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Punitive Segregation in State Prisons-The Need for Definite Time Limitations

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PUNITIVE SEGREGATION IN STATE PRISONS—THE NEED FOR DEFINITE TIME LIMITATIONS

I. INTRODUCTION

During the past several decades there have been a number of prison revolts. Many penologists, judges, lawyers, former prisoners, and politicians who have been associated with the penal system in the United States have argued in favor of nationwide reforms. It is submitted that some of the most rudimentary reforms may now be possible in the aftermath of one particular revolt. On September 9, 1971, a prison revolt occurred at Attica State Prison, Attica, New York.[1] As a consequence of that revolt, the efficacy of the entire American penal system is undergoing a convulsive reexamination.[2] On one hand, American prisons have been depicted as places where there are "armed guards set to herd animals."[3] On the other hand, they have been described as being among the "most humane and advanced in the world."[4]

It is a sociological truism that some sanctions, such as imprisonment, are necessary to enforce society's rules of conduct.[5] Once

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1. TIME MAGAZINE, Sept. 27, 1971, at 20. Violence began when a group of inmates refused to line up for a work detail. The convicts rushed through the cell block setting fires and wielding makeshift weapons. The riot culminated in an assault by New York State Troopers on the prison compound; the result was 27 dead and many wounded. *Id.* at 24.

2. *Id.* at 19. *See also* N.Y. Times, Sept. 20, 1971, at 24, col. 2 (editorial):

> The mood in prisons is tense because drug addiction, sexual frustration, antisocial resentments, racial hurts, criminal guilt and fantasies of escape create tensions. A prison is a community of defeated men.
>
> Knowing all this, the public has to ask itself whether it is prepared to pay the price in higher taxes to provide more buildings, more professional staff, better-trained guards, better food and higher wages for work done by prison inmates. . . .

Id.

3. Wicker, *The Animals At Attica*, N.Y. Times, Sept. 16, 1971, at 43, col. 3. *But see* Oswald, *'New Directions'*, N.Y. Times, Sept. 16, 1971, at 43, col. 5:

> The main impact of the new direction for the department [of Corrections] is the recognition of the individual as a human being and the need for basic fairness throughout our day-to-day relaship with each other.

Id.

4. Agnew, *The 'Root Causes' of Attica*, N.Y. Times, Sept. 17, 1971, at 41, col. 2.

5. *See e.g.*, Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects*, 1969 WIS. L. REV. 550:

> It is sufficient to note than in our society, if it is to continue in

a person is imprisoned, however, a fundamental question arises: Is he to be denied all rights as a human being,[6] or does he retain certain basic rights?[7] The traditional view of penology emphasizes that incarceration "requires deprivation of all rights."[8] The prisoner is to be punished rather than be rehabilitated.[9] The modern view, however, emphasizes treatment of the prisoner which will eventually aid his return to society.[10] Accordingly, the modern view[11] favors the retention of basic constitutional rights during incarceration.

The courts have, in the past, generally maintained a "hands-off" doctrine in their determination as to which view to support.[12] An unfortunate consequence of the hands-off doctrine is to deny to a prisoner judicial review of his grievances, especially those arising of alleged mistreatment while in prison. There is a recent trend, however, for increased judicial inquiry into alleged deprivations of constitutional rights of prisoners.[13]

The evaluation of the rights of a prisoner during incarceration is directly related to developments in the theories of punishment.

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existence, there must be general acceptance of authoritive regulation as a means of achieving social control. . . .

Id. at 557.

6. *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, at 82-83 (1967).

7. *See, e.g.*, Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944):

> A prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion.
>
> When a man possesses a substantial right, the courts will be diligent in finding a way to protect it. . . .

Id. at 445.

8. *See, e.g.*, Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights—Obstacles to A Hearing On The Merits*, 20 RUTGERS L. REV. 528 (1966).

9. *See* note 15 and accompanying text *infra*.

10. *See, e.g.*, BARNES AND TEETERS, NEW HORIZONS IN CRIMINOLOGY at 644-83 (9th ed. 1950). *See also* Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark.), *vacated*, 404 F.2d 571, 579-80 (8th Cir. 1968).

11. For purposes of this Comment, "modern view" is used interchangeably with "new penology." *See* TIME MAGAZINE, Sept. 27, 1971, at 26, col. 3:

> Today the presumed goals of prisons are various, and sometimes they conflict. The aims are to wreck society's vengeance on a criminal, to deter other men from violating the law, to rehabilitate a prisoner so that he is fit to return to the open world. . . .

Id.

12. *Compare* Sewell v. Pegelow, 291 F.2d 196, 197 (4th Cir. 1961) *with* Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala.), *aff'd*, 389 U.S. 967 (1967). *See generally*, Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944).

13. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944).

II. THEORIES OF PUNISHMENT[14]

One of the earliest theories of punishment justified punishment as "a return for moral evil."[15] The theory's basic philosophy was that once a person commits a crime, society must be avenged.[16] This retributive theory is best described as being punishment merely for the sake of revenge.[17] In colonial times retributive punishment was applied without regard for the nature or severity of the offense. For example, in 1679 a Frenchman who was only *suspected* of setting a fire in the city of Boston "was ordered to stand in the pillory, have both ears cut off, pay the charges of the court, and lie in prison on bonds of five hundred pounds. . . ."[18] The retributive theory became synonymous with harsh corporal punishment. Tearing out the tongue, cutting off the lips, and tearing off the ears were routinely employed.[19] The attitude of the colonists toward a person who was considered to be a criminal has been summed up vividly:

> Our ancestors were not squeamish. The sight of a man lopped of his ears, or split of his nostrils, or with a seared brand or great gash in his forehead or check could not affect the stout stomachs that cheerfully and eagerly gathered around the bloody whipping-post and the gallows.[20]

The underlying justification for punishment, revenge for society, encouraged little compassion for the criminal.[21]

The development of the deterrence theory of punishment brought about a significant advancement in penology.[22] According

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14. For purposes of discussion, each theory will be discussed separately. It should be noted, however, in practice all theories are merged—the difference is merely a matter of degree as to which theory is given more effect.

15. HART, PUNISHMENT AND RESPONSIBILITY, 81 (1968).

16. *Id.*

17. *Id.*

18. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS, 41 (1896).

19. *See* Durkheim, *Two Laws of Penal Evolution*, 38 CINN. L. REV. 32, 43 (1969). *See generally*, EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (1896). Long hair once had a utilitarian value—it was used to hide deformities such as loss of ears. *Id.*

20. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS, 138 (1896).

21. *Id.* at 58:

> [T]he sight of an author or a publisher with his ear nailed to a pillory was too common to be widely noted, for anyone who printed without permission could, by the law of the land, be thus treated; when the author was released, if his bleeding ear was left on the pillory, that did not matter.

22. The deterrent theory is discussed in its classical meaning *i.e.*, use of fear or intimidation to discourage certain conduct. For an extensive discussion of the interrelationship of the deterrent theory with the reformative theory *see* Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects*, 1969 WIS. L. REV. 550.

to this theory, an individual is deterred from deviations in conduct because of a conscious fear of punishment.[23] It is important to note that this theory placed less emphasis on the moral evil of the offense than did the retributive theory.[24] The result of this shift in emphasis was the gradual acceptance of proportionate punishment:[25] punishment which varies according to the gravity of the offense.[26] A traffic offense, for instance, does not warrant the same punishment as murder. Complementing the growth of this theory was the growing public rejection of the harsher methods of punishment imposed under a retributive philosophy.[27] A corollary of the idea of proportionate punishment is that people who commit the same type of offense should be punished as similarly as possible.[28] Standards of decency in methods of punishment were begining to emerge.[29]

The most recent advance in penology is the development and growing acceptance of the reformative theory of punishment. This theory "embraces any strengthening of the offender's disposition and capacity to keep within the law, which is intentionally brought about by human effort otherwise than through fear. . . ."[30] The predominant characteristic of this theory is an attempt to rehabilitate the criminal and prepare him to return to society.[31] The dignity of the individual is the keystone of the reformative theory.[32] Sanctions are not applied to degrade the offender; rather, they are used to correct the deviation from orderly conduct. This theory of punishment supports the retention of rights while the prisoner is incarcerated. If the reformative theory is to function properly, methods of punishment must not interfere with certain individual rights.

As the theories of punishment have progressed to the point at which individual rights are recognized, the places of imprisonment evolved into the present day "correctional institution."[33] Compare the present day situation to the time when a prison was a repressive environment where prisoners were subjected to all forms of phy-

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23. *See* Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects*, 1969 WIS. L. REV. 550, 552.
24. HART, PUNISHMENT AND RESPONSIBILITY at 237 (1968).
25. *Id.*
26. *See, e.g.*, Durkheim, *Two Laws of Penal Evolution*, 38 CINN. L. REV. 32, 44 (1969).
27. *See generally*, Note, *The Cruel and Unusual Punishment Clause and The Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).
28. *Id.* at 636.
29. *Id.*
30. HART, PUNISHMENT AND RESPONSIBILITY at 26 (1968).
31. *Id.*
32. *Cf.* Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). *See generally*, Note, *The Cruel and Unusual Punishment Clause and The Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).
33. *See generally*, Durkheim, *Two Laws of Penal Evolution*, 38 CINN. L. REV. 32, 49 (1969).

sical abuse.[34] Although many modern prisons are in need of drastic renovation and improvement, physical maltreatment of prisoners is prohibited by law, although in fact it does occur occasionally.[35]

Changes in the theory of penology have been slow. One reason is that the courts have traditionally maintained a "hands off" position when prison affairs were concerned, leaving the changes to the legislative and executive branches of government. However, increasing demand for reform coupled with continued inaction on the part of legislators and prison authorities has forced the judiciary to consider problems of prison administration that were avoided in the past. One area of internal prison administration which has had increased judicial scrutiny in recent years is the internal disciplinary procedures of prisons. In some areas the courts are now setting limits on prison disciplinary measures.

This Comment will examine the issue of whether a prisoner who is confined to punitive segregation[36] for an indefinite period of time is by that fact subjected to cruel and unusual punishment.

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34. *Id.*

> In Dahomey, the prison was a hole like a well, where the condemned stagnated in filth and vermin. In Judea, we have seen that the prison was made of wooden cages in which the scarcely fed prisoners were confined. . . .

35. *See* note 122 *infra.*

36. For purposes of this Comment, "punitive segregation" refers to the isolation of a certain prisoner from the general prison population. Such segregation is a disciplinary action invoked by prison officials against a prisoner who violates prison rules. Punitive segregation can be imposed only by prison officials. Solitary confinement, on the other hand, is a broader term and may be imposed as a statutory sanction. *See, e.g.,* PA. STAT. ANN. tit. 18, § 4302 (1939). The general purpose of punitive segregation is discussed in *Graham v. Willingham,* 265 F. Supp. 763 (D. Kan. 1967):

> The objectives of inmate discipline and control are consonant with the correctional objectives of the institution, the focus being on individual adjustment and institutional community welfare. In this context, the purpose of segregating inmates from the general population is to insure immediate control and supervision of inmates who are a threat to themselves, to others or the safety and security of the institution.

Id. at 765. The conditions of punitive segregation often vary from one prison to another. *Compare* Sostre v. McGinnis, 312 F. Supp. 863 (S.D. N.Y.), *rev'd,* 442 F.2d 178, 186 (2d Cir. 1971) (running water, regular exercise, clothes), *with* Wright v. McMann, 257 F. Supp. 739 (N.D.N.Y.), *rev'd,* 387 F.2d 519, 521 (2d Cir. 1967) (no hygienic implements, exposure to subfreezing temperatures, unsanitary conditions).

This Comment is limited to situations in which a prisoner in a state prison seeks relief through the federal courts.

III. Jurisdiction of Federal Courts

The first question facing such a prisoner is whether or not the federal courts will take jurisdiction of his petition. Until 1961, state prison inmates who alleged improper treatment while in prison were forced to seek relief in the state courts.[37] Alleged mistreatment of such prisoners was considered within the realm of "internal discipline" of prison administration; therefore, the federal courts declined jurisdiction.[38] This "hands off" attitude is illustrated in *Blythe v. Ellis*,[39] where an inmate of a Texas prison brought suit against the prison director for the latter's alleged violations of the civil rights of the prisoner.[40] The plaintiff had been placed in punitive segregation by the defendant not long after the plaintiff had undergone surgery.[41] The plaintiff alleged that as a result of such segregation, his sickness was aggravated, resulting in the need for additional surgery.[42] The District Court for the Southern District of Texas refused to apply the terms of the eighth amendment to the states.[43] The court concluded that no cause of action had been stated: "The court is of the opinion that defendant's alleged conduct constitutes 'internal discipline.' Referal courts do not inquire into such matters as solitary confinement. . . ."[44] The court did concede, however, that deprivation of essential medical care or infliction of serious bodily injury would be actionable.[45]

An additional roadblock for the state prisoner seeking relief in the federal courts for prison mistreatment was the requirement that he exhaust his administrative and judicial remedies within the state before the federal courts would take jurisdiction. The general rule that administrative remedies must be exhausted before judicial relief would be granted was followed in early instances where state prisoners sought relief in the federal courts.[46] A series of decisions based on actions brought by state prisoners alleging violations of their civil rights has now cleared the path for actions by state prisoners in federal courts without lengthy state judicial and administrative proceedings.

In cases involving civil rights it was held that one could resort to a federal court without first exhausting the judicial remedies of

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37. *See, e.g.*, Pierce v. LaVallee, 293 F.2d 233, 234 (2d Cir. 1961).
38. *See, e.g.*, Blythe v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961).
39. 194 F. Supp. 139 (S.D. Tex. 1961).
40. *Id.* at 139.
41. *Id.*
42. *Id.*
43. *Id.* at 140. *But see* Robinson v. California, 370 U.S. 660 (1962) (refused to apply to the states the protection against cruel and unusual punishment provided by the eighth amendment to the United States Constitution).
44. Blythe v. Ellis, 194 F. Supp. 139, 140 (S.D. Tex. 1961).
45. *Id.*
46. *See, e.g.*, Aircraft and Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947).

state courts.[47] The requirement of exhaustion of administrative remedies in certain actions brought under the Civil Rights Act was repudiated in *McNeese v. Board of Education.*[48] However, in *United States v. Pennsylvania,*[49] the court refused to apply the *McNeese* holding to actions by state prisoners against prison officials. In this decision a state prisoner sought to enjoin prison officials from denying him the use of a law library as well as access to various legal sources.[50] Suit was initiated under the Civil Rights Act.[51] The court refused to eliminate the requirement of exhaustion of administrative remedies:

> Accordingly, this court therefore concludes that inmates of state correctional institutions must, before invoking the aid of the Civil Rights Act, first exhaust their administrative remedies or make a satisfactory showing that they were in fact unable to do so.[52]

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47. *See* Lang v. Wilson, 307 U.S. 268 (1939):

> To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. . . . But the state procedure open for one in the plaintiff's situation . . . has all the indicia of a conventional judicial proceeding. . . . Barring only exceptional circumstances, . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts.

Id. at 274. *See also* U.S.C.A. § 1983 (1964):

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

Id. See also 28 U.S.C.A. § 1343 (1948):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

Id.

48. 373 U.S. 668 (1963).

49. 247 F. Supp. 7 (E.D. Pa. 1965).

50. *Id.* at 8.

51. *Id.*

52. *Id.* at 11. The court based its conclusion on a fear of interfering with prison discipline rather than on a consideration of deprivation of constitutional rights of the prisoner.

> [F]ederal courts will not interfere with uniformly applied prison regulations designed to achieve the discipline indispensable to the orderly operation of a state penal institution. . . .

Id. at 12.

In *Wright v. McMann*,[53] however, the Second Circuit Court of Appeals held that exhaustion of state administrative remedies is *not* required in a civil rights action by a prisoner against prison officials.[54] *Wright* involved a claim by a state prisoner that his constitutional rights were violated when he was placed in a "strip cell."[55] The court reviewed the question of whether involvement at the federal level was permissible,[56] and concluded:

> [W]hile federal courts are sensitive to the problems created by judicial interference in the internal discipline of state prisons, in appropriate cases they will not hesitate to intervene. . . .[57]

It is submitted that the portion of the holding in *United States v. Pennsylvania*[58] requiring the exhaustion of administrative remedies is clearly out of line with the trend of later case law. There is no longer any question that a prisoner can bring an action under the Civil Rights Act without first exhausting judicial and administrative remedies at the state level.[59]

IV. The Constitutionality of Punitive Segregation

Until 1962 when the United States Supreme Court held the cruel and unusual punishment clause of the eighth amendment applicable to the states in *Robinson v. California*,[60] the constitutionality of punitive segregation had never been determined. Based on the general rule that punishment is not "cruel and unusual" un-

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53. 387 F.2d 519 (2d Cir. 1967).

54. *Id.* at 522.

55. *Id.* at 521. (The strip cell had no furniture other than a sink and toilet. Such cell had inadequate heat, and the prisoner was denied all hygienic implements. He was exposed to subfreezing temperatures).

56. *Id.* at 522:

> Until recently the federal courts refused to review charges instituted under the Civil Rights Act and arising out of state prison disciplinary procedures. The prisoners, instead, were left to pursue whatever remedies were available in the state courts. The oft repeated reasons used to justify this result were (a) that the Eighth Amendment's prohibition against cruel and unusual punishment did not apply to the states: (b) a reluctance to interfere in the internal discipline of state prisons, and (c) the need to utilize state remedies in the first instance. . . .

57. *Id.*

58. 247 F. Supp. 7 (E.D. Pa. 1965). *See* text accompanying notes 49-52 *supra*.

59. *See, e.g.*, Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969):

> As to the matter of exhaustion of state remedies, it is presently the rule that where an action is appropriately brought under provisions of the Civil Rights Act, the exhaustion of state remedies is not a condition precedent to federal jurisdiction. State and federal courts have concurrent jurisdiction in such cases. . . .

Id. at 790. See also, Houghton v. Shafer, 392 U.S. 639 (1968); Cooper v. Pate, 378 U.S. 546 (1964); Brown v. Brown, 368 F.2d 992 (9th Cir. 1966). The requirement that state administrative remedies must first be exhausted *does* apply, however, in a habeas corpus proceeding, Smart v. Avery, 411 F.2d 408, 409 (6th Cir. 1969) ("The Civil Rights Statute cannot be used by a state prisoner to circumvent the requirement of the statute. . . .")

60. 370 U.S. 660 (1962).

less exotic methods of punishment are employed or traditional punishment is applied excessively, it is now well-established that punitive segregation in and of itself does not violate the eighth amendment.[61]

The primary justification for this view appears to be the reluctance of the courts to interfere with prison disciplinary procedures unless there is a deprivation of the prisoner's constitutional rights.[62] But the courts still refuse to question the basic premise that punitive segregation, in and of itself, does not deprive the prisoner of his constitutional rights.

A representative case is *Courtney v. Bishop*[63] which involved a complaint by a prisoner that he had been arbitrarily placed in punitive segregation.[64] The prisoner had been afforded a hearing before a district court; his complaint was subsequently dismissed.[65] The court recognized that lawful incarceration deprives a prisoner of certain rights and privileges;[66] yet the court refused to hold that incarceration causes forfeiture of all rights.[67] The plaintiff conceded, in *Courtney*, that punitive segregation is not unconstitutional per se.[68] *Courtney* gives added credence to the argument that prison officials must be given leeway in administering disci-

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61. *See* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Ford v. Board of Managers of New Jersey State Prison, 407 F.2d 937 (3d Cir. 1969); Courtney v. Bishop, 409 F.2d 1185 (8th Cir.), *cert. denied*, 396 U.S. 915 (1969); Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967); Knight v. Rogen, 337 F.2d 425 (7th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970); Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964).

62. *See, e.g.*, Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) where it is stated:

> As to the traditional preference for leaving matters of internal prison management to state officials, an analysis of recent cases indicates that while federal courts are still sensitive to the problems created by interference of the federal judiciary in matters involving the internal discipline of state prisons, they will not hesitate to intervene in appropriate cases. That this intervention may extend to an examination of maximum security procedures in state prisons in order to insure the protection of constitutional rights is amply supported by precedent. . . . While the rule remains that matters of state prison discipline are not ordinarily subject to examination in federal court, the rule is otherwise if the treatment of prisoners is of such a nature that their constitutional rights are violated.

Id. at 791.

63. 409 F.2d 1185 (8th Cir. 1969).

64. *Id.* at 1186. The prisoner claimed there was inadequate food and medical care. He also alleged that numerous beatings were inflicted upon the prisoner by prison officials.

65. *Id.* at 1186.

66. *Id.* at 1187.

67. *Id.*

68. *Id.*

plinary rules. It appears that before a prisoner can receive judicial relief from punitive segregation, he must prove that the *conditions* of punitive segregation violate the eighth amendment.

A rule has evolved under which punitive segregation will be held unconstitutional[69] if certain standards of human decency are not met.[70] *Wright v. McMann*[71] involved a complaint by a state prisoner that he was subjected to cruel and unusual punishment because of the conditions of his confinement.[72] The prisoner was forced to sleep completely nude on a cold concrete floor[73] in a cell which was "reeking from the stench of the bodily wastes of previous occupants which he says covered the floor, the sink, and toilet."[74] Although fearful that the decision would result in the filing of similar complaints throughout the district,[75] the court concluded such conditions were so inhumane as to constitute cruel and unusual punishment.[76]

In *Hancock v. Avery*[77] the prisoner was placed in punitive seggregation and was not given any clothes to wear,[78] or any hy-

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69. For a general but thorough discussion of what may constitute "excessive" punishment under the eighth amendment *see* Note, *The Cruel and Unusual Punishment Clause and The Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

70. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Jordon v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

71. 387 F.2d 519 (2d Cir. 1967) (*See* note 53 and accompanying text *supra*).

72. 387 F.2d at 521. The prisoner alleged:

> [T]he said solitary confinement cell wherein plaintiff was placed was dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue superimposed thereon; plaintiff was without clothing and entirely nude for several days . . . until he was given a thin pair of underwear to put on; plaintiff was unable to keep himself clean or perform normal hygienic functions as he was denied the use of soap, towel . . . and other hygienic implements; plaintiff was compelled under threat of violence, assault or other increased punishments to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 A.M. to 10:00 P.M. every day, and he was not permitted to sleep during the said hours under the pain and threat of being beaten or otherwise disciplined therefore; the windows in front of his confinement cell were opened wide throughout the evening and night hours of each day during subfreezing temperatures causing plaintiff to be exposed to the cold air and winter weather without clothing or other means of protecting himself. . . .

Id.

73. *Id.*

74. *Id.* at 522.

75. *Id.* at 527.

76. *Id.* at 526.

> The subhuman condition in the 'strip cell' . . . could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency. . .

Id.

77. 301 F. Supp. 786 (M.D. Tenn. 1969).

78. *Id.* at 789.

genic materials.[79] At the rear of the cell was a hole used to receive bodily wastes; the flushing operation was controlled by a guard and was carried out five times every twenty-four hours.[80] The defendants, who were prison officials, argued that the methods of dealing with allegedly "incorrigible" persons such as the plaintiff should be left to the discretion of prison administrators.[81] The defendants further argued that lack of clothing and hygienic material was necessary to prevent the plaintiff from injuring himself.[82] The court concluded the debasing conditions to which plaintiff was subjected did amount to cruel and unusual punishment.[83] *Hancock* recognized that application of the eighth amendment should remain flexible.[84] Two tests were applied to aid in the determination of whether the eighth amendment should be applied in a given case.[85] It is significant that *Hancock* held such conditions to be cruel and unusual when imposed "*for any length of time, however brief.*"[86] By refusing to deprive the prisoner of all his rights during punitive segregation the *Hancock* decision encourages more humane treatment of prisoners than have previous decisions.

The conditions of punitive segregation have been held to be in violation of the eighth amendment when punitive segregation is imposed in such a way as to be "grossly disproportionate" to the offense.[87] In *Fulwood v. Clemmer*,[88] a Muslim prisoner had allegedly broken a prison rule which forbade conduct that would tend to break the peace.[89] The prisoner was put in punitive segre-

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 792.
84. The court stated:
> Just what constitutes cruel and unusual punishment in the constitutional sense is a matter which defies concrete definition. However, it has long been understood that the concept of cruel and unusual punishment is one of wide application capable of acquiring new depths of meaning to conform to more enlightened concepts of criminal justice.

Id. at 791.
85. *Id.* One test is whether the punishment "shocks general conscience"; the other is when a punishment goes beyond what is necessary to achieve a legitimate penal aim.
86. *Id.* at 792 (emphasis added). See note 112 and accompanying text *infra.*
87. *See, e.g.*, Sostre v. Rockefeller, 309 F. Supp. 611, 614 (S.D.N.Y. 1969), *rev'd in part sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).
88. 206 F. Supp. 370 (D.D.C. 1962).
89. The rule read in part:
> It is against the law to engage in a demonstration, disturbance, strike, or act of resistance, either alone or in combination

gation for over two years.[90] The court explicitly recognized that the racial preachings of the prisoner were in violation of the prison rule.[91] Nevertheless, the court found the penalty of punitive segregation to be disproportionate to the offense:

> Despite the power of prison authorities to make proper rules and regulations for the government of prisoners, and to maintain discipline in the prison population, a prisoner may not be unreasonably punished for the infraction of a rule. A punishment out of proportion to the violation may bring it within the bar against unreasonable punishments.[92]

As discussed above,[93] exotic and barbaric methods of punishment are not permissible. Thus, courts have recognized that even while a man is incarcerated he is entitled to certain basic protections. The prisoner does forfeit, of course, many rights he would normally have if he were a "free" man,[94] and the rights of a prisoner are circumscribed by the need for prison discipline. Nevertheless, this limitation must always reasonably relate to the maintenance of prison discipline and not constitute an arbitrary and capricious disregard of human rights.[95]

Punitive segregation has consistently been upheld as a proper exercise of discretion of prison officials.[96] But the *Clemmer* and *Hancock* decisions have recognized that the conditions and term of punitive segregation must meet certain minimum standards of decency and reasonableness; otherwise, punitive segregation in a given instance will be considered violative of the eighth amendment.

V. Sostre v. Rockefeller—Imposing Definite Limitations on Punitive Segregation: Advance and Retreat

The United States District Court for the Southern District of New York has extended the doctrine enunciated in *Clemmer* and in *Hancock*;[97] unfortunately, this progressive and stimulating approach was reversed by the Second Circuit Court of Appeals.[98] In *Sostre v.*

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with others, which will tend to breach the peace or which constitutes disorderly conduct.

Id. at 378.

90. *Id.* at 379.

91. *Id.* at 378.

92. *Id.* at 379.

93. *See* note 33 and accompanying text *supra.*

94. *See, e.g.,* Price v. Johnston, 334 U.S. 266 (1948). *Cf.,* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1969).

95. *See, e.g.,* United States *ex rel.* Raymond v. Rundle, 276 F. Supp. 637 (E.D. Pa. 1967); United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965).

96. *See* note 61 and accompanying text *supra.*

97. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). *See also* McCray v. State, 40 U.S.L.W. 2307 (Nov. 11, 1971).

98. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

Rockfeller[99] the plaintiff, a prisoner at Green Haven Prison, New York State, brought a civil rights action[100] against the Governor of New York, the Commissioner of Corrections and the wardens of two New York state prisons.[101] The plaintiff had previously spent twelve years in prison, four of which were in punitive segregation at Attica State Prison.[102] The plaintiff had been extremely active in attempting to secure legal rights for other prisoners.[103] At the time of suit the plaintiff was in prison pursuant to a sentence of 30-40 years for selling narcotics.[104] He was confined to an otherwise empty cell block at Attica for one night, then transferred to Green Haven.[105] The plaintiff initiated a legal battle for reversal of his conviction but was immediately placed in punitive segregation.[106] He was released from punitive segregation for several days but was again confined to punitive segregation, this time for more than one year.[107] A temporary restraining order allowed his release to the general prison population.[108] The defendants argued that the plaintiff was a dangerous prisoner and his continued presence in punitive segregation was essential to prison security.[109] There was evidence that the defendants had attempted to discourage the plaintiff from engaging in legal activities.[110]

The district court in *Sostre* found that plaintiff was kept in

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99. 312 F. Supp. 863 (S.D.N.Y. 1970). Discussion of this case is confined to the issue pertaining to length of confinement in punitive segregation. In an exhaustive opinion the court addressed itself to issues of due process, freedom of political thought and compensatory and punitive damages.

100. *See* note 47 *supra.*

101. 312 F. Supp. at 866.

102. *Id.*

103. 312 F. Supp. at 866. Plaintiff was a "jailhouse lawyer" and helped other prisoners secure certain legal rights. *See* Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

104. 312 F. Supp. at 866.

105. *Id.* The deputy warden of Attica stated the reason for the transfer: "I thought it was best for the interests of the inmate and for the state that this man be transferred to another institution." *Id.* at 867.

106. *Id.* at 867. The conditions of punitive segregation at Green Haven included: restricted diet; shower and shave with hot water once a week; denial of access to library, newspapers and movies, loss of group privileges.

107. *Id.*

108. *See* Sostre v. Rockefeller, 309 F. Supp. 611 (S.D.N.Y. 1969).

109. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970). Defendants base their reasoning on the contents of a letter written by the prisoner to his sister. Portions of the letter stated:

> As for me, there is no doubt in my mind whatsoever that I will be out soon, either by having my appeal reversed in the courts or by being liberated by the Universal Forces of Liberation. . . .

Id. at 867.

110. *Id.* at 867.

punitive segregation not because of any serious infraction of prison rules but, rather, "because he is unquestionably, a black militant who persists in writing and expressing his militant and radical ideas in prison."[111] The court specifically stated:

> [P]unitive segregation under the conditions to which plaintiff was subjected at Green Haven is physically harsh, destructive of morale, dehumanizing in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time which should certainly not exceed 15 days.[112]

In other words, the district court in *Sostre* would require the establishment of a definite time limit on confinement to punitive segregation. The court found that punitive segregation as applied to the instant plaintiff was clearly disproportionate to the offense.[113] The court also found the conditions of punitive segregation at Green Haven to be "cruel and unusual punishment when tested against 'the evolving standards of decency that mark the progress of a maturing society'. . . ."[114] It is clear from the decision: Extended periods of confinement in punitive segregation are in violation of the eighth amendment.

The Second Circuit Court of Appeals reversed the critical portions of the holding of the district court holding pertaining to the conditions of punitive segregation and the restriction on time a prisoner can spend in punitive segregation.[115] The circuit court emphasized that the plaintiff was not totally isolated from human contact.[116] The court also emphasized the fact that plaintiff refused to participate in a group therapy program.[117] Although the court of appeals recognized the potential harm involved in extended periods of punitive segregation, the court apparently based its decision on its own reluctance to interfere with prison disciplinary procedures.[118] The court did intimate its displeasure with indefinite confinement to punitive segregation under the conditions endured by the plaintiff;[119] yet the court refused to support the courageous ini-

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111. *Id.* at 870.
112. *Id.* at 868.
113. *Id.* at 871. *See* note 87 and accompanying text *supra.*
114. *Id.* at 871.
115. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). (Plaintiff did not appeal from dismissal of Governor Rockefeller as a defendant).
116. *Id.* at 185. The court stated:

> Although for four months only one other prisoner was confined with Sostre in his small 'segment' of five cells, the entire punitive segregation unit at Green Haven housed on the average about 15 prisoners at any one time. . . .

Id.
117. *Id.* (Group therapy was a type of counselling in which the prisoner must participate in order to become eligible for release from punitive segregation).
118. *Id.* at 191. "For a federal court . . . to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. . . ." *Accord,* Graham v. Willingham, 265 F. Supp. 763, 765 (D. Kan. 1967).
119. Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971).

tiative of the district court in placing a definite time limit on punitive segregation.[120]

Another recent decision, *McCroy v. State*,[121] has held that there should be a fifteen day time limit on punitive segregation. The decision appears to apply where the institution in question is designated a "treatment" center rather than a maximum security prison.[122]

The decisions which have found the conditions of punitive segregation to be unconstitutional in certain instances recognize that the physical well-being of a prisoner is at stake.[123] Several state legislatures have established a general policy of maintaining the physical health of prisoners.[124] The application of the eighth amendment to the states[125] is additional evidence of a policy to maintain the physical health of a person during incarceration.

The district court in *Sostre* merely extended this policy to encompass the *mental health* of a prisoner. The court explicitly stated:

> Subjecting a prisoner to the demonstrated risk of the loss of his sanity as punishment for any offense in prison is plainly cruel and unusual punishment as judged by present standards of decency. . . .[126]

Expert testimony introduced in *Sostre* pointedly recognized that segregated confinement similar to that endured by the prisoner is "degrading, dehumanizing, conducive to mental derangement."[127] Even the circuit court in *Sostre* recognized the varacity of such expert analysis.[128] It is beyond comprehension how an enlight-

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120. *Id.* *See* text accompanying notes 112-114 *supra.*
121. 40 U.S.L.W. 2307 (Nov. 11, 1971).
122. *Id.* at 2308.
123. *See, e.g.*, Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).
124. *See, e.g.*, PA. STAT. ANN. tit. 61, § 371 (1829):
> From and after the first day of July next, all and every person adjudged to suffer separate or solitary confinement at labor in . . . penitentiaries, shall be kept singly and separately at labor in the cells or workyards of said prisons, and be sustained upon wholesome food of a coarse quality, *sufficient for the healthful support of life*, and be furnished with clothing suited to their situation. . . .

Id. (emphasis supplied).
125. *See generally*, Robinson v. California, 370 U.S. 660 (1962).
126. Sostre v. Rockefeller, 312 F. Supp. 863, 871 (S.D.N.Y. 1970). *Accord*, Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).
127. Sostre v. McGinnis, 442 F.2d 178, 190 (2d Cir. 1971).
128. *Id.* The court stated:
> Nor would candor permit us to dismiss these [expert] opinions as aberrational among those views revealed in relevant sources referred to us by counsel or known to us through our own research. To the contrary, it would not be misleading to characterize many

ened judiciary can state that "long-term isolation might have so serious an impact, in fact, as to 'destroy' a person's 'mentality' . . ."[129] yet that same judiciary continues to refuse to place time limitations on such isolated confinement.

The circuit court in *Sostre* apparently maintains it is not qualified to determine whether a punishment should be placed beyond the power of a state.[130] It is submitted that precisely because the courts *are* qualified to prohibit excessive or exotic punishments the barbaric tortures of the past are no longer permissible.[131] The humanitarian decision of the district court in *Sostre* illustrates the potential responsiveness of the judiciary to the modern view of penology.[132]

VI. Judicial Review of Internal Prison Discipline

There is an emerging trend towards enlarging the area of judicial review of sanctions imposed upon prisoners by prison officials.[133] Certainly the mere fact of incarceration acts to deprive a prisoner of rights he would otherwise enjoy. Yet some rights should never be taken by the state. Ordinarily one of these is the right to be free from conditions which can destroy the mental health of the prisoner. It is conceded that some evils cannot be immediately alleviated since incarceration is hardly conducive to mental health. Prolonged punitive segregation, on the other hand, which aggravates the mental torture of imprisonment, can and should be remedied by an activist judiciary.[134]

Admittedly, the court cannot "supervise minutely the operation of the prisons."[135] Certain leeway must be granted to prison officials to apply sanctions to facilitate the orderly administration of a prison. For example, *Landman v. Peyton*[136] held that use of tear gas approximately 12 to 15 times in the course of a year was a legitimate exercise of disciplinary authority.[137] Also, a sanction

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> of the opinions of plaintiff's experts as fairly representative of the perspective of adherents to the "new penology". . . .

Id. at 190.

129. *Id.*

130. *Id.* at 191.

131. See general text discussion pertaining to the theories of punishment at text accompanying notes 14-36 *supra.*

132. *See* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970). *See also,* Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969):

> The nineteenth century penology taught that incarceration "requires deprivation of all rights." In recent times there has been a swing to the "new penology" which has as its promise that "men are sent to prison *as* punishment rather than *for* punishment."

Id. at 1047.

133. *See generally,* Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. Pa. L. Rev. 985 (1962).

134. *See* Sostre v. Rockefeller, 312 F. Supp. 863, 871 (S.D.N.Y. 1970).

135. *See* Edwards v. Sard, 250 F. Supp. 977, 978 (D.D.C. 1966). *See also,* Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969).

136. 370 F.2d 135 (4th Cir .1966).

137. *See* 370 F.2d at 138 n.2.

such as punitive segregation may be applied to a particular prisoner in order to protect the safety of the general prison population and the guards. In *Graham v. Willingham*,[138] the prisoner involved had participated in violent acts against other inmates. The court found that the punitive segregation of the violent inmate was a lawful exercise of authority.[139]

This Comment does not suggest that prison officials be prohibited from the use of punitive segregation as a sanction. Rather, the courts should declare that an indefinite confinement to punitive segregation for any offense committed while in prison is prohibited *as a matter of law*.[140] It would be left to the discretion of prison officials whether to apply, in a given instance, the sanction of punitive segregation for a *definite* period of time.

There may be a problem determining how long a prisoner must be returned to the general prison population before he can be disciplined again by another definite period of punitive segregation. One prisoner, for example, was released by court order from punitive segregation; immediately after such release, however, he was confined to his cell because he had "dust on his cell bars."[141] Repeated confinements to punitive segregation with relatively little time in the general prison population could constitute an "indefinite" confinement and thereby be prohibited.

If a prisoner repeatedly endangers the security of other prisoners and guards, he should be considered an "exception" to the general rule. Until a more effective method of treating such a person is developed, he could be confined to punitive segregation for an indefinite time. However, such instances should truly be the *exception* rather than the general rule. The burden of proof should be on prison officials to justify continued re-sentencing of any prisoner to punitive segregation. An administrative tribunal could be established to determine on a case-by-case basis, whether a particular resentencing is an abuse of discretion on the part of prison officials.[142] But if a prisoner is placed in punitive segregation for an indefinite period of time it should establish a prima facie case of abuse of discretion, which could only be rebutted by clear and

138. 265 F. Supp. 763 (D. Kan.), *aff'd*, 384 F.2d 367 (10th Cir. 1967).
139. *Id.* at 368.
140. *See, e.g.*, Sostre v. Rockefeller, 312 F. Supp. 863, 871 (S.D.N.Y. 1970).
141. *Id.* at 869.
142. For decisions involving procedural safeguards, *see* United States *ex rel.* Campbell v. Pate, 401 F.2d 55 (7th Cir. 1969); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969).

convincing evidence that the prisoner is a threat to the physical well-being of the general prison population.

It is submitted that punitive segregation for an indefinite period of time is contrary to the modern preference of rehabilitation over physical and mental degradation of a prisoner. Such punitive segregation increases the mental abuse of a prisoner.[143] The current federal practice, however, urges the retention of prisoners in punitive segregation "for as long as necessary to achieve the purposes intended," sometimes "indefinitely."[144] The present system involves such a high potential for abuse that judicial caution in "interfering" with prison administration is no longer justified.[145]

It can be argued that punitive segregation for indefinite periods of time is a valuable weapon in the bureau of corrections' arsenal of disciplinary methods. Fear of such isolation may deter an inmate from violation of prison rules. Thus, by placing time restrictions on punitive segregation the courts are impeding the control which prison officials maintain over their inmates.[146] The logical extension of this argument is that *any means* by which prison officials can control their inmates are thereby justified.[147]

As discussed above, however, certain limits do exist on the means which prison officials can employ to maintain order and security.[148] By placing time limits on punitive segregation the courts would merely be recognizing the obsolescence and cruelty of another form of punishment. Just as the severance of ears and fingers is no longer a proper method of punishment,[149] indefinite confinement to punitive segregation can no longer be considered a proper method of punishment.

VII. Conclusion

There is a delicate balance between the right of a prisoner to be relatively free from mistreatment and the right of prison officials to administer sanctions as disciplinary actions. In *Rodriguez v. McGinnis*,[150] the court recognized that balance:

> [T]here is full recognition by the federal courts that the primary authority and responsibility for prison administration and discipline remains, and should remain, with the State administrative personnel, and that the federal courts

143. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 192-93 (2d Cir. 1971).
144. *Id.* at 190.
145. *See* note 70 and accompanying text *supra*.
146. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971).
147. *See, e.g.*, a statement by the director of the School of Public Administration at the University of Southern California, as reported in Time Magazine, Sept. 27, 1971, at 26, col. 3 ("The idea of correcting anyone in prison is bankrupt. You can't mix punishment and rehabilitation. Prisons should be used for punishment.")
148. *See* note 66 *supra*.
149. *See* notes 14-36 and accompanying text *supra*.
150. 307 F. Supp. 627 (N.D.N.Y. 1969).

> are never inclined to reach out to intrude unless,—and this is an important "unless"—there is sufficient showing procedures and regulations exist that impair the constitutional rights of prisoners. . . . This position is no more than a simple, common-sense one that is in accord with the American desire for fairness within its prison systems.[151]

The judiciary should never abdicate its responsibility to protect human rights. No matter how contemptible the crime, the accused is entitled to a fair trial. When a man is convicted and imprisoned, he is removed from free society, but not from the human race.

Judicial supervision of certain penal sanctions is permitted by the eighth amendment. Courts must recognize that the mental health of the prisoner is just as important as his physical health. The real and potential harm resulting from punitive segregation for an indefinite period of time outweighs the benefits resulting from it. If the judiciary is to protect the dignity of the individual, it must prohibit punitive segregation for an indefinite period of time.

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151. *Id.* at 629.