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Constitutional Law -- Conditions of Confinement for Administratively Segregated Prisoners

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end.[64] However, the New Jersey Solid Waste Act and the *Hackensack* decision upholding it may impel the federal courts toward the enunciation of a new statement on this statute and others that represent a challenge to the plenary federal commerce powers and toward the invalidation of any environmental protection provision that erects a discriminatory barrier against other states. The only other alternative may be a beginning of the "ecological Balkanization" of this country similar to "the intolerable experience of the economic Balkanization of America that existed in the colonial period and under the Articles of Confederation"[65]—the situation the commerce clause was designed to eliminate.

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Constitutional Law—Conditions of Confinement for Administratively Segregated Prisoners

It is common for prisoners subjected to segregation or solitary confinement to lose many privileges and rights accorded the general inmate population. The federal courts in recent years have often defined and protected constitutional rights of inmates placed in segrega-

64. A bill to amend the Solid Waste Disposal Act of 1965 was introduced in the House of Representatives in 1975 and was designed to oblige each state to adopt a statewide waste management and resource recovery program implementing, among other objectives: "(10) interstate co-operation in waste management and resource recovery, and (11) consistency of waste management and resource recovery with Federal, state, and local air and water pollution control, noise control, land use, and other environmental policies and regulations." H.R. 5487, 94th Cong., 1st Sess. pt. I, § 251 (1975). As hearings on the bill reveal, however, even these proposed amendments would not have resulted in an increased federal role in the area preempting the states from taking action on their own. Such state action would still be permitted and therefore could continue to result in provisions that, like the New Jersey Waste Act, make no effective contribution to the national effort to deal with the solid waste situation. Thus in response to a query as to the desirability of areawide, rather than state-by-state approaches, the bill's sponsor, Rep. Paul G. Rogers, declared, "Well, I think this is commendable, and I think this should be encouraged. Areawide planning would be encouraged under section 255(b) of my bill, unless the state decides—as Connecticut has—to establish and operate a statewide plan." *Hearings on H.R. 5487 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 101 (1975).

65. American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 628, 517 P.2d 691, 696 (1973).

tion for "disciplinary" or "punitive" purposes but have less frequently considered rights of inmates segregated for "administrative" purposes. In *Sweet v. South Carolina Department of Corrections*,[1] an inmate who had been held in administrative segregation for five years for protection from assault by other inmates claimed denial of equal protection of the law and imposition of cruel and unusual punishment in that his living conditions were not comparable to those of the general inmate population. The Court of Appeals for the Fourth Circuit, however, ruled that the lack of ordinary privileges, particularly full exercise and shower opportunities, would implicate constitutional rights only if plaintiff's health had been impaired as a consequence of such deprivation or if the deprivation were not necessitated by prison security and order.[2]

Plaintiff Sweet was voluntarily placed in administrative segregation in 1968 following threats of violence by other inmates, who apparently suspected that plaintiff had been giving information to prison officials.[3] Sweet filed suit under 42 U.S.C. section 1983 in federal district court against the Department of Corrections and its director requesting injunctive and monetary relief for unconstitutional imposition of cruel and unusual punishment and for denial of equal protection. He claimed he was given insufficient food, exercise and shower time, opportunity to work, medical attention, reading and writing materials, and opportunity to converse with other inmates.[4] He also claimed that he was denied freedom to exercise his religion and to confer with counsel, and that prison officials failed to investigate his complaints.[5] The conditions of his administrative segregation, he argued, resembled those of prisoners in punitive segregation despite the fact that his segregation was caused by other inmates' threats rather than by his own misconduct.

After an evidentiary hearing, the district court dismissed the complaint.[6] The court of appeals, sitting en banc, found no factual basis for many of the claims and ruled that other clear deprivations were necessary as a practical matter in the maintenance of prison order and

1. 529 F.2d 854 (4th Cir. 1975) (en banc).
2. *Id.* at 866.
3. The record is unclear about the reason for these threats. Both appellant and appellee noted in their briefs that Sweet had given some sort of information to officials. Brief for Appellant at 2; Brief for Appellee at 5.
4. 529 F.2d at 859.
5. *Id.*
6. *Id.* at 857.

security and were thus constitutional. The court noted, however, that the district court had not considered evidence of the effect on Sweet's health of only two showers and two one-hour exercise periods per week for an indefinite period of time.[7] The court of appeals affirmed the dismissal of the monetary claims and remanded to the district court for consideration of the health issue and the practicality of injunctive relief.[8] Three appellate judges concurred, adding that inmates in protective segregation should, so far as possible, be treated like the general inmate population without regard to the expense involved.[9] The concurring judges further stated that the warden should be required to submit a plan for protecting Sweet without imposing deprivations and that if he were unable to do so, an independent consultant should be retained to report feasible changes in Sweet's treatment to the district court.[10]

Recent court decisions examining the rights of segregated prisoners

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7. *Id.* at 866. The record from the evidentiary hearing before the district court disclosed the following facts: (1) Sweet was given three full meals per day but was perhaps denied extras by inmates who served the food and gave extras to others. (2) Sweet had been allowed to work for a few brief periods, but his supervisor testified that Sweet was removed because he could not get along with other inmates and because it was unsafe for him to work in most places. (3) Sweet's cellblock was visited regularly by medical technicians who reported serious cases to a doctor for further treatment. While Sweet received no psychiatric treatment as such, prison records showed he had been seen many times by the doctor and was scheduled for an operation to correct a disability in his leg. (4) Sweet's cellblock was visited regularly by a chaplain who counseled inmates and performed services privately for any inmate requesting such services and who also provided writing materials to inmates on request. The chaplain testified that Sweet had never asked him for anything but writing materials, which were provided. Officials testified that it would be unsafe for Sweet to attend the prison's regular services and that group services in the cellblock would be an unfair imposition on the privacy of other inmates who would not want to be part of the services. The officials stated that group services in an adjacent exercise yard were possible, but the chaplain felt that they would be undesirable because the inconsistent outdoor services caused by the weather changes would agitate the inmates. (5) Sweet admitted being given educational reading materials, and, according to officials, other books were brought to the cellblock. (6) There was no evidence of lack of legal consultation or investigation of Sweet's complaints. (7) Officials testified that Sweet was denied the opportunity to converse with other inmates because he was loud and he aggravated them. *See* Joint Appendix for Appellant and Appellee at 22A, 45A, 69A, 73A, 74A, 79A, 164A-75A, 183A-94A, 204A-05A.

8. 529 F.2d at 866. The majority opinion was written by Judge Russell and joined in by Chief Judge Haynsworth and Judges Field and Widener. As to the propriety of money damages, *see generally* United States v. Demko, 385 U.S. 149 (1966); United States v. Muniz, 374 U.S. 150 (1963); Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270, 1290-97 (1969).

9. 529 F.2d at 866, 869. The concurring opinion was written by Judge Butzner and joined in by Judges Craven and Winter.

10. *Id.* at 869.

have evaluated procedures[11] and official justifications[12] for placing inmates in segregation and the substantive conditions of segregated confinement. The Supreme Court and inferior federal courts have given form to substantive rights relevant to segregated prisoners through the first amendment as well as the fifth and fourteenth amendments' right of access to counsel and the courts.[13] While the Supreme Court has not directly ruled on the many substantive conditions of segregated confinement, the lower federal courts have had to address claims growing out of various forms of prisoner deprivation. Even when an inmate is segregated only briefly, the courts have enjoined unsanitary physical conditions within segregation cells,[14] insufficient medical attention,[15] or clearly inadequate protection from other inmates.[16] When the period of segregation is extended, courts have declared unconstitutional unjustifia-

11. *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), *modified*, 510 F.2d 613 (9th Cir.), *cert. granted*, 421 U.S. 1010 (1975); Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1975); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972); Landmann v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated & remanded*, 404 F.2d 571 (8th Cir. 1968).

12. *E.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971); Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970). *See generally* Robinson v. California, 370 U.S. 660 (1962); 60 AM. JUR. 2d *Penal and Correctional Institutions* § 46 (1972).

13. *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Johnson v. Avery, 393 U.S. 483 (1969); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam). These cases did not deal directly with segregated inmates. *But cf.* Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (dismissal of pro se complaint); Brooks v. Florida, 389 U.S. 413 (1967) (per curiam) (involuntary confession).

14. *E.g.*, McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (mem.).

15. *E.g.*, cases cited note 14 *supra*.

16. *E.g.*, McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971). The Fourth Circuit in *Sweet* relied on an earlier case in which a nonsegregated inmate claimed he was being unconstitutionally deprived of protection from inmate violence. In Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973), plaintiff was in danger of assault, apparently in reprisal for aiding a younger prisoner who was being sexually molested by other inmates. The lower court, after a hearing, dismissed his complaint which alleged that he was being unconstitutionally deprived of protection from inmate violence. 487 F.2d at 889. The Court of Appeals for the Fourth Circuit reversed and remanded, holding that the plaintiff need not show past attacks or fear of attack on his person. Plaintiff could establish cruel and unusual punishment if there were a pervasive risk of harm from other inmates and if the prison officials were not exercising reasonable care to protect him. *Id.* at 890.

ble deprivations involving food, exercise, reading and writing materials, and isolation from human contact.[17]

In a leading case, *Sostre v. McGinnis*,[18] a federal district court held unconstitutional punitive segregation in excess of fifteen days when the prisoner was subject to deprivations including a limit of one hour per day of exercise and one shower per week.[19] The Court of Appeals for the Second Circuit reversed, concluding that the prisoner's indefinite segregation was constitutional for the following reasons: (1) there was no evidence of actual impairment of his own physical or mental health and (2) there was conflicting evidence on the ordinary effects of such segregation on health.[20] The court also noted that plaintiff could secure his release from segregation by agreeing to obey prison rules.[21]

In *Spain v. Procunier*,[22] prisoners held in "administrative" segregation for four years pending disposition of criminal charges arising from the murders of prison guards and inmates brought suit alleging cruel and unusual punishment. In addition to the usual deprivations accompanying segregation that were present in *Sweet* and *Sostre*, plaintiffs were denied any outdoor exercise, were bound in neck chains for all out-of-cell movements, and occasionally were removed from their cells with

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17. Relevant to *Sweet* are recent opinions suggesting that solitary confinement of unlimited duration is per se unconstitutional. *E.g.*, O'Brien v. Moriarty, 489 F.2d 941, 944 (1st Cir. 1974) (dictum); Sostre v. McGinnis, 442 F.2d 178, 207-09 (2d Cir. 1971) (Feinberg, J., dissenting), *cert. denied*, 404 U.S. 1049 (1972).

As to specific deprivations, *see, e.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 (1972); Pugh v. Locke, 406 F. Supp. 318, 332 (M.D. Ala. 1976); Berch v. Stahl, 373 F. Supp. 412 (W.D.N.C. 1974); Rhem v. Malcolm, 371 F. Supp. 594, 627 (S.D.N.Y. 1974); Osborn v. Manson, 359 F. Supp. 1107 (D. Conn. 1973); Lollis v. New York State Dep't of Social Serv., 322 F. Supp. 473 (S.D.N.Y. 1970); ABA COMM'N ON CORRECTIONAL FACILITIES & SERV., SURVEY OF UNITED STATES IMPLEMENTATION OF THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 17-18, 51 (1974) [hereinafter cited as UN STANDARD RULES] (noting that South Carolina adopted the Rules by executive order and reported full compliance with rule requiring one hour of exercise per day); AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 402-03, 408-20 (3d ed. 1966) (providing for daily exercise for segregated prisoners); M. HERMANN & M. HEFT, PRISONERS' RIGHTS SOURCEBOOK 113-23 (1973); L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT 259 (1973) (quoting CONN. DEP'T OF CORRECTION, POLICY DIRECTIVE ON DISCIPLINARY PROCEDURES) (providing for a minimum of two showers per week); Annot., 18 A.L.R. FED. 7 (1974); Annot., 51 A.L.R.3d 111 (1973); 60 AM. JUR. 2d *Penal and Correctional Institutions* §§ 44-52 (1972).

18. 442 F.2d 178 (2d Cir. 1971), *rev'g* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 1049 (1972).

19. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).

20. 442 F.2d at 193-94 n.24.

21. *Id.* at 193.

22. 408 F. Supp. 534 (N.D. Cal. 1976).

tear gas.[23] There was conflicting evidence as to the effect these deprivations were having on plaintiffs' health.[24] The federal district court held that this combination of conditions was unconstitutional and singled out the use of tear gas (except in riot situations) and neck chains as unconstitutional corporal punishment.[25] The court gave injunctive relief including an order that plaintiffs be permitted one hour per day of outdoor exercise five days per week, weather permitting, except in emergencies.[26] The order was issued despite recognition by the court that its holding would require extensive construction of new facilities and the hiring of new personnel.[27]

Disciplinary segregation is used as a means of discipline or punishment or as a means of protecting guards or other inmates.[28] Administrative segregation, on the other hand, is used for many categories of inmates: those in need of protection from other inmates, those awaiting disciplinary hearings or resolution of criminal proceedings, those who are mentally ill, those awaiting transfer to another institution, and occasionally those who are simply deemed dangerous to themselves, guards, or other inmates.[29] In *Wolff v. McDonnell*,[30] the Supreme Court held that inmates are entitled to a due process hearing prior to placement in disciplinary segregation; such hearings, however, have not been generally required by lower courts for nondisciplinary administrative segregation.[31] The inmate who needs protection may be placed in

23. *Id.* at 541-45.
24. *Id.* at 538, 546.
25. *Id.* at 545.
26. *Id.* at 547.
27. *Id.* at 537.
28. For example, the Federal Bureau of Prisons' policy is that "[a]n inmate may be placed in disciplinary segregation when his continued presence in the general population poses a serious threat to himself, staff, or other inmates or to the security of the institution" and when "the inmate has been found to have committed a serious violation of institution rules or regulations." BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, POLICY STATEMENT: INMATE DISCIPLINE, No. 7400.5D at ¶ 4 (July 7, 1975).
29. Use of administrative segregation to house inmates who are a threat to other inmates or guards has blurred the distinctions between administrative and disciplinary segregation. *See, e.g.*, Spain v. Procunier, 408 F. Supp. 534 (N.D. Cal. 1976); United States *ex rel.* Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), *aff'd*, 467 F.2d 51 (2d Cir. 1972); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971); L. ORLAND, *supra* note 17, at 258 (quoting CONN. DEP'T OF CORRECTION, POLICY DIRECTIVE ON DISCIPLINARY PROCEDURES); McAninch, *Penal Incarceration and Cruel and Unusual Punishment*, 25 S.C.L. REV. 579, 580 (1973). Officials in *Sweet* who testified about uses of administrative segregation in South Carolina did not list this use.
30. 418 U.S. 539 (1974).
31. Hearings have been required when administrative segregation is used for inmates who are a threat to other inmates or guards. *See* cases cited note 29 *supra*. For other uses of administrative segregation, hearings have not been required. *See, e.g.*, Young v. Wainwright, 449 F.2d 338 (5th Cir. 1971) (per curiam).

administrative segregation by prison officials on their initiative or upon request by the inmate.[32] Although punitive segregation is usually of shorter duration than administrative segregation, many experts criticize the use of punitive segregation, whereas administrative segregation has been generally approved.[33]

Both the majority and concurring judges stressed that Sweet possessed a constitutional right to protection, and that under the circumstances, it was probably the officials' duty to honor his request for protection.[34] The entire court, therefore, apparently felt that a diminution of exercise and shower rights should not ideally condition access to protective segregation.[35] However, while the majority held that considerations of Sweet's health and prison order and security were necessary to a ruling on constitutional issues,[36] the concurring judges would require only a finding that Sweet's treatment could feasibly be improved without regard to the expense involved in such improvements.[37] The concurring judges also made specific recommendations that Sweet be transferred to another prison, that those who made the threats be segregated instead of Sweet, or that extra guards accompany Sweet in the general population.[38]

There are fundamental reasons why such broad constitutional principles, when applied to the treatment of protected, segregated prisoners,

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32. *See generally* cases cited notes 29 & 31 *supra.*

33. *E.g.*, UN STANDARD RULES, *supra* note 17, at 40, 47 (under the Rules, separation of prisoners should be used only for protection, treatment or for supervision of the mentally abnormal); ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY, A PROGRAM FOR PRISON REFORM 14 n.10 (1972); L. ORLAND, *supra* note 17, at 249 (American Correctional Association policy is to prefer administrative segregation over punitive segregation for long terms); *id.* at 353 (§ 3(d) of the Model Act drafted by the National Council on Crime and Delinquency supports use of segregation only for the protection of inmates and personnel, not for punishment). Extended solitary confinement has been described as the "most widespread, controversial, and inhumane of current penal practices . . . ." NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 32 (1973) [hereinafter cited as CORRECTIONS].

34. 529 F.2d at 859, 867. *See* note 16 *supra.*

35. *See* 529 F.2d at 859, 867-69.

36. Deprivations of mental or physical health, whether intentionally inflicted or not, are being recognized by corrections experts as unwarranted "corporal punishment." *See* L. ORLAND, *supra* note 17, at 248-49; M. RICHMOND, PRISON PROFILES 77, 90 (1965); Note, *supra* note 8, at 1286-87. *See generally* Trop v. Dulles, 356 U.S. 86 (1958).

37. 529 F.2d at 868. *See* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974) (lack of funds not an acceptable excuse for overcrowded prisons); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (rejecting claim by Arkansas officials that the use of a strap was valid punishment due to the expense of constructing then unavailable segregation facilities).

38. 529 F.2d at 869.

do not adequately deal with present prison conditions. The courts, in defining constitutional rights of prison inmates, have balanced the rights of the imprisoned individual against the interests of the prison administration. This balancing test fails analytically because it does not take into account a crucial factor: the existence and nature of a unique inmate society within prisons.[39] It is a totalitarian society often characterized by idleness, boredom and inter-inmate hatred and violence; relationships between inmates and guards or officials are less important.[40] Courts are capable of making informed judgments on the constitutional rights of a prisoner as he interacts with the familiar world outside of prison; however, the judiciary seems uncomfortable with the task in cases in which the rights asserted involve the closed world within prisons.[41]

The court in *Sweet* did not adequately consider the fact that plaintiff was suspected by other prisoners of violating one of the most basic norms of inmate society by giving unsolicited information to prison officials. An expected result of this supposed breach of trust is unrelenting, potentially violent hatred directed toward the "informant" by most of the inmate population.[42] As experts acknowledge, prison

39. The writer's opinions on this issue are mostly a result of his experiences and observations while confined in North Carolina youthful offender prisons in 1970. *See* Note, *supra* note 8, at 1287 (courts should give credence to the human interactions within the prison environment, which may make rehabilitation impossible). *See also* Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

40. Lloyd Ohlin has described prison society as follows: "A prison is not a collection of unrelated individuals. It is a highly organized system of roles, relationships, rules and activities. The treatment preoccupation with individual offenders has obscured the heavy impact of the prison organization on offenders, not as individuals but as members of the social system." M. RICHMOND, *supra* note 36, at 131 (quoting L. OHLIN, TARGETS FOR CHANGE IN CORRECTIONAL INSTITUTIONS). *See* ANNUAL EARL WARREN CONFERENCE ON ADVOCACY, *supra* note 33, at 47-56; L. ORLAND, *supra* note 17, at 127, 153, 167-68, 173-76; U.S. DEP'T OF JUSTICE, PREVENTION OF VIOLENCE IN CORRECTIONAL INSTITUTIONS 16-17, 41 (1973) (a collection of papers presented at the Fourth National Symposium on Law Enforcement Science and Technology).

41. Perhaps this explains the Supreme Court's reluctance to judge the constitutionality of many substantive conditions in this area. Access to counsel and the courts, and visiting and correspondence privileges involve extenuated contacts with the outside world. Conversely, discipline, protection, and classification of inmates are primarily internal processes. *See* M. HERMANN & M. HEFT, *supra* note 17, at 114; Note, *supra* note 8, at 1281-82 n.80.

42. Joint Appendix for Appellant and Appellee at 14A-24A, 88A, 141A; Brief for Appellant at 8, Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975). The officials testified that Sweet would be in danger regardless of who was in the inmate population, even in twenty years, and that Sweet could not adapt to the prison population due to a general inability to get along with other inmates. *Id. See* M. RICHMOND, *supra* note 36, at 102 (cooperation and compliance with authority may lead to an inability to take care of oneself).

order is maintained at least partly through the consent of the inmates;[43] Sweet was thus probably as much a threat to order in the prison as an inmate who was considered a "discipline" problem. The concurring judges' recommendation that the officials isolate or transfer those who threatened Sweet instead of segregating Sweet is unrealistic. Given the severity of Sweet's supposed breach and the unanimity of inmate antagonism to such actions, many inmates would probably threaten Sweet. This unanimity and the fact that inmate gossip is regularly passed from prison to prison also make transfer of Sweet to another prison an unwise administrative reaction unless inter-inmate contact and transfer of inmates were unusually rare between the two prisons.[44]

Additionally, the concurring judges oversimplified the problem by suggesting that extra guards be assigned to Sweet as he interacted with the general inmate population and by stating that the expense involved in giving Sweet better treatment was irrelevant. Expense generally dictates the levels of prison physical facilities, programs and personnel.[45] While a court may limit mail censorship, for example, without directly increasing prison expenses, most problems of internal management, even when constitutional rights are involved, require that expense be considered.[46] Many prisoners suffer deprivations that are arguably unconstitutional even when resources available to prisons are correctly allocated.[47] At the very least, any adjustment that necessitates reallocation of resources to one prisoner will in some way deprive another. If Sweet and other prisoners in administrative segregation were given more exercise time, guards would probably have to be transferred to supervise that inmate exercise, and the risk of escape or violence in other areas

43. U.S. DEP'T OF JUSTICE, *supra* note 40, at 17-18.

44. Sweet was convicted of statutory rape. The Department of Corrections had a policy of not allowing sex offenders in minimal security prisons. See UN STANDARD RULES, *supra* note 17, at 15-16 (Rule 8, approving separation of inmates based on criminal record). As a result there were only two institutions at which Sweet could be kept; Sweet had already been at the other institution, where he had problems. Joint Appendix for Appellant and Appellee at 7A, 16A. There is a solution under federal statutes authorizing transfer of certain inmates between a state prison system and the federal prison system. 18 U.S.C. §§ 4002, 5003, 5013 (1970). This alternative has been employed for inmates threatened by other inmates.

45. *See* UN STANDARD RULES, *supra* note 17, at 53 (lack of resources at the heart of most noncompliance with the Rules); N.C. PENAL SYS. STUDY COMM'N, N.C. BAR ASS'N, INTERIM REPORT (1971) (finding that North Carolina is trying to operate a twentieth-century system with nineteenth-century facilities).

46. *See* note 41 *supra*. *Cf.* Brief for Appellant at 32 (arguing particularly that expenses cannot justify first amendment restrictions).

47. This is most obvious when basic resources such as housing are lacking. *See* Spain v. Procunier, 408 F. Supp. 534, 537 (N.D. Cal. 1976); sources cited note 45 *supra* and note 55 *infra*.

would increase.[48] An alternative solution worth consideration would be to shift employees from education, training, and counseling to custodial duties.[49] However, it is likely that requests for administrative segregation (from inmates truly in fear of violence,[50] as well as those who might like the rare privacy afforded by segregation) would increase far beyond prison facility capabilities if such segregation were not accompanied by a loss of some privileges. Some concomitant "deprivation" operates to allocate the prison's scarce resources in such a way as to accommodate the needs of inmates.

Nevertheless, official justification for prisoner deprivations based on the necessity of prison order or on expense should be closely scrutinized by the courts. For example, the officials in *Sweet* testified that they could not allow Sweet to exercise, work, or worship with the general prison population because he would have to be accompanied and protected by a guard on all occasions, but these officials contradicted themselves by saying that, although they would not recommend it, they would allow Sweet to move out of segregation and back into the general prison population if he chose to do so.[51] Considering the duty of officials to take all reasonable precautions for Sweet's protection,[52] he should probably be retained in administrative segregation even if he desired to move back in the population. This apparent contradiction should have been recognized, if not resolved, in *Sweet*.

The court was wise in remanding to the district court for further fact-finding,[53] and sensitive in its concern that long term segregation can

48. Prison officials in *Sweet* stated that religious services were once held in plaintiff's cellblock but were discontinued due to a lack of personnel. They argued that in order to double the showers and exercise time of the inmates in the cell block, it would be necessary to double the number of guards assigned there during those periods. Joint Appendix for Appellant and Appellee at 45A, 57A; Brief for Appellee at 7. Such a lack of resources is widespread; given these scarcities, classification of inmates is argued as the best means of allocating resources and in fact has that goal as its primary purpose. CORRECTIONS, *supra* note 33, at 210; L. ORLAND, *supra* note 17, at 219. *See also* U.S. DEP'T of JUSTICE, *supra* note 40, at 16-17; Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 955 n.90 (1970).

49. This solution draws support from a recent realization by corrections experts that "rehabilitation" does not usually occur in prisons and that emphasis is more properly placed on providing humane conditions in prisons. *See* note 39 *supra*.

50. It has been said that to eliminate the possibility of violence, all detainees in jails would have to be kept under maximum security. Note, *supra* note 48, at 955. Thus, a doctrine that a prisoner has an absolute right to be free from harm seems impossible to put into effect and therefore unwise. *See* CORRECTIONS, *supra* note 33, at 32; Note, *supra* note 8, at 1297.

51. Joint appendix for Appellant and Appellee at 159A.

52. *See* note 16 *supra*.

53. The Fourth Circuit thus required more serious consideration of the conditions

impair physical and mental health. When such adverse effects on health occur, the inmate's deprivations deserve special attention by the courts.[54] The success of such judicial entry into areas formerly controlled by prisoners and administrators requires not only the courts' sense of justice but also their ability and willingness to become familiar with the strange society and the allocation of resources within prisons.[55]

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of administrative segregation than in Breedon v. Jackson, 457 F.2d 578 (4th Cir. 1972). In that case, plaintiff was voluntarily placed in segregation to protect him from inmate assaults. He claimed that as a result of segregation he was subjected to unconstitutional deprivations including limited exercise and bathing opportunities and demanded monetary relief. The court of appeals affirmed the lower court's dismissal without a hearing and concluded as a matter of law that there was no violation of the Constitution. 457 F.2d at 581.

In two recent cases involving suits brought by inmates in segregation, the Supreme Court has reversed lower courts' dismissals without hearings. Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Haines v. Kerner, 404 U.S. 519 (1972) (per curiam).

The concurring judges in *Sweet* were realistic in recognizing the need for ascertaining the informed advice of an independent consultant to suggest constitutionally acceptable means of initiating effective segregated confinement. It is interesting to note that South Carolina is one of the few jurisdictions with a formal prison inspection system. UN STANDARD RULES, *supra* note 17, at 35.

54. The court's holding in *Sweet* was applied recently in Dorrough v. Hogan, No. C74-1823A (N.D. Ga. Sept. 29, 1976). Plaintiffs filed a class action; they were being held in administrative segregation and limited to two one-hour exercise periods a week. After a full trial, the court entered an order allowing twenty more days before entering a final ruling for parties to submit pleadings on the health and practicality issues. The court expressed another concern:

> This court tends to agree with the court in [Jordan v. Arnold, 408 F. Supp. 869, 876-77 (M.D. Pa. 1976)] when it held that a court order requiring daily exercise is appropriate when overall conditions are found to be substandard, but that an order requiring the prison officials to merely change their exercise schedule might be an unwarranted intrusion into an area governed by official discretion.

No. C74-1823A, slip op. at 2.

55. *See* ANNUAL EARL WARREN CONFERENCE ON ADVOCACY, *supra* note 33, at 49, 53-59. Since the courts cannot force legislatures to appropriate more funds to prisons, courts may be tempted to force quick changes by simply ordering the release of prisoners held under unconstitutional conditions. *See generally* Morales v. Schmidt, 340 F. Supp. 544, 548-49 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).