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."[40] This test was later used by the Supreme Court in *Estelle v. Gamble*,[41] in which the Court applied the eighth amendment to analyze conditions of confinement.[42] *Gamble* held that deliberate indifference to the serious medical needs of prisoners constitutes a wanton infliction of unnecessary pain and suffering and therefore violates the eighth amendment. The *Laaman* court also applied this second test, stating that "Imprisonment may not be marked by conditions which inflict needless suffering whether or not the pain is physical. Conditions which cause such deprivations must be justified by the legitimate penological objectives of the corrections system."[43]

In *Pell v. Procunier*,[44] the United States Supreme Court recognized three primary goals of correctional institutions: deterrence of crime, rehabilitation of those committed to its custody, and internal security within the correctional facilities themselves. In applying *Gregg*, the *Laaman* court first discussed these objectives of the correctional systems, emphasizing that New Hampshire, through its Constitution, legislation and judicial pronouncements, has recognized rehabilitation as a primary goal of its correctional system.[45]

In addressing the "suffering" component of this Eighth Amendment test, the court stated that "imprisonment in an institution where degeneration is probable and self-improvement unlikely would cause unnecessary suffering in the form of probable future incarceration."[46] The court made the final nexus to the eighth amendment thusly: "Punishment for one crime, under conditions which spawn future crimes and more punishment, serves no valid legislative purpose and is 'so totally without penological justification that it results in the gratuitous infliction of suffering' in violation of the eighth amendment."[47]

Based on the above analysis and the court's factual finding that the conditions at NHSP made "degeneration probable and reform unlikely . . , an eighth amendment violation was found.[48] It was stated:

> Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates

38. *Id.* at 173.
39. *Id.*
40. *Id.* at 182-83.
41. 429 U.S. 97 (1976).
42. Prior to *Gamble*, the eighth amendment had only been applied by the Supreme Court in the context of physical punishments. Subsequently, in Hutto v. Finney, 437 U.S. 678 (1978), the Court affirmed the conclusion in Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976) that conditions in the Arkansas prison's isolation cells violated the Eighth Amendment.
43. 437 F. Supp. at 315.
44. 417 U.S. 817, 822-23 (1974).
45. 437 F. Supp. at 315-16.
46. *Id.* at 316.
47. *Id.* (quoting Gregg v. Georgia, 428 U.S. at 183).
48. *Id.* at 325.

> and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment.[49]

The sixty-three page *Laaman* opinion presents an in-depth study of the NHSP facility and the constitutional law surrounding conditions of confinement. Despite its thoroughness, however, *Laaman* leaves room for interpretation and speculation.

IV. The Right Not to Degenerate

While it is clear that *Laaman* does not establish an affirmative constitutional right to rehabilitation, it does support a negative right, *i.e.*, the right to be incarcerated under conditions which do not cause degeneration. *Laaman* based this right on a "growing recognition that convicts have a right to be incarcerated in conditions that . . . do not threaten their sanity of mental well-being . . . are not counterproductive to [their] . . . efforts to rehabilitate themselves, [and] . . . do not increase the probability of [their] . . . future incarceration; . . ."[50] While the *Laaman* court stopped short of granting prisoners the right to demand specific rehabilitation programs, it has given rehabilitation a prominent place among penological goals.

There are aspects to the decision which set it apart from other "totality of conditions" cases. Few of these cases have dealt analytically and affirmatively with the constitutional issues surrounding overall conditions of confinement, particularly rehabilitation.[51] In *Pugh v. Locke*,[52] for example, there was little or no constitutional analysis and the court's finding was based partly on defendant's admission that there were "aggravated and existing violations of plaintiffs Eight Amendment Rights."[53] Pugh's importance was further undercut when on appeal, the Fifth Circuit summarily rejected the argument by the United States as *amicus curiae* that "states have a duty to insure that the mental, physical, and emotional status of prisoners in their custody do not deteriorate."[54] The appellate court indicated that a state's eighth amendment obligation is ended if it "furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety . . . ."[55]

To the extent that *Laaman* can be seen as another totality of conditions case, it is generally consistent with that body of law.[56] However, *Laaman* marks significant progress in the "totality of conditions" approach. It is the

49. *Id.* at 323.

50. *Id.* at 316 (citations omitted).

51. *See e.g.*, Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976) (overall conditions of confinement, including lack of educational and recreational programs, were declared to be cruel and unusual punishment without any discussion of Eighth Amendment principles); Barnes v. Gov't of Virgin Islands, 415 F. Supp. 1218 (D.V.I. 1976) (simply noting the "evolving standards of decency" referred to in Trop v. Dulles, 356 U.S. 86 (1958)).

52. 406 F. Supp. 318 (N.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Ala., 559 F.2d 283 (5th Cir. 1977).

53. 406 F. Supp. at 322, 329.

54. Newman v. Ala., 559 F.2d 283, 291 (5th Cir. 1977).

55. *Id.*

56. *See* notes 24-30 *supra* and accompanying text.

first case to utilize that model to support its holding with the Eighth Amendment tests set forth in *Gregg v. Georgia*[57] and subsequently applied by the Supreme Court in *Estelle v. Gamble*. In utilizing *Gregg, Laaman* has combined much of the case law which has addressed,[58] tangentially or otherwise, areas important to rehabilitation, such as mental health.[59] Additionally, the *Laaman* court used this case law along with policy arguments to support its statements favoring the emergent right to be confined in conditions which do not cause degeneration.[60] Finally, *Laaman*'s application of the Eighth Amendment test and its interpretation of suffering, although innovative, are consistent with Supreme Court pronouncements.

The Supreme Court has long recognized that cruel and unusual punishment is not a static concept, but rather a flexible one which may acquire meaning as public opinion becomes enlightened by human justice.[61] In *Gamble*, the Court illustrated its willingness to uphold that statement by applying the eighth amendment to a condition of confinement, and reiterating the eighth Amendment's applicability to "more than physical barbarous punishments."[62] *Laaman*'s interpretation of suffering and consequent application of the cruel and unusual punishment test to degenerating conditions is consistent, with that approach to the extent that physical and mental suffering are analogous. This analogy is further supported by the Fourth Circuit which stated in *Bowring v. Godwin*[63] that it saw "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart."[64] Thus, it is not only legally consistent but it also is logical to expand the meaning of suffering to encompass physical, mental, emotional and even intellectual distress.

In *Laaman* the existence of suffering was established because of the "probability" of future incarceration resulting from "probable" degeneration and "unlikely" self improvement under the conditions at NHSP. It is not entirely clear whether the court's factual findings in this area were supported by specific evidence, or whether the court merely assumed a connection between prison conditions and recidivism.[65] It could be argued that

57. 428 U.S. 153, 173 (1976).

58. 429 U.S. 97 (1976).

59. *See* note 20 *supra* and accompanying text.

60. 437 F. Supp. at 316.

61. Weems v. United States, 217 U.S. 349, 374 (1910).

62. 429 U.S. at 102. In *Gamble*, 429 U.S. 97 (1976), an inmate filed a § 1983 action claiming that he had received inadequate medical care and thus had been subjected to cruel and unusual punishment in violation of his eighth amendment rights. The Supreme Court held that the government did have an obligation to provide medical care for those whom it is punishing by incarceration, and that the wanton infliction of unnecessary suffering on a prisoner by deliberate indifference to his serious medical needs is inconsistent with contemporary standards of decency and violates the eighth amendment. However, the Court found that the prisoner, Gamble, had failed to sufficiently allege "deliberate indifference" in his *pro se* complaint.

63. 551 F.2d 44 (4th Cir. 1977).

64. *Id.* at 47.

65. In addition to evidence of a limited number of poorly organized vocational training and education programs made available to very few inmates (437 F. Supp. at 294-6), there was evidence of extreme idleness of the inmate population at NHSP. *Id.* at 291-93. According to expert testimony, such idleness causes work habits to atrophy and leads to degeneration by undermining self-confidence. One expert stated: "Many inmates have no work skills and are deficient in work habits. If he does not *acquire* them during his sentence, he is worse off when released." *Id.* at 293 (Emphasis added.) The court also noted that "the experts and consultants were almost unanimous

some overt act by the released prisoner will be the proximate cause of future incarceration. On the other hand, if there is evidence to demonstrate that imprisonment without rehabilitation causes degeneration, and thus reincarceration, an inmate could argue that s/he is being punished twice for the offense which first led to incarceration. This double jeopardy foundation for a right to rehabilitation is, however, more tenuous than the Eight Amendment approach. Arguably, the Supreme Court would be more persuaded by the latter.

V. A RIGHT TO REHABILITATION?

Ramsey Clark has suggested that "If America cares for its character, it must revolutionize its approach to corrections."[66] Shocking conditions such as those found in the Arkansas correctional system,[67] the "Adjustment Centers" of the California prisons,[68] and even those described in *Laaman*[69]

in concluding that an inmate who remains essentially inactive for the duration of his stay at NHSP will constitute a more serious danger to society after serving his time than he was when he started his sentence." *Id.* at 294. Although no data is given regarding the correlation between these prison conditions and recidivism, that conclusion may logically be drawn from the expert testimony that incarceration under conditions such as those found at NHSP can cause an erosion of work habits and skills already possessed. Obtaining post-release employment is difficult for inmates by nature of their ex-offender status, and if nothing is done to maintain or enhance those skills already possessed, post-release employment becomes more difficult to obtain. Studies have often recognized a high inverse correlation between recidivism and one's ability to find and maintain steady emloyment. *See generally* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (abr. ed. 1969); G. POWNALL, EMPLOYMENT PROBLEM OF RELEASED PRISONERS (Manpower Administration, U.S. Dep't. of Labor, 1969); P. McCreary and J. McCreary, *Job Training and Placement for Offenders and Ex-Offenders* (National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Dep't. of Justice, April 1975). A recent experimental study by the Department of Labor indicated that recidivism can be reduced by providing ex-offenders with a small weekly income for a short (13-week) period following release. EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEP'T. OF LABOR, R & D MONOGRAPH 45, UNLOCKING THE SECOND GATE (1977) [hereinafter UNLOCKING THE SECOND GATE."]. There is also a general recognition of a strong correlation between unemployment or underemployment and crime. A 1974 survey of inmates by the Justice Department shows that about one-third of the inmates of state correctional facilities had been jobless in the month preceeding the arrest leading to their incarceration. Of those employed, the average annual salary was approximately $4,600. *See* NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, DEP'T. OF JUSTICE, NO. SD-NPS-SR-2, SURVEY OF INMATES OF STATE CORRECTIONAL FACILITIES 1974 at 4 (1976); UNLOCKING THE SECOND GATE, *supra*, at 1.

66. R. CLARK, CRIME IN AMERICA 238 (1970).

67. Many of the deplorable conditions were cited in Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971) and later noted in Finney v. Ark. Board of Corrections, 505 F.2d 194 (8th Cir. 1974).

> The record indicates that the inmates have been required to run in front of moving vehicles or ridden horses. Finally even after *Holt II,* a young boy named Willie Stewart was given a *one day* sentence. On that day he was put through all forms of mental and physical torture, ending when the guards shot at his feet and inadvertently killed him.

Id. at 208. *See* B. JACKSON, KILLING TIME: LIFE IN THE ARKANSAS PENITENTIARY (1977). *See also* D. DUFFEE & R. FITCH, AN INTRODUCTION TO CORRECTIONS (1976) which describes some of the conditions in the Arkansas correctional system. For instance, they describe the "Tucker Telephone" which is an "old-fashioned crank telephone with two loose wires; the wires are attached to sensitive parts of the body and the crank turned to generate electricity until the inmate has fainted." *Id.* at 146. *See generally* Burns, *The Black Prisoner as Victim*, 1 BLACK L.J. 120, 121, n.3 (1971); R. CLARK, CRIME IN AMERICA 213 (1970).

68. *See* Hollander, *The "Adjustment Center": California's Prisons Within Prisons*, 1 BLACK L.J. 152 (1971).

69. For instance, the court described the following conditions found in the kitchen:

> The kitchen area is infested with rodents, cockroaches and other insects . . . . '[F]lysticks'

speak to the need for improvements in penal institutions. As Judge Bownes pointed out in *Laaman*, the need for rehabilitation efforts is based on the interests of both society and individual inmates.[70]

The Supreme Court has yet to specifically define suffering or directly address the right to rehabilitation. In *Hutto v. Finney*,[71] the Court found "no error in the [district] court's conclusion that, taken as a whole, conditions in the [Arkansas prison] isolation cells continue to violate the prohibition against cruel and unusual punishments."[72] In *dicta*, the Court did agree with prison officials "that the Constitution does not require that *every aspect* of prison discipline serve a rehabilitative purpose."[73] Arguably, these statements do not preclude finding an eighth amendment violation where the totality of circumstances indicate a total lack of rehabilitative effort by the prison system. The manner in which the Court has recently dealt affirmatively with prisoners' rights,[74] its traditional interpretations of the eighth amendment as a flexible concept[75] and its recognition of rehabilitation as a major goal of the correctional system[76] all suggest the Court might take a step toward establishing rehabilitation as a constitutional right.

Of the possible approaches—administrative action by prison authorities,[77] legislative,[78] or judicial remedies, the most fruitful approach has been

with gross accumulations of dead flies hang in the kitchen. Ventilation is inadequate, and, in order to increase it, the personnel often keep a back door open which allows insects, rats and mice to enter the building. While some efforts have been made to combat the roden infestation, in the words of defendants' expert, 'pest control cannot be effective until they control solid waste.'

437 F. Supp. at 278.

70. 437 F. Supp. at 316.

71. 437 U.S. 678 (1978).

72. *Id.* at 687.

73. *Id.* at 686 n.8.

74. Estelle v. Gamble, 429 U.S. 97 (1976); Bounds v. Smith, 430 U.S. 817 (1977). *Bounds* held that the constitutional right of access to the courts requires prison authorities to provide inmates with adequate law libraries or some alternative form of legal assistance.

The Supreme Court dealt less favorably with prisoners' rights in Jones v. N.C. Prisoners Labor Union Inc., 433 U.S. 119 (1977) which upheld regulations prohibiting the activities of an inmate labor union. The regulations were said to be justified by security reasons.

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

76. Bell v. Procunier, 417 U.S. 817, 822-23 (1974); Procunier v. Martinez, 416 U.S. 396, 404, 412-13 (1974).

77. The administrative approach would be consistent with the "hands-off" doctrine by deferring to the expertise of prison administrators. At least one commentator has suggested this as a possible, although unlikely, source of meaningful reform. *See* Hollander, *The "Adjustment Center": California's Prisons Within Prisons*, 1 BLACK L.J.152, 159 (1971). Any meaningful reform would depend upon its sincere adoption and implementation by prison officials. However, past experience has demonstrated this approach to be largely ineffective. Wolff v. McDonnell, 418 U.S. 539, 599-600 (1974) (Douglas, J., dissenting).

78. Except for regulations which serve as conditions for the receipt of federal grant money (*e.g.*, LEAA regulations), or model legislation which has been adopted by state legislatures, federal legislation is not binding upon state institutions. The Law Enforcement Assistance Administration (LEAA) was created by the Omnibus Crime Control Act of 1970. 42 U.S.C. § 371 (1970). For general information on the purpose and activities of LEAA, *see* Velde, *Correcting Corrections*, 1 BLACK L.J. 125 (1971). For various examples of model correctional legislation, *see* Estelle v. Gamble, 429 U.S. 97, 103-04, n.8 (1976); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS (2d ed. 1975). Likewise, state legislation and constitutional provisions have not been very effective and almost a farce where, in spite of their presence, conditions such as those in New Hampshire, California and Arkansas exist. *See* notes 70, 72 *supra*. One commentator has cited several reasons for the general ineffectiveness

the latter.[79] This approach, however, has been severely limited either by traditional limitations on federal judicial review, such as the requirement that the alleged injustice rise to the level of a constitutional deprivation,[80] or by the courts' self-imposed restraints, such as the "hands off" policy.[81] In addition, other arguments could be raised against a constitutional right to rehabilitation: First, that not everyone would want to receive rehabilitation treatment, and secondly, that the costs would be staggering.

With regard to the first assertion, one judge has pointed out:

> I have had far too much experience with habitual offenders to adopt some naive view that prison can reform all or even a large majority of convicted criminals. There is much merit to the question posed by a California inmate who said, 'How are you gonna rehabilitate me, man, when I ain't never been habilitated?'[82]

---

and unrealized potential of reform legislation. *See* Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 649-51 (1971).

79. See text accompanying notes 13-21, *supra*.

80. For a summary of the various constitutional provisions employed in prisoners' rights litigation, *see* Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L. Q. 219 (1977); Comment, *A Jam in the Revolving Door: A Prisoner's Right to Rehabilitation*, 60 GEO. L.J. 225, 237-243 (1971). It is generally desirable for an inmate to bring his/her claims under the federal constitution because not only does s/he acquire a federal forum (which may be much more desirable than the state court system), but also s/he may be able to bring the claim under 42 U.S.C. § 1983, thereby acquiring other advantages such as counsel fees under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 290 Stat. 2641 (amending 42 U.S.C. § 1988 (1970)). *See* Hirschkop and Grad, *Prisoners' Rights Litigation— 42 U.S.C. § 1983—Plaintiff's View*, 11 U. RICH. L. REV. 785 (1977).

81. See text accompanying notes 7-9, *supra*.

82. Barnes v. Gov't of V.I. 415 F. Supp. 1218, 1226 (D.V.I. 1976). The statement by that prisoner, although seemingly inarticulate and amusing, touches the heart of a very serious problem faced by Blacks and other minority people who truly have not been "habilitated" in the sense of obtaining and enhancing marketable skills through job experience. Ironically, the inability of Blacks to find jobs oft-times plays a significant role in their initial incarceration. The inmate's comment is particularly apposite for Black inmates who bear a heavier burden than their White counterparts. In the first instance, they must convince prison officials that they are willing to join society and live without commiting crimes. Secondly, they must be able to find jobs in a period of high unemployment. Ironically, the failure to bear this latter burden often plays an important role in the initial incarceration of many Blacks. *See generally*, NAT'L URBAN LEAGUE, BLACK PERSPECTIVES ON CRIME AND THE CRIMINAL JUSTICE SYSTEM 143-158 (R. Woodson, ed. 1977); ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL 133-55 (1975); CARROLL & MONDRICK, RACIAL BIAS IN THE DECISION TO GRANT PAROLE, 11 Law & Soc. Rev. 93 (1976). *Cf.*, S. CLARKE, THE INFLUENCE OF INCOME AND OTHER FACTORS ON WHETHER CRIMINAL DEFENDANTS GO TO PRISON, 11 Law & Soc. Rev. 57 (1976). The April 1978 unemployment rate for Blacks and other minorities 16 years or older was estimated to be 11.8%, while that of whites was 5.2%; similar statistics for March 1978 estimate 12.4% and 5.3%, respectively. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T. OF LABOR, MONTHLY LABOR REVIEW 70 (June 1978). Because of the casual relationship between unemployment and crime, (*See* note 65, *supra*) the disproportionate unemployment rate of Blacks and other minorities has resulted in a disproportionate impact of the criminal justice system on this group. The Department of Justice has reported that the proportion of Blacks in the general population of those respective states as of 1970. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, DEPARTMENT OF JUSTICE, NO. SD-NPS-SR-3, CENSUS OF PRISONERS IN STATE CORRECTIONAL FACILITIES 1973 at 6 (1976). In Maryland and Louisiana, the percentages of Black inmates were reported to be as high as 74% and 71% respectively. *Id.* In seventeen states, Blacks numerically outnumbered other groups. The disproportionate impact of the criminal justice system on Blacks is also reflected by the fact that in approximately four out of every five jurisdictions, the median maximum sentence for Black inmates was longer than that for White inmates. *Id.* at 8. In a majority of states, the median number of months served by Black prisoners was larger than that served by White prisoners. *Id.* at 9. There is thus a greater opportunity and longer time for the

This assertion has also been discussed at length by at least one commentator who advocated that prisoners should have a , right to refuse treatment,[83] or, in some cases, the "right to be ignorant."[84] That contention too has considerable merit, particularly if the treatment might, for example, infringe on religious practices. To grant prisoners the *right* to rehabilitation is to merely grant them the *opportunity* to receive such treatment, and not to force treatment upon unwilling inmates or to even guarantee any predetermined results for those desiring to participate.

Addressing the second argument against a right to rehabilitation, it is well established that "[I]nadequate funding is not a legitimate excuse when constitutional rights are being sought."[85] As so well stated by one court: "Humane considerations and constitutional requirements are not . . . to be measured or limited by dollar considerations. . . ."[86] Further, this particular assertion presents serious questions of validity for at least two additional reasons. First, it has been suggested that rehabilitation efforts may decrease the states' total correctional expenditures by causing a decline in recidivism, and thereby offset their costs.[87] Secondly, there are ways of reducing the costs of these efforts, such as using educated inmates as teachers.[88]

If a right to rehabilitation were found, it would not necessarily require a standard program. Among the rehabilitative efforts which have been em-

---

degenerative aspects of prison life to erode the skills of the Black population. When Blacks are eventually released from incarceration (if at all) and seek employment, they are faced with a triple disadvantage: (a) a prison record which discourages many potential employers and often precludes them statutorily from obtaining licenses required to enter certain professions; (2) deteriorated skills and (3) a job market which operated to their disadvantage even before they had criminal records. Unless some attempt at education, vocational training, counseling, etc. is made during incarceration, this process will continue to perpetuate and reinforce the plight of Black and other minority people who as a result will never become "habilitated".

83. *The Right to Refuse Treatment and Rehabilitation, supra* note 9.

84. Ginsberg cited a case, Rutherford v. Hutto, 377 F. Supp. 268 (E.D. Ark. 1974), wherein an illiterate prisoner claimed that his forced attendance at elementary school classes caused him nervousness and asserted that he had a constitutional right to remain ignorant and illiterate. *The Right to Refuse Treatment and Rehabilitation, supra* note 9, at 173 n.6.

85. Barnes v. Gov't of V.I., 415 F. Supp. 1218, 1227 (D.V.I. 1976). *See also* Watson v. Memphis 373 U.S. 526, 537 (1963); Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Ala., 559 F.2d 283 (5th Cir. 1977); Costello v. Wainwright, 525 F.2d 1239, 1251-52 *modified* 529 F.2d 547 (5th Cir. 1976), *rev'd and remanded on other grounds*, 430 U.S. 325 (1977); Rhem v. Malcolm, 377 F. Supp. 995, 999 (S.D.N.Y. 1974), *aff'd and remanded as to remedy*, 507 F.2d 333 (2d Cir. 1974); Finney v. Ark. Bd. of Corrections, 505 F.2d 194, 201 (8th Cir. 1974); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 687 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974), *cert. denied*, 419 U.S. 977 (1974); Rozecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968); Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971).

86. Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968).

87. This suggestion carries an implicit assumption that such efforts will be effective. To ensure such efficacy, it is essential that courts, legislatures and prison administrators avail themselves of the expertise of social sicence research in this area. Current research in the area of program evaluation, much of which deals with prison reform, can offer a considerable amount of guidance in order that not only the most effective, but also the most economically efficient treatment programs are employed. *See e.g.*, Green, *Applying the Controlled Experiment to Penal Reform*, 62 CORNELL L. REV. 158 (1976). *See also* D. CAMPBELL & J. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963) for a very excellent overview of various designs which might be used in evaluating such programs. For a related discussion, *see* notes 86-93 *infra* and accompanying text.

88. Barnes v. Gov't of V.I., 415 F. Supp. 1218, 1233 (D.V.I. 1976).

ployed are vocational training, religious programs, visitation and communication privileges, mental health treatment in the form of individual or group counseling or therapy, classification systems, recreational opportunities, probation, parole, work assignments, work study and work release.[89] Many of these methods have been ordered by courts such as *Laaman* (work opportunities, vocational training, religious and educational programs including remedial and college level courses, library access, social visitation, leisure time activities and recreational activities);[90] *Pugh* ("meaningful" jobs, basic education programs, vocational training, transitional programs to aid re-entry, community based facilities such as work release and pre-release, and classification systems);[91] *Barnes v. Government of the Virgin Islands* ("meaningful jobs to each inmate, basic education programs, recreation, religious programs" and "meaningful rehabilitation opportunities which would prepare [inmates] to return to society" including work release, college release *or* vocational training);[92] and *Mitchell v. Untrenier* (classification system, recreation, educational and vocational training, group and individual counseling, religious programs and library).[93]

Perhaps the most critical argument against such programs are the studies which have found rehabilitation programs to be ineffective, leading social scientists to the conclusion that they may not work.[94] These findings do not in any way toll the death knell for rehabilitative treatment. First, the fault could lie with the research since the validity of these evaluation studies is often questionable.[95] Secondly, assuming *arguendo* that the findings are valid, the mere fact that treatment has not been effective thus far does not lead to the inevitable conclusion that it can never achieve the desired result.[96] The question should be: "What types of programs *will* be effective and how should they be administered?" A constitutional right to rehabilitation would provide the incentive to answer this question.

VI. CONCLUSION

As two commentators have noted, "The courts will not recognize the right to rehabilitation until it has been validated by thorough observation and legitimized by general acceptance."[97] *Laaman v. Helgemoe* has helped to give that right some legitimacy by taking the interim step of finding a right not to degenerate while incarcerated, through creative application of the eighth amendment. That amendment has already been used as a vehicle for ordering rehabilitation where other institutional infirmities existed. The courts should not continue to require a totally infirm institution before re-

89. *See generally,* FELKENER, THE CRIMINAL JUSTICE SYSTEM 292-303 (1973).

90. 437 F. Supp. at 325-31.

91. 406 F. Supp. 318, 331-35 (N.D. Ala. 1976), *aff'd sub nom.* Newman v. Ala., 559 F.2d 283 (5th Cir. 1977).

92. 415 F. Supp. 1218, 1231-36 (D.V.I. 1976).

93. 421 F. Supp. 886, 897-902 (N.D. Fla. 1976).

94. LIPTON, MARTINSON & WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT 627-28 (1975) (hereinafter LIPTON). *See also* Martinson, *What Works*, 43 THE PUBLIC INTEREST (1974); CARLSON, THE DILEMMAS OF CORRECTIONS 31-35 (1976).

95. LIPTON, *supra* note 94, at 627-28.

96. *Id.*

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

sponding to pleas for rehabilitation such as that expressed by the inmate who said: "I'm angry at what I have been through. Yet I have survived. If my luck holds up, I hope that when I have served my term I will walk out of [prison] . . . into a constructive place in society, and into a life without fear."[98]

SHEILA A. PHILLIPS

98. REMICK, IN CONSTANT FEAR 185 (1975).