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Comment

A STATUTORY RIGHT TO TREATMENT FOR PRISONERS: SOCIETY'S RIGHT OF SELF-DEFENSE

I. THE FAILURE OF CORRECTIONS TO CORRECT

Virtually no one is immune from the results of crime in a free society. A recent study conducted in high crime areas of two large cities revealed that forty-three percent of those interviewed said they stay off streets at night because of their fear of crime. Twenty percent said they would like to move to another neighborhood because of their fear of crime. Slightly more than one-third of a representative sample of all Americans said they keep firearms in their homes for protection against criminals. 1 Approximately one and one quarter million people are incarcerated in state and local correctional agencies and institutions on any given day, 2 and between sixty and seventy percent of the inmate population are young people between the ages of fourteen and thirty. 3 The vast majority of criminal offenders are not hardened professional criminals. Most offenders are vocationally incompetent and significantly limited in education. 4 For these offenders the principal feature of a criminal career is that it is open to anyone irrespective of conventional occupational skills. The recognized task of any correctional system should be the transfer of the criminal careerist to the pursuit of a conventional career. 5 The reaction to the desperate need of both society and criminal offenders for rehabilitative treatment has been the systematic caging and warehousing of prisoners only to release them later upon society outraged but not reformed. A Staff Report to the National Commission on the Causes and Prevention of Violence states:

Because of shortages of trained personnel and suitable facilities, prisons in this country have never adequately performed their correctional functions. A look back at the old times in comparison with the new times reveals that prisons are substantially unchanged insofar as they still serve as little more than cages with time locks on their doors. 6

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3 Conrad, Program Trends in Correctional Rehabilitation in Research in Correctional Rehabilitation 6 (1967).
4 Id.
5 Id. at 7.
One hundred years ago the framers of the Declaration of Principles of the American Prison Association stated that rehabilitation and moral regeneration of prisoners and not the infliction of vindictive suffering were the proper aims of corrections.\(^7\) Nearly one century later a distinguished psychiatrist and expert penologist stated:

Reformation of the individual is still not the purpose of our system. The infliction of vindictive suffering still has not been repudiated. The prisoner still has little to do with his destiny, and can scarcely imagine that he does have. Prison discipline, far from gaining anyone's good will or conserving anyone's self-respect, still tends to do just the opposite. And a prison whose primary aim is to make offenders into "industrious, free men rather than orderly and obedient prisoners" is yet to be born!\(^8\)

It is difficult to ascertain why we confine men for years without any concerted attempt to arrest the forces within them which placed them in our criminal institutions, all the while professing in literature and legislation a profound concern for their treatment and well being. We have seen fit to delegate unlimited discretion to prison administrators, insulate them from judicial review,\(^9\) and ratify by silence incredible deprivations of liberty under the guise of discipline.\(^10\) This unsupervised delegation of authority is made all the more dangerous by the fact that it is for the most part exercised in secret. At least two writers have suggested that this vast exercise of discretion over the lives and human rights of individuals makes prison life as it exists today unconstitutional.\(^11\) It is society, however, even more than the prisoner, who suffers the consequences of the broad discretion vested in prison administrators to decide whether the individual deserves treatment or segregation, rehabilitative opportunity or solitary confinement. These decisions

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\(^7\) Transactions of the National Congress on Penitentiary and Reformatory Discipline 541 (Principle II) (1871).


\(^10\) Sweeney v. Woodhall, 344 U.S. 86 (1952) (prisoner allegedly beaten with nine pound strap with five metal prongs; held: prisoner must exhaust state remedies); Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966) (prisoner placed in solitary naked, without blanket or mattress, in 40 degree temperature for 27 hours then denied bath or toiletry articles for 16 days; held: deprivations were not of constitutional dimension). See also United States ex rel. Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); Ruark v. Schooley, 211 F. Supp. 921 (D. Colo. 1962); Blyth v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961).

are being made every day by virtually anyone in authority who comes into contact with the prisoner, from the warden on down to the individual guard. Because these decisions can be made in secret, prison administrators enjoy an immunity from criticism unmatched by officials in any other institutional framework. The proponent of law and order as well as the civil libertarian should be concerned about the administrator's ability to deny rehabilitative opportunity. It is society who must deal with the criminal offender after his release without treatment. It is society who must demand that prisoners be rehabilitated rather than abused and who must select reformation as the goal of corrections rather than retributive punishment. It is with an awareness of society's right of self-defense that we must review the utility of a statutory right to treatment for prison inmates.

II. THE EVOLVING RIGHT TO TREATMENT

A. The Mentally Ill

The right to treatment was first proposed as a solution to the problem of the inadequate treatment afforded the mentally ill. It was suggested that incarceration by the state in a mental hospital in the absence of proper treatment constituted a deprivation of liberty without due process of law. The assertion that the mentally ill were being denied due process of law appeared to rest on procedural grounds. Without treatment there was very little to differentiate the custody and confinement of a mentally ill person from that of a person channeled through the criminal justice system. If the result of the different type of proceedings was the same then the same procedural safeguards should be employed. It is apparent, however, that the denial of due process is more substantive in nature. The commitment of a mentally ill person, whether through civil proceedings or through criminal proceedings after an acquittal based on insanity, is not unconstitutional because of any error or lack of safeguards in the proceedings. The very basis of the attack is that the confinement itself is illegal and not the proceedings which placed the person in confinement. It has been suggested that the denial of due process stemmed from the state's assumption of

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12 "[I]t is inconsistent with our whole system of government to grant such uncontrolled power to any official, particularly over the lives of persons. The fact that a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials." President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 83 (1967).


14 Id. at 503.
the role of *parens patriae* and its subsequent failure to fulfill it.\(^\text{15}\) A more plausible reason would seem to be that the sole basis for placing an insane person in a mental institution rather than some other place of detention was the expectation that he would receive treatment which would eventually enable him to rejoin society. Failure to provide adequate treatment embodied a fundamental unfairness prohibited by the Due Process Clause.

The question of whether the right to treatment for the mentally ill was based on procedural or substantive constitutional rights has been for the most part mooted with the discovery of much clearer directives for treatment based on statutory law. The Court of Appeals for the District of Columbia in *Rouse v. Cameron*\(^\text{16}\) was the first court to authorize a remedy based on a statutory right to treatment. Charles Rouse had been found not guilty by reason of insanity of carrying a dangerous weapon, a misdemeanor for which the maximum imprisonment was one year. He was mandatorily committed pursuant to statute and four years later petitioned for habeas corpus on the grounds that he had received no psychiatric treatment. The court stated that failure to provide treatment raised serious questions of due process of law,\(^\text{17}\) but chose to base its decision on the 1964 Hospitalization of the Mentally Ill Act for the District of Columbia which provides: "A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment . . . ."\(^\text{18}\) The court stated that the right to treatment was cognizable in habeas corpus and remanded the case to determine if treatment was in fact being afforded. The right to treatment has been utilized several times since then to test adequacy of treatment.\(^\text{19}\) The right to treatment has been held to apply to civilly committed as well as criminally insane persons.\(^\text{20}\) Perhaps the most significant aspect of the *Rouse* decision is the remedial basis of the opinion. The court stated that continuing failure to provide suitable and adequate


\(^\text{17}\) 373 F.2d at 453.


\(^\text{19}\) E.g., *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Dobson v. Cameron*, 383 F.2d 519 (D.C. Cir. 1967).

The right to treatment was clearly a present right and not a matter of administrative grace. Although the right to treatment in *Rouse* was statutory in nature, a right to treatment for a person committed as incompetent to stand trial has been based on constitutional grounds.\(^2\)

### B. Sexual Psychopaths

In *Millard v. Cameron*,\(^2\) the companion case to the *Rouse* decision, the court extended the right to treatment to persons committed as sexual psychopaths. Despite the fact that sexual psychopath statutes generally provide for indefinite commitment after only a civil proceeding they have almost universally been held constitutional.\(^2\) Invariably, however, it has been held that constitutionality depends on the fact of adequate treatment.\(^2\) In *Millard* the court held that lack of treatment destroyed any reason for “differential treatment” and repeated the declaration of *Rouse* that lack of treatment could not be justified by lack of staff or facilities. As in *Rouse*, the court remanded the habeas corpus petition to the district court to determine if adequate treatment was in fact being provided. Both the cases involving the mentally ill and those concerning sexual psychopaths stress the fact that the absence of treatment destroys all justification for differential treatment.\(^3\) This appears to be an objection to lack of treatment based on the proposition that it is a denial of equal protection of the law. However, the obvious fact is that neither the mentally ill person nor the sexual psychopath could ever be confined in the same manner as a normal person. The mentally ill are not criminally culpable as are criminal offenders and therefore the theory of punishment as a deterrent to crime does not apply to them. Comparisons to the treatment afforded prisoners are not practical since the reasons for confinement are not the same. The basis for confinement of the mentally ill is either isolation or

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21 373 F.2d at 457. The court reached this conclusion because the language which originally limited the right to treatment to the extent that facilities, equipment, and personnel were available was omitted from the final draft of the Act.


23 373 F.2d 468 (D.C. Cir. 1966).


26 Millard v. Cameron, 373 F.2d 468, 472 (D.C. Cir. 1966).
treatment. Both are primarily based on the protection of society. The courts in the cases upholding a right to treatment have rejected the idea that mere isolation without treatment justifies confinement; therefore, the theory behind the right to treatment must be two-fold. First, the individual has a right to be treated fairly once he is found to be mentally ill, and secondly, society has created a right of self-defense through commitment statutes providing for adequate treatment. A violation of the individual's right to treatment also violates society's right of self-defense.

C. Juveniles

A statutory right to treatment has also been found to exist for juveniles. In Creek v. Stone the court found that a juvenile delinquent arrested for robbery but held at a receiving home pending trial was entitled to adequate treatment in the form of psychiatric care and that failure to provide adequate care vitiated the justification for confinement. In another case in the same jurisdiction the court held that a juvenile who was found to be habitually truant and beyond the control of his mother could not be detained by the Department of Public Welfare unless adequate treatment was afforded him. In both cases the right to treatment was held to be cognizable in habeas corpus. Once again the basis of the right was broad statutory language: "When the child is removed from his own family, the court shall secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents." Since the purpose of juvenile detention was to provide the atmosphere the juvenile should have had at home, failure to provide such care violated Congressional intent in passing the statute and amounted to illegal confinement. The cases involving the right to treatment for juveniles have been cited with apparent approval by the United States Supreme Court.

D. Defective Delinquents

The state of Maryland has long recognized that the interests of society are best served by rehabilitation of offenders who demonstrate a danger to society. The Defective Delinquent Act of Maryland provides for indefinite confinement after a civil proceeding for a person who:

by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity toward criminal activity, and

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27 379 F.2d 106 (D.C. Cir. 1967).
28 In re Elmore, 382 F.2d 125 (D.C. Cir. 1967).
30 In re Gault, 387 U.S. 1, 23 n.30 (1966).
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who is found to have either such intellectual deficiency or emo-
tional unbalance, or both, as to clearly demonstrate an actual
danger to society so as to require such confinement and treatment,
when appropriate, as may make it reasonably safe for society to
terminate the confinement and treatment.\(^{51}\)

The broad character of the definition of the defective delinquent
is matched by the breadth of the list of offenses for which one may
be subjected to a delinquency proceeding. It includes (1) felonies;
(2) serious misdemeanors; (3) crimes of violence; (4) certain sex,
crimes; and (5) two or more convictions for any offenses or crimes
punishable by imprisonment.\(^{32}\) In *Sas v. Maryland*\(^{33}\) several inmates
confined under the act challenged its constitutionality and also
asserted that no treatment was being provided. The court held the
statute constitutional on its face, but in remanding the case for
further consideration suggested that failure to provide treatment
would deny those confined under the act equal protection of the
law as compared to other law breakers who are convicted of the
same crime but not indefinitely confined.\(^{34}\) Actually the indefinite
sentence could be looked at as merely a more severe sentence
equally applicable to all multiple offenders. In this light the statute
would appear similar to almost any habitual criminal statute. More
probably the objection should be that an indeterminate sentence
where no treatment is afforded constitutes cruel and unusual punish-
ment. The court stated that deficiencies in staff, facilities, and fi-
nances would undermine the justification for the law and the con-
stitutionality of its application.\(^{35}\)

The decision in *Sas* is a key to whether the right to treatment
should be extended to all prisoners. In *Sas* the individuals singled
out for rehabilitative treatment were not suffering from mental
peculiarities which would differentiate them from the normal prison
population as are the mentally ill and sexual psychopaths. The
classification was not based on age as is the case with juveniles.
The only real criteria used to distinguish the defective delinquent
were his emotional unbalance and his dangerousness to society.
The act was broad enough to encompass virtually every offense
normally punishable by imprisonment. In fact many of those pro-
ceeded against as delinquents were youthful offenders for crimes


\(^{32}\) Id. § 6.

\(^{33}\) 334 F.2d 506 (4th Cir. 1964).

\(^{34}\) Id. at 509. *Contra,* Commonwealth v. Williams, 432 Pa. 44, 246 A.2d
356 (1968) (no constitutional requirement of treatment).

\(^{35}\) 334 F.2d at 517. It was later held by the Maryland Supreme Court
that under present medical standards treatment was in fact being
provided. Director of Patuxent Institution v. Daniels, 243 Md. 16, 221
against property.\textsuperscript{38} The act itself expressly states that treatment is to terminate only when release would be safe for society. The right to treatment of defective delinquents applies to the fully culpable offender who does not suffer from any handicap of mental illness or age. The protection of society which is the announced goal can only be accomplished by isolation of the offender from society or by his reformation. The statute, however, states that treatment is to be provided. Since the statute has been interpreted to provide that treatment and not isolation of multiple offenders was what the legislature intended, it would seem probable that treatment and not mere isolation or punishment would likewise be preferred in the confinement and correction of all prisoners.

III. THE BASIS OF THE RIGHT TO TREATMENT

The statutes under which a right to treatment has been found to exist for the mentally ill, sexual psychopaths, and juveniles share two common denominators. Embodied in all of the statutes is a recognition that the purpose of confinement is rehabilitation. A second common factor is broad statutory language which states a duty to treat or which states a legislative purpose from which such a duty may be implied. Similar language can be found in the statutes of almost every state, usually in the statute which authorizes the existence of the prison system. One of the clearest examples of language which would support a right to treatment is expressed in a Delaware statute:

A Department of Correction is established to provide for the treatment, rehabilitation and restoration of offenders as useful, law abiding citizens within the community .... These institutions and services shall be diversified in program, construction and staff to provide effectively and efficiently for the maximum study, care, custody, training, and supervision and treatment of those persons committed to the institutional facilities or on probation or parole, so that they may be prepared for release, aftercare, discharge or supervision in the community.\textsuperscript{37}

Missouri provides:

\begin{quote}
[I]n the correctional treatment applied to each inmate, reformation of the inmate, his social and moral improvement, and his rehabilitation toward useful, productive and law abiding citizenship shall be guiding factors and aims.\textsuperscript{38}
\end{quote}

New York provides:

1. The commissioner shall establish program and classification procedures designed to assure the complete study of the background

\textsuperscript{38} 334 F.2d at 516.


and condition of each inmate in the care or custody of the department and the assignment of such inmate to a program that is most likely to be useful in assisting him to refrain from future violations of the law. Such procedures shall be incorporated into the rules and regulations of the department and shall require among other things: consideration of the physical, mental and emotional condition of the inmate; consideration of his educational and vocational needs; consideration of the danger he presents to the community or to other inmates; the recording of continuous case histories including notations as to apparent success or failure of treatment employed; and periodic review of case histories and treatment methods used.\textsuperscript{39}

North Carolina provides:

[The Commission shall classify the facilities of the state prison system and develop a variety of programs so as to permit proper segregation and treatment of prisoners according to the nature of the offenses committed, and the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and correctional treatment of persons committed to the Department.\textsuperscript{40}]

Nebraska provides:

The Director of Corrections shall:

\begin{itemize}
  \item (3) Establish and administer policies and programs for the operation of the facilities in the division and for the custody, control, safety, correction and rehabilitation of persons committed to the division.\textsuperscript{41}
\end{itemize}

Most states express a similar rehabilitative purpose in their statutes.\textsuperscript{42}

\textsuperscript{39} N. Y. CORREC. LAWS § 137 (McKinney 1970).
\textsuperscript{40} N. C. GEN. STAT. § 148-36 (Supp. 1969).
Many states have entered into either the Western\textsuperscript{43} or New England Interstate Compacts.\textsuperscript{44} These compacts are enacted by the legislatures of the states pursuant to the same procedures as ordinary statutes and once enacted have a force even superior to statutes.\textsuperscript{45} The compacts are nearly the same, both providing for the interstate transfer of prisoners to member states having more suitable facilities for the type of treatment required. Both compacts state the policy of all the member states to be to provide high quality programs and facilities for the confinement, treatment, and rehabilitation of various types of offenders.\textsuperscript{46}

The language of these acts is no more vague or equivocal than those upon which a right to treatment has already been based.\textsuperscript{47} There are, of course, some states in which rehabilitation is not stated as a governing purpose. These occurrences, however, are as easily attributable to a failure to revise statutes in accordance with prevailing norms and standards as they are to any deliberate choice of vindictive punishment over rehabilitation. Where language expressive of rehabilitative intent does not exist it should be drafted and until it is the statutes which authorize a correctional system should be construed \textit{in pari materia} with other statutes of

\begin{itemize}
\item \textsuperscript{43} The Western Interstate Corrections Compact has been adopted by Alaska, California, Colorado, Guam, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. The Council of State Governments, Handbook on Interstate Crime Control 50 (1966).
\item \textsuperscript{44} The New England Interstate Corrections Compact has been adopted by Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont. See McGrath, The New England Interstate Corrections Compact, 38 State Gov't 16 (1965).
\item \textsuperscript{45} They are superior in that once lawfully entered into the highest court of any member state may not make an interpretation which would nullify an obligation of a member state. Dyer v. Sims, 341 U.S. 22 (1951).
\item \textsuperscript{46} The language of the Western Compact is representative of both: "The party states desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of co-operation with one another, thereby serving the best interest of such offenders and of society." Nev. Rev. Stat. § 215.020 (1967).
\item \textsuperscript{47} See notes 18 and 29 and accompanying text \textit{supra}.
\end{itemize}
the state concerning the same subject matter, such as those concerning parole and probation.\textsuperscript{48}

The statutory language demonstrates that the enacting legislatures recognized the purpose of the prison system to be reformation of the individual and the protection of society. The very name "Department of Corrections" under which most prison systems are organized is illustrative of that intent. Although not every state has a statute stating that rehabilitation and reformation are the goals of the correctional system, no state has a statute saying that rehabilitation is not the desired goal or that vindictive punishment is. Even a cursory glance at correctional laws would indicate that punishment inflicted without a view towards reformation is in conflict with the evolving standards of decency that mark the progress of a maturing society.\textsuperscript{49}

**IV. ADVANTAGES OF A STATUTORY RIGHT**

*Sostre v. Rockefeller*,\textsuperscript{50} a suit brought under 42 U.S.C. § 1983\textsuperscript{51} demonstrates the inherent problems of federal intervention in a

\textsuperscript{48} There is no reason why the legislative purpose behind placing an offender in prison should be different from that which lies behind probation and parole, which has uniformly been the reformation of the individual and his return to society.


\textsuperscript{50} 312 F. Supp. 863 (S.D.N.Y. 1970). After this comment was written the Court of Appeals for the Second Circuit affirmed the decision of the trial court but at the same time modified it in several important respects. The court reversed the award of punitive damages and also the holding of the trial court that confinement in punitive segregation for more than 15 days constituted cruel and unusual punishment per se. Also reversed was the requirement that prison administrators submit rules to govern future disciplinary proceedings on the grounds that the question whether New York prisons systematically violate due process was not presented in the lower court. The court did warn administrators of any arbitrary or capricious punishment. "We would not likely condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity to reply to charges lodged against him and a reasonable investigation into the relevant facts, at least in cases of substantial discipline." *See* N.Y. Times, February 25, 1971, at 1, col. 8.

\textsuperscript{51} "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress." 42 U.S.C. § 1983 (1964). A similarly worded section vests original jurisdiction over such actions in the district courts. 28 U.S.C. § 1343(3) (1964). For an exhaustive article on the uses of section 1983 by prisoners, see Note, *Prisoner's Rights Under Section 1983*, 57 Geo. L.J. 1270 (1969).
state institutional framework. Martin Sostre was a Black Muslim activist who had been sentenced to thirty to forty years for a narcotics conviction. He had previously served twelve years in prison; four of those years were spent in solitary confinement. During his prior sentences Sostre had successfully secured certain unrestricted religious liberties for Black Muslim prisoners. On the day of his arrival at Attica prison he was transferred by the Deputy Warden to Green Haven prison based on what the Deputy Warden regarded as the best interests of the inmate and of the state. Sostre came into immediate conflict with prison administrators. He was placed in solitary confinement for his attempts to mail handwritten motions to the court and for his refusal to explain the letters R.N.A. in a letter he wrote. Sostre was subjected to 372 days in solitary confinement. During that time only one other prisoner was placed in the same group of cells. Sostre remained in his cell twenty-four hours per day. Most important, Sostre was not permitted to use the prison library, read newspapers, see movies or attend school and training programs. The court held that prolonged solitary confinement beyond fifteen days was needlessly degrading and dangerous to the maintenance of sanity.

It was found that Sostre had been subjected to cruel and unusual punishment, denied procedural due process, denied access to the courts and public officials and wrongfully denied his freedom of political expression. He was awarded a total of $13,020 compensatory and punitive damages. The court enjoined administrators from placing Sostre in solitary or revoking his good time credit without extending full due process privileges to him.

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52 See Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961) and Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964).

53 One prisoner brought to solitary and placed in another group of cells committed suicide the next day. 312 F. Supp. at 868.

54 Sostre was allowed one hour per day recreation in a small completely enclosed yard, but he refused this privilege since it was conditioned upon a mandatory strip frisk including a rectal examination. Id. at 868.

55 Id. The time limitation of fifteen days was removed by the Court of Appeals for the Second Circuit on appeal. See note 50 supra.

56 Id. at 885. The recovery was divided into $9,300 compensatory and $3,720 punitive damages; however, on appeal the award of punitive damages was reversed. See note 50 supra.

57 After Sostre was released from solitary confinement he was again disciplined for having dust on his cell bars. Later he was disciplined for possessing inflammatory racial literature which consisted of his own hand written articles, containing excerpts from magazines and newspapers in general circulation around the prison and a list of names from Esquire magazine. Subsequently administrators were enjoined from placing him in solitary or depriving him of good time credit without (1) giving him written notice of any charges made against
ministrators were further required to submit proposed rules and regulations governing future disciplinary proceedings for approval where the possible punishments included punitive segregation or loss of good time.58

While Sostre was undoubtedly subjected to severe infringement of his constitutional rights, the most harmful aspect of his treatment was that he was denied thirteen months' training or possible rehabilitation. The most shocking fact in the entire case is that the warden was able to deny a prisoner these privileges without once being compelled to justify his decision.

The decision in Sostre met with immediate opposition from prison administrators. Officials asserted that guards were afraid to discipline prisoners for fear of being sued for damages, and that the prisoners resented Sostre being singled out for what they regarded as special privileges. The warden of the prison stated that things were going so badly that the prison might have to be shut down.59 No doubt much of the administrative reaction was designed to create a favorable climate for review of the decision. It is possible, however, that the administrative belligerence evidenced in New York, at what was regarded as unwarranted federal interference, is not unlike the reaction which occurred after the school desegregation and legislative reapportionment cases.60 Once constitutional mandates have been imposed on a state institution such as a school or prison the actual process of reformation is dependent upon funds which can only be provided by the state legislature. Legislatures, in turn, are notably reluctant to appropriate money to effectuate federal court orders. It is true that redressing infringements of First or Eighth Amendment rights does not require the cooperation of state government, but any attempt to reform a prison system to provide programs of training and rehabilitation inevitably would.61 The enforcement of state statutes conferring a

58 Id. The Court of Appeals reversed this portion of the decision. See note 50 supra.
60 See Gellhorn, Decade of Desegregation—Retrospect and Prospect, 9 UTAH L. REV. 3, 5 (1964).
61 See Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (inhuman cell conditions prohibited); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (conditions of cells held to violate Eighth Amendment);
right to treatment would have the advantage of forcing state legislatures to support their own announced aims and goals and would avoid the feeling of interference in state affairs which federal intervention would appear to cause.

Failure to provide adequate treatment occurs both on an individual and on a massive scale, as is demonstrated by a recent prisoner class action brought in a federal court. A United States District Court decision in *Holt v. Sarver* by declaring that confinement in the Arkansas prison system constituted cruel and unusual punishment in violation of the Eighth Amendment. The atrocities committed in Arkansas under the authority of prison administrators are too numerous for an extended recital. The actual physical control of the prison, both from a clerical aspect and from the standpoint of security, was in the hands of trustees. Armed trustee guards had absolute power of life or death over prisoners, which was demonstrated by the discovery of numerous unmarked graves in the prison yard. Inmates were housed in barracks with rows of beds side by side. It was common practice for inmates to creep or crawl among the beds in order that they might stab an enemy or subject one of the weaker prisoners to homosexual abuse. Irrespective of the physical abuses, which were commonplace, the worst feature of the system was that there was no attempt to provide any sort of rehabilitation. The court stated: "In Act 50 of 1968 the Legislature recognized the important place of training and rehabilitation in the Arkansas penal program and directed the Department of Corrections to initiate and prosecute such a program." The statute the court was referring to states:

The purpose of this Act is to establish a Department of Correction to assume the custody, control and management of the State Penitentiary; to execute the orders of the Criminal courts of the State

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64 The full story of the Arkansas prison scandal is recited in MURTON & HYAMS, ACCOMPLICES TO THE CRIME (1969).
65 309 F. Supp. at 376.
66 Id. at 378.
of Arkansas, and, to provide for the custody, treatment, rehabilita-
tion and restoration of adult offenders as useful, law abiding citi-
zens within the community.⁶⁷

Another section of the statute states: "Persons committed to the
institutional care of the Department shall be dealt with humanely
with efforts directed to their rehabilitation."⁶⁸

The court recognized that nothing had been done. Aptitude tests
were given but the results were disregarded. The most significant
attempt at reformation was forced labor in the fields. The court
recognized that failure to provide rehabilitation, in addition to
violating express legislative direction, was harmful to the interests
of society:

Since it costs money to confine convicts, more than many tax-
payers realize, it would seem to be in the enlightened self-interest
of all states to try to rehabilitate their convicts, as the Arkansas
Legislature and Respondents have recognized.⁶⁹

The court was not willing to find the system unconstitutional on
the grounds of failure to provide treatment, but was content to de-
clare the system unconstitutional for its purely physical aspects,
the lack of guards, sanitary conditions, and assaults upon inmates.
As enlightened as the opinion was, the court failed to realize that
the interests of society would not be measurably improved by more
guards, clean sheets, and shiny new cells. Society has a right to
demand that prisoners be released from prison benefited by their
confinement and less dangerous to the public. The court found that:

It can be said safely that except in a very, very few and unusual
cases confinement in the Arkansas State Penitentiary today is the
opposite of beneficial. As a generality it may be stated that few
individuals come out of it better men for their experience; most
come out as bad as they went in, or worse.⁷⁰

It should be noted that in the Holt case the legislature had en-
acted legislation providing that each prisoner was to be given ade-
quate rehabilitative treatment.⁷¹ The court in Holt expressly re-
cognized that new legislation had been enacted, based on the self-
interest of the state, which provided for the rehabilitation of prison-
ers.⁷² Instead of requiring rehabilitative opportunities for the
prisoners, however, the court was forced to be content to require
plans to eliminate the harsh physical conditions. Based on the
jurisdiction of the federal court, it could fashion remedies only on

⁶⁷ ARK. STAT. ANN. § 46-100 (Supp. 1989).
⁶⁸ Id. § 46-116.
⁶⁹ 309 F. Supp. at 379.
⁷⁰ Id.
⁷¹ Note 67 and accompanying text supra.
⁷² Note 69 and accompanying text supra.
the constitutional claim of cruel and unusual punishment which was brought before it. Both the prisoners and society had a clear statutory right to make certain that adequate rehabilitative treatment was afforded all prisoners. A right to treatment was present but not enforced since jurisdiction was based on the federal Constitutional question.

V. ENFORCEMENT OF THE STATUTORY RIGHT TO TREATMENT

The right to treatment as it presently exists in cases involving the mentally ill, juveniles, and defective delinquents cannot be said to be an effective weapon against denials of adequate treatment. It probably can be analyzed as an attempt to provide a remedy through habeas corpus proceedings to what would previously have been called a right without a remedy. Habeas corpus, however, is at best inadequate since it provides only for release. What the petitioner is asking for is the type of treatment which he is authorized by statute to receive. Habeas corpus is a remedy only in the sense that release of the petitioner can be used as a threat to obtain treatment. It is very doubtful that a court would ever release a mentally ill person, or for that matter a prisoner, since to do so would be a threat to the public. The purpose of this comment is to suggest a means of enforcing the right to treatment by both the prisoner and the public which would give meaning to what would otherwise be useless acts of oratory by state legislatures.

A. STATE ADMINISTRATIVE PROCEDURE ACTS

Almost every state has enacted some type of administrative procedure act. Many have enacted the Revised Model State Administrative Procedure Act. The major principles of these acts require that each agency of state government adopt essential procedural rules, and that all rule making, procedural and substantive, be accompanied by notice to interested persons with an opportunity to submit views or information. In addition they provide for review of administrative orders and the correction of administrative errors.

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73 Legislation in about 25 states has been founded to a greater or lesser extent on either the original Model Act of 1946 or the Revised Model Act of 1961. They are Arizona, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Virginia, Washington, West Virginia, and Wisconsin.

74 2 F. COOPER, STATE ADMINISTRATIVE LAW 881 (1965).
Whatever name is given to the Division of Corrections or Penal Institutions it is clearly an administrative agency of the state and falls under the provisions of the act unless specifically excluded.\textsuperscript{75} Using the Revised Model Act as a guide, several conclusions can be made which bear on making the right to treatment enforceable.\textsuperscript{76} First, as an agency of the state the Division of Corrections is required, as a rule, to adopt a description of its organization stating the method of its operation and methods whereby the public may obtain information, and make available for public inspection all rules and other written statements of policy, as well as all final orders, decisions, and opinions.\textsuperscript{77} The act further provides:

\begin{quote}
(b) No agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. ...
\end{quote}

It may be that the Division of Corrections simply ignores these or similar provisions believing that correctional rules and decisions do not affect the public. However, it is reasonably safe to assume that many citizens are as concerned with crime as with decisions by the highway department or public power commission. If the provisions of the Act are not observed the Act provides a remedy through declaratory judgment in state district court which may be brought by any person whose "legal rights or privileges" are interfered with.\textsuperscript{78} If the Division of Corrections follows the guidelines of the Administrative Procedure Act but ignores the statutory language requiring adequate treatment and rehabilitative opportunity for prisoners, provision is made for a declaratory judgment within the agency:

\begin{quote}
Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.\textsuperscript{80}
\end{quote}

One of the important aspects of enforcing the right to treatment under administrative procedure acts is that hearings are

\textsuperscript{75} \textit{Revised Model State Administrative Procedure Act} § 1, Comment (1961) [hereinafter cited as \textit{Model Act}].
\textsuperscript{76} The Model Act is used since the principles embodied by it are of almost universal applicability and because analysis of individual state administrative procedure acts would be beyond the scope of this comment. Reference should be made to the provisions of each state act where the Model Act has not been adopted.
\textsuperscript{77} \textit{Model Act} § 2, Comment.
\textsuperscript{78} Id. § 2 (b).
\textsuperscript{79} Id. § 7.
\textsuperscript{80} Id. § 8 (emphasis added).
bound by the rules of evidence, and the basis of decisions in contested cases must be in writing or stated in the record.\textsuperscript{81} If after exhaustion of all administrative remedies a decision is still not satisfactory, provision is made in the Revised Model Act for judicial review: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act.\textellipsis\textsuperscript{82}

Provision is made in the Act for the filing of a petition for review in the district court of the county designated by the statute.\textsuperscript{83} Review of administrative decisions is limited to traditional areas. The court is not authorized to substitute its discretion for that of the agency; however, the court may reverse or modify the decision of the agency if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;
(2) in excess of the statutory authority of the agency;
(3) made upon unlawful procedure;
(4) affected by other error of law;
(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.\textsuperscript{84}

There are, of course, many different administrative procedure acts, of which the Revised Model State Act is only one. However, most of the provisions of key significance to the right to treatment are present in some form or another. The purpose of any administrative procedure act is essentially the same as the right to treatment, that is, to compel compliance with statutory directives and to provide aggrieved parties with administrative due process and judicial review.

B. ALTERNATIVE MEANS OF ENFORCEMENT—STANDING TO SUE

State administrative procedure acts are by no means the only available means of enforcing the right to treatment. Unlike the federal courts, many state courts freely recognize the rights of those described as citizens, residents, or taxpayers to challenge

\textsuperscript{81} Id. § 12.
\textsuperscript{82} Id. § 15(a).
\textsuperscript{83} Id. § 15(b).
\textsuperscript{84} Id. § 15(g).
The Court of Appeals of New York has held that a person could challenge a license issued to a seller of newspapers based on the fact that the plaintiff was a citizen and therefore needed no special interest. Decisions to the same effect can be found in New Jersey, Massachusetts, Minnesota, California, Nebraska, and many other states. In these states it would appear that failure to provide adequate treatment could be challenged completely apart from administrative procedure acts by seeking a writ of mandamus.

Another means which could be utilized to enforce the right to treatment is the taxpayer suit. The number of states which allow taxpayer suits to challenge the legality of official conduct is in a constant state of flux. A safe statement seems to be that most states allow such suits where a taxpayer has a pecuniary interest in the public expenditure and a few allow them even without a direct pecuniary interest, based on the concept of public action. More significant perhaps, only New York appears to be totally opposed to allowing suits by state taxpayers to challenge state expenditures. Thus, while a direct pecuniary interest may be necessary in most states, there are some states in which citizen-mandamus or taxpayer suits can be an effective weapon to enforce the right to treatment. Citizen-mandamus and taxpayer suits suffer from an in-

See K. Davis, Administrative Law Treatise § 22.10 (1958). The question of whether a prisoner qualifies as a citizen of the state, a resident, or a taxpayer is dependent upon the requirements of each state and the civil disabilities imposed on the prisoner. See generally Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403 (1967). These alternative means of enforcement by nonprisoners are a means by which a private citizen can gain standing to sue correctional administrators without resorting to administrative procedure acts.


Ferry v. Williams, 41 N.J.L. 332 (1879).


State v. Weld, 39 Minn. 426, 40 N.W. 561 (1888).


Lynch v. City of Omaha, 153 Neb. 147, 43 N.W.2d 589 (1950); Noble v. City of Lincoln, 153 Neb. 79, 43 N.W.2d 578 (1950); Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947), cert. denied, 335 U.S. 814 (1949). All of these cases grant taxpayers the right to sue despite a failure to show any special interest.


An exhaustive list of state cases through 1965 is cited in 3 K. Davis, supra note 85, § 22.10 n.85 (Supp. 1965).

Id.
herent weakness, however, since such suits may not be effective as a means of compelling a state to spend money to rehabilitate prisoners. These suits would seem limited to prohibiting the correctional system from operating contrary to law. Suits under state administrative procedure acts would appear to be the best means by which to force administrators to adopt operating procedures and rules implementing a right to treatment with existing appropriations.

C. STANDING TO SUE UNDER ADMINISTRATIVE PROCEDURE ACTS

Before suit can be brought under a state administrative procedure act the party commencing the action must have standing to sue. The problem of standing could easily be overcome by drafting new legislation conferring standing upon interested citizens to sue to enforce a right to treatment for prisoners. The most persuasive argument for granting public interest standing would seem to be that any statute which exists for the protection of society affects the entire public directly and thus all members of the public should be able to enforce the statute. Public interest standing is not the Pandora's box some might think. The commencement of a lawsuit against public officials or agencies is hardly a frivolous matter likely to be commenced by anyone who is not sincere in believing that the directives of a statute are not being carried out.

The law of standing, however, has always been opposed to allowing members of the public to sue to enforce public rights. Historically, courts have felt that a valid case or controversy could not be presented unless the complaining party had suffered harm of a kind different from that suffered by other members of the public. The requirement of standing is met in the Revised Model Act by the provision that only a person aggrieved may seek judicial review of a contested case.

It would seem too obvious for debate that the prisoner himself is a party aggrieved by correctional rules or their absence or by abuse of administrative discretion in failing to provide adequate treatment. The prisoner is not necessarily deprived of his right to take advantage of the legal process because of the fact of imprison-

95 Michigan recently enacted a bill giving the individual citizen the right to sue private industry or public agencies for injuring the environment. N.Y. Times, July 5, 1970, at 21, col. 1.

96 RESTATEMENT (SECOND) OF TORTS § 821C (Tent. Draft No. 16, 1970) expresses a widely adopted view on standing: "For a public nuisance there is liability in tort only to those who have suffered harm of a kind different from that suffered by other members of the public exercising the public right."

97 MODEL ACT § 15(a).
ment, but at the same time his indigency and inability to obtain adequate legal assistance make him a very ineffective champion of the right to treatment. In addition, the right of the public to compel prisoner rehabilitation should not be made dependent on the willingness of a prisoner to seek rehabilitation. The sole desire of the prisoner may be to extricate himself from the prison environment. It would appear that if effective enforcement of the right to treatment rests with the public it must be based on public interest standing or the right to act as a "private attorney general" to enforce a public right.

In order to assert the rights of the public, the party bringing suit must have standing himself. Traditionally, only those whose interests were protected by the statute in question or those whose "legal rights" or "interests" were invaded had standing to challenge an administrative decision. A more liberal test of standing had been adopted in Federal Communications Commission v. Sanders Brothers Radio Station. In that case a radio station challenged the grant of a construction permit to a competing station. The court stated that economic injury was not, in and of itself and apart from considerations of public convenience, interest, or necessity, sufficient to confer standing. But it added:

[Congress] may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.

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98 See Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945): "A prisoner retains all rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."


100 The term "private attorney general" is attributable to the opinion of Judge Frank in Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943).


102 309 U.S. 470 (1940).
We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission.103

The Sanders Brothers case has been interpreted to mean that anyone aggrieved or injured in fact has the requisite standing under an administrative procedure act.104 Among those who have been found to be aggrieved in fact are competitors,105 consumers,106 and groups organized by persons showing a special interest in a particular area of administrative action.107

A recent Supreme Court case appears to have adopted both the tests of "aggrieved in fact" and "member of a class protected by statute." In Association of Data Processing Service Organizations, Inc. v. Camp,108 the Court stated that the issue of standing was to be decided by two inquiries. First, the question must be asked "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."109 The second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."110 The Court rejected the "legal interest" test as going to the merits rather than the issue of standing. Thus, a somewhat broadened concept of standing has emerged. Anyone aggrieved in fact and arguably within the zone of interests protected by the statute has standing to sue. Included among those aggrieved in fact are special interest groups.

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103 Id. at 477 (footnote omitted).
104 3 K. Davis, supra note 85, § 22.04.
107 Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965) (conservation group held to have standing): "In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be in the class of aggrieved parties . . . ." See also Note, Administrative Law—Expansion of "Public Interest" Standing, 45 N.C.L. Rev. 998 (1967).
108 397 U.S. 150 (1970). The basis of standing was the economic loss suffered by Data Processing when the Comptroller of the Currency ruled that national banks could make data processing services available to other banks and their customers. A companion case, Barlow v. Collins, 397 U.S. 159 (1970), held that tenant farmers under the Upland Cotton Program had standing to challenge the validity of amended regulations promulgated by the Secretary of Agriculture.
109 397 U.S. at 152.
110 Id. at 153.
The ramifications of *Data Processing* are relevant to the right to treatment to the extent that state courts interpret state administrative procedure acts in the same way as the federal act. If that happens, several classes of people would appear to have standing to sue to enforce a right to treatment for prisoners under state administrative procedure acts. Persons aggrieved in fact, besides the prisoner, might be the prisoner's family, which is dependent upon him for support and maintenance. The police might be considered aggrieved in fact since they must deal directly with the prisoner if he is not rehabilitated. Those employers who wish to employ ex-offenders may be aggrieved by the fact that the offenders were not taught any useful skill or trade while in prison. Arguably, all of these people might also be considered to be within the protection of the statutes which require that treatment be afforded prisoners.

Perhaps the most significant group of persons who appear to have standing would be those organized especially to seek rehabilitation of prisoners. Like conservation groups, which have been held to have standing to assert the rights of the public, prisoner rehabilitation groups likewise can be expected to provide the concrete adverseness necessary for a case or controversy. Foremost among these groups would appear to be the groups which comprise the American Correctional Association.\(^{111}\) Certainly ex-offender groups across the country and groups of concerned citizens organized in good faith to promote prisoner rehabilitation would also be entitled to standing. All of these groups meet the test of being aggrieved in fact. They also meet the test of arguably being within the zone of interests protected by the statute. It would appear that if a right to treatment is to become effectual its enforcement would fall upon these groups. The right of those who have standing to assert the rights of the public as well as their own has been stated by the Supreme Court: "That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. . . . [T]he rights to be vindicated are those of the public and not of private litigants."\(^{112}\)

\(^{111}\) The American Correctional Association is a composition of fourteen affiliated bodies, each of which would likewise have standing. Representative of these organizations are the American Correctional Chaplains Association, Association of Correctional Psychologists, International Half Way House Association, The Salvation Army, and The Women's Correctional Association. 32 Am. J. of Correction 3 (May-June 1970).

VI. CONCLUSION

Neither the police nor the courts have the opportunity to deal with the problems of the criminal offender in any sort of a corrective manner. Whether that opportunity is taken advantage of when the offender enters a correctional institution should be of great concern to the public. Correctional systems should have as their main purpose the protection of society through the rehabilitation of offenders. If retribution is substituted for reformation it is society as well as the prisoner who suffers. The right to treatment has been an effective instrument in securing for the mentally ill, sexual psychopaths, and juveniles the type of treatment which will enable them to safely rejoin society.

The language of rehabilitative intent which is expressed in broad terms in our state statutes indicates that society, through their elected representatives, has recognized that treatment and not physical suffering is the goal of confinement. If state courts are unable to deal with serious problems of public concern, history shows that federal courts will assume the responsibility. Federal intervention suffers from a serious handicap when it attempts reform of state institutional framework since state institutions must rely on state legislatures for their successful continuation. An enforceable right to treatment on a state level would avoid much of the legislative reluctance to act which often arises when federal courts attempt to enforce constitutional mandates.

If society is to benefit from a right to treatment it must become an enforceable right of the public as well as the prisoner. State habeas corpus is not an adequate remedy since total release of the prisoner is not a realistic solution. Prison administrators must be compelled to comply with the statutory language of treatment and rehabilitation through suits brought under state administrative procedure acts, citizen-mandamus, or taxpayer suits. Since the right to treatment stems from statutory directives designed to protect society as well as to provide treatment for prisoners, it should be enforceable by either the prisoners themselves or by interested members of the public. The most effective weapon to enforce the right to treatment would be suits under state administrative procedure acts to compel compliance with correctional statutes and to limit the discretion of prison administrators. Like all public officials, prison administrators are vested with a public trust. Administrative procedure acts exist to insure that administrators remain responsive to the commands of the public and do not violate that trust. The right to treatment, properly enforced, can insure that the field of corrections will not become insulated from the view of the public and that the opportunity to rehabilitate criminal offenders will not be lost.

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