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Joan W. Howarth

University of Nevada, Las Vegas -- William S. Boyd School of Law

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NOTES

The Rights of Gay Prisoners: A Challenge to Protective Custody

Although increased judicial and public attention has been focused on the rights of prisoners and of gay men and women in recent decades, very little attention has been paid to the men and women who are both gay and in prison. The problems of these prisoners range from the refusal of prison officials to allow any gay literature (including religious materials),¹ to negative therapy programs which attempt to "cure" gays,² to parole denials based on homophobic psychiatrists' reports,³ to the gamut of ways that anti-gay attitudes affect adversely the gay prisoner's situation.⁴ The focus of this Note, however, is on the specific

1. See *Lipp v. Procnier*, 395 F. Supp. 871 (N.D. Cal. 1975). "Publications which call attention or identify inmates who accept homosexuality can, in our opinion, be detrimental to their safety as well as to the safety of others. For that reason, we have concluded that such publications should be prohibited." Letter from Norman Carlson, Director of the U.S. Bureau of Prisons, to Congressman Edward Koch (Dec. 10, 1976) (Letter on file in Southern California Law Review Office).

2. See generally Note, *Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment*, 49 S. CAL. L. REV. 880 (1976). See also, Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1626 (1974).

3. P. BUFFUM, *HOMOSEXUALITY IN PRISON* 26 (1972). "Because their behavior is now perceived as illness, homosexuals are subjected to more intensive treatment and often end up serving longer sentences than the average inmate because they do not respond, and perhaps appropriately so, to this form of treatment." *Id.* Cf. Smith, *Some Problems Encountered in Dealing With the Homosexual in the Prison Situation*, in *CORRECTIONAL CLASSIFICATION AND TREATMENT* 285, 293 (1975) (discussing the effect of segregation and close supervision on parole). See also *Warren v. Harvey*, No. 80-2034 (2d Cir., filed May 1, 1980) (plaintiff's homosexuality cited as stressful factor supporting decision to deny his motion for release from state mental hospital).

4. See, e.g., R. GIALLOMBARDO, *SOCIETY OF WOMEN: A STUDY OF A WOMEN'S PRISON* 44 (1966). Giallombardo found that 83.3% of 90 prison officials she questioned agreed with the statement, "Homosexuality is a sin against Nature and God." *Id.*

A survey conducted in 1969 by one of the major television networks reported that two out of three Americans viewed homosexuals with disgust, discomfort, or fear. Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527, 544 n.98 (1979). But a survey commissioned in 1976 by the New York Daily News indicated that 63% of those answering believed that homosexuals should not be subjected to discrimination. *Id.*

issues raised by the traditional method of dealing with homosexuals in prison: isolation from the general prison population. This traditional segregation often results in almost twenty-four hour-a-day confinement to a cell, which severely limits access to programs and opportunities normally enjoyed by prisoners.⁵

The rationales for segregating gay prisoners have rarely been closely examined. The original rationale was clearly punitive.⁶ A therapeutic justification has also been presented.⁷ Today, corrections officials justify segregation with a protection rationale; gay men are often the targets of harassment and the victims of sexual assault in prison.⁸ Although the dominant rationale for segregation has shifted, the deprivation suffered by the segregated gay prisoner remains the same. In as much as gay prisoners are said to be isolated for their own protection, an analysis of their situation requires discussion of the practice of protective custody in general. Gay men are not the only prisoners who are segregated for protective purposes; protective custody is used for many prisoners who are thought to be likely victims of prison violence for a wide variety of reasons, including having been convicted of particularly heinous crimes⁹ or having given testimony damaging to another inmate.¹⁰

This Note first discusses the history and current practice of segregation of gay prisoners¹¹ as well as the broader subject of protective custody,¹² and then outlines the judicial response to the problems of protective custody prisoners generally and gay prisoners specifically.¹³ This Note then critiques the judicial confusion and resulting reluctance to scrutinize these segregation policies.¹⁴ Specifically, the Note argues that constitutional due process requires the implementation of procedu-

5. See text accompanying notes 57-86, 92-117 *infra*.

6. See text accompanying notes 59-70 *infra*.

7. "An administrative segregation unit for men with serious problems of maladjustment, such as the problem of homosexuality, should be used as a place of confinement and treatment of those who are unable to adjust to the ordinary routine of the institutional program, until evidence of adjustment warrants return to the general population." AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 413 (1966 ed.) [Hereinafter cited as 1966 MANUAL]. See, e.g., P. BUFFUM, *supra* note 3, at 26; notes 71-76 and accompanying text *infra*.

8. See text accompanying notes 77-84 *infra*.

9. See, e.g., Wojtczak v. Cuyler, 480 F. Supp. 1288 (E.D. Pa. 1979).

10. See, e.g., Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975); Breeden v. Jackson, 457 F.2d 578 (4th Cir. 1972).

11. See text accompanying notes 57-85 *infra*.

12. See text accompanying notes 44-56 *infra*.

13. See text accompanying notes 86-117, 218-63 *infra*.

14. See text accompanying notes 118-80, 356-61 *infra*.

ral safeguards prior to any nonvoluntary assignment into protective custody.¹⁵ It also challenges the constitutionality of the segregation, protective or otherwise, of any prisoner solely on the basis of his or her status as a homosexual.¹⁶ Finally, this Note argues that the due process clause, the eighth amendment, and the equal protection clause of the Constitution require major changes in the treatment of all protective custody prisoners, and of gay prisoners in particular.¹⁷

Several factors combine to make an examination of the segregation of gay prisoners particularly timely. Public attitudes toward homosexuality are becoming increasingly tolerant.¹⁸ In recent years, gay men and women have successfully challenged many traditional religious and scientific perceptions about homosexuality.¹⁹ They have fought for the repeal of long-entrenched prohibitions against homosexual activity; sexual conduct between consenting adults of the same sex is now decriminalized in twenty-two states.²⁰ Furthermore, homosexual status is no longer an automatic bar to government security clearances²¹ or to naturalization as a U.S. citizen.²²

Judicial opinions have generally not kept pace with the changing attitudes reflected in the executive and legislative branches of government.²³ The Supreme Court, for instance, has refused so far to hear arguments on the constitutional issues implicated by state regulation of homosexual conduct.²⁴ Reflecting society's uneasiness towards homosexuality, judicial opinions interpreting the civil rights of gay men and women have reached widely varying results.²⁵ Some courts have recog-

15. See text accompanying notes 181-217 *infra*.

16. See text accompanying notes 118-80 *infra*.

17. See text accompanying notes 264-355 *infra*.

18. By comparison, the status of homosexuality was punishable by death in Colonial America. J. KATZ, *GAY AMERICAN HISTORY* 16-22 (1976).

19. See, e.g., Berzon, *Developing a Positive Gay Identity*, in *POSITIVELY GAY* 4-5 (1979); L. SCANZONI & V. MOLLENKOTT, *IS THE HOMOSEXUAL MY NEIGHBOR? ANOTHER CHRISTIAN VIEW* (1978).

20. These states include: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington, West Virginia, Wyoming and Vermont. *Private Sex Decriminalized In Vermont*, 5 *SEXUAL L. REP.* 9 (1979).

21. *Sexual Clearances Granted to Homosexual Men*, 4 *SEXUAL L. REP.* 50 (1978).

22. *Immigration & Naturalization—Homosexual Acts In Private—Good Moral Character*, 4 *SEXUAL L. REP.* 37 (1978).

23. See Coleman, *The Sexual Law Explosion: A Survey of Judicial and Legislative Developments in Sexual Law During the Past Decade*, 4 *SEXUAL L. REP.* 21, 33 (1978).

24. See Knutson, *Supreme Court Remains Aloof to Gay Rights*, 4 *SEXUAL L. REP.* 23 (1978).

25. *Compare*, *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970) ("Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and

nized the distinction between conduct and status.²⁶ "homosexuality is not a crime."²⁷ "Homosexuals are human beings; [they are] as much entitled to the protection and benefits of the laws and due process fair treatment as others."²⁸ But society's anti-gay attitudes²⁹ and confusion³⁰ about homosexuality appear to be heightened when dealing with gays in the peculiar situation of an enforced single-sex institution, which, of course, describes the vast majority of jails and prisons. Prison authorities have associated the control of rampant sexual activity, both voluntary and coerced, with the control of homosexual prisoners.³¹ Research indicates that this link is in error; the level of sexual activity among inmates (both male and female) is much too high to be attributed to the presence of homosexuals in the prison population.³² Furthermore, heterosexual men are the aggressors in most prison sexual assaults.³³

Attitudes concerning the rights of prisoners have also changed rapidly in recent years. Courts for many years followed a "hands-off" policy towards prisoners' rights, choosing instead to rely on prison officials' expertise and declining to interfere with internal prison administration.³⁴ The growing recognition that convicts do not leave all of their constitutional rights at the prison door has eroded this deferential position.³⁵ Since the landmark 1944 federal appeals decision of

obscene.") with *Gay Law Students v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (court equated publicly acknowledging sexual preference and working for gay rights with "political activity" protected by the California Labor Code, in holding that a privately owned public utility may not discriminate in employment because of sexual orientation).

26. See *Robinson v. California*, 370 U.S. 660 (1962).

27. *Rittenour v. District of Columbia*, 163 A.2d 558, 560 (1960).

28. *McConnell v. Anderson*, 316 F. Supp. 809, 814 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

29. See generally, G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* (1972).

30. See, e.g., Berzon, *supra* note 19, at 3-9.

31. See text accompanying notes 61-70 *infra*.

32. See text accompanying notes 61-65 *infra*.

33. See text accompanying notes 66-70 *infra*.

34. See Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795, Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C. R.—C. L. L. REV. 367 (1977); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

35. The changing attitude about prisoners' constitutional rights is reflected in statutes as well. For instance, in 1975 the California legislature repealed the "Civil Death" section of the Penal Code ("A sentence of imprisonment in a state prison for any term suspends all of the civil rights of the person so sentenced . . .") and replaced it with a statute reflecting concern for prisoners' rights ("A person sentenced to imprisonment in a state prison may . . . be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security" of the prison, etc.). CAL. PEN. CODE § 2600 (West Supp. 1975).

Coffin v. Reichard,³⁶ many courts have aggressively intervened to ensure that constitutional principles are not forgotten in the treatment of prisoners. For instance, courts have ordered an end to routine racial segregation (rejecting prison authorities' arguments that racial integration would lead to a breakdown of order),³⁷ and have found that certain specific conditions (such as overcrowding,³⁸ inadequate medical treatment,³⁹ physical abuse by guards,⁴⁰ and lack of exercise⁴¹) constitute cruel and unusual punishment, thus violating the eighth amendment. Recently, federal courts have found the entire Alabama and Arkansas prison systems in violation of the eighth amendment.⁴² Yet, judicial opinions concerning prison life generally fail to distinguish between prisoners whose true sexual preference is homosexual, heterosexual prisoners who engage in homosexual activity during incarceration, and prisoners who commit acts of sexual aggression. The use of the label "homosexuals" to describe all three groups has obscured the situation of true gay prisoners and has denied them the benefit of increased judicial activism on behalf of prisoners. Although very recent Supreme Court decisions have signalled a retreat from the Court's earlier activist stance regarding prisoners' rights,⁴³ prior decisions have established a body of constitutional principles that continue to protect prisoners. By applying constitutional principles to the practice of segregating gay prisoners in inferior conditions, this Note focuses on one specific aspect of the broader, largely unanswered question of what protections are required for prisoners who, for whatever reason, are thought not to fit into normal prison life.

36. 143 F.2d 443, 445 (6th Cir. 1944).

37. See *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968).

38. See, e.g., *Martinez Rodriguez v. Jiminez*, 409 F. Supp. 582, 586-87 (D.P.R.), *aff'd*, 537 F.2d 1 (1976).

39. See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976); *Woolsey v. Beto*, 450 F.2d 321 (5th Cir. 1971); *Sanders v. United States*, 438 F.2d 918 (5th Cir. 1971).

40. See, e.g., *Hutto v. Finney*, 437 U.S. 681 (1978); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).

41. See, e.g., *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d 854 (4th Cir. 1975).

42. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 78 (1978); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

43. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

I. PRISON ADMINISTRATION

A. ADMINISTRATIVE SEGREGATION

A well established and recognized aspect of prison control is the removal from the general prison population of assaultive, disruptive, or dangerous prisoners whose presence in the general population is thought to pose a threat to prison security. Conditions in punitive segregation, sometimes called solitary confinement or lockup,⁴⁴ have been the focus of a great deal of legislative⁴⁵ and judicial⁴⁶ attention. Although the conditions of punitive segregation vary from prison to prison, it typically entails being confined in a cell virtually twenty-four hours a day, with inferior meals and severe reductions in the personal property allowed.⁴⁷

Disruptive prisoners are not the only category of prisoner who are separated from the general prison population. Prison officials also separate prisoners who are in particular danger in the general population, a practice known as protective custody. Protective custody prisoners include those who have dangerous enemies within the prison population (for instance, because of damaging court testimony),⁴⁸ and those who are considered easy sexual targets.⁴⁹ Protective custody status is sometimes assigned at the prisoner's request, and sometimes without his or her consent.⁵⁰ The conditions of confinement of protective custody prisoners are often quite similar to those in which prisoners segregated for punishment find themselves.⁵¹ For example, protective custody conditions reported in *Doe v. Lally*⁵² included an end to movie, television, and recreation privileges, twenty-two hours a day in a cell, and the loss of the right to good time credits.⁵³ The protective custody

44. CALIFORNIA ASSEMBLY SELECT COMMITTEE ON PRISON REFORM AND REHABILITATION, ADMINISTRATIVE SEGREGATION IN CALIFORNIA'S PRISONS: ALIAS THE HOLE, LOCKUP, SOLITARY CONFINEMENT AND THE ADJUSTMENT CENTER (Sept., 1973).

45. *Id.*

46. *See* Wolff v. McDonnell, 418 U.S. 539 (1976) (protective safeguards required prior to punitive custody assignment); Diamond v. Thompson, 364 F. Supp. 659, 665 (M.D. Ala. 1973) (scrutiny of diet and exercise in punitive segregation).

47. *See, e.g.*, Davidson, *The Hole*, in JUSTICE & CORRECTIONS 461-64 (Johnston & Savitz eds. 1978).

48. *See, e.g.*, Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854; Breedon v. Jackson, 457 F.2d 578 (4th Cir. 1972).

49. *See* notes 77-82 and accompanying text *infra*.

50. *See* notes 283-92 and accompanying text *infra*.

51. *See* text accompanying notes 217-63 *infra*.

52. 467 F. Supp. 1339 (D. Md. 1979).

53. *Id.* at 1349 n.7.

conditions detailed in *Palmigiano v. Garrahy*⁵⁴ included no vocational training, no organized recreation, and almost total confinement within a dormitory of forty inmates.⁵⁵ The protective custody inmates were forced to do without exercise or visits for periods of two weeks or more. Some were placed in the hospital area near inmates with serious infectious diseases.⁵⁶

B. SEGREGATION OF GAY PRISONERS

Corrections officials have traditionally used segregation as a technique for dealing with homosexual prisoners. Although many modern prison systems do not isolate gay inmates, segregation is still standard procedure in many jails and prisons for both men⁵⁷ and women.⁵⁸ The dominant rationale for segregating male gay prisoners has shifted through the years from punitive, to therapeutic, to protective, although prison authorities have rarely enunciated their justifications clearly enough to make the changes precise. Since the justification for segregating gay prisoners is rarely articulated clearly, all three rationales are probably present in various degrees at various times.

Until recently, the dominant rationale for segregating gay prisoners was clearly punitive. Segregation stemmed not only from moral

54. 443 F. Supp. 956 (D.R.I. 1977), *remanded*, 599 F.2d 17 (1st Cir. 1979).

55. *Id.* at 970.

56. *Id.* at 976.

57. Sociologist Peter C. Buffum described the former practice at Soledad Prison, in California, where any known homosexuals were transferred to "queen's row," a separate cell block, where they: "were denied access to most of the recreational, educational, and vocational training facilities available to the general population. They were served meals segregated from the main population, and worked exclusively in the prison laundry. . . . So in actuality, they were in prison within prison." P. BUFFUM, *supra* note 3, at 26. Buffum reported that formal arrangement is no longer practiced at Soledad, but that now "many known homosexuals are transferred to . . . the hospital facility." *Id.* Anthony Scacco noted that the Manhattan House of Detention and the penal installation on Rikers Island both have lock-ups for men labelled as homosexuals. A. SCACCO, *RAPE IN PRISON* 103 (1975).

58. See K. BURKHART, *WOMEN IN PRISON* 374 (1973). Kathryn Burkhardt reports that "women classified as homosexuals when they enter jail are often discriminated against, especially in county jails, where they are often segregated from other women and not allowed to 'mingle.'" *Id.* at 373. Until 1976, for instance, "obvious homosexuals" at Los Angeles County's jail for women were housed in a separate cell block, known as the "daddy tank." They were locked into solitary confinement twenty-four hours a day except for work, and were barred from special programs. *Id.* Public pressure from Los Angeles lesbians and feminists forced the closing of daddy tank in 1976. *No Touching, No Human Contact—In Cell Block 4200*, *LESBIAN TIDE*, Nov./Dec. 1976, at 6; Cordova, *Prison Reform: New Freedoms for Daddy-Tanked Lesbians*, *LESBIAN TIDE*, Mar./Apr. 1977, at 6. Nevertheless, lesbian segregation continues in other areas of the country. BURKHART, *supra* at 373.

indignation⁵⁹ and ignorance about homosexuality,⁶⁰ but also from official perception that homosexuals presented a serious threat to security. The American Correctional Association's Manual of Correctional Standards for Jails, 1959 Edition, illustrated this fear:

Sex Deviates. The homosexual presents a serious problem to the jailer. The known homosexual should be segregated immediately, promptly, and completely from other inmates in the jail. The jailer should be under no illusions about the homosexual or a sex deviate. Complete isolation and at least segregation from other prisoners is the only method by which they may be rendered harmless within the jail. Otherwise, they should be fed and handled as any other inmate.⁶¹

The 1964 Jail Practices and Procedures Manual published by the California State Peace Officers Association illustrated similar alarm in its instructions about gay inmates. It advised that some homosexuals could be picked out by their mannerisms. "If, under close observation and subsequent questioning, they are found to be overt homosexuals, they should be segregated in a separate part of the institution where there will be no opportunity to contaminate other prisoners, particularly young prisoners."⁶²

References to segregation in order to render homosexuals harmless and prevent contamination presumably referred to fears that the homosexual prisoner would create problematic sexual activity among prisoners. In fact, consensual sexual activity is widespread in single-sex prisons for both men and women.⁶³ However, numerous studies indi-

59. At one time, officials at the Federal Penitentiary at Leavenworth would put a large yellow "D" (for degenerate) on the backs of prisoners discovered committing a homosexual act. C. VEDDER & P. KING, PROBLEMS OF HOMOSEXUALITY IN CORRECTIONS 14-15 (1967). Fifteen years ago, officials at Iowa's correctional facility for women would single out anyone they thought to be a lesbian and make her wear a yellow uniform, instead of the standard blue. K. BURKHART, *supra* note 58, at 375.

60. A standard manual for jail officials recognizes this confusion: "The jailer sees a wide variety of sex offenders, including exhibitionists, window peepers, child molesters, rapists, and homosexuals. *Despite popular belief*, these offenders are quite different from each other and present different problems." U.S. BUREAU OF PRISONS, THE JAIL: ITS OPERATION AND MANAGEMENT 92 (1970) (emphasis added) [hereinafter cited as JAIL MANUAL]. For an example of the ignorance and fears of prison officials, see VEDDER & KING, *supra* note 59, at 24. They warn that homosexual prisoners "present the officials with annoying administrative problems and . . . pose a constant threat to the community in which they live after release." *Id.*

61. AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 441-42 (1959 ed.) [hereinafter cited as 1959 MANUAL].

62. CALIF. STATE PEACE OFFICERS ASS'N, JAIL PRACTICES AND PROCEDURES 244 (1964). The Manual attempted to educate corrections officials about homosexuals: "True male homosexuals have the sexual instincts of women but the sexual organs of men . . . Homosexuals actually fall in love with other men. . . ." *Id.*

63. Researchers' estimates of the percentage of male inmates who engage in homosexual activity in prison range from 15%, 30-40%, 35%, 35-40%, 40%, and 40-50%, to a finding that 80-

cate that most prisoners who engage in sexual activities are heterosexuals whose homosexual activity in prison is a temporary adaptation to the prison environment;⁶⁴ thus, gay and lesbian prisoners represent only a small percentage of inmates involved in sexual activity. The notion that prison sexual activity is caused by the presence of homosexual prisoners is further challenged by findings that the relatively few truly homosexual prisoners prefer to relate to other gays.⁶⁵

Another reason for the expressed goal of rendering a homosexual harmless by means of segregation is the identification of gay prisoners with the well-known serious problem in men's prisons and jails of sexual assault and rape, which is generally referred to as "homosexual

90% of prisoners who had served three years in a maximum security prison of male inmates had engaged in homosexual behavior in prison. P. BUFFUM, *supra* note 3, at 12-13. Sexual activity is equally or more common at women's institutions. Homosexual practices were noted in reports on women's facilities as early as 1913 and 1929. R. GIALLOMBARDO, *supra* note 4, at 19 nn.13 & 14. More recently, sociologist Rose Giallombardo found that the correctional officers and the "square inmates" (those least involved with the sexual aspect of inmate culture) at one facility each estimated that 50-75% of the inmates were involved at some point in sexual activity with other inmates; the Associate Warden estimated 80%; inmates who were very much involved in the sexual activity estimated 90-95%. *Id.* at 151. David Ward and Gene Kassebaum estimated that at least 50% of inmates at the California Institute for Women at Frontera were sexually active at least once during their term of imprisonment. D. WARD & G. KASSEBAUM, *WOMEN'S PRISON: SEX AND SOCIAL STRUCTURE* 92 (1965). They reported that all groups at the prison indicated surprise that their figure was not higher. *Id.* at n.6.

64. Ward and Kassebaum estimated that only between 5-10% of the inmates involved in sexual activity were "true homosexuals"; the rest would return to heterosexual behavior after release. D. WARD & G. KASSEBAUM, *supra* note 63, at 96. See BUFFUM, *supra* note 3, at 15-16.

65. See, e.g., D. JARVIS, *INSTITUTIONAL TREATMENT OF THE OFFENDER* 92 (1978).

There are actually two different types of homosexuals among female offenders. The first group is rather small and includes women who were homosexual before they were committed. They had already found the "gay" lifestyle to be more satisfying, and they will return to it after release. For them, such relationships are a basic way of life. . . . [T]hey are happier if they can relate to another woman who also was homosexual before commitment.

Id.; see K. BURKHART, *supra* note 58, at 373.

Related to the mistaken idea that gays are responsible for the sexual activity in prisons is the attitude that a gay person in a single-sex institution has some sort of advantage over heterosexual inmates. One recent corrections text perpetuates that notion:

Another shortcut up the informal social ladder is available to offenders who are homosexual or homosexually inclined. When men are isolated from women for long periods of time, homosexuality may become acceptable. When this happens in prison, the control of sexual favors may become a source of power and a means of reward. For example, a homosexual inmate who plays the "female" sex role is called a "queen," a title of special status.

D. JARVIS, *supra*, at 86. The harsh reality of that "special status" is reported in A. DAVIS, *REPORT ON SEXUAL ASSAULTS IN THE PHILADELPHIA PRISON SYSTEM AND SHERIFF'S VANS* (1968). Davis reported that gay prisoners are "readily available as male prostitutes," but he detailed that the availability is created "by a combination of bribery, persuasion, and the threat of force." *Id.* at 4; see P. BUFFUM, *supra* note 3, at 17. These pressures face non-gay prisoners as well, particularly if they are slight, young, good looking, or effeminate. See notes 77-84 and accompanying text *infra*.

rape."⁶⁶ Scholarship in the field reveals, however, that "homosexual rapes" in prison are generally assaults by heterosexuals.⁶⁷ The Director of the Federal Bureau of Prisons recently issued a policy statement aimed at correcting this confusion about the role of homosexuals in prison rape:

[T]he use of the terms "homosexual assault" and "homosexual rape" to describe assaults or rapes committed by one prisoner on another is misleading. Through the use of such terms, the public is led to believe that these assaults are committed by persons who are homosexual. . . . [T]he vast majority of rapes and assaults are committed by persons who are not homosexual. . . .⁶⁸

This official statement is reinforced by the scholarship in the field, such as sociologist Anthony Scacco's finding that "the sexual assaults that occur within prisons and jails cannot be categorized as homosexual attacks, rather they are assaults by heterosexually-oriented males on other males for political reasons, *i.e.*, to show power or dominance over other human beings."⁶⁹ Alan J. Davis' report on sexual violence in the Philadelphia jail system noted that, "investigators were struck by the fact that the typical sexual aggressor does not consider himself a homosexual, or even to be engaging in homosexual activity."⁷⁰ The recognition that the gay prisoner is not the perpetrator of either the rampant consensual sex or of sexual violence among prisoners may be the cause of the general retreat in recent years away from an expressed punitive rationale for the segregation of gay prisoners.

The practice of segregating gay prisoners has also been justified

66. Public awareness of this problem was aroused by Philadelphia prosecutor Alan J. Davis' report to a Philadelphia court which concluded that "sexual assaults are epidemic in the Philadelphia Prison System." A. DAVIS, *supra* note 65, at 3. Davis found that "[v]irtually every slightly built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are overwhelmed and repeatedly 'raped' by gangs of inmate aggressors." A. DAVIS, *supra* note 65, at 17; see C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 380-81, 389 (1978); G. SYKES, SOCIETY OF CAPTIVES 95-99 (1958); see also Jacobs, *Prison Violence & Formal Organization*, in PRISON VIOLENCE 79 (A. Cohen, G. Cole & R. Bailey eds., 1976). "Intense racial conflict has profoundly increased the potential for interpersonal violence in prison. Homosexual rape particularly seems to be characterized by its interracial expression." *Id.*; see A. DAVIS, *supra* note 65, at 34.

Although isolated incidents of physically coerced sex have been reported in women's prisons (see, e.g., *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974)), authorities do not recognize it as a widespread problem. See K. BURKHART, *supra* note 58, at 381, 384; *Poe v. Weiner*, 386 F. Supp. 1014, 1021 (M.D. Pa. 1974).

67. See notes 68-70 and accompanying text *infra*.

68. U.S. Bureau of Prisons Policy on Reporting Rapes, 4 SEXUAL L. REP. 30 (1978).

69. A. SCACCO, *supra* note 57, at 103-04.

70. A. DAVIS, *supra* note 65, at 37; see P. BUFFUM, *supra* note 3, at 15-16.

during the past thirty years by a therapeutic rationale. Much of the literature of the corrections field has tended to characterize homosexuality as a psychological or medical problem.⁷¹ The 1959 and 1966 editions of the American Correctional Association's Manual of Correctional Standards described the "problem of homosexuality" as a "serious problem of maladjustment,"⁷² and recommended a segregation unit for such men.⁷³ The 1970 National Sheriff's Association Manual on Jail Administration recommended segregation and treatment of homosexuals.⁷⁴

Although this therapeutic rationale is presented in some literature in current use in the corrections field, the idea that homosexuality is a mental illness is no longer accepted by the mental health field.⁷⁵ Such techniques as neurosurgery, electric shock, aversion therapy, and prolonged psychoanalysis have been used to stop homosexual activity, but a change in sexual preference is much harder, perhaps impossible, to produce.⁷⁶ Thus, any attempt by prison officials to "correct" homosexuality is not simply a major intrusion into the prisoner's privacy and autonomy, but is also doomed to failure.

Thus, the premises of both the punitive and therapeutic segregation of gay prisoners have been severely shaken by current findings about homosexuality in general and prison life in particular. In fact, neither punishment nor treatment is the current dominant rationale for the continuing segregation of male gay prisoners; a protective rationale has now been overlaid upon the traditionally punitive and/or therapeutic practice. Corrections authorities now claim that gay prisoners require special treatment, often including segregation, because they are

71. See, e.g., Loveland, *Classification in the Prison System*, in CONTEMPORARY CORRECTION 91, 97 (P. Tappan ed. 1951) (discusses transfer of inmates "requiring special medical and psychiatric treatment or training," including "homosexuals, narcotic addicts, and others"); Fuller, *Medical Services*, in CONTEMPORARY CORRECTION, *supra*, at 181-82 (prisoner seduced into homosexual acts is likely to suffer a "permanent moral degeneration" and upon release become a "confined sex pervert").

72. 1959 MANUAL, *supra* note 61, at 245; 1966 MANUAL, *supra* note 7, at 413.

73. 1959 MANUAL, *supra* note 61, at 245; 1966 MANUAL, *supra* note 7, at 413.

74. NATIONAL SHERIFF'S ASS'N, MANUAL OF CORRECTIONAL STANDARDS app. C., X-54 (1970). "Special instructions should be included in the jail rules concerning the segregation, observation, and treatment of sex deviates, and the prevention of homosexual activities." *Id.*

75. For a history of the American Psychiatric Association and the American Psychological Association decisions that homosexuality is not mental illness, see L. SCANZONI & V. MOLLENKOTT, *supra* note 19, at 82-86; Berzon, *supra* note 19, at 5.

76. See W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 227 (1973); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1626 (1974).

likely targets of sexual attacks. In his recent policy statement refuting the mistaken idea that prison rapes are committed by homosexuals,⁷⁷ the Director of the Federal Bureau of Prisons pointed out that, rather than committing the assaults, "homosexuals are frequently the victims."⁷⁸ The victimization of gay men in prison has been noted by some prison sociologists, and has been presented as a reason for segregation. Anthony Scacco, for instance, recommends classification and separation of potential rape victims, in particular known homosexuals, although he acknowledges the limitations of this policy: "These types of jail-within-a-jail lockup may be a temporary answer toward protecting those in prison from sexual assault; however, it is a rather lugubrious remedy when one considers that, in most instances, heterosexually oriented males are the ones responsible for sexual attacks on other males."⁷⁹ Alan Davis' Philadelphia study also reported that likely victims of sexual assault can be identified; the victims he studied looked young for their age, were less athletic, less physically coordinated, more handsome, and more effeminate than the average prisoner.⁸⁰ Expert testimony described in *Doe v. Lally*⁸¹ identified the typical victim of sexual assault in a Maryland prison as young, slight, and newly admitted.⁸² The profile of a typical victim fits a stereotype of a gay man, but there are, of course, countless gay prisoners who are not slight, handsome, or effeminate.⁸³ There are many victims who are not gay, and there are many gay prisoners who are not victims. Gay rights advocates suggest that in light of the history of misinformation in the corrections field concerning gay prisoners, categorical assumptions about their role as victims should also be carefully examined.⁸⁴

In summary, prison officials have dealt with inmates who are

77. See notes 68-70 and accompanying text *supra*.

78. *U.S. Bureau of Prisons Sets Policy on Reporting Rapes*, *supra* note 68.

79. A. SCACCO, *supra* note 57, at 103-04.

80. A. DAVIS, *supra* note 65, at 35.

81. 467 F. Supp. 1339 (D. Md. 1979).

82. *Id.* at 1349. See *Withers v. Levine*, 615 F.2d 158 (4th Cir. 1980).

83. See text accompanying notes 171-72 *infra*.

84. See, e.g., Kleinberg, *Gay Prisoners: Literacy, Literature, Liberation*, CHRISTOPHER STREET, Jan. 1979, at 23.

Director Carlson uses as his major argument for the suppression of gay literature the supposition that the materials will "mark" the recipient, singling him out for even more aggravated assault. . . . [F]indings are based on the observation that gay men are harassed and sexually molested in prison, as any gay prisoner will confirm. But the report is inaccurate because it is euphemistic. It does not mean that gay men will be subject to rape if they're identified as gay: witness Roberto, who is just one of the many gays who were never assaulted in prison. It means effeminate or feminine or youthful or slight gay men, it means non-macho or non-violent gay men will be easier marks.

Id. at 29.

known or suspected to be homosexual with the traditional method of handling problem inmates: segregation from the general population. Although punitive and therapeutic rationales for the segregation have been articulated, the dominant purpose today is protection. Because the purpose of the segregation of gay men in prison is protection, the analysis of their situation is to a great extent an analysis of the practice of protective custody. As discussed earlier, gay prisoners are just one of several different categories of prisoners held in protective custody.⁸⁵ The deprivations which gay prisoners endure for their own protection are often the same as the deprivations that unpopular prisoners, or inmates who have given dangerous testimony, must endure.

The basic problem shared by all protective custody prisoners, including segregated gay prisoners, is that, through no fault of their own, they are confined in conditions greatly inferior to the conditions of the general prison population. There has not yet been any significant judicial inquiry into the specific constitutional issues raised by the segregation of gay prisoners.⁸⁶ Although there has been some judicial analysis of protective custody issues, a coherent framework for constitutional analysis of protective custody has not been developed by the courts. The protective custody system (as applied to gay and non-gay prisoners alike) is vulnerable to attack in two basic areas: the criteria and procedures for assignment into protective custody, and the conditions of protective custody confinement once it has been imposed.

II. REFORM OF CRITERIA AND PROCEDURES FOR PROTECTIVE CUSTODY ASSIGNMENT

A. SELECTION FOR PROTECTIVE CUSTODY

One of the major problems with current protective custody practice is the lack of regular procedures to determine who is to be confined in protective custody. In the paradigm situation, protective custody confinement is available upon request to any inmates who fear for their safety in the general prison population. In *Breeden v. Jackson*⁸⁷ and *Sweet v. South Carolina Department of Corrections*,⁸⁸ for example, the plaintiff prisoners not only consented to, but in fact requested protective custody. There is no need for procedural safeguards prior to protective custody placement initiated by a prisoner, although periodic re-

85. See text accompanying notes 9-10 *supra*.

86. See text accompanying notes 90-117 *infra*.

87. 457 F.2d 578 (4th Cir. 1972); see text accompanying notes 218-28 *infra*.

88. 529 F.2d 854 (4th Cir. 1975); see text accompanying notes 229-49 *infra*.

evaluations are necessary to ensure that protective custody continues to be by choice.⁸⁹

Protective custody status, however, is not always by request. Large numbers of prisoners are confined in protective custody without their consent. One of the largest identifiable categories of non-consenting protective custody prisoners consists of men who have been segregated into inferior conditions because they have been identified as homosexual. The automatic segregation of homosexuals as a class with inferior conditions raises serious equal protection and due process problems. Even where the protective custody assignment is made on an individualized basis, procedural due process issues are raised whenever prisoners are placed in protective custody (because they are gay or for some other reason) without their consent, or, in the alternative, whenever requests for protective custody are denied.

B. AUTOMATIC SEGREGATION OF HOMOSEXUALS: REVIEW AND CRITIQUE OF CASE LAW

Although many of the constitutional arguments challenging the segregation of gay men in prison are equally applicable to all protective custody prisoners, special considerations are raised when the gay prisoner is segregated because of his homosexuality. There is no coherent judicial theory or even any substantial number of cases dealing directly with the constitutional issues surrounding the routine segregation of gays in jails and prisons.⁹⁰ The cases generally assume that gay men are segregated, without examining the reasons for the routine. Changing attitudes towards homosexuality and gay rights⁹¹ are reflected in some of the more recent opinions, however, indicating that courts are now ready to examine the situation of incarcerated gay men and lesbians for the first time.

A description of each of the handful of reported cases discuss the segregation of gay prisoners is an appropriate starting place. The plaintiffs in *Smith v. Washington*,⁹² inmates at the Washington, D.C. jail, filed a section 1983⁹³ action alleging constitutional deprivations be-

89. See ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, COMPENDIUM OF MODEL CORRECTIONS LEGISLATION AND STANDARDS, IV-64 (1975) [hereinafter cited as COMPENDIUM]. "The cases of inmates . . . in protective custody should be reviewed at least every two weeks." *Id.*

90. See text accompanying notes 92-117 *infra*.

91. See text accompanying notes 18-28 *supra*.

92. 593 F.2d 1097 (D.C. Cir. 1978).

93. 42 U.S.C. § 1983 (1970).

cause of their segregation into a cellblock for homosexuals. Their action withstood a motion for summary judgment on a jurisdictional challenge. The Department of Corrections claimed that the prisoners' allegations that accused homosexuals were segregated in inferior conditions resulting in reduced "good time" credit without adequate procedural safeguards did not satisfy the jurisdictional requirement of \$10,000 in damages. The court disagreed. This decision is a positive signal for successful attacks on the practice of routine segregation of gay prisoners.

More typical are cases where the segregation of "known homosexuals" is mentioned in passing, but is not the subject of the court's attention. In *McCray v. Bennett*,⁹⁴ the court found that due process required a meaningful bi-monthly review of the classifications of all prisoners segregated for punitive or security reasons,⁹⁵ but apparently excepted the inmates in the segregation unit who had requested "safekeeping" or were "known homosexuals."⁹⁶

Careful scrutiny of the factual basis for special treatment of gays in prison is particularly important because unexamined assumptions have resulted not only in the widespread routine segregation of gay men and lesbians, but also in equally unexamined assumptions that homosexuals cannot assert simple due process claims available to other prisoners. In *Diamond v. Thompson*,⁹⁷ the court made a reference to homosexual prisoners that illustrates this point. The court set out procedures required for due process prior to the transfer of an inmate out of the general population into segregation.⁹⁸ It then named two categories of inmates who do not need these safeguards: those who have escaped from prison and "admitted homosexuals." The court noted that an "admitted homosexual can be segregated for his safety or the safety of other inmates without elaborate procedural safeguards,"⁹⁹ but that "such inmates should at least be notified of the reasons for transfer."¹⁰⁰ The rationale stated was "reasonableness,"¹⁰¹ but it was not explained. Presumably the safeguards are unnecessary because the "admitted homosexual" has already admitted the offense for which he is being segre-

94. 467 F. Supp. 187 (M.D. Ala. 1978).

95. *Id.* at 193.

96. *Id.* at 190.

97. 364 F. Supp. 659 (M.D. Ala. 1973).

98. *Id.* at 665. The procedures included written notice of the charges against him, and an opportunity to be heard, present witnesses, and cross-examine adverse witnesses. *Id.*

99. *Id.*

100. *Id.* at 665 n.3.

101. *Id.* at 665.

gated, yet the court required no showing that the inmate's status as homosexual actually necessitated segregation.

Two New York cases have raised the particular problems of gay prisoners whose segregation denies them access to rehabilitation programs. *Ex rel. Ceschini v. Warden*¹⁰² raised issues surrounding the segregation of gays in prison, but did not discuss them. Ceschini had been convicted in 1965 of two misdemeanors. Each of the two violations would have subjected him to not more than a one year sentence under the Penal Law. However, he was sentenced under the Correction Law to concurrent indefinite terms in the New York City Penitentiary of up to three years, depending on his progress towards rehabilitation. Ceschini complained that because he was a homosexual, he was segregated from the other prisoners and had, therefore, been deprived of "participating in activities, such as school, learning a trade, which would contribute to [his] rehabilitation."¹⁰³ The court granted a hearing to determine whether Ceschini was receiving rehabilitation treatment, noting that the purpose of the Correction Law was rehabilitation, not punishment.¹⁰⁴

*People v. Williams*¹⁰⁵ presented similar circumstances. Williams had been sentenced to the New York City Reformatory for a maximum of three years. He filed a writ of habeas corpus alleging that because he was a homosexual and thus segregated in the City Reformatory, he was denied access to rehabilitative programs. The writ was successful in forcing an order for resentencing. After hearing arguments, the trial court changed his sentence to the New York State Reformatory, a sentence which carried a maximum of four years. Williams appealed that resentencing, relying on *North Carolina v. Pearce*,¹⁰⁶ which requires that if a resentence after appeal is harsher than the original sentence, a valid reason for the change must be given, a rule designed to prevent vindictiveness on the part of the trial judge.

The appeals court distinguished prison sentences (as in *Pearce*) from reformatory sentences (as in this case) and upheld the new four year sentence.¹⁰⁷ This order was reversed unanimously less than four

102. 30 A.D.2d 649, 291 N.Y.S.2d 200 (1968).

103. *Id.* at 649, 291 N.Y.S.2d at 201-02.

104. *Id.* at 649, 291 N.Y.S.2d at 202.

105. 43 A.D.2d 531, 349 N.Y.S.2d 86 (1973), *rev'd*, 34 N.Y.2d 657, 355 N.Y.S.2d 578 (1974).

106. 395 U.S. 711 (1969).

107. 43 A.D.2d at 531, 349 N.Y.S.2d at 88. "These periods are not sentences fixed by the courts but rather the outside limits that a correctional authority may take in its rehabilitative

months later by the New York Court of Appeals,¹⁰⁸ which found the lower court decision "violative of the spirit and purpose of the reasoning" in *Pearce*.¹⁰⁹ In its very short (two paragraph) opinion the court reasoned that, "[i]t suffices that the prisoner was not responsible for the conditions which brought about, from his point of view, a more severe sentence."¹¹⁰

Another New York case, *Ex rel. Price v. Warden*,¹¹¹ concerned a prisoner imprisoned on Riker's Island who refused to be transferred to segregated homosexual housing.¹¹² As a result, he was placed first in punitive segregation and then in administrative (non-punitive, in this case) segregation. The court found that due process was substantially afforded, noting that hearings preceded the transfer, that Price's record indicated that he was homosexual, and that the transfer was made to deal with an exigent situation of threatened violence.¹¹³ Of particular interest here is the two-judge dissent, which faced not only the question of the procedural due process of Price's segregation, but also "[t]he more complex issue . . . [of] whether respondent's General Order No. 33, segregating homosexuals from the inmate population at large is unconstitutional on its face"¹¹⁴

The dissenters noted that the deputy warden testified that the reason for the segregation of homosexuals was that "they are a detriment to the good order of the institution,"¹¹⁵ a conclusion based solely on his own long-time experience in the prison system. After pointing out that other systems, including New York State correctional facilities, did not segregate homosexuals, the dissenters found "no legal justification for summarily compelling such segregation under the guise of 'security'"¹¹⁶ The dissent called the differences in the conditions between the homosexual and general population of "questionable legality" and noted, "it clearly appears that defendant was being 'punished' for status

efforts." *Id.* at 531, 349 N.Y.S.2d at 87. Two judges raised a strong objection. *Id.* at 532, 349 N.Y.S.2d at 88 (Lane, J., dissenting).

108. 34 N.Y.2d 657, 311 N.E.2d 650, 355 N.Y.S.2d 578 (1974).

109. *Id.*

110. *Id.* Although the court was dealing here with a harsher sentence in terms of time, the observation is equally relevant to sentences which are particularly harsh for gay prisoners in terms of conditions.

111. 48 A.D.2d 275, 369 N.Y.S.2d 130 (1975).

112. *Id.* at 276, 369 N.Y.S.2d at 131.

113. *Id.* The appeal of this decision was dismissed because Price had been released. 37 N.Y. 804, 337 N.E.2d 616, 375 N.Y.S.2d 112 (1975).

114. 48 A.D.2d at 277, 369 N.Y.S.2d at 132 (Murphy, J., dissenting).

115. *Id.* at 278, 369 N.Y.S.2d at 133-34.

116. *Id.* at 279, 369 N.Y.S.2d at 134.

rather than for any overt criminal act."¹¹⁷

C. PROPOSED ANALYSIS OF THE SEGREGATION OF GAYS

Although courts have generally avoided dealing directly with the constitutional issues surrounding the segregation of gay prisoners, the dissent in *Price* shows the direction that such an analysis should take. First, the rationale for the segregation must be examined. In *Price*, the deputy warden presented no evidence except his personal experience that gays were a "detriment" to order as support for the compelled segregation of gay prisoners.¹¹⁸ As discussed earlier, the blame for rampant sexual activity¹¹⁹ and sexual assaults¹²⁰ in prisons should not be attributed to gay prisoners. The current rationale for segregation of male gay prisoners is protection, not punishment.¹²¹ For that reason, many arguments advanced for improved conditions¹²² and procedures¹²³ for segregated gay prisoners generally are equally valid for all protective custody prisoners. Principles of eighth amendment jurisprudence,¹²⁴ due process,¹²⁵ and penological policy considerations¹²⁶ compel improvements in the conditions of confinement of all protective custody prisoners including many gay prisoners. However, when status (as homosexual) alone has been enough to force a prisoner into segregated confinement raises new substantive due process¹²⁷ and equal protection¹²⁸ arguments as well.

1. *Equal Protection*

Equal protection analysis requires an examination of the category of people differentiated by a state action and the relative importance of their deprivation. Varying standards for testing the state's interest in the regulation are applied depending on the nature of the group being distinguished and the severity of the deprivation. Traditionally, a regu-

117. *Id.*; cf. *Robinson v. California*, 370 U.S. 660 (1962) (imprisonment for status is cruel and unusual punishment in violation of Fourteenth Amendment).

118. 48 A.D.2d at 278, 369 N.Y.S.2d at 133-34.

119. Gay men are only a small minority of sexually active prisoners. See text accompanying notes 63-65 *supra*.

120. Gay men are potential victims (not perpetrators) of sexual assaults in prison. See text accompanying notes 77-85 *supra*.

121. See *id.*

122. See text accompanying notes 264-355 *infra*.

123. See text accompanying notes 181-217 *infra*.

124. See text accompanying notes 316-24, 342-55 *infra*.

125. See text accompanying notes 181-217, 299-315 *infra*.

126. See text accompanying notes 332-40 *infra*.

127. See text accompanying notes 169-80 *infra*.

128. See text accompanying notes 129-68 *infra*.

latory classification that impairs individual autonomy is upheld if the classification is rationally related to the achievement of a legitimate state interest.¹²⁹ If, on the other hand, the state action affects a "fundamental" right or creates a "suspect" category, the regulation will be carefully scrutinized for the required "compelling state interest."¹³⁰ The "compelling state interest" standard is so high that its application almost automatically dooms the regulation.¹³¹ But if the group adversely affected by the regulation has no special claims for protection, and their affected interests are not deemed to be fundamental, the standard is very low, and practically guarantees that the regulation will be upheld.¹³² The Supreme Court has also applied an intermediate standard of review for cases of discrimination against a somewhat suspect or "sensitive" class even though "fundamental" interests are not at stake.¹³³

Although the Supreme Court has not yet viewed homosexuals as a suspect group, Professor Lawrence Tribe has suggested that homosexuality eminently satisfies the criteria of "suspectness" articulated by the Supreme Court in *Mathews v. Lucas*,¹³⁴ namely that it is "determined by causes not within the control of the . . . individual,"¹³⁵ and that it "bears no relation to the individual's ability to participate in and contribute to society."¹³⁶ The Court identified a "suspect class" as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹³⁷ The history of gay people shows a strongly entrenched tradition of discrimination and disgrace,¹³⁸ and although gay men and lesbians have scored significant political victories recently, the entry of known homosexuals into the political arena at

129. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); see Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 698-99 (1977).

130. *Dunn v. Blumstein*, 405 U.S. 330 (1971); *Graham v. Richardson*, 403 U.S. 365 (1971); see Bice, *supra* note 129, at 693-707.

131. Bice, *supra* note 129, at 694.

132. See Bice, *supra* note 129, at 698-702.

133. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-31, at 1089 (1978).

134. 427 U.S. 495 (1976).

135. *Id.* at 505.

136. *Id.* L. TRIBE, *supra* note 133, at 944-45 n.17; see Chaitin & Lefcourt, *Is Gay Suspect?*, 8 LINC. L. REV. 24 (1973); Friedinan, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527, 556-58 (1979).

137. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

138. See generally, KATZ, *GAY AMERICAN HISTORY* (1976).

any level still requires a degree of courage.¹³⁹

The Supreme Court has generally applied a "hands-off" policy concerning gay rights, refusing to overturn both anti-gay and pro-gay decisions.¹⁴⁰ Nevertheless, the susceptibility of homosexual status to classification as suspect has crept into dictum of at least one District Court opinion. In *Acanfora v. Board of Education of Montgomery County*,¹⁴¹ the court found that although the fact that a teacher was gay was not sufficient grounds to justify his transfer or dismissal, when the teacher made radio and television appearances sparking controversy beyond the needs of his defense, the school board's refusal to renew his contract was neither arbitrary nor capricious. The court noted, however, that: "Corollary to the proposition that ordered liberty protects private, consenting, adult homosexuality is the notion that discrimination directed at such activity is 'suspect' under the Equal Protection clause of the Fourteenth Amendment."¹⁴² The court pointed to the opinion of four judges in *Frontiero v. Richardson*¹⁴³ that sex is a suspect classification, and commented, "While from this, it does not necessarily follow that sexual preference is similarly 'suspect' as a classification, the broad thrust of the opinion of the court substantially supports extrapolation"¹⁴⁴

Although homosexual status in theory fits the criteria for "suspect classification," the Supreme Court is not likely to afford gay people the protection of strict scrutiny in the near future.¹⁴⁵ The court, however, has developed a middle-range "sensitive classification" which triggers an intermediate review.¹⁴⁶ The court has placed such groups as aliens¹⁴⁷ and illegitimates¹⁴⁸ into this category. Professor Tribe described a sensitive class: "Whether or not the groups in question might qualify for treatment as 'discrete and insular minorities,' they bear

139. See, e.g., N.Y. Times, Nov. 28, 1978, § 2, at 13, col. 3 (Harvey Milk, first acknowledged gay San Francisco supervisor, slain). See generally OUT OF THE CLOSETS—VOICES OF GAY LIBERATION (K. Jay & A. Young eds.).

140. See Knutson, *supra* note 24, at 23.

141. 359 F. Supp. 843 (D. Md. 1973), *aff'd in part and rev'd in part*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

142. *Id.* at 852. The court had noted: "In this context, the time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests. Intolerance of the unconventional halts the growth of liberty." *Id.* at 851.

143. 411 U.S. 677 (1973).

144. 359 F. Supp. at 852.

145. See Knutson, *supra* note 24.

146. See Bice, *supra* note 129, at 702-07.

147. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1975).

148. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977).

enough resemblance to such minorities to warrant more than a casual judicial response when they are injured by law."¹⁴⁹ Gay men and lesbians are more likely to be afforded this middle level of protection. So far, however, anti-gay discrimination cases have been decided on grounds other than equal protection.¹⁵⁰

Equal protection analysis also requires an examination of the nature of the interests at stake. Gay prisoners' complaints range from relatively minor ones, such as the monitoring of gay prisoners' showers,¹⁵¹ to the common problem of gays being kept in solitary confinement equivalent to punitive segregation.¹⁵² Such separate confinement can result in gay prisoners being deprived of access to rehabilitative programs,¹⁵³ and it can result in limited access to fundamental interests, such as access to the courts (by means of library privileges)¹⁵⁴ or religious practice.¹⁵⁵ The infringement of a fundamental interest triggers the protection of strict scrutiny.¹⁵⁶ If the interests at stake are deemed important, although not necessarily fundamental, an intermediate review can be triggered.¹⁵⁷

149. L. TRIBE, *supra* note 133, § 16-31, at 1090.

150. *See, e.g.*, *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1976); *Burton v. Cascade School Dist.*, 512 F.2d 850 (9th Cir. 1975); *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977); *Gay Students Org. v. Bonner*, 367 F. Supp. 1088 (D.N.H. 1974).

151. *Poe v. Werner*, 386 F. Supp. 1014 (M.D. Pa. 1974).

152. *See* text accompanying notes 264-67 *infra*.

153. *See, e.g.*, *People v. Williams*, 43 A.D.2d 531, 349 N.Y.S.2d 86, *rev'd on other grounds*, 34 N.Y.2d 657, 355 N.Y.S.2d 578 (1973); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 291 N.Y.S.2d 200 (1968); text accompanying notes 274-82 *supra*.

154. *See Bounds v. Smith*, 430 U.S. 817 (1977).

155. *See, e.g.*, *Wojtczak v. Cuyler*, 480 F. Supp. 1288 (E.D. Pa. 1979).

156. *See Bice, supra* note 129, at 693-702.

157. *See, e.g.*, *United States Dep't of Agriculture v. Murry*, 413 U.S. 508 (1973); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

Professor Tribe has identified a third, less explicit consideration of the court in deciding whether to scrutinize the government regulation at the intermediate level. "If a rule is imbedded in a setting characterized by institutional rigidity to change, so that shifting social and moral norms are less likely to be reflected in modifications of the rule, the propriety and probability of intermediate scrutiny both increase." L. TRIBE, *supra* note 133, § 16-31, at 1091. "[I]ntermediate review . . . will be most appropriate when the legislative and administrative processes seem systematically resistant to change." *Id.* at 1091-92. The refusal of many prison authorities to integrate their prisons racially without court interference is just one of many examples in the history of prison reform that point to the applicability of this consideration to the situation of gays in prison. *See, e.g.*, *McClelland v. Sigler*, 327 F. Supp. 829 (D. Neb. 1971), *aff'd per curiam*, 456 F.2d 1266 (8th Cir. 1972); *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968).

The *McClelland* district court stated:

Threats of recalcitrant prisoners whose racial prejudices are erected to defy the constitutional rights of black prisoners need to be quashed. The prisoners who threaten violence,

Identification of homosexuals as a "sensitive" class requires that the state's purposes in segregating gay prisoners stand up to at least an intermediate level of scrutiny, whatever the interests at stake. The chief rationale for the confinement (or other special conditions) of gay prisoners is prison security, although that purpose has been largely unexamined by the courts.¹⁵⁸ The one judge who has questioned the rationale for compelled segregation of gay prisoners found the official's explanation of the policy ("they are a detriment to the good order of the institution")¹⁵⁹ woefully inadequate.¹⁶⁰ The tradition of segregation of gay men and lesbians was founded on fears and misconceptions about homosexuality.¹⁶¹ Literature of the corrections field and accounts of prison experiences indicate that the traditional punitive attitude toward gays is still very much in evidence.¹⁶² Any special treatment of gay prisoners needs to be carefully scrutinized, then, to be sure that the hidden rationale for the treatment is not in fact punishment for the status of being gay.¹⁶³

As discussed earlier, the current dominant rationale for the segregation of male gay prisoners is protection from sexual assault.¹⁶⁴ Placement in protective custody has traditionally been based on an assessment of an individual prisoner's need for protection, and has been assigned at the request of the prisoner.¹⁶⁵ But segregation of gay prisoners has been accomplished with special rules putting gay prisoners, as a group, in a special class.¹⁶⁶ Yet there is evidence that some, but not all, gay prisoners fit the pattern of being likely targets of sexual assault.¹⁶⁷ More individualization of selection is a standard remedy for equal protection infirmities. Prison officials could accommodate security needs without classifying all gays into a special category by instituting more precise procedures for individualized determinations of assignment into protective custody, using such factors as age, weight,

rather than those who seek their right to nondiscriminatory treatment, should be the ones to feel the weight of the consequences of their overt bigotry.

327 F. Supp. at 834.

158. See text accompanying notes 90-117 *supra*.

159. 48 A.D.2d at 278, 369 N.Y.S.2d at 133-34; see text accompanying notes 111-17 *supra*.

160. *Id.*

161. See text accompanying notes 59-84 *supra*.

162. See, e.g., Lemmond, *Charges of Abuse and Rape at New Mexico State Prison*, Aug.-Sept., 1978, in UNITY 6; text accompanying notes 59-84 *supra*.

163. See *ex rel.* Price v. Warden, 48 A.D.2d at 278-79, 369 N.Y.S.2d at 133-34.

164. See text accompanying notes 77-84 *supra*.

165. See text accompanying notes 87-88 *supra*.

166. See text accompanying notes 57-85 *supra*.

167. See text accompanying notes 77-84 *supra*.

and strength. Certainly a prisoner's status as homosexual could be a weighty factor in support of his request for protective custody. If the prisoner does not seek protective custody, the same procedural safeguards that accompany possible assignment into punitive custody should be triggered by a protective custody assignment.¹⁶⁸

2. *Substantive Due Process*

Due process principles offer an alternative ground for invalidation of automatic segregation of gay prisoners. As discussed previously, any punitive or therapeutic segregation lacks credible justification, leaving it open to attack even under a deferential, minimum rational basis standard. Protection is now the common rationale for the segregation of gay prisoners.¹⁶⁹ Although it arises in the equal protection analysis, the problem of a lack of correlation between a prisoner's sexual preference and the likelihood of his becoming a victim is also a substantive due process issue. Substantive due process requires that a regulation that intrudes on a person's autonomy must be rationally related to a legitimate state interest.¹⁷⁰ Protection is the only defensible rationale for the segregation of many gay men in prison, but it does not seem to be a defensible rationale for the segregation of *all* gay men in prison. Research indicates that inmates who are young, handsome, non-athletic, slight, and/or effeminate are likely targets of assault.¹⁷¹ The description of a likely victim thus fits in several ways the stereotype of a gay man. It could be, then, that prison officials have used the term "homosexual" to identify effeminate men, who they marked as likely victims. Effeminacy is not a rational determinant of homosexuality, however; research indicates that only between ten to fifteen percent of the male gay population evince effeminate characteristics.¹⁷² Thus, the majority of gay inmates do not fit the mold of likely potential victims.

168. See text accompanying notes 181-217 *infra*.

169. See text accompanying notes 77-84 *supra*.

170. See Bice, *supra* note 129, at 707-11.

171. See notes 80-84 and accompanying text *supra*.

172. Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687, 702 (1973); see ABA COMM'N ON CORRECTIONAL FACILITIES AND SERVICES, MEDICAL AND HEALTH CARE IN JAILS, PRISONS AND OTHER CORRECTIONAL FACILITIES 35-36 (1974):

Appearances May Deceive. Contrary to popular belief, it is not possible to identify a homosexual by his appearance. All too often we tend to follow uninformed and prejudiced opinion and consider those persons to be homosexual whose walk, gestures, and way of talking seem to be feminine. Slimness and a delicate appearance are also mistakenly considered signs of homosexuality. The jailer must recognize his own prejudices and not make the mistake of considering all slim, youthful prisoners as homosexual. The consequences to the prisoner can be very serious.

The question for those prisoners is whether special rules which require their segregation solely because they are gay have any relationship to the goal of reducing prison violence. In *Bono v. Saxbe*,¹⁷³ the court held that efforts to determine whether an inmate would be able to function in the prison setting violated substantive due process for prisoners who were separated based on the crime for which they were convicted, because there was no correlation between that criterion and the harm to be prevented.¹⁷⁴ A blanket assertion that gay prisoners need protective segregation is vulnerable to the same attack. Thus, the analysis of the due process rights of any gay prisoner requires an examination of the rationality of the regulations as applied to that prisoner after the stereotypes are stripped away.

Although courts have not yet addressed this issue with regard to gay prisoners, analogous reasoning in an employment case is worth noting. In *Saal v. Middendorf*,¹⁷⁵ the court found that an automatic ban of all homosexuals from the Navy was "irrational and capricious" as applied to the plaintiff,¹⁷⁶ and thus violative of her fifth amendment due process rights. (The court cited "serious equal protection problems"¹⁷⁷ that it did not reach.) The Navy, like many prison officials, expressed fear of disruptions caused by personnel who detest gay men and lesbians.¹⁷⁸ The Navy's proposed remedy was also strikingly similar to that promoted by prison authorities: homosexuals are "military liabilities who cannot be tolerated in a military organization Their prompt separation is essential."¹⁷⁹ The court decided that in the plaintiff's case, "prompt separation" was neither essential, nor even rational.¹⁸⁰

The segregation of gay prisoners for punitive or therapeutic purposes has been discredited. A prisoner's status as homosexual does not automatically make him a likely victim of prison violence in need of protective segregation. Thus, automatic segregation of many gay prisoners fails to meet minimum rationality requirements of due process. Thus, the automatic channelling of all gay prisoners into separate homosexual confinement creates serious equal protection and due process

173. 450 F. Supp. 934 (E.D. Ill. 1978).

174. *Id.* at 934.

175. 427 F. Supp. 192 (N.D. Cal. 1977).

176. *Id.* at 202.

177. *Id.* at 202 n.13.

178. *Id.* at 201 n.10.

179. *Id.* at 201.

180. *Id.* at 202.

violations. An end to automatic segregation for all gay prisoners does not solve the protective custody assignment problem, however. Even where protective custody assignments are made on an individualized, case-by-case basis, constitutional due process requires procedural safeguards to protect prisoners from incorrect assignments.

3. *Procedural Due Process Protection Prior to Protective Custody*

Procedural due process issues are raised whenever any prisoners are placed in protective custody without their consent, or when prisoners' requests for protective custody are denied. The determination of what procedural safeguards (if any) are constitutionally compelled requires an analysis of whether assignment to protective custody deprives the prisoner of a liberty or property interest protected by the due process clause of the fifth or fourteenth amendment.¹⁸¹ In *Wolff v. McDonnell*¹⁸² the Supreme Court recognized that significant procedural due process safeguards were required prior to placement into punitive custody, but in *Moody v. Daggett*¹⁸³ the Court indicated that individual classification decisions did not require constitutional due process protections.¹⁸⁴ Involuntary protective custody contains elements of both punitive custody and administrative classification. It is like an administrative classification decision in that there is no allegation of wrongdoing that triggers the special confinement. But it is like punitive custody in its effect upon the prisoner, and because the confinement is caused by allegations of particular factual circumstances—in this case, that the prisoner needs protection. A determination of the procedural requirements prior to assignment to protective custody is complicated by the hybrid identity of protective custody.

Addressing the rights of a prisoner accused of wrongdoing, the

181. See Bice, *supra* note 129, at 711.

182. 418 U.S. 539 (1974).

183. 429 U.S. 78 (1976).

184. *Id.* at 88 n.9. See *Pugliese v. Nelson*, 617 F.2d 916 (2d Cir. 1980). Here, the court rejected the claim of two federal prisoners that their interest in avoiding "central monitoring case" classifications entitled them to due process protections prior to being so classified. The *Pugliese* decision emphasized the reluctance of the current Supreme Court to impose due process safeguards on prison officials. *Id.* at 921-25. One part of the court's analysis could be helpful to due process claims, however. The court noted that, in making the determination of whether a prisoner's interest is constitutionally protected, "[c]onsiderable weight is given to whether the alleged liberty interest is in the nature of 'a bird in the hand' rather than one in the bush." *Id.* at 922. In *Pugliese*, the prisoners complained that the special classification delayed or precluded their access to such benefits as furloughs or work release. *Id.* at 923. In addition to jeopardizing these potential future benefits, assignment into protective custody can mean the immediate withdrawal of benefits that the prisoner currently enjoys.

Wolff decision held that "the prisoner's interest [in keeping good-time credits] has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."¹⁸⁵ The Court found that a prisoner threatened with loss of good-time credits due to serious misconduct had a right to advance notice of the charges against him,¹⁸⁶ a limited right to present evidence and call witnesses on his behalf,¹⁸⁷ and the right to a written statement of the reasons for the result of the hearing.¹⁸⁸ Of particular importance to protective custody analysis is the *Wolff* court's statement that solitary confinement was equivalent to the loss of good-time credits, and thus required the same safeguards.¹⁸⁹ *Wolff*, then, stands for a procedural due process requirement of significant safeguards prior to any punitive custody assignment.

The Supreme Court clarified the source of a prisoner's procedural due process claim in *Meachum v. Fano*.¹⁹⁰

In *Meachum* the Supreme Court refused to extend the *Wolff* right to a factfinding hearing to a prisoner faced with transfer to another prison, even if the transfer was a form of punishment.¹⁹¹ The *Meachum* decision was based in part on the knowledge that, "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."¹⁹² The Court explained that the *Wolff* protections were based on a liberty interest originating in state law,¹⁹³ namely the rule

185. 418 U.S. at 557.

186. *Id.* at 563-64.

187. *Id.* at 566-67.

188. *Id.* at 564-65.

189. [I]t would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards

Id. at 571-72 n.19. Since the court was not addressing the issue of protective custody, perhaps the "normally" is a reference to the fact that in some cases the confinement is protective, rather than punitive. The "major change in the conditions of confinement" is the same whether the label is punitive or protective.

190. 427 U.S. 215 (1976).

191. *Id.* at 227. See *Montanye v. Haymes*, 427 U.S. 236 (1976).

192. 427 U.S. at 225.

193. A strong dissent took issue with this understanding of the source of the liberty interest. *Id.* at 230 (Stevens, J., dissenting).

that good time would normally only be forfeited (or solitary confinement imposed) because of serious misbehavior.¹⁹⁴ Thus, the Court looked for a state regulation or statute limiting official discretion in making prisoner transfers, which it took to be the necessary source of any liberty interest or entitlement in not being transferred. Finding no such statute or regulation, the Court held that "whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."¹⁹⁵ The source and extent of due process protections against changes in the conditions or circumstances of a prisoner's confinement is an area of a great deal of litigation and much confusion as courts attempt to reconcile *Wolff* and *Meachum*.

There are two basic strands to the argument that due process requires procedural safeguards prior to an involuntary protective custody assignment. The first argument stresses that protective custody confinement is substantially similar to punitive segregation, which requires due process safeguards under *Wolff*. The second follows *Meachum* and focuses on whatever statutes or regulations may be said to have created a liberty interest in staying out of protective custody. The first argument is supported by correctional scholarship which stresses the punitive nature of protective custody conditions.¹⁹⁶ The model standards of the National Sheriff's Association also make the point that even when the inmate *requests* segregation for protective custody, "segregation has an inherently punitive quality that requires the imposition of special safeguards."¹⁹⁷ The first argument is strongest in the many prison systems where protective custody conditions are exactly like punitive custody conditions, except that protective custody confinement typically lasts longer. A 1978 district court faced with this question applied this reasoning. *Murphy v. Fenton*¹⁹⁸ held that where protective custody meant being locked in a cell continuously except for two hours a week for exercise and showers, "prolonged incarceration . . . against an in-

194. *Id.* at 226.

195. *Id.* at 228.

196. See, e.g., A. DAVIS, *supra* note 65 at 6; Jacobs, *supra* note 66, at 82.

197. COMPENDIUM, *supra* note 89, at 34; cf. *Gomes v. Travisono*, 510 F.2d 537, 541 (1st Cir. 1974), *cert. denied*, 418 U.S. 910 (1974). ("We now read *Wolff* as determining what procedures are due by evaluating the substantiality of the loss to the inmate and balancing that loss against the burden procedures would put on prison administrators, not by focusing on the purpose or motive of the action proposed.")

198. 464 F. Supp. 53 (M.D. Pa. 1978).

mate's will implicates a liberty interest protected by procedural due process."¹⁹⁹ The court analogized to the procedural due process safeguards required by *Wolff* prior to disciplinary segregation and reasoned that equal protection principles mandate protections for protective custody prisoners as well.²⁰⁰

In *Taylor v. Clement*,²⁰¹ another post-*Meachum* protective custody case, the court held that the plaintiff inmates were denied due process when they were placed in protective custody involuntarily without a hearing under conditions indistinguishable from punitive segregation. The *Taylor* court was confronted with one of the practical problems of a system which offers procedural safeguards prior to punitive segregation but not prior to protective segregation, even when the conditions are identical. If merely changing the label to something other than punitive custody removes the protection of procedural safeguards, the *Wolff* procedures could be denied any prisoner. The *Taylor* court looked behind the protective custody label: "[W]e take it to be axiomatic that prison officials cannot avoid their due process responsibilities simply by relabelling the punishments imposed on prisoners within their charge."²⁰² The court required evidence from the prison officials that the purpose of confinement was in fact safety, not punishment, but none was forthcoming.²⁰³ The court did not reach the question of whether a prisoner really segregated for his or her own protection would be entitled to procedural safeguards.²⁰⁴ However, by ordering prison officials to pay damages to prisoners who were improperly assigned to protective custody, the court implied that some standards and safeguards were necessary. The court also ordered the prison to create a distinction between conditions in punitive and protective custody.²⁰⁵

Any argument which focuses solely on the negative effect of protective custody on the prisoner is undercut by the Supreme Court's reasoning in *Meachum*. The *Meachum* decision did not analyze the extent of the deprivation suffered by the prisoner; rather, it focused the analysis on whether the state had created an entitlement which identified a protected liberty interest. Under *Meachum*, the extent of compelled

199. *Id.* at 57.

200. *Id.* at 58.

201. 433 F. Supp. 585 (S.D.N.Y. 1977).

202. *Id.* at 587-88.

203. *Id.* at 588. The prisoners were awarded damages of \$25.00 for each day of confinement in "protective custody." *Id.* at 589.

204. *Id.* at 587.

205. *Id.* See text accompanying notes 124-258 *infra*.

due process protections prior to protective custody confinement depends on whether the applicable statutes, regulations, and policies concerning protective custody or the general prison confinement have created a sufficient interest in remaining outside of protective custody to warrant due process protection. Thus, the due process protection depends to a great extent on the statutes, regulations, and policies of each individual prison and state. Predictably, courts have given differing answers to the question of whether a prisoner has a protected liberty interest in not being assigned to protective custody against his wishes. In *Spain v. Proconier*,²⁰⁶ the district court required a "duly noticed hearing with appropriate due process safeguards" prior to involuntary assignment to protective custody in the Adjustment Center at San Quentin State Prison.²⁰⁷ In *Wright v. Enomoto*,²⁰⁸ the court found that the prisoner had a protected interest (conferred by regulations) in not being confined in non-punitive segregation without protective safeguards. (The court noted that non-punitive segregation could be worse than punitive confinement because of the longer time period.²⁰⁹) In *Bills v. Henderson*,²¹⁰ however, the distinction between punitive and nonpunitive segregation cut the other way. The court found, that based upon Tennessee laws and administrative guidelines, failure to provide inmates with a written record of the hearing which determined their placement in punitive segregation was violative of due process. But involuntary placement into nonpunitive segregation implicated no liberty interest, even though the same cell-block was used for both forms of segregation.²¹¹

One of the flaws of the *Meachum* state entitlement liberty interest analysis is that it creates an incentive for officials to adopt policies and regulations that provide the prisoner with only minimum guarantees and protection.²¹² For instance, the 1978 Federal Draft Standards for Corrections of the Department of Justice presently provide for involuntary protective custody only upon a showing of "substantial evidence that protective custody is warranted."²¹³ Perhaps because that rule

206. 408 F. Supp. 534 (N.D. Cal. 1976), *aff'd in part, modified in part and rev'd in part*, 600 F.2d 189 (9th Cir. 1979).

207. 408 F. Supp. at 539.

208. 462 F. Supp. 397 (N.D. Cal. 1976), *aff'd mem.*, 434 U.S. 1052 (1978).

209. *Id.* at 403-04. See text accompanying notes 341-55 *supra*.

210. 446 F. Supp. 967 (E.D. Tenn. 1978).

211. *Id.* at 973. See *Reed v. Hadden*, 473 F. Supp. 658, 660-61 (D. Colo. 1979).

212. See *Walker v. Hughes*, 558 F.2d 1247, 1254-55 (6th Cir. 1977).

213. As provided by the DEP'T OF JUSTICE 1978 FEDERAL DRAFT STANDARDS FOR CORRECTIONS [hereinafter cited as DRAFT STANDARDS]:

could be construed to create a liberty interest in remaining in the general prison population, that section of the draft "is being further considered in light of recent court decisions."²¹⁴ Under the *Meachum* analysis, the only major restraint to prevent the drafting of regulations which are designed to be so vague that they avoid creating any liberty interest is the principle of minimal substantive due process; any regulations which do not provide the prisoner with some understanding of his or her situation and an opportunity to change it are arguably arbitrary and capricious.²¹⁵ As Justice Stevens pointed out in the *Meachum* dissent, "even the inmate retains an inalienable interest in liberty—at the very minimum the right to be treated with dignity."²¹⁶

The procedural due process claim of a prisoner whose request for protective custody was denied would also depend on the identification of some liberty interest in the protective custody status. The prisoner would look to prison practice or regulations to show a reasonable expectation of placement in protective custody if his safety in the general prison population was in doubt.²¹⁷ The procedural due process arguments discussed above are only useful to establish regular procedures for the determination of who gets in and who stays out of protective custody. They do not reach the protective custody conditions themselves.

III. REFORM OF THE CONDITIONS OF PROTECTIVE CUSTODY

Reform in the area of placement into protective custody does not solve all protective custody inequities. Once protective custody has been assigned, the prisoner (who is often gay) is confronted with living conditions which are much more restricted than the conditions of the general prison population. In fact, the conditions of protective custody are often exactly the same as those imposed on prisoners whose segregation

Written policy and procedure provide that admission to the administrative segregation unit for purposes of protective custody is made only where there is substantial evidence that protective custody is warranted, or unless the inmate provides written consent to such confinement. Where an inmate consents to administrative segregation, the inmate may at any time request assignment to the general inmate population, and such requests shall be granted, unless there is substantial evidence to show that protective custody in the unit is absolutely necessary.

Id. at 58.

214. *Id.* at 58 n.2.

215. See *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975).

216. 427 U.S. at 233 (Stevens, J., dissenting).

217. The prisoner could also have an eighth amendment action against the prison officials based on their duty to provide a reasonable level of safety. See text accompanying notes 277-97 *infra*.

is punishment for a disciplinary infraction. Protective custody conditions can be challenged in two ways. First, the system of subjecting prisoners in need of protection to conditions worse than general prison confinement and equivalent to punitive segregation is vulnerable to being struck down on a number of constitutional grounds. Second, even without making any comparison between protective custody and the confinement in the general prison population or in punitive custody, the typically extended duration of protective custody raises special eighth amendment concerns as to the impact of the prolonged deprivations on the prisoner.

A. FORCING DISTINCTIONS BETWEEN PROTECTIVE AND PUNITIVE CUSTODY

1. *Current Case Law*

The protective custody system is vulnerable to a direct constitutional attack because of the practice of protecting potential victims by imposing the same conditions of confinement as for punishment of other prisoners being disciplined. Several significant cases have addressed this issue.

*Breeden v. Jackson*²¹⁸ was an action by a prisoner for damages from Virginia prison officials. Nathan Breeden had been transferred to maximum security confinement at his own request because of threats to his life. The court rejected Breeden's claim that the deprivations imposed on him in maximum security constituted cruel and unusual punishment prohibited by the eighth amendment. The majority noted that Breeden was free to leave maximum security because prison officials had found no verification of the threats.²¹⁹ The conditions of which Breeden complained were exactly the normal conditions of punitive solitary confinement, including limited recreational opportunities and restricted bathing privileges. The opinion cited several cases where similar solitary confinement conditions had not been found to be in violation of the eighth amendment.²²⁰

In dissent,²²¹ Judge Craven stressed the prevalence of violence at

218. 457 F.2d 578 (4th Cir. 1972).

219. *Id.* at 579.

220. *Id.* at 581. The court noted that Breeden's complaints did not include mental abuse, physical injuries, or being forced to sleep nude on a concrete floor, all of which had been found to be cruel and unusual punishment. *Id.* at 579-80.

221. *Id.* at 581 (Craven, J., dissenting). Judge Craven expressed disinterest in the prayer for damages and found that although Breeden had already been paroled, the case was not moot because his parole could be revoked.

the prison,²²² and noted that the alleged conditions in maximum security were no exercise, two meals a day of leftovers, one cold shower and shave a week, one visitor a month, and no personal belongings.²²³ Judge Craven found that "the time has come to enunciate clearly to prison administrators that it is their responsibility to protect life and that they may not condition such protection on relinquishment of earned prison privileges."²²⁴ Craven also challenged the voluntariness of Breeden's request for maximum security: "Since the alternative was alleged to be personal injury and possible death, I think he was given no real choice."²²⁵ "I do not believe the state may constitutionally put such a choice to a prisoner, but, instead, must assume its responsibility to provide a reasonably safe place of imprisonment."²²⁶ Craven noted that "abdicat[ing] control of prisons to the rule of terror of the inmate 'bulls' " constituted cruel and unusual punishment, and that "subjecting a well-behaved prisoner to deprivations imposed as punishment upon unruly prisoners . . . [amounted to] arbitrary and capricious action in violation of the due process clause of the Fourteenth Amendment."²²⁷ He recommended remanding for an evidentiary hearing that might reveal "institutional treatment . . . as to shock general conscience"²²⁸

The Fourth Circuit judges convened en banc to consider the case of *Sweet v. South Carolina Department of Corrections*.²²⁹ James Sweet had been in segregated confinement for his own protection for almost five years, following an incident where Sweet apparently (although the record was confused) either reported a knife attack on himself or informed in connection with a riot.²³⁰ Sweet requested segregated confinement because "his presence in the general population would place him in danger of serious bodily harm, if not death,"²³¹ an assessment

222. *Id.* at 581 n.1. (Judge Craven cited a news account of a fatal stabbing at Breeden's prison the previous month).

223. *Id.* at 581-82 n.2.

224. *Id.* at 581.

225. *Id.* at 581-82.

226. *Id.* at 582.

227. *Id.* The dissent finally pointed out that the majority relied heavily upon *Smith v. Swenson*, 333 F. Supp. 1253 (D.D. Mo. 1971), for judicial approval of maximum security protective custody, although the inmate in that case was charged with stabbing another prisoner. *Id.* at 581 n.3.

228. *Id.* (quoting *Lee v. Tahash*, 352 F.2d 970, 972 (8th Cir. 1965)).

229. 529 F.2d 854 (4th Cir. 1975).

230. *Id.* at 857.

231. *Id.* at 858.

with which the prison warden agreed.²³² Sweet brought the action seeking privileges in addition to those afforded prisoners punitively segregated, as well as monetary relief.²³³

The majority began its analysis by citing the threshold principle that courts should only intervene in prison administration if the condition or practice "reaches the level of an unconstitutional deprivation."²³⁴ The court reviewed how these principles have been applied to segregated confinement, establishing minimum standards for such areas as "basic sanitation and nutrition."²³⁵ The court then considered Sweet's specific complaints, and with two exceptions, found that the conditions of Sweet's confinement met the constitutional standards for segregated custody.²³⁶ The court did express concern, however, about Sweet's complaints of inadequate exercise time, and to a lesser extent, shower opportunities, because of his lengthy indefinite stay in segregation. On those issues the court remanded for additional testimony.²³⁷

Three judges who preferred the limited remedy of the majority to the district court's dismissal filed a special concurrence, claiming that the majority's judgment did not "provide the full remedy that the eighth and fourteenth amendments of the Constitution require."²³⁸ The concurrence, written by Judge Butzner, noted that the district court accepted the Warden's assessment that Sweet's protective custody was voluntary, in spite of the warden's own testimony that "the population is dangerous to him."²³⁹ Butzner repeated the holding of *Woodhaus v. Virginia*²⁴⁰ that "[a] prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates" ²⁴¹ Therefore, concluded the concurrence, "the only issue in this case is the constitutionality of the means employed by the state to provide protec-

232. *Id.* at 867 n.1 (Butzner, J., concurring).

233. *Id.* at 857-59.

234. *Id.* at 859.

235. *Id.* at 860 (quoting *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972)). Several of Sweet's complaints were dismissed as simply untrue. *Id.* at 862.

236. *Id.* at 864-65.

237. *Id.* at 866. Aside from this limited remand, the court affirmed the district court decision, which included dismissal of the claim for a monetary judgment. *Id.*

238. *Id.* at 867 (Butzner, J., concurring).

239. *Id.* at n.1.

240. 487 F.2d 889 (4th Cir. 1973).

241. 529 F.2d at 867 (Butzner, J., concurring) (quoting *Woodhaus v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973)).

tion."²⁴² Butzner pointed out that the cases cited by the majority establish that segregated confinement is a constitutionally permissible form of punishment for infractions of the prison rules, but that these decisions do not address "the constitutionality of using solitary confinement for an indefinite time to guard a prisoner who has violated no rules."²⁴³ The concurrence noted that the premise of cases sanctioning punishment by solitary confinement is that prison officials need to discipline unruly prisoners for prison security, but that "discipline is not promoted by placing the victims in solitary confinement while those who threaten them enjoy the privileges of prisoners at large."²⁴⁴ Judge Butzner cited the principles of *Wolff v. McDonnell* that "a prisoner is not shorn of all constitutional rights,"²⁴⁵ and that "among those which he retains is immunity from the arbitrary and capricious imposition of punishment for breaking prison disciplinary rules."²⁴⁶ He pointed out that Sweet had broken no rules, and that "a preference for solitary confinement over the probability of death is not a real choice."²⁴⁷ The three concurring judges perceived due process, equal protection, and eighth amendment violations:

Confining him as though he has breached prison rules, when in fact he has not, is so arbitrary and capricious that it deprives him of due process of law. And placing him in the same class as lawless prisoners, though he is not lawless, denies him the equal protection of the law Measured by the prison's own standards of punishment, his solitary confinement is clearly disproportionate to his conduct and therefore constitutes cruel and unusual punishment in violation of the eighth amendment.²⁴⁸

These judges recommended that the warden "submit a plan for imprisoning Sweet without depriving him of the privileges accorded other prisoners"²⁴⁹

The next appeals court case to raise these issues was *Nadeau v.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 867-68.

247. *Id.* at 868.

248. 529 F.2d at 868.

249. *Id.* at 869. The judges suggested the possibility of providing for either additional guards or transferring Sweet. They argued that the possibility of additional expense "is not a justification for retaining him in solitary confinement in violation of his constitutional rights." *Id.* See *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

Helgemoe,²⁵⁰ in the First Circuit. This suit was brought on behalf of thirty-five prisoners being held at their own request in protective custody in a New Hampshire state prison. The prisoners challenged the conditions of their confinement on first, sixth, eighth, and fourteenth amendment grounds. The district court found largely in favor of the prisoners. It noted that although the specific circumstances of each prisoner's case were different, all "are housed in the protective custody unit because they believe, and the prison administration concurs, that there would be a real threat to their physical or mental well-being were they to remain in the main cell block."²⁵¹ After a detailed description of the circumstances of confinement in "the Annex," the area of protective custody, the court turned to the question of the voluntariness of the segregation, cited the reasoning of both the *Breeden* dissent²⁵² and the *Sweet* concurrence,²⁵³ and found that the request for protective custody did not "constitute a waiver of any claims concerning the conditions of their confinement,"²⁵⁴ because the prisoners have a "statutory and constitutional right to be reasonably protected from bodily harm . . ."²⁵⁵ The court then focused on the eighth amendment prohibition of cruel and unusual punishment, applying a "penological justification test." This test required "some penological reason for the lack of privileges afforded the plaintiff class . . ."²⁵⁶ Noting that the privileges given to the general population presumably had a penological purpose, the court found that the reduction of privileges in protective custody, including inferior meals and limited access to showers, exercise, rehabilitation, and visitors, did not meet this test.²⁵⁷

The court of appeals rejected the eighth amendment penological justification test used by the lower court because of its impracticality and lack of good authority.²⁵⁸ The court cited *Breeden*, *Sweet*, and five other cases²⁵⁹ to show that courts have rejected the claims made by nondisciplinary inmates in protective confinement for the same privi-

250. 423 F. Supp. 1250 (D.N.H. 1976), *aff'd in part and vacated and remanded in part*, 561 F.2d 411 (1st Cir. 1977).

251. *Id.* at 1254-55.

252. See text accompanying notes 221-28 *supra*.

253. See text accompanying notes 238-49 *supra*.

254. 423 F. Supp. at 1260.

255. *Id.* at 1261. See also *Woodhaus v. Virginia*, 487 F.2d at 890.

256. 423 F. Supp. at 1264.

257. *Id.* at 1267-74.

258. 561 F.2d 411, 415-17 (1st Cir. 1977).

259. See cases cited at note 277 and text accompanying notes 276-77 *infra*.

leges given the general population.²⁶⁰ The court applied the standard that distinctions between protective custody prisoners and the general prison population must be rational, and not capricious or arbitrary.²⁶¹ Additionally, the court used the traditional eighth amendment tests of whether conditions "shock the conscience" or are "disproportionate" to the offense.²⁶² Most of the questions of the case were remanded to ascertain which of the remedial orders were supportable by the conventional eighth amendment analysis.²⁶³

2. *Proposed Analysis*

a. *Protective-punitive distinction*: The first step in analyzing the rights of protective custody prisoners to conditions superior than those of punitive custody is to distinguish between the two types of confinement. Punitive segregation is imposed as punishment after a disciplinary infraction by a prisoner; protective custody is designed to protect nonculpable prisoners in need of special protection from the general prison population. Although this point appears elementary and basic to the entire analysis of the rights of protective custody prisoners, two of the most authoritative circuit court decisions on the subject, *Breeden* and *Sweet*, never made this distinction.

Instead of distinguishing between the two kinds of segregation, the *Breeden* court attempted to prove the constitutionality of the protective confinement precisely because it was identical to the normal maximum security: "With a single exception, the deprivations were the usual incidents of confinement in maximum security."²⁶⁴ "Under petitioner's own claim, they are the usual and accepted regulations imposed in maximum security."²⁶⁵ The court twice referred to *Breeden*'s confinement as prison "discipline,"²⁶⁶ thus obscuring the central fact of the case: *Breeden* had done nothing for which to be "disciplined."

The *Sweet* majority never directly confronted *Sweet*'s complaint that there was no difference between the conditions of his confinement and those of prisoners in punitive segregation. The court's limited remand with instructions for the district court to investigate whether the

260. 561 F.2d at 416. The court noted that an earlier First Circuit case, *O'Brien v. Moriarty*, 489 F.2d 941 (1st Cir. 1974), specifically left the issue open. 561 F.2d at 416.

261. *Id.* at 416.

262. *Id.* at 419 (referring to 423 F. Supp. at 1261).

263. *Id.* at 420-21.

264. 457 F.2d at 579.

265. *Id.* at 581.

266. *Id.* at 579, 580.

limited access to exercise and showers would be harmful after a long confinement (and thus cruel and unusual punishment) would apparently have been the result for any prisoner kept in segregation for a long time, without regard to whether the confinement was protective or punitive.²⁶⁷

The failure of the *Breeden* and *Sweet* majorities to make any distinction between protective and punitive custody is perhaps explained in part by certain factual weaknesses in each of the cases. In *Breeden*, Judge Russell's opinion implied disbelief that the prisoner actually needed protection. The opinion noted that although *Breeden* claimed to have been threatened with bodily harm, the threats had never been verified by prison officials.²⁶⁸ The flavor of skepticism, about the reality of *Breeden's* need for protection²⁶⁹ tainted the opinion, making his complaints about the conditions of protective custody appear frivolous.

The case of James Sweet also presented a factual context that was not conducive to a determination of the rights of a blameless segregated prisoner. The opinion noted that prison authorities considered Sweet a "constant problem," that he had a history of punitive segregation, that the explanations he gave about the incidents leading up to protective segregation were confused and inconsistent, and further, that some of his factual allegations were false.²⁷⁰ The fact that the plaintiffs in both *Sweet* and *Breeden* were unsympathetic characters, however, should not be an excuse to ignore the constitutional issues raised by a system which conditions safety on the relinquishment of normal privileges.²⁷¹

The courts' failure to distinguish protective custody from punitive custody led to reliance on inapposite authority. The *Breeden* majority answered the question of the rights of protective custody prisoners by repeated citation of cases which dealt with the parameters of special confinement for disciplinary reasons.²⁷² The *Sweet* majority did no better.²⁷³ In both of those cases, however, the courts referred to prior cases only to bolster their analysis. In *Nadeau*, the citation of *Breeden* and *Sweet* replaced independent analysis of the issues: "The Fourth

267. See text accompanying notes 341-55 *infra*.

268. 457 F.2d at 579.

269. See text accompanying notes 222 *supra*.

270. 529 F.2d at 857, 864-65.

271. One might speculate, for instance, whether the results would have been the same if the plaintiff had been a middle class family man, perhaps a banker convicted of embezzlement, in protective custody because of threats of sexual assault.

272. 457 F.2d at 579-81; see text accompanying notes 217-19 *supra*.

273. See 529 F.2d at 859-66.

Circuit has squarely rejected this claim twice,"²⁷⁴ and "[o]ther courts have agreed."²⁷⁵ Although the court cited five cases²⁷⁶ (in addition to *Sweet* and *Breeden*) to support this proposition, even a cursory examination of the facts and reasoning of these cases undercuts their weight as authority on this issue;²⁷⁷ a mere listing of cases concerning differing forms of segregation is no substitute for an independent examination of the constitutional issues surrounding protective custody.

274. 561 F.2d at 416.

275. *Id.*

276. *Id.*

277. *Smith v. Swenson*, 333 F. Supp. 1253 (W.D. Mo. 1971), the first case cited, dismissed the claim of a maximum security prisoner who was placed in maximum security not only because of threats to his life, but also because he was being charged with possession of a home-made knife and with stabbing another prisoner. *Id.* at 1254. Thus, the issue of protective confinement conditions was not even raised.

In the second case, *Joyner v. McClellan*, 396 F. Supp. 912 (D. Md. 1975), the court granted summary judgment in a suit in which a prisoner in protective custody sought either a transfer or change in conditions, and apparently monetary relief. *Id.* at 913. (The judge noted that Joyner, who acted as his own counsel, "nowhere clearly set forth the nature of the relief sought." *Id.*) All but the damages claim was moot because the prisoner had been transferred two years prior to the decision, but the judge relied primarily on *Breeden* (and cited *Smith v. Swenson* at 1258) in dismissing the claim for damages. The importance of the case is undercut by the court's inference that Joyner only needed protective custody because he refused to give evidence against his attackers:

It is unfortunate that the victim, rather than the perpetrators, must be the one who bears the burden of segregation. But the Due Process Clause bars prison officials from segregating prisoners for infractions without some evidentiary basis. Mere suspicions will not do, and, here, Joyner refused to give evidence against his attackers.

Id. at 915. A realistic assessment of prison culture indicates that Joyner's need for protective segregation would probably have increased if he had identified his attackers, especially since the record shows that the stabbing was committed by members of a group of prisoners called "The Family," not all the members of which were known. *Id.* at 914-15.

In *Hundley v. Sielaff*, 407 F. Supp. 543 (N.D. Ill. 1975), the court explicitly followed the *Breeden* decision, after noting that the two prisoners (one of whom had already been transferred) had filed a complaint that was "lucid for a *pro se* prisoner action." *Id.* at 544. They sought transfer and privileges for a religious group that the court dismissed as "a scheme devised to obtain special privileges . . ." *Id.* at 545.

The next case cited in *Nadeau*, *Krist v. Smith*, 309 F. Supp. 497 (S.D. Ga. 1970), actually dealt with the segregation of a prisoner with a record of prison escape. The court noted in dicta that solitary confinement was used for escape risks, punishment or protection. The last case cited, *Taylor v. Strickland*, 411 F. Supp. 1390 (D.S.C. 1976) *aff'd*, 565 F.2d 159 (1977), involved an inmate's request to transfer out of protective custody to another institution entirely, a transfer he said was promised to him by corrections officials in exchange for aiding them in the collection of contraband weapons. Again, the court relied on *Sweet* and *Breeden* in dismissing the complaint. The court also noted that the complaint was not completed properly (*pro se* plaintiff), and that the inference that officials solicited the prisoner's help in the weapons round-up would raise issues not present in *Sweet* or *Breeden*, but that "[s]uch an issue is not apparent in the pleadings as presently filed, and this court has too much work to do to call for additional pleadings, or stir the odorous pile this and other cases of this sort present." *Id.* at 1396 n.15. Elsewhere the court referred to the "coddled prisoners of today," *Id.* at 1392 n.2, and in a reference to the *Sweet* court's concern for the sanitation of protective custody prisoners, "perhaps [this court] can employ its precious time

b. *Duty of reasonable protection*: The duty of prison officials to provide a reasonably safe prison environment is an appropriate foundation for the analysis of the rights of protective custody inmates. "A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief."²⁷⁸ Since 1974, this principle has been reflected in escape cases recognizing the defense of necessity or duress based on the threat of assault, particularly sexual assault. In *People v. Harmon*²⁷⁹ an inmate escaped after having been beaten by inmates for not submitting to their demands, and after having his request for protective segregation refused. The court noted that "the State has a duty to assure inmate safety,"²⁸⁰ and reversed his escape conviction. The Supreme Court has recently eliminated the availability of the duress or necessity defense for prisoners who do not avail themselves of available alternatives to breaking the law (including turning themselves in at the first opportunity),²⁸¹ but the duty to provide reasonable protection remains.²⁸²

One of the reasons that the situation of protective custody prisoners has been largely unexamined is that many protective custody prisoners have been segregated at their own request. Much of the judicial

and talent in the research and study of the shower bath as a constitutional privilege with which the criminal, or any other mad dog of society, must be supplied." *Id.* at 1392.

The *Nadeau* court cited all these cases without examining them, but rejected the order in *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), *aff'd* 564 F.2d 388, 594 F.2d 786 (10th Cir. 1979) that required that nondisciplinary segregated prisoners be given privileges as close to those of the general population as possible because there was no explanatory rationale. 561 F.2d at 416.

278. *Woodhaus v. Virginia*, 487 F.2d at 890; *See Martinez Rodriguez v. Jiminez*, 409 F. Supp. 582 (D.P.R.), *aff'd*, 537 F.2d (1st Cir. 1976), *aff'd*, 555 F.2d 877 (1st Cir. 1977).

279. 53 Mich. App. 482, 220 N.W.2d 212 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975).

280. 53 Mich. App. at 484, 220 N.W.2d at 213. *See also* *People v. Luther*, 53 Mich. App. 648, 219 N.W.2d 812 (1974), *aff'd*, 394 Mich. 619, 232 N.W.2d 184 (1975) (conviction for escape reversed because judge told jurors that escape to avoid sexual attack was not a defense); Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110 (1975). Similar decisions have been made in California, *see* *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); Florida, *see*, *Lewis v. State*, 318 So. 2d 529 (Fla. App. 1975); Illinois, *see* *People v. Unger*, 33 Ill. App. 3d 770, 338 N.E. 2d 442 (1975), *aff'd*, 66 Ill. 2d 333, 362 N.E. 2d 319 (1977); and Kentucky, *see* *Pittman v. Commonwealth*, 512 S.W.2d 488 (Ky. 1974).

281. *United States v. Bailey* 444 U.S. 394 (1980). *See* Note, *Necessity Defense to Prison Escape After United States v. Bailey*, 65 VA. L. REV. 359 (1979); *see also*, Note, *Escape From Cruel and Unusual Punishment: A Theory of Constitutional Necessity*, 59 B.U.L. REV. 334 (1979); Comment, *From Duress to Intent: Shifting the Burden in Prison-Escape Prosecutions*, 127 U. PA. L. REV. 1142 (1979).

282. 444 U.S. at 410. "We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available . . ." *id.*

analysis of protective custody has focused on this apparent voluntariness of protective custody confinement, and has refused to offer relief to prisoners whose segregation is, to some extent, the product of their own choice. Each appeals court opinion on this issue has so far undercut the protective custody prisoner's claims with the assertion that the assignment was, after all, voluntary.²⁸³ The fact that prisoners have an eighth amendment right to reasonable protection challenges the notion that protective custody is in any meaningful way, voluntary.

Protective custody is the method that many prison officials have chosen to implement their eighth amendment duty to provide reasonable safety for vulnerable inmates.²⁸⁴ Protective custody is not a luxury; it is the system established by prison officials for accommodating a threatened prisoner's eighth amendment right to be reasonably free from sexual and physical violence. As Judge Craven noted in his *Breeden* dissent, "[s]ince the alternative was alleged to be personal injury and possible death, I think he was given no real choice."²⁸⁵ Judge Butzner made the same point for the concurring judges in *Sweet*: "A preference for solitary confinement over the probability of death is not a real choice."²⁸⁶ The nature of the choice offered is seen most clearly in *Joyner v. McClellan*,²⁸⁷ where Joyner was told he could return to the general population if he signed a form waiving the prison's liability for bodily injury.²⁸⁸ Many courts assume that the fact that the protective custody prisoner has chosen to remain in the special confinement operates as a waiver of his right to object to the protective custody conditions. Yet the choice of returning to the general population is for many protective custody prisoners nothing more than a dangerous, cynical offer. The request for protective custody does not constitute a waiver of all claims concerning that confinement because prisoners have a consti-

283. See *Breeden v. Jackson*, 457 F.2d at 579. The *Sweet* majority assumed that Sweet's custody was voluntary. *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d at 86 n.16. They pointed out that the custody was "terminable at any time by him," *id.*, ignoring the testimony of the warden that Sweet was "not considered dangerous to the population. I think—and I am not being facetious—the population is dangerous to him." *Id.* at 86 n.1 (Butzner, J., concurring). The *Nadeau* decision also ignored the reality of the choice facing the protective custody prisoners by stressing that it was a voluntary decision: "prisoners may request a transfer to the general population at any time." *Nadeau v. Helgemoe*, 561 F.2d at 412.

284. See *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d at 867 (Butzner, J., concurring).

285. 457 F.2d at 581-82.

286. 529 F.2d at 868.

287. 396 F. Supp. 912.

288. Joyner refused. *Id.* at 913.

tutional right to be reasonably protected from prison violence.²⁸⁹ A recent district court decision addressing these issues, *Wojtczak v. Cuyler*,²⁹⁰ specifically rejected the prison officials argument that "by requesting voluntary confinement in [maximum security for his own protection] the plaintiff has waived the rights and privileges granted to prisoners in the general population."²⁹¹ Instead, the *Wojtczak* court held that, "absent valid security considerations, plaintiff may not be required to renounce his right to reasonable protection from other inmates as a condition of receiving the opportunities afforded to prisoners in the general population."²⁹²

The eighth amendment right to reasonable protection is more than a refutation of the argument that protective custody conditions are immune to attack because they are assumed voluntarily; it also supports the position of protective custody prisoners in other ways. For example, one emerging aspect of the duty to provide reasonable protection to protective custody prisoners is the duty to classify prisoners in a reasonable manner.²⁹³ One of the most effective means of reducing prison violence is careful attention to classification of prisoners,²⁹⁴ and courts have begun to evaluate prison efforts to provide reasonable safety by examining their classification procedures. In *Withers v. Levine*,²⁹⁵ for example, the court found that where officials had assigned cellmates without any prior review of inmate characteristics or the suitability of the placement, an inmate who was sexually assaulted by his cellmate raised a successful claim that the absence of proper classification procedures constituted a violation of his constitutional right to be reasonably free from harm.²⁹⁶ The Fourth Circuit Court of Appeals reinforced the seriousness of the eighth amendment duty to provide reasonable safety by holding prison officials liable under a negligence standard once a

289. See *Nadeau v. Helgemoe*, 423 F. Supp. at 1260-61.

290. 480 F. Supp. 1288 (E.D. Pa. 1979).

291. *Id.* at 1303.

292. *Id.*

293. See *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977), *aff'd*, 599 F.2d 17 (1st Cir. 1979). But see *Altizer v. Paderick*, 569 F.2d 812, 813 (4th Cir. 1978) (notes official discretion in classifying prisoners).

294. See, e.g., *Doe v. Lally*, 467 F. Supp. 1339, 1357 (D. Md. 1979). This court put forth a duty to classify inmates in order to identify potential victims. But note that the duty to protect (by segregation) can be in conflict with procedural due process rights to segregation. See *Ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973) and text accompanying notes 181-217 *supra*.

295. 615 F.2d 158 (4th Cir. 1980).

296. *Id.* In that case the officials placed together one inmate with a history of assaultive behavior and one inmate (the plaintiff) with a history of concern with victimization. *Id.* at 160. See note 310 *infra*.

pervasive risk of harm is established.²⁹⁷ The *Withers* opinion specifically held that "[i]t is not necessary to show that all prisoners suffer a pervasive risk of harm" in order to show the need for protective measures, "[i]t is enough that an identifiable group of prisoners do, if the complainant is a member of that group."²⁹⁸ Thus the *Withers* court has drawn the logical conclusion that the right of reasonable safety is especially strong for prisoners who are particularly vulnerable to victimization. Those prisoners are, of course, the ones who seek protective custody.

Once the applicability of a right to reasonable safety is established, analysis of the protective custody system uncovers serious due process, eighth amendment, and equal protection deficiencies.

c. *Substantive due process*: In *Wolff v. McDonnell*,²⁹⁹ the Supreme Court reestablished that, "[p]risoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law."³⁰⁰ A procedural due process argument was made earlier in support of procedural safeguards to accompany any forced protective custody assignment, whether forced in or out.³⁰¹ The issue in that case is the sufficiency of procedures prior to a protective custody assignment. The substantive due process attack of the conditions of protective custody confinement is related, yet very different. The question here is whether the state's justifications for confining protective custody prisoners in punitive conditions are sufficient to withstand due process inspection. Judge Craven clearly asserted his answer in the *Breeden* dissent: subjecting a "well-behaved prisoner to deprivations imposed as punishment upon unruly prisoners seems to be arbitrary and capricious action in violation of the due process clause of the Fourteenth Amendment."³⁰²

This argument is grounded in notions of elementary fairness. Justice normally requires that we penalize the offender, not the victim. Anthony Scacco pointed out the practice of confining the victims and potential victims in a "prison within a prison" is a "lugubrious rem-

297. 615 F.2d at 162.

298. *Id.* at 161. "It is irrelevant that larger, older men need experience no such fear, when younger and smaller men are frequently victimized and each such person has a reasonable basis for fearing that he will become a victim or will be victimized again." *Id.*

299. 418 U.S. 539 (1974).

300. *Id.* at 556. See *Haines v. Kerner*, 404 U.S. 519 (1972).

301. See text accompanying notes 181-217 *supra*.

302. 457 F.2d at 582 (Craven, J., dissenting).

edy" for the problem of institutional violence.³⁰³

The harshness of the deprivation in protective custody varies from prison to prison.³⁰⁴ The *Wolff* analysis was grounded in a recognition of the significance of the deprivation of liberty which accompanies either the loss of good time credits or placement in solitary confinement.³⁰⁵ The seriousness of the liberty deprivation which results from solitary confinement for protective reasons can be analogized to *Wolff*;³⁰⁶ the protective custody prisoner arguably suffers an equal (or even greater)³⁰⁷ deprivation, although there is no doubt that he has done nothing to deserve it. The *Wolff* safeguards are designed to prevent the inadvertent assignment to solitary confinement of a well-behaved prisoner; protective custody regulations now routinely provide for assignment of solitary confinement to such prisoners.

Because the *Breeden*, *Sweet*, and *Nadeau* majorities used the apparent voluntariness of the prisoners' assignments to protective custody to effectively waive the constitutional rights of the prisoners, they did not reach an analysis of the prisons' justifications for the practice of making the punitive and protective conditions equivalent. Prison officials would probably raise three justifications for the policy. Security is of course the prime responsibility of prison authorities, as well as their chief justification for resisting claims of prisoners' rights. In this case, however, although there are obvious security reasons for removing the protective custody prisoner from the general population, the security rationale for making the conditions of protective segregation equivalent to conditions of punitive segregation appears more difficult to establish. The policy is more likely based on administrative efficiency and cost reduction. As one court has pointed out, however, prison officials cannot be allowed to play "fast and loose with [prisoners'] basic constitutional rights in the interest of administrative efficiency."³⁰⁸ Likewise, cost has not been held to be a legitimate obstacle to the preservation of constitutionally guaranteed prison conditions.³⁰⁹

303. A. SCACCO, *supra* note 57 at 103-04.

304. See text accompanying notes 196-204 *supra*.

305. See text accompanying notes 181-88 *supra*.

306. See text accompanying notes 196-205 *supra*.

307. See text accompanying notes 341-55 *infra*.

308. *Ex rel. Marcial v. Fay*, 247 F.2d 662, 669 (2d Cir. 1957).

309. See *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968). Cf. *United States v. Albrook*, 336 F. Supp. 937 (D.D.C. 1971) (juveniles eligible to be sentenced to Lorton could not be denied treatment facilities because the institution was overcrowded).

A third, more specific rationale for refusing to effect any distinctions between punitive and protective segregation is the prison authorities' fear of making protective custody too comfortable. According to a gay prisoner at Terre Haute: "They make it extremely hard for a person to get on protective custody status. . . . If you are lucky enough to be put on P.C. status in deadlock, the officials make it very hard on you, by various methods."³¹⁰ In the words of the 1977 Manual of Standards for Adult Correctional Institutions: "Care should be taken to ensure that inmates do not see placement in protective custody as desirable."³¹¹ Although the advice is not explained, most likely the deprivations of protective custody serve as a valve to control the number of inmates seeking such protection. In other words, prisoners in protective custody are penalized in order to keep others out of protective confinement. Yet this attempt to limit the desirability of protective custody might be creating an opposite effect. Corrections analysts have found that lack of reporting by victims is one of the major factors contributing to the high level of prison violence.³¹² They point to the victims' desire to avoid the conditions of protective custody status as a chief reason for not reporting violence.³¹³ Thus, the poor protective custody conditions indirectly add to the level of violence in the general prison population and increase the need for protective custody placement. Violations of the rights of protective custody prisoners and an increasing level of violence throughout the prison are the results of this flawed, circular policy. Efforts aimed directly at reducing violence in the general prison population will provide the only real long-term control on the numbers of prisoners seeking protective custody.³¹⁴ Even at present, the problem of freeloaders (prisoners seeking protective cus-

310. Wildes, *Letter from Terre Haute, CELLMATE*, (Oct. 1978). Wildes elaborated:

Most deadlock cells are two-man cells. A favorite tactic used is to house a gay inmate with an aggressive straight inmate. The situation can become so bad that the gay inmate will usually choose to return to the population. . . . But even at best, conditions in administrative segregation are hard to cope with. You're locked in a small cell 24 hours a day. You are given two or three showers a week (five minutes per shower). Sometimes you may be given an hour's exercise period but not on a regular basis. You are deprived of most of your property. You are denied access to educational programs as well as drug or alcohol rehabilitation programs and religious services. In short, you are being punished for seeking protection of your life.

Id.

311. COMM'N ON ACCREDITATION FOR CORRECTIONS, *MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS* 39 (1977) (discussion of Rule 4201).

312. See text accompanying notes 332-40 *infra*.

313. *Id.*

314. See, e.g., *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977) (almost one-fifth of the prison population was in protective custody in spite of severe deprivations accompanying that status).

tody status although they do not really need it) could be solved with a system of individual, case-by-case determinations of the need for protective custody.³¹⁵

d. *Disproportionality: Cruel and unusual punishment:* The second constitutional basis for challenging a system of equivalent deprivations for punitive and protective segregation is the eighth amendment, which prohibits "cruel and unusual punishment." Two of the traditional tests for eighth amendment violations are first, whether the condition "shocks the conscience," and thus offends the "evolving standard of decency,"³¹⁶ or second, whether the punishment is grossly disproportionate to the offense.³¹⁷ This latter test, whether the punishment fits the crime, may be applied most profitably to protective custody conditions which are equivalent to the conditions imposed upon prisoners who are being punished.³¹⁸ Subjecting well-behaved prisoners to the same conditions which are used to punish culpable behavior appears grossly disproportionate.

A possible criticism of this analysis is that application of the proportionality test is inappropriate because the purpose of the restrictive confinement is not punishment.³¹⁹ Although this argument is in tune with recent Supreme Court reasoning regarding pretrial detainees,³²⁰ the eighth amendment standard is applied to virtually all aspects of the treatment of convicted inmates.³²¹ The proposal that the proportionality test is avoidable if the prisoner assigned to special confinement is without any taint of culpability strains credulity.³²² Severe confinement would thus be challengeable if imposed for a slight infraction, but

315. For a discussion of the applicability of procedural safeguards to protective custody assignments, see text accompanying notes 181-217 *supra*.

316. *Ingraham v. Wright*, 430 U.S. 651 (1977).

317. *Weems v. United States*, 217 U.S. 349 (1910).

318. The *Sweet* and *Breedon* majorities applied the first test to reach the conclusion that the protective custody conditions did not "shock the conscience" because they were no worse than punitive segregation. See text accompanying notes 264-69 *supra*. This test, too, might result in an opposite conclusion if the focus was on the nonculpability of the prisoner.

319. See *Bono v. Saxbe*, 450 F. Supp. 934, 944 (E.D. Ill. 1978); *Fitzgerald v. Procunier*, 393 F. Supp. 355, 342 (N.D. Cal. 1975).

320. See *Bell v. Wolfish*, 441 U.S. 520 (1979). Justice Rehnquist's majority opinion limited "punishment" of pre-trial detainees to actions taken with a punitive purpose. *Id.* at 538-39. But see 441 U.S. at 563. (Marshall, J., dissenting).

321. See, e.g., *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

322. Of course, an argument could be made that the conditions of protective custody have evolved in the way that they have in part because of a punitive attitude of officials toward those prisoners who need protection, who are not tough enough to survive in the general prison popula-

acceptable if imposed without any infraction. The better analysis would include "no offense" (apart from victim status) at the bottom end of the proportionality continuum.³²³ The proportionality test as applied to punitive segregation scrutinizes the confinement in light of the conviction and some culpable prison conduct. The proportionality test as applied to protective custody examines the conditions in light of the conviction and no culpable prison conduct. The three judges who concurred in *Sweet* applied this test: "[M]easured by the prison's own standards of punishment, his solitary confinement is clearly disproportionate to his conduct and therefore constitutes cruel and unusual punishment in violation of the eighth amendment."³²⁴

e. *Equal protection*: Equal protection principles were applied earlier to the practice of automatic segregation of gay prisoners.³²⁵ Equal protection limitations apply not only to protective custody classification decisions, but also to conditions of confinement after protective custody has been assigned. As discussed earlier, equal protection analysis requires an examination of both the class of people distinguished and the nature of the interest effected by the rule in question, in order to determine the standard by which the government's interest in making the classification will be reviewed.³²⁶

The district court in *Nadeau v. Helgemoe*³²⁷ based its analysis on eighth amendment grounds rather than equal protection, because protective custody prisoners are not a "suspect class," but did note that any infringement of fundamental rights, such as access to the courts (via library privileges) or exercise of religion, would have to be justified by a showing of compelling state interest.³²⁸ The degree of deprivation of protective custody prisoners varies according to the specific conditions of their confinement, and might include reduced access to the library, limited opportunities for exercise, meals alone in the cell, fewer showers, or reduced access to educational or rehabilitation programs. The success of an equal protection challenge to protective custody condi-

tion. Cf. text accompanying notes 59-71 *supra* (discussion of punitive attitudes toward gay prisoners).

323. See *O'Brien v. Moriarty*, 489 F.2d 941, 944-45 (1st Cir. 1974) (discusses proportionality analysis of segregation, citing Judge Craven's dissent in *Breeden*).

324. 529 F.2d at 868.

325. See text accompanying notes 129-33 *supra*.

326. See *Bice*, *supra* note 129, at 693-707.

327. 423 F. Supp. 1250 (D.N.H. 1976), *modified*, 561 F.2d 411 (1st Cir. 1977). See text accompanying notes 159-72 *supra*.

328. *Id.* at 1265.

tions will depend largely on whether protective custody status results in the denial of any fundamental rights.

Equal protection arguments for the protective custody prisoner are undercut by the obvious rational basis for treating protective custody prisoners differently (at least in terms of segregation) from the general population. The stronger argument comes when prison officials are asked to justify treating protective custody prisoners the same as punitive custody prisoners. Judge Butzner noted that "placing [the protective custody prisoner] in the same class as lawless prisoners, though he is not lawless, denies him the equal protection of the law."³²⁹ But the excessiveness and irrationality problems in that comparison seem to point more naturally to due process and eighth amendment analyses. In the absence of any fundamental rights being infringed (such as denial of access to religious practice), the deferential standard of review would probably allow the practice as long as it was supported by a legitimate state interest in prison security or administrative efficiency. Equal protection analysis does become meaningful, however, when the interests at stake are fundamental, or when the prisoner has been assigned to protective custody because he is gay. Much of the equal protection analysis of homosexuality discussed earlier in the context of challenges to a prison decision to automatically segregate gay prisoners³³⁰ is equally applicable to challenges to the conditions of protective custody once it has been assigned to a gay prisoner. As discussed earlier, conditions imposed on a prisoner because of his status as homosexual arguably should be tested by a middle level of scrutiny.³³¹ The punitive conditions of protective custody confinement are much more likely to be struck down when this intermediate standard is applied.

f. *Penal policy considerations*: Making distinctions between the conditions of confinement for protective and punitive custody prisoners is a reform that is not only constitutionally compelled, but is also supported by penological considerations. Commentators point to the lack of reporting by victims as a major factor leading to the widespread sexual violence in prisons.³³² Davis explained why victims in the Philadelphia prison system did not report attacks:

[I]nmates who complain are themselves subjected to a form of pun-

329. 529 F.2d at 868.

330. See text accompanying notes 134-68 *supra*.

331. See text accompanying notes 129-50 *supra*.

332. See, e.g., A. DAVIS, *supra* note 65, at 6; Jacobs, *supra* note 66, at 82.

ishment. It is usual procedure to put a victim of a sexual assault on 'lock-in feed-in' ostensibly for his own protection. This means that after a complaint is made, and especially if it is pressed, the complainant is lock in his cell all day, fed in his cell, and not permitted recreation, television, or exercise until it is determined that he is safe from retaliation. Many victims consider this 'solitary confinement' worse than a 'house keeping' relationship with a sexual aggressor.³³³

Davis recommended providing a separate housing unit for victims of sexual assault where they would be allowed to enjoy separately the same activities allowed the general prison population.³³⁴

Courts have recognized this problem as well. In *Doe v. Lally*³³⁵ the court acknowledged the problem of the lack of reporting of sexual assaults.³³⁶ In *Anderson v. Redman*³³⁷ the court noted the impracticality of reporting sexual assault because of the fear of reprisal,³³⁸ and pointed out that protective custody meant being "locked in the hospital area twenty-four hours per day" with "virtually no privileges."³³⁹ Both the National Sheriff Association's Model Compendium of Legislation and Standards and the Department of Justice's 1978 Draft Standards for Corrections emphasize a goal of similar conditions for protective custody inmates and the general prison population.³⁴⁰

B. LONG-TERM PROTECTIVE CUSTODY: CRUEL AND UNUSUAL

The eighth amendment's prohibition of cruel and unusual punishment is often the prisoner's foremost protection against harsh prison conditions. Courts have determined that certain specific practices and conditions, such as inadequate diet,³⁴¹ or physical abuse by guards,³⁴² are violative of the eighth amendment. Recently courts have applied a totality of conditions test in finding that an entire prison system violates the eighth amendment.³⁴³ The aspect of protective custody which most clearly raises eighth amendment concerns about the impact of the confinement on the prisoner is the extended duration of most protective

333. A. DAVIS, *supra* note 65, at 76.

334. *Id.* at 78.

335. 467 F. Supp. 1339 (D. Md. 1979).

336. *Id.* at 1349 n.7.

337. 429 F. Supp. 1105 (D. Del. 1977).

338. *Id.* at 1115.

339. *Id.* at 1120.

340. COMPENDIUM, *supra* note 89, at 24; DRAFT STANDARDS, *supra* note 212, at 58-61.

341. See, e.g., *Shapley v. Wolff*, 568 F.2d 1310 (9th Cir. 1978); *Cunningham v. Jones*, 567 F.2d 653 (6th Cir. 1977).

342. See, e.g., *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971).

343. See, e.g., *Holt v. Sawyer*, 442 F.2d 304 (8th Cir. 1971).

custody assignments. A deprivation which is relatively minor when imposed as a temporary measure becomes much more serious when it is imposed indefinitely. Whereas punitive segregation is normally assigned for a fixed term, placement in protective custody is often for an indefinite period. For example, a prisoner assigned to protective custody because he is homosexual is likely to stay in protective custody for his entire term in prison. In *Sweet*, for instance, the court rejected Sweet's arguments that the conditions of his confinement in protective custody should be better than conditions of punitive custody,³⁴⁴ but remanded for a factual inquiry into the impact on Sweet of the lack of exercise and fewer showers over an extended period of time.³⁴⁵ Even where the conditions of protective and punitive custody are identical, the extended stay of the protective custody prisoners can make their deprivation more serious. Court orders limiting the period that a prisoner may be assigned to punitive custody³⁴⁶ are implicit recognition that the same conditions which are constitutionally permissible for discrete periods of time can become intolerable if imposed for extended periods.

An aspect of protective custody confinement that has increasing impact the longer it is imposed is the standard requirement that protective custody prisoners spend most of the hours of each day confined in their own cell, instead of participating in recreation and employment programs throughout the prison. One of the major issues of prisoner litigation today is overcrowding.³⁴⁷ Courts have been particularly sensitive to the problem of overcrowded cells when the prisoner must spend more time an unusually large percentage of each day confined in his cell. In *Nelson v. Collins*,³⁴⁸ for instance, the court found that double-celling in forty-four square foot cells was a violation of the eighth amendment in all circumstances, but that it was worst for protective and punitive custody prisoners because they were confined in their cells "virtually twenty-four hours a day."³⁴⁹

344. 529 F.2d 854; see text accompanying notes 228-48 *supra*.

345. 529 F.2d at 866; cf. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978) (emphasized that the length of time in segregation contributed to a finding of an eighth amendment violation in disciplinary segregation).

346. See, e.g., *Laanan v. Helgemoe*, 437 F. Supp. 269, 310, 326 (D.N.H. 1977).

347. See *Campbell v. McGruder*, 580 F.2d, 521, 536-40 (D.C. Cir. 1978); *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). But see *Bell v. Wolfish* 441 U.S. 520, 542 (1979) (Justice Rehnquist rejects any "one man, one bed" principle in fifth amendment analysis of rights of pretrial detainees).

348. 455 F. Supp. 727 (D. Md.), *modified*, 588 F.2d 1378 (1978).

349. 455 F. Supp. at 731.

In *Burks v. Walsh*,³⁵⁰ the court found that conditions in the Missouri State Penitentiary were not violative of the eighth amendment *except* in the segregation units. The court noted the deprivations in protective custody, including the amount of time that the inmates were confined to their cells,³⁵¹ and held that "to confine two inmates to the 47.18 square foot cells of the Special Treatment Unit is plainly intolerable, inhumane, totally unreasonable in light of the modern conscience, and shocking to the conscience of the Court."³⁵²

In *M.C.I. Concord Advisory Board v. Hall*,³⁵³ the court found that the protective custody conditions violated the eighth amendment, noting that the protective custody cells were "dark holes" and "unglorified cages" and that there was no recreational or vocational area available for the use of these inmates.³⁵⁴ This decision specifically noted that the fact that the prisoners had requested protective custody did not constitute a waiver of their right to be free of conditions violative of the eighth amendment.³⁵⁵ As these cases indicate, protective and punitive custody raise special overcrowding concerns because the inmate spends so much time each day confined in his cell. In addition, the limited space is particularly harmful to protective custody prisoners whose special confinement lasts for months or years.

IV. LESBIANS IN JAILS AND PRISONS

The constitutional analysis of the segregation (or any disparate treatment) of incarcerated lesbians is relatively simple because it is difficult to identify any legitimate state interest to justify such segregation. Historically lesbians have been segregated,³⁵⁶ but the justification appears to have been moral condemnation or punishment for the status of being a lesbian.³⁵⁷ That purpose would not satisfy even the most deferen-

350. 461 F. Supp. 454 (W.D. Mo. 1978).

351. *Id.* at 459-60. The court recounted one inmate's testimony that he entered protective custody because of "enemies in the General Population" but that he checked out because he was "locked up all the time." *Id.* at 479. On his second day back in the general prison population he was assaulted by three men. After his release from the hospital he chose to return to protective custody. Protective custody inmates remained in their cells except for three meals a day and four and a half hours a week. *Id.* at 460.

352. *Id.* at 488-89. *But see* *Crowe v. Leeke*, 540 F.2d 740 (4th Cir. 1976).

353. 447 F. Supp. 398 (D. Mass. 1978).

354. *Id.* at 401.

355. *Id.*

356. *See* text accompanying notes 58-59 *supra*.

357. *Id.*

tial rational basis test in equal protection analysis.³⁵⁸ If the prison's stated purpose is to minimize sexual activity, segregation of lesbians is not rationally related to that goal, since commentators on women's prisons unanimously agree that lesbians represent only a small minority of inmates who are sexually active.³⁵⁹ (In fact, Jarvis' conclusion that lesbians prefer to relate to other lesbians in the prison population³⁶⁰ indicates that segregation of lesbians is exactly counterproductive to a goal of reducing sexual activity).

The important distinction between the analysis of the treatment of incarcerated gay men and that of incarcerated lesbians is the difference in the level of sexual violence in men's and women's institutions. The majority of this Note deals with emanations from the male gay prisoners' relationships to the sexual violence which is rampant in men's institutions. Although there are isolated examples of sexual violence in women's prisons, it is not a significant or widespread problem.³⁶¹ Therefore, the segregation of lesbian prisoners cannot be justified on those grounds. Of course, this Note concerns discrimination based on an inmate's status; sanctions for specific incidents of sexual activity, on the other hand, are within the traditional authority of prison officials.

CONCLUSION

The due process clauses of the fifth and fourteenth amendments, the cruel and unusual punishment prohibition of the eighth amendment, and the equal protection clause of the fourteenth amendment compel reform of the current practices of confinement of many gay prisoners. Six principles emerge. First, policies concerning male gay prisoners should be developed in the context of a possible need for protection, not treatment or punishment.³⁶² Second, a man's status as homosexual should not be determinative of his classification within the prison population, although it should be one factor in making an individualized assessment of his need for protective custody.³⁶³ Third, due process requires the implementation of procedural safeguards to accompany each protective custody assignment, including those of gay men.³⁶⁴ Fourth, constitutional principles require prison authorities to make sig-

358. *Cf.* Robinson v. California, 370 U.S. 660 (1972) (imprisonment for status is cruel and unusual punishment).

359. *See* note 58 *supra*.

360. Jarvis, *supra* note 61, at 92.

361. *See* note 66 *supra*.

362. *See* text accompanying notes 57-85 *supra*.

363. *See* text accompanying notes 79-84, 164-68 *supra*.

364. *See* text accompanying notes 181-217 *supra*.

nificant distinctions between the conditions of protective and punitive custody,³⁶⁵ and to explain any differences between protective custody conditions and general prison population conditions in terms other than efficiency and cost reduction.³⁶⁶ Fifth, the typical extended duration of protective custody heightens eighth amendment concerns about the daily conditions of segregated confinement. Finally, no rational basis exists for any special classification of incarcerated lesbians based solely on their status as lesbians.³⁶⁷

Ideally, these reforms will be undertaken voluntarily by prison officials. More realistically, however, these principles will be won gradually as the most hidden part of the gay rights movement becomes stronger, and as prisoners bring suits to enjoin the discrimination they experience because they are gay.

Joan W. Howarth

365. See text accompanying notes 264-340 *supra*.

366. See text accompanying notes 308-09 *supra*.

367. See text accompanying notes 356-61 *supra*.