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SECTION 11 OF THE BILL OF RIGHTS: REHABILITATION POTENTIAL AND SENTENCING

INTRODUCTION

Article I, section 11 of the 1970 Constitution is entitled "Limitation of Penalties After Conviction," and the first sentence of that provision reads as follows:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

Section 11 of the Bill of Rights of the 1870 Constitution had provided only that penalties should be proportioned to the offense. The question which the new language raises is whether, under the 1970 Constitution, there is an enforceable right to have the penalty proportioned to the *offender* as well as the offense. Investigation of the history of constitutional limitations on penalties in Illinois, and of the debates concerning the new section 11, indicates that the creation of a new right was intended.

The evil which the provision seeks to remedy is an arbitrary or capricious exercise of sentencing powers. The method chosen by the delegates to protect against this evil was to draft a constitutional mandate providing two factors, seriousness of the offense and rehabilitation, which must be considered in any exercise of the legislative power of sentencing. The framers realized that although the legislature specifies limits on the length of imprisonment according to the offense, the crucial exercise of sentencing power is the penalty set by a judge within those limits. It was the possibility of arbitrary sentencing by a "punitive-minded judge" which prompted the framers to include the language concerning rehabilitation.[1]

Section 11 was intended to place a direct constitutional limitation on a judge who is exercising those functions of the legislative power of sentencing which have been delegated to the judicial branch. Failure of a judge to take rehabilitative possibilities into consideration is a violation of that limitation, and consequently, a violation of defendant's constitutional right under section 11.

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1. In a personal interview on September 13, 1974 with Mr. Elmer Gertz, Chairman of the Bill of Rights Committee at the 1970 Constitutional Convention, Mr. Gertz stated that he felt the intention behind section 11 was "to place limitations on punitive-minded judges."

LIMITATION OF PENALTIES UNDER THE 1870 CONSTITUTION

The investigation of any provision of a new constitution must necessarily begin with a look backward toward its ancestral foundation. Only by comparing the new provision with its predecessor can substantive changes be distinguished from the mere rephrasing of an established constitutional doctrine.

The doctrine that the penalty should fit the crime can be traced back to Magna Carta.[2] The delegates to the 1970 Constitutional Convention were aware of the fact that the eighth amendment to the United States Constitution was based on the tenth section of the English Bill of Rights.[3] The 1818 and 1848 Illinois Constitutions also stated that penalties should be proportioned to the nature of the offense and added, "the true design of all punishments [is] to reform, not to exterminate mankind."[4] The Illinois Constitution of 1870 phrased the idea in the following manner: "All penalties shall be proportioned to the nature of the offense . . . ."[5]

These provisions operated as limitations on the imposition of penalties by the government.[6] Since state constitutions may only limit the legislative branch and grant powers to the executive and judicial branches,[7] all these limitations on penalties were presumably directed at the legislative branch. However, because sentencing is so interwoven with the judicial process, one question which arose under the 1870 Constitution was whether the courts, as well as the legislature, were limited by the provision which provided that all penalties be proportioned to the offense.

The Supreme Court of Illinois first considered this question in 1916 in *People v. Elliot*.[8] The court said:

> The provision is directed to the lawmaking power, which alone can determine what acts shall be regarded as criminal and how they shall be punished.[9]

The court in *Elliot* further held that since article II, section 11 of the 1870 Constitution was binding only on the legislature, if

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2. Chapter 20 of the Magna Carta reads:
> A freeman shall not be ammenced for a small fault, but after the manner of the fault, and for a great crime according to the heinousness of it . . . .

S.H.A. CONST. Magna Carta § 20.

3. G. BRADEN & D. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 51 (1969) [hereinafter cited as BRADEN & COHN]. This book was prepared specifically for use as a reference by the delegates to the 1970 Constitutional Convention.

4. ILL. CONST. art. VIII, § 14 (1818); ILL. CONST. art. XIII, § 14 (1848).

5. ILL. CONST. art. II, § 11 (1870).

6. BRADEN & COHN, *supra* note 3, at 5.

7. *See* Field v. People *ex rel.* McClernand, 3 Ill. 79, 81 (1839).

8. 272 Ill. 592, 112 N.E. 300 (1916).

9. *Id.* at 599, 112 N.E. at 303.

the penalty imposed was within the specified limits set by the legislature, the penalty, itself, could not be attacked on a constitutional ground. Instead, the constitutionality of the statute under which the penalty was imposed would have to be challenged.[10] A more precise statement of this principle was enunciated by the Supreme Court of Illinois in *People v. Brickey*.[11]

> In short, where a sentence is imposed within the limits of the statute, as here, no constitutional question with respect to the punishment being disproportionate can be involved by merely assailing the sentence. It is necessary to attack the law, itself, and show that it violates some specific provision of the State or Federal constitution in order to raise the question.[12]

One factor which probably contributed to this construction was that until the 1960's the legislature had delegated relatively few sentencing functions to the judicial branch. Until the enactment of the Criminal Code of 1960,[13] the authority to impose a sentence within the statutory limitations, in most cases, rested with the jury and not with the court.[14] A sentence fixed by the trial court was not subject to appellate review, if within the statutory limitations,[15] until the Criminal Procedure Act of 1963[16] specifically granted such power.[17] Thus, for most of the period during which the courts operated under the 1870 Constitution, there was no statutory authority to interfere with a validly imposed sentence, no matter how harsh. This lack of judicial power was specifically noted in *People v. Smith*,[18] in which the court stated:

> If the statute is not in violation of the constitution, then any punishment assessed by a court or jury within the limits fixed thereby cannot be adjudged excessive, for the reason that the *power* to declare what punishment may be assessed against those convicted of crimes *is not a judicial power, but a legislative power*, controlled only by the provisions of the constitution.[19]

Because of the delegation of sentencing functions which occurred during the 1960's, the authority of judges to exercise the legislative power of sentencing was greatly increased. Thus, it is understandable that the drafters of section 11, at the 1970 Con-

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10. *Id.* at 600, 112 N.E. at 304.
11. 396 Ill. 140, 71 N.E.2d 157 (1947).
12. *Id.* at 144, 71 N.E.2d at 160.
13. ILL. REV. STAT. ch. 38 (1973) (originally enacted as Act of July 28, 1961, [1961] Ill. Laws 1983).
14. *See, e.g.*, Act of May 29, 1943, ch. 38 § 754a [1943] Ill. Laws 589 (repealed 1961).
15. People v. Dudgeon, 341 Ill. App. 553, 94 N.E.2d 556 (1950).
16. ILL. REV. STAT. ch. 38, § 100 *et seq.* (1973) (originally enacted as Act of Aug. 14, 1963, [1963] Ill. Laws 2836).
17. ILL. REV. STAT. ch. 110A, § 615(b)(4) (1973) (originally enacted as Act of Aug. 14, 1963 ch. 38, § 121-9(4) [1963] Ill. Laws 2877).
18. 245 Ill. App. 119 (1923).
19. *Id.* at 123 (emphasis added).

stitutional Convention, assumed that an effective provision limiting penalties must directly limit the judicial branch in its exercise of sentencing powers.[20]

DEBATES CONCERNING ARTICLE I, SECTION 11 OF THE 1970 CONSTITUTION

Proposals Before the Convention

Proposal #1 of the Bill of Rights Committee did not contain the language concerning restoration to useful citizenship.[21] That language had been proposed, but the committee voted 7 to 5 to retain, unchanged, section 11 of the Bill of Rights of the 1870 Constitution.[22] On the floor of the convention, Delegate Foster reintroduced the language concerning rehabilitation by proposing the following amendment:

> All penalties shall be proportioned both to the nature of the offense and to the objective of restoring the offender to useful citizenship and the basis of such penalties shall be explained by the court and subject to review.[23]

After debate, the requirement of explanation of the basis for penalties and providing for review was deleted by the Lennon Amendment to the Foster Amendment.[24] The delegates believed that to require a written reason for imposing a sentence was to constitutionalize something unheard of before, that is, the forced rendering of written opinions from the judicial branch.[25] Second, it was thought that since the power of review had already been statutorily granted, such language would merely be redundant.[26]

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20. *See* text accompanying note 24 *infra* where Delegate Kamin's question was *not* whether section 11 was binding on the courts, but whether it was *also* binding on the legislature.

21. REC. OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION *Committee Proposals*, vol. VI at 10 (1969-70) [hereinafter cited as *Committee Proposals*].

22. *Id.* at 45.

23. REC. OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION *Verbatim Transcripts*, vol. III at 1391 (1969-70) [hereinafter cited as *Verbatim Transcripts*].

24. *Verbatim Transcripts*, vol. III at 1394.

25. *Id.* at 1392.

26. *Id.* at 1395. The transcripts reveal that Mr. Lennon's only purposes were to avoid being redundant and to avoid placing the burden of a written opinion on a trial judge. After stating that he did not quarrel with the principle that a sentence should be reviewable to determine if any bias or persecution was involved, Delegate Lennon stated his objection to the requirement of a written opinion in the following manner:

> But I am quarreling, I think, with the proposition that a judge, in carrying out this feature of a trial and this feature of a conviction, must in detail explain every inch of the way what he has done with respect to the penalty.

Verbatim Transcripts, vol. III at 1395.

Statements Concerning Purpose

One method of discerning the intended purpose of the proposed changes is an examination of the statements of the proponent of the amendment.

> MR. FOSTER: Mr. President and fellow members, the purpose of this amendment is to clarify the constitutional language with regard to penalties. Traditionally the constitution has stated that a penalty should be proportionate to the nature of the offense. I feel that with all we've learned about penology that somewhere along the line we ought to indicate that in addition to looking to the act that the person committed, we also should look at the person who committed the act and determine to what extent he can be restored to useful citizenship.[27]

It appears that Mr. Foster's purpose was to create an additional factor to be considered when the constitutionality of a penalty is questioned. The issue then arises whether this additional requirement was intended to create a new legal right with a correlative duty, or whether it merely constituted an overture to those governmental bodies who determine penalties to be cognizant of the possibility of rehabilitation. In short, was the language intended to be substantive or hortatory?

The delegates were aware that, in at least one instance, a penalty had been struck down as being violative of the 1870 provision.[28] Therefore, section 11 of the 1870 Constitution had been construed as creating an enforceable right to have the penalty proportioned to the offense.

The new section 11 employed basically the same language, while adding the language concerning rehabilitation. Use of the word "shall" indicates that the requirement concerning rehabilitation is mandatory rather than permissive. If a permissive construction had been intended, the wording of this proposal could easily have been changed so as to reflect a contrast in treatment between the requirement of proportionment to the offense and proportionment to the offender, such as by stating "shall be proportioned to the offense *and may* be determined with the objective of restoring the offender to useful citizenship." Instead, the mandatory word "shall" in the present provision refers to *both* requirements. It would seem then, that the intent of the framers of this provision was that a penalty might be successfully challenged as unconstitutional for failing to consider the objective of restoring the offender to useful citizenship.

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27. *Id.* at 1391.
28. *See* BRADEN & COHN 52 which contains a discussion of Chicago & A.R.R. v. People *ex rel.* Koerner, 67 Ill. 11 (1873).

A question and answer exchange between Delegates Hendren and Foster provides additional insight into the meaning of the Foster Amendment.

> MR. HENDREN: I would like to ask Delegate Foster a couple of questions. Leonard, specifically what does the word "proportion" mean in your amendment and, secondly, does this mean that major emphasis will be placed upon rehabilitation?
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> MR. FOSTER: I am not sure how—in terms of "proportion" it means that the more serious the crime, the more serious the punishment; and, also, in deciding what punishment to impose, the court would do that which with regard to this particular convicted person is most likely to get him back into useful citizenship.
>
> It means that they can't just take rules of thumb and apply them willy-nilly, but they have to look at each situation rather carefully, applying whatever standards are developed.
>
> Now what was your second question?
>
> MR. HENDREN: Would major emphasis be placed upon rehabilitation?
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> MR. FOSTER: I would hope so. At least some emphasis would have to be placed on rehabilitation under this provision. Now, of course, probably there would be worked out by the legislature and by rules of court just where the emphasis would lie. This is a pretty wide open statement here. It's just a statement of sentiment, almost, on the part of the Convention. I would hope, though, that it would lead to the major thrust being towards rehabilitation rather than just punishment.[29]

The remark that the statement is just one of "sentiment" might initially appear to indicate that the statement was, indeed, intended to be hortatory. However, by qualifying "sentiment" with the world "almost," Delegate Foster indicated that although rehabilitative factors were to be considered as constitutional requirements, at the same time, the provision was purposely left broad enough to allow the development of standards by the legislature and the courts.

Assuming that a new constitutional limitation was intended, the question arises as to whether it applied only to the legislature in the same manner in which the 1870 provision was interpreted, or whether it was also intended to bind the courts in their exercise of the legislative power of sentencing. An exchange between Delegates Kamin and Foster gives some insight:

> MR. KAMIN: I am curious. Is it contemplated that the requirement is directed to the legislature as well as to the court and is the legislation which provides a penalty subject to challenge under this provision? That's my first question. My second

29. *Verbatim Transcripts*, vol. III at 1392.

> question is, if a judge is within the range of penalties prescribed by the legislature and if the legislation passes the test, hasn't the judge passed the test with regard to the proportion?
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> My third question is, what is viewed as the remedy upon review when a reviewing court is reviewing the socalled [*sic*] basis of such penalties? Is the penalty voided because the reason wasn't good enough or does the penalty stand until a better reason is given? What do you contemplate—
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> MR. FOSTER: As to the first question, as I remember it, yes, this would be binding on the legislature.
>
> As to the second question. I would presume that in order for this provision to be effectuated there would have to be rules adopted by the courts, but where the legislature provides a range—say, five to twenty for a given offense—even if the judge is within the range under this provision, I would expect him to somehow justify picking either the five or the twenty. Now that was two—
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> MR. KAMIN: My third question was the remedy.
>
> MR. FOSTER: The remedy I would think on review would be that the reviewing court could either reduce the penalty or set the man free.[30]

It is apparent from this exchange, and indeed from the language of the Foster Amendment before amended by the Lennon Amendment, that this proposal was drafted on the assumption that it was binding on the courts as well as the legislature.

An attempt to limit the judiciary in any manner would seem to contradict the well-established principle that state constitutions only limit legislatures and grant powers to the judicial and executive branches.[31] Section 11, however, was not intended to limit the judiciary in the exercise of its constitutionally granted powers or of its inherent powers. It was intended to limit judges in their exercise of the *legislative* powers of sentencing which had been delegated to them by statute.[32] In view of the wide latitude given to judges by statute to determine sentences, it is easy to see why the delegates assumed that an effective constitutional limitation on penalties must bind the courts.

Since section 11 was intended to directly limit the judicial exercise of sentencing powers, it would logically follow that a disregard of this limitation by the judiciary would raise a constitutional question. In fact, the most interesting part of the above exchange is how closely Mr. Kamin's second question, concerning the situation where a judge is within the range of statutorily permitted penalties, parallels the question raised by cases

30. *Id.* at 1393.
31. *See* Field v. People *ex rel.* McClernand, 3 Ill. 79 (1839).
32. *See* text accompanying notes 39-43 *infra.*

such as *People v. Smith*[33] under the 1870 Constitution.

The interpretation of the 1870 Constitution in *Smith* is consistent with Mr. Kamin's suggestion that if a judge has passed a sentence within the range of penalties prescribed by the legislature, he has passed the constitutional test. Note however, that Mr. Foster, the proponent of the 1970 provision, would disagree, and under the new provision, require justification for the sentence picked within the statutory range. The point of the analogy is that since the 1870 provision was aimed solely at the legislature, no constitutional issue could be raised by attacking a sentence as excessive, provided that the court had acted within the limits prescribed by the legislature; in contrast, the 1970 provision, which was aimed at the courts as well as the legislature, would arguably allow a defendant to raise a constitutional issue as to the validity of the sentence, even though it was within the statutory limits, on the grounds that the *court* had failed to comply with the language of section 11.

The final wording of the first sentence of section 11 was changed twice, both times by the Committee on Style, Drafting, and Submission, before adoption by the convention.[34] Although that committee was not supposed to make any substantive changes, it is interesting to note that the word "proportioned" was supplanted by the word "determined."[35] The word "deter-

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33. *See* text accompanying notes 18-19 *supra*.

34. The first change was to strike the words "both" and "to" and add the words "determined with" so that the sentence then read:

> All penalties shall be proportioned to the nature of the offense and determined with the objective of restoring the offender to useful citizenship.

Committee Proposals, vol. VI at 212. The explanation of this change was: "It does not make sense to talk of penalties being 'proportioned' to the objective of restoring the offender to useful citizenship. What is intended is that penalties be determined with that objective." *Committee Proposals*, vol. VI at 219.

The second change was made by Proposal 15 of the Committee on Style, Drafting, and Submission, and included no explanation since none was thought necessary. The sentence was changed to read as it now appears in the constitution:

> All penalties shall be determined *both* according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

Committee Proposals, vol. VII at 2435 (emphasis added).

The intent of this change, however, can be found in a comment made by Mr. Whalen when explaining Proposal 15 to the Convention:

> [T]he purpose of the change was to insure that *both* factors must be taken into account and also to prevent any possible interpretation that this section was meant to abolish the death penalty.

Verbatim Transcripts, vol. V at 4238 (emphasis added).

35. A comparison of dictionary definitions of the two words demonstrates their differences:

> Proportion: to make the parts of harmonious or correspondent or symmetrical.
>
> Determine: to come to a decision concerning as the result of investigation or reasoning.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1819, 616 (unabridged 1971).

mine" was the verb chosen by the legislature when it delegated power to the *court* to decide penalties,[36] and the use of it is another indication that the true intent of section 11 was to place limits on the exercise of such power.

JUDICIAL INTERPRETATION OF ARTICLE I, SECTION 11 OF THE 1970 CONSTITUTION

Standards for Reduction of Sentence on Appeal

The most obvious use of a constitutional provision which places limits on penalties is to attack a sentence as being constitutionally excessive. However, because the legislature had previously enacted statutes addressing the problem of excessive sentences, section 11 did not cause a sudden change in this area of the law. An investigation of the standards used to decide questions of reduction of sentence reveals what effect section 11 has had on judicial proceedings concerning excessive sentences.

The Criminal Code of 1961[37] stated as one of its objectives the prescription of penalties which were not only proportionate to the crime but which recognized differences in rehabilitation possibilities.[38] The new criminal code also provided that upon conviction the *court* should determine and impose the penalty.[39] To implement the court's power to determine the sentence, the Code provided for a mandatory hearing in aggravation and mitigation and set forth guidelines which the court could consider.[40] These guidelines are evidence of the offender's moral character, life, family, occupation and criminal record.[41]

In 1963, the Criminal Code of Procedure[42] granted reviewing courts the power to reduce the punishment imposed by the trial court.[43] The reviewing courts, mindful of the statutory guide-

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36. Act of July 28, 1961, ch. 38, § 1-7(b) [1961] Ill. Laws 1988 (repealed 1973):
(b) Determination of Penalty. Upon conviction, the court shall *determine* and impose the penalty in the manner and subject to the limitations imposed in this Section. (emphasis added).
(subject matter currently covered by ILL. REV. STAT. ch. 38, § 1005-4-1(b) (1973)).

37. ILL. REV. STAT. ch. 38 (1973) (originally enacted as Act of July 28, 1961, [1961] Ill. Laws 1983).

38. *Id.* § 1-2(c).

39. Act of July 28, 1961, ch. 38, § 1-7(b) [1961] Ill. Laws 1988 (repealed 1974, subject matter currently covered by ILL. REV. STAT. ch. 38, § 1005-4-1(b) (1973)).

40. Act of July 28, 1961, ch. 38, § 1-7(g) [1961] Ill. Laws 1989 (repealed 1974, subject matter currently covered by ILL. REV. STAT. ch. 38, § 1005-3-2(a) & § 1005-4-1(a) (1973)).

41. *Id.*

42. ILL. REV. STAT. ch. 38, § 100 *et seq.* (1973) (originally enacted as Act of Aug. 14, 1963, [1963] Ill. Laws 2836).

43. ILL. REV. STAT. ch. 110A § 615(b)(4) (1973) (originally enacted as Act of Aug. 14, 1963, ch. 38, § 121-9(4) [1963] Ill. Laws 2877).

lines set up for trial courts in the Criminal Code of 1961, apparently have chosen to adopt those standards in cases where sentences determined by the trial court were challenged as excessive.

A good example of the appellate court's adoption of such sentencing guidelines, prior to the 1970 Constitution, is the case of *People v. Evrard*.[44] There, after citing the new power of review granted the court by the Criminal Procedure Act of 1963[45] and the provisions of the Criminal Code of 1961 establishing sentencing guidelines,[46] the court affirmed the conviction but remanded with directions. The lower court was directed to take evidence concerning the defendant's moral character, life, family, occupation and criminal record and to impose a punishment taking into consideration such evidence.[47] On remand, the defendant and his wife testified as to defendant's employment, marital situation, age, education, service record and prior criminal record.[48] Defendant was then sentenced to five years of probation, with a condition that the first six months of such period be spent in a penitentiary.[49] On appeal from that portion of the sentence providing for six months in the penitentiary, the appellate court held that the trial court had given full and adequate consideration to the appellate court's directions on remand,[50] and that since it did not appear that the trial judge was influenced by anything but a desire to do what was fair and reasonable under the circumstances, the new sentence should be affirmed.[51] Thus, by the time the 1970 Constitution became effective, the appellate courts had had almost seven years in which to work out rules applicable to the implementation of their power to reduce sentences. The broad language of section 11 regarding consideration of rehabilitative possibilities did not interject any new guidelines for the appellate courts to follow, nor did its language indicate that the guidelines already in use were inadequate to meet the new constitutional limitations.

The appellate courts, therefore, continued to apply the rules developed in the period after the 1963 Criminal Code of Procedure and before the 1970 Constitution, while adding references to section 11 as constitutional support for their actions on questions of excessiveness of sentence. Representative of cases applying the statutory guidelines and using section 11 as authority

44. 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965).
45. *Id.* at 274, 204 N.E.2d at 779.
46. *Id.*
47. *Id.* at 276-77, 204 N.E.2d at 780.
48. 65 Ill. App. 2d 118, 119-20, 212 N.E.2d 305, 306 (1965).
49. *Id.* at 121, 212 N.E.2d at 306.
50. *Id.* at 125, 212 N.E.2d at 308.
51. *Id.* at 128, 212 N.E.2d at 310.

is the case of *People v. Helms*.[52] There the court reduced a sentence of 5 to 8 years for involuntary manslaughter to 2 to 6 years, citing section 11 and basing its conclusion "primarily on the factors that the [d]efendant had no prior record, maintained his family life, was steadily and gainfully employed, and exhibited positive interest in the community."[53]

The statutory guidelines discussed above and the judicial interpretations of them are not limitations on the possible scope of judicial action under section 11. Although the statutory guidelines are still valid, the intention of the framers of section 11 was that the *court* determine penalties with a view toward restoring the offender to useful citizenship. The courts, therefore, should be free to develop whatever standards they deem are necessary in order to comply with the mandate of section 11. An investigation of those cases which specifically recognize the mandate of section 11 exemplifies judicial efforts to establish such guidelines.

In *People v. Towns*,[54] the court held that a sentence of 1 to 9 years for theft was not consistent with the mandate of section 11, relying on the usual factors of youth and lack of prior criminal acts plus the facts that defendant "admittedly had a poor environment, . . . showed remorse for his offense, and . . . had applied for a night school adult education program and a position in a manpower training course in auto mechanics . . . ."[55] *Towns* demonstrates that at least one court considers a defendant's environment and attitude to be important indications of his rehabilitative possibilities.

The cases of *People v. Griffin*[56] and *People v. Roddy*[57] indicate that the court will examine the length of the original sentence to determine whether or not the possibility of rehabilitation has been considered. In *Griffin*, a sentence of 6 to 14 years for forgery was held not to make "provisions for the possibility of rehabilitation"[58] and was reduced to 2 to 6 years, considering as a factor "the possibility that his criminal behavior may stem from emotional difficulties which might be corrected with proper care when he was institutionalized."[59]

52. 133 Ill. App. 2d 727, 272 N.E.2d 228 (1971). *See also* People v. Moore, 133 Ill. App. 2d 827, 272 N.E.2d 270 (1971), where the court cited section 11 and noted substantially the same factors as in *Helms*, plus the fact that defendant was unarmed and no violence was involved. Defendant's sentence for burglary was reduced from 3 to 10 years to 1 to 3 years.
53. 133 Ill. App. 2d at 734-35, 272 N.E.2d at 233.
54. 3 Ill. App. 3d 710, 279 N.E.2d 60 (1971).
55. *Id.* at 712, 279 N.E.2d at 61.
56. 8 Ill. App. 3d 1070, 290 N.E.2d 620 (1972).
57. 9 Ill. App. 3d 65, 291 N.E.2d 264 (1972).
58. 8 Ill. App. 3d 1070, 1072, 290 N.E.2d 620, 622 (1972).
59. *Id.*

In *Roddy*, where the only substantial question on appeal was the excessiveness of the sentence, the appellate court reduced a sentence of 10 to 30 years for burglary to 3 to 9 years. The decision is interesting in that it was evidently based solely on defendant's age and the possibility of his rehabilitation. The sentence was reduced, even though at the time of his conviction he had been on parole from a prison conviction for burglary, and the conviction under consideration was his third for that crime.[60] Citing the case of *People v. Lilly*[61] for the proposition that excessive sentences defeat the effectiveness of the parole system, the court decided that the sentence imposed by the trial court would, as a practical matter, leave no room for rehabilitation of the 23 year-old defendant.[62]

A striking example of the court's attempt to implement the required consideration of rehabilitative factors is the case of *People v. Dandridge*.[63] In *Dandridge*, it appeared that defendant was the organizer of an armed robbery, that he had viciously and wantonly struck the lady manager of a market on the head with his pistol, that he had violated parole from a theft sentence, and had escaped from jail while being held on the present charge. On appeal, defendant's sentence was modified to provide a minimum of 10 years, instead of 14, while the maximum of 28 years was upheld.[64] The court, after reasoning that this reduction was necessary to provide a reasonable possibility of rehabilitation, stated that "this conclusion is not reached as a substitute for the judgment of the trial court, but rather as a search for appropriate action under the constitutional direction."[65] At least one enlightened court of review, therefore, has explicitly recognized its own constitutional duty to protect the new right created by section 11, even in the absence of facts meeting the previously adopted statutory standards.

Representative of cases in which reduction of a sentence was not granted is *People v. Vega*,[66] where the court held that a sentence of 3 to 9 years for involuntary manslaughter "does not constitute a great departure from the spirit and purpose of the fundamental law or . . . [violate] section 11 of article I of the Constitution of Illinois, which requires all punishment to be proportional to the offense."[67] The court was either unaware of, or chose to ignore, the facts that the word "proportional" no longer

60. 9 Ill. App. 3d at 65-66, 291 N.E.2d at 264.
61. 79 Ill. App. 2d 174, 223 N.E.2d 716 (1967).
62. 9 Ill. App. 3d at 66, 291 N.E.2d at 265.
63. 9 Ill. App. 3d 174, 292 N.E.2d 51 (1973).
64. *Id.* at 176, 292 N.E.2d at 52.
65. *Id.*
66. 16 Ill. App. 3d 504, 306 N.E.2d 718 (1973).
67. *Id.* at 509, 306 N.E.2d at 722.

appeared in section 11, and that the consideration of rehabilitation had been added.

The 1974 case of *People v. Robinson*[68] cited as authority the 1965 Illinois Supreme Court case of *People v. Taylor*[69] and refused to reduce defendant's 5 to 15 year sentence upon conviction for deviate sexual assault. The court in *Taylor* had announced the following standard to be used in the application of the appellate courts' statutory power to reduce sentences:

> [W]here it is contended that the punishment imposed in a particular case is excessive, though within the limits prescribed by the legislature, this court should not disturb the sentence unless it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose, or that the penalty is manifestly in excess of the prescription of section 11 of article II of the Illinois Constitution which requires that all penalties shall be proportioned to the nature of the offense.[70]

The date of the *Taylor* case, as well as the fact that the new section 11 is contained in article I of the 1970 Constitution (as opposed to section 11 of article II of the 1870 Constitution), should have alerted the court in *Robinson* to the fact that they were applying a rule promulgated under the 1870 Constitution.

An investigation of the validity of the *Taylor* standard was made by a more perceptive court in *People v. Knox*.[71] There, after acknowledging that the Supreme Court of Illinois in *People v. Taylor* had set out guidelines to be used when applying Supreme Court Rule 615(b) (which grants the power to review sentences), the court took notice of the change in language between article II, section 11 of the 1870 Constitution and article I, section 11 of the 1970 Constitution.[72] The court concluded:

> Potential rehabilitation, always a matter to be considered at the time of sentencing, has been afforded specific recognition by virtue of the section quoted above. We are of the opinion that such recognition extends the guidelines previously expressed by our Supreme Court.[73]

The court in *Knox* would seem to have correctly concluded that in addition to being bound by guidelines of the Supreme Court of Illinois pertaining to that court's statutorily authorized rules, it is also bound by the constitutional mandate found in section 11 that sentences be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

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68. 18 Ill. App. 3d 360, 309 N.E.2d 757 (1974).
69. 33 Ill. 2d 417, 211 N.E.2d 673 (1965).
70. *Id.* at 424, 211 N.E.2d at 677, *quoting* People v. Smith, 14 Ill. 2d 95, 150 N.E.2d 815 (1958).
71. 3 Ill. App. 3d 1050, 280 N.E.2d 10 (1972).
72. *Id.* at 1053-54, 280 N.E.2d at 13.
73. *Id.* at 1054, 280 N.E.2d at 13.

When the period which spans both sides of the adoption of the 1970 Constitution is investigated, the following conclusions can be drawn with regard to the question of reduction of sentence on appeal. Because of pre-1970 Constitution changes in statutory law, and the adoption by the appellate court of those changes, the reduction of a sentence on appeal has not been significantly altered by the new section 11. Rather, as has been demonstrated, the courts of review in Illinois have adopted previous guidelines concerning the question of reduction of sentence and have used section 11 of article I of the 1970 Constitution as new and strong authority to support their actions.

The basic effect of section 11 has been to give the appellate courts an opportunity to develop new standards to implement the mandate of section 11. The Supreme Court of Illinois has not yet provided the appellate courts with any assistance in their efforts to establish such guidelines. In the absence of such assistance, the appellate courts will continue in their task of searching for standards with which to implement the mandate of section 11.

Use of Section 11 as a Challenge to Sentencing Rules

Another method of utilizing section 11 is to challenge existing sentencing statutes and rules as being unconstitutional because of the new requirement that each offender's possible restoration to useful citizenship be considered. Although the new Uniform Code of Corrections[74] was enacted after section 11 became effective, it carried forward much of the prior law concerning sentencing and therefore was still vulnerable to attack. The Supreme Court Rules concerning sentencing were enacted before the 1970 Constitution became effective and therefore they were also an obvious target.

In the case of *People ex rel. Ward v. Moran*,[75] the Illinois Supreme Court considered an action for mandamus brought by the State's Attorney of Christian County seeking to compel respondent, an appellate court judge of the fifth district, to vacate that portion of his judgment which reduced defendant's sentence from imprisonment in the penitentiary to probation. After rejecting the argument by the respondents (the defendant was also a respondent) that Supreme Court Rule 615(b)[76] empowers a court of review to reduce a penitentiary sentence imposed by

74. ILL. REV. STAT. ch. 38, § 1000-1 *et seq.* (1973).
75. 54 Ill. 2d 552, 301 N.E.2d 300 (1973).
76. ILL. REV. STAT. ch. 110A, § 615(b) (1973).

a trial court to one of probation, the supreme court considered respondents' argument concerning section 11.[77]

It was argued that since section 11 mandates that penalties be determined with the objective of restoring the offender to useful citizenship, probation was proper in this case since it was the only method, under these facts, which could restore the defendant to useful citizenship.[78] The supreme court found the argument to be unpersuasive and, after quoting in italics the language concerning rehabilitation, stated:

> There is no indication that the italicized portion of section 11 is to be given greater consideration than that which establishes that the seriousness of the offense shall determine the penalty. Nor does section 11 specifically empower a reviewing court to grant probation after the trial court has imposed a penitentiary sentence.[79]

Denying the writ of mandamus but utilizing its supervisory authority,[80] the supreme court directed the appellate court to vacate that portion of its judgment granting probation and to specifically reconsider whether the trial court exercised its discretion or acted arbitrarily in denying probation.[81] In effect, the court held that section 11, standing by itself, does not guarantee every defendant the right to probation.[82] Rather, it guarantees that each defendant will be sentenced with both of the requirements of section 11 in mind, and not arbitrarily.

Sections 1005-8-4(f) and (g) of the new Uniform Code of Corrections[83] provide that sentences imposed for crimes committed while confined, or during an escape or attempt to escape, shall not commence until the expiration of the term under which the offender is being held. In *People v. Hudson*,[84] the appellate court upheld consecutive sentences imposed upon offenders who had been convicted of aggravated battery and escape from the penitentiary.[85] The court made the following reply to the defendants' contention that such sentencing violated section 11 and that the statute[86] was therefore unconstitutional:

> The new Constitution does not require the abolition of consecutive sentences. To do so would be to tie the hands of the courts and the legislature and render them powerless to impose

77. 54 Ill. 2d 552, 556, 301 N.E.2d 300, 301 (1973).
78. *Id.*, 301 N.E.2d at 302.
79. *Id.* at 556-57, 301 N.E.2d at 302.
80. ILL. CONST. art. VI, § 16 (1970).
81. 54 Ill. 2d at 557, 301 N.E.2d at 303.
82. *Id.* at 554, 301 N.E.2d at 301.
83. ILL. REV. STAT. ch. 38, §§ 1005-8-4(f) & (g) (1973).
84. 11 Ill. App. 3d 147, 296 N.E.2d 40 (1973).
85. The cases of three defendants, one of whom was convicted of aggravated battery and the other two who were convicted of escape from the penitentiary, were consolidated on appeal because they all raised the same issue, *id.* at 147, 296 N.E.2d at 41.
86. ILL. REV. STAT. ch. 38, §§ 1005-8-4(f) & (g) (1973).

> punishment upon one who commits a crime which (sic) incarcerated. Without a consecutive sentence then, except in the unusual cases such as where the prisoner has only a short time remaining on the sentence under which he is confined, the court could not really punish him. Thus, we find that Ill. Rev. Stat., ch. 38, par. 1005-8-4(f) and (g) is constitutional.[87]

The Uniform Code of Corrections also carried forward the prior practice of fixing minimum terms of imprisonment for certain crimes. Such statutes were an obvious target of attack via section 11 since most had been enacted prior to the adoption of the 1970 Constitution.

In *People v. Cantrell,*[88] the Appellate Court of the First District decided to consider defendant's claim that the statute imposing a minimum sentence of 14 years for murder was unconstitutional, even though defendant had failed to properly raise that issue at trial.[89] Defendant contended that such a statute violated section 11 in that it prevented the court from tailoring the sentence to fit the personal attributes of the offender.[90] After a review of the Verbatim Transcripts of the Constitutional Convention, the court held that the intention of the delegates was that the legislature be required to develop sentencing standards that reflected the goal of restoring the offender to useful citizenship, as well as providing a penalty that was proportionate to the nature of the offense.[91] Thus, the court concluded that since the legislature still had power to make judgments with respect to criminal penalties, those judgments should not be overturned and the statutory minimum of 14 years for the crime of murder was constitutional.[92]

This interpretation of section 11 is consonant with the intention of the framers. While the framers intended to place limits upon the legislature as well as the courts, there is no indication that they intended to alter the distribution of the power of sentencing between the courts and the legislature.

As the above cases indicate, constitutional challenges via section 11 have not been successful. This is not surprising when the types of challenges involved are analyzed. In all the cases except *Moran*, the challenges were to statutes enacted by the legislature. Courts have always avoided declaring statutes unconstitutional unless a *clear* violation of a recognized constitutional provision was present. Although section 11 does create

87. 11 Ill. App. 3d 147, 149, 296 N.E.2d 40, 42 (1973).
88. 14 Ill. App. 3d 1068, 304 N.E.2d 13 (1973).
89. *Id.* at 1070-71, 304 N.E.2d at 15.
90. *Id.* at 1071, 304 N.E.2d at 16.
91. *Id.* at 1072, 304 N.E. 2d at 16.
92. *Id. See also* People v. Moore, 15 Ill. App. 3d 691, 304 N.E.2d 696 (1973), where using similar reasoning the court upheld the 4 year minimum sentence for the crime of rape, *id.* at 693, 304 N.E.2d at 698.

a new constitutional right, it was not *clear* that the statutes attacked were in violation of the new right. Therefore, the courts continued to avoid censoring the legislature by declaring a questionable law invalid.

THE PROCEDURAL EFFECTS OF SECTION 11

Implicit in the creation of a new constitutional right are the procedural aspects of that right. Statutes enacted prior to 1970 had required the possibility of rehabilitation to be considered in determining sentences.[93] Section 11 *elevated* those requirements to constitutional status. Theoretically then, if the Illinois legislature repealed every law which made rehabilitation a consideration in the sentencing procedure, section 11 would still compel the courts to take into consideration the possibility of returning an offender to useful citizenship.

The elevation of this right, from statutory to constitutional status, has other important procedural implications. First, although there is no right to a direct appeal from the trial court to the Illinois Supreme Court in cases presenting constitutional issues, such cases are more likely to eventually be heard in that court.[94] Second, the procedures of the Post-Conviction Hearing Act[95] are available only upon the showing of a denial of a constitutional right.

The procedural effectiveness of section 11 depends upon whether or not a substantial constitutional question is raised when a defendant contends that a court has failed to act within the limitations prescribed by section 11. In short, may the actions of a judge alone, in refusing to consider rehabilitation as a factor in sentencing, violate a defendant's right under section 11? This certainly seems to have been the intent of the framers.[96] The answer to the question, however, depends upon whether section 11 is determined to be self-executing.

Section 11: A Self-Executing Provision?

Whether a constitutional provision is self-executing is of crit-

93. *See* Act of July 28, 1961, ch. 38, § 1-7(g) [1961] Ill. Laws 1989 (repealed 1973, subject matter currently covered by ILL. REV. STAT. ch. 38, §§ 1005-3-2(a) & 1005-4-1(a) (1973)).

94. Supreme Court Rule 603 provides that all criminal case appeals shall be taken to the appellate court except in cases in which a death sentence was imposed or a federal or state statute was held invalid, in which case the appeal is directly to the supreme court. ILL. REV. STAT. ch. 110A, § 603 (1973). If a constitutional issue is raised, however, the supreme court is more likely to exercise its discretion and allow an appeal from the appellate court because such a question would be of "general importance." *See* ILL. REV. STAT. ch. 110A, § 315(a) (1973).

95. ILL. REV. STAT. ch. 38, § 122-1 *et seq.* (1973).

96. *See* text accompanying notes 30-33 *supra.*

ical importance to the determination of how a constitutional question may be raised. A constitutional provision is self-executing if no legislation is necessary to give it effect.[97] Breach of a statute, the purpose of which is to implement a constitutional right, does not per se raise a constitutional question.[98] Therefore, if section 11 is not self-executing, but instead requires legislation to implement it, the actions of a judge which violate such legislation would not raise a constitutional question.

The fact that section 11 is mandatory in its language does not preclude a construction that it is not self-executing.[99] In *Tuttle v. National Bank*,[100] the Supreme Court of Illinois held that the determining factor, as to the question of self-execution, is the intention behind the provision.[101]

The intention which is determinative of the question of self-execution is whether the provision was intended to be directed to the courts or to the legislature.[102] The portion of section 11 requiring proportionment to the offense was interpreted, under the 1870 Constitution, to be directed to the legislature.[103] The new language of section 11, concerning restoration to useful citizenship, was *intended* to be directed to the courts.[104] Since a constitutional provision may be self-executing in part and not so in another part,[105] it is consistent to conclude that the rehabilitation language of section 11 is self-executing, while the language concerning proportionment to the offense is not.

If the purpose of a constitutional provision would be frustrated unless it is given immediate effect, it should be held to be self-executing.[106] Since the intended purpose of the language concerning restoration to useful citizenship was to limit the judicial exercise of the sentencing power as delegated by the legislature, that portion of section 11 should be held self-executing. If this construction of section 11 is adopted, then the failure of a judge to act within the limitations prescribed by section 11 concerning rehabilitation as a factor in sentencing would be a direct violation of a defendant's constitutional right, and would raise a question of constitutional magnitude.

Appeals to the Supreme Court

The 1968 case of *People v. Sluder*[107] re-announced the rule

97. *See* 16 AM. JUR. 2d *Constitutional Law* § 94 (1964).
98. *See, e.g.*, People v. Orndoff, 39 Ill. 2d 96, 233 N.E.2d 378 (1968).
99. *See* 16 AM. JUR. 2d *Constitutional Law* § 93 (1964).
100. 161 Ill. 497, 44 N.E. 984 (1896).
101. *Id.* at 501-02, 44 N.E. at 985.
102. *See* 16 AM. JUR. 2d *Constitutional Law* § 98 (1964).
103. *See* text accompanying notes 8-9 *supra.*
104. *See* text accompanying notes 30-33 *supra.*
105. *See* 16 AM. JUR. 2d *Constitutional Law* § 94 (1964).
106. 161 Ill. 497, 502, 44 N.E. 984, 985.
107. 40 Ill. 2d 559, 240 N.E.2d 666 (1968).

promulgated in *People v. Elliot*,[108] that where a penalty was within the statutory limits prescribed for that offense, a contention that it was excessive did not raise a constitutional question.[109] Unfortunately, the case is still being cited for that proposition,[110] even though it is obvious that the court in *Sluder* was using the provision of the 1870 Constitution in drawing its conclusion. As pointed out earlier, one of the significant changes wrought by section 11 of the 1970 Constitution was that it was aimed specifically at the judicial as well as the legislative branch.

Therefore, if it could be shown that the judge who imposed the sentence disregarded the mandate of section 11, directing that he take into consideration the offender's rehabilitation potential, it would seem clear that a constitutional issue has been raised even though the sentence was within statutory limits. Since trial judges have always been deemed to be in a better position to make discretionary judgments, the case alleging a breach of discretion in sentencing would probably have to be clear-cut.[111] If, however, the record reveals that a sentence was the result of the prejudice of a judge, rather than of a consideration of the factors prescribed by section 11, then it should be held to be violative of the defendant's constitutional right.[112]

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108. 272 Ill. 592, 112 N.E. 300 (1916).

109. *Id.* at 600, 112 N.E. at 304.

110. *E.g.*, People v. Rife, 18 Ill. App. 3d 602, 610, 310 N.E.2d 179, 185-86 (1974).

111. A trial court judge's discretion, although respected, is by no means sacred and the Supreme Court of Illinois will reverse when it concludes that an error in judgment has been made. *See* People v. Nuccio, 43 Ill. 2d 375, 253 N.E.2d 353 (1969), where defendant's conviction was reversed and remanded because it appeared that the judge at defendant's bench trial was unaware that evidence he was considering was incompetent. The presumption that a judge at a bench trial will, in his discretion, consider only competent evidence was overridden by the facts on record.

112. In the case of People v. Smith, 98 Ill. App. 2d 406, 240 N.E.2d 462 (1968), the appellate court quoted that part of the record in which the trial judge imposed the sentence. The defendant had been found guilty of molesting a young boy and the trial judge made the following statement upon imposition of sentence:

> 'I wish that the legislature had made the punishment even more severe than it is under this statute because I would be impelled by my conscience and by my duty to impose a maximum sentence of any number of years that the statute would permit me to do.
> Now then, that being the case, from this evidence, beyond all reasonable doubt that this has happened, and we've got to take these fellows off the streets of this city or else we are going to run into this problem at the time, and with an alert citizenry maybe we will get rid of some of these criminals that go after these little children, the little girls and little boys of our community, so they can live and be as God intended they should, there will be a finding of guilty in this case and the Court will impose a minimum sentence of two hundred and thirty-eight months, a maximum sentence of twenty years in the Illinois State Penitentiary, to be served at Menard. I will so direct in the pen letter. I will enter judgment on the finding first. Menard Penitentiary where we perhaps can take care of these people.
> I will further direct that one month out each year, being the month

Post-Conviction Hearings

Proceedings under the Post-Conviction Hearing Act are available to any person who asserts that "in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both . . . ."[113] In *People v. Pier*,[114] the defendant contended in his post-conviction petition that his right to due process had been violated because his admission of a probation violation had been induced by the state's attorney's unfulfilled promise to recommend a lesser sentence.[115] The state contended that the Post-Conviction Hearing Act did not apply to the review of probation revocation hearings.[116] The court rejected the state's contention on the basis that "conviction" as used in the Act included imposition of sentence.[117] The court concluded:

> Under this definition a defendant may raise in a post-conviction petition issues of a constitutional dimension that occurred not only in the proceeding which involved the determination of his guilt, but also those which arose in proceedings concerning the imposition of the sentence.[118]

Accordingly, if a defendant can show that his right under section 11 was violated in the proceedings concerning imposition of his sentence, the procedures of the Post-Conviction Hearing Act are available to him.

The Illinois Supreme Court has held, without elaboration, that when "the sentence is within the statutory limits . . . the allegation of excessiveness raises no issue cognizable under the Post-Conviction Hearing Act."[119] Although this would seem to close the door as to issues concerning excessiveness as grounds for post-conviction proceedings, it is possible that the court,

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of October, when this crime occurred, that he shall be confined to solitary confinement during that month of each year that he is there so that he can meditate on what he attempted to do to this three and a half year old boy. And maybe some day he may come out of the penitentiary and know that these crimes do not go unpunished and that his conscience should trouble him at least one month out of each year.'

98 Ill. App. 2d at 412-13, 240 N.E.2d at 465-66. The appellate court found that the sentence imposed was not "clearly free from the implication of being the result of prejudice on the part of the court." The court reduced the sentence to 10 to 20 years and removed the required periods of solitary confinement. *Id.* at 416, 290 N.E.2d at 465. The case illustrates the type of situation which the framers presumably had in mind when they drafted the constitutional mandate of section 11.

113. ILL. REV. STAT. ch. 38, § 122-1 (1973).
114. 51 Ill. 2d 96, 281 N.E.2d 289 (1972).
115. *Id.* at 97, 281 N.E.2d at 289.
116. *Id.*
117. *Id.* at 98, 281 N.E.2d at 290.
118. *Id.*
119. People v. Ballinger, 53 Ill. 2d 388, 390, 292 N.E.2d 400, 401 (1973).

which probably was applying the reasoning of the *Sluder* case discussed above, might be persuaded to change its position if it would accept the propositions that section 11 is self-executing and was intended to bind the judicial as well as the legislative branch.

In the case of *People v. Scott*,[120] the supreme court held that an allegation that the defendant had not received a hearing in aggravation and mitigation, in violation of his statutory right, did not raise a constitutional issue cognizable under the Post-Conviction Hearing Act.[121] The defendant might have been able to effectively raise a constitutional question had he argued that section 11 was self-executing, and that the failure of the judge to consider factors relating to rehabilitation, as evidenced by the lack of a hearing in mitigation, was a breach of his constitutional right.

The closest that a court has come to recognizing section 11 as a means of raising a constitutional question, which is required under the Post-Conviction Hearing Act, was dicta in the case of *People v. Rife*,[122] where the court stated:

> It appears that the only way this court could act on the sentence issue would be to find that the 20 to 50 year sentence imposed was so excessive as to be cruel and unusual punishment for the offense of burglary and *perhaps in conflict with the 1970 constitutional mandate (art. I, sec. 11) that sentences be set with the objective of restoring the offender to useful citizenship as well as according to the offense, thus raising a constitutional question requiring a post-conviction hearing.*[123]

The court, however, found itself bound by *People v. Sluder* and applied the outmoded rule that if the sentence is within the statutory prescription, an allegation of excessiveness raises no constitutional issue.[124]

As long as the courts continue to uphold the rule promulgated by *People v. Elliot*[125] in 1916, that a sentence within statutory limits cannot be attacked as unconstitutional without attacking the statute itself, it is apparent that allegations of excessive or harsh sentences will not be held to raise constitutional issues sufficient to meet the requirement of the Post-Conviction Hearing Act. In view of the intent of the drafters of section 11 to bind the judiciary, the rule of *People v. Elliot* should be modified or abolished so as to allow section 11 to operate in the manner intended. Until such time, the intent of the framers of

120. 49 Ill. 2d 231, 274 N.E.2d 39 (1971).
121. *Id.* at 233-34, 274 N.E.2d at 40.
122. 18 Ill. App. 3d 602, 310 N.E.2d 179 (1974).
123. *Id.* at 610, 310 N.E.2d at 185-86 (emphasis added).
124. *Id.*, 310 N.E.2d at 186.
125. 272 Ill. 592, 112 N.E. 300 (1916).

section 11 to place constitutional limitations on punitive-minded judges will not receive the constitutional protection which it deserves.

LEGISLATIVE ACTION

As was noted earlier, in the investigation of the intent of the framers of section 11, the delegates contemplated implementation of the new language concerning rehabilitation, through legislation and rules of court consonant with the aim of the new language. The Uniform Code of Corrections,[126] which became effective on January 1, 1973, lists its purposes in the following manner:

> (a) prescribe sanctions proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders;
>
> (b) forbid and prevent the commission of offenses;
>
> (c) prevent arbitrary or oppressive treatment of persons adjudicated offenders or delinquents; and
>
> (d) restore offenders to useful citizenship.[127]

It is obvious from the declaration of such purposes that this legislation was an attempt by the legislative branch to meet the mandate of section 11. Generally, the Code would seem, statutorily, to have been successful because, as one commentator has noted, it

> urges a greater utilization of the full range of sentencing dispositions—imprisonment, periodic imprisonment (work release), probation, conditional discharge, and imposition of a fine—with an eye toward fashioning an efficacious and economical sanction that will provide society with protection and the offender with a reasonable probability of rehabilitation.[128]

The most salient feature of the new Code is its classification of offenses into categories.[129] The dual purpose of such classification is apparently to assist the legislature in creating an ordered system of offenses by seriousness, and to simplify the sentencing choices which a judge must make in criminal cases.[130] It is hoped that such classifications will result in more even-handed justice and eliminate disparity of sentencing.[131]

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126. ILL. REV. STAT. ch. 38, § 1001-1 *et seq.* (1973).
127. *Id.* at § 1001-1-2.
128. Pusatri & Scott, *Illinois' New Unified Code of Corrections*, 61 ILL. B.J. 62 (1972).
129. ILL. REV. STAT. ch. 38, § 1005-5-1 (1973).
130. S.H.A. ch. 38, (Council Commentary for Div. X of the Uniform Code of Corrections, 1973).
131. *Id.*

Also new under the Uniform Code of Corrections are the pre-sentencing procedures set out in article 3 of chapter 5,[132] which provide that every defendant has a right to a pre-sentence investigation before sentencing unless knowingly waived by him or ordered by the court despite such waiver.[133] The investigation must be presented in written form[134] and contain information concerning defendant's physical, mental and criminal histories, family situation, economic status, education, occupation and personal habits.[135] The report should also contain any other information about special resources that might assist in defendant's rehabilitation, including all the various rehabilitative programs to which defendant might be committed. The provision requiring written reports is significant since it helps courts of review make determinations on the questions of whether, on the facts available to him, the sentencing judge violated the constitutional directive of section 11.

Article 4 of chapter 5 of the Code[136] is entitled "Sentencing" and sets out the procedures by which penalties will be imposed. This new section makes it clear that a hearing in aggravation and mitigation is mandatory whether requested or not, and sets out all the considerations the court shall hear before setting sentence.[137] One of these considerations is, of course, the pre-sentence report. The prior requirement of having the judge set the sentence is carried over.[138]

This section of the Code is important because it statutorily requires that a judge receive all the evidence that he could possibly use to determine the possibilities of restoring the offender to useful citizenship. Such a requirement is probably the closest the legislature can come to complying with the intent behind section 11.

Finally, with regard to the objective of rehabilitation, the Code takes recognition of the fact that the offender who is forced to serve out his full term has most likely been the type of offender most resistant to any attempts to rehabilitate him. Therefore, the Code provides that every offender will be subject to a period of parole after release.[139] Such a requirement is consonant with the objective of section 11, since in many cases the time just following release may be the most critical in terms of returning the offender to useful citizenship.

132. ILL. REV. STAT. ch. 38, § 1005-3-1 *et seq.* (1973).
133. *Id.* § 1005-3-1.
134. *Id.*
135. *Id.* § 1005-3-2.
136. *Id.* § 1005-4-1 *et seq.*
137. *Id.* § 1005-4-1(a).
138. *Id.* § 1005-4-1(b).
139. *Id.* § 1005-8-1(e).

Only those significant features of the Code which pertain to sentencing have been discussed here. The new Uniform Code of Corrections, as a whole, would appear not only to have clarified prior statutes and grouped them for easier reference, but also to have been drafted with the constitutional mandate that penalties should be prescribed with the view of returning the offender to useful citizenship, firmly in mind.

Conclusion

In the 1960's, the legislature shifted the delegation of the power to determine the precise period of imprisonment, within statutory limits, from the jury, supposedly a body of reasonable men, to one man, the trial court judge. Recognizing the possibility that a judge might be unable to separate his own personal prejudice from the legislatively-announced goals of imprisonment, the delegates to the 1970 Constitutional Convention sought to create a constitutional safeguard. The framers of section 11 realized that, to be effective, such a safeguard would have to directly limit the types of considerations constitutionally allowable when a judge imposes a sentence.

The burden of establishing tests and standards to be applied in the determination of whether a judge has acted outside the constitutional limitations of section 11 rests with the reviewing courts of Illinois. The task is of monumental difficulty since it involves the entirely subjective factors of each offender's possibility of rehabilitation and of each judge's motives in setting a sentence. Nonetheless, the people of Illinois have determined that the goal of imprisonment should be to return the offender to useful citizenship. The judiciary therefore has a duty to see that this objective, rather than the satisfaction of the biases of a judge, is sought upon imposition of sentence.

The first step towards the fulfillment of this duty is the recognition that section 11 creates a new constitutional right and that a defendant raises a question of constitutional dimensions when he alleges violations of it. Once the importance of section 11 as a constitutional right is realized, the procedural machinery of appellate review and post-conviction hearings will begin to attempt to solve the problem of applicable standards. Until it is held that the allegation that a judge has breached the constitutional limitation placed on him by section 11 raises a constitutional question, the substantive right of section 11 will lie dormant.

Implementation and protection of rights, constitutionally reserved to the people in their grant of sovereignty to the govern-

ment, has always been a major function of the judicial branch. The Illinois Constitution of 1970 reserved a new right, that of having penalties determined with the offender as well as the offense in mind. The judicial system of Illinois must now proceed to protect and implement that right.

Roy W. Hardin