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Constitutional Status of Solitary Confinement

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THE CONSTITUTIONAL STATUS OF SOLITARY CONFINEMENT

Although the Supreme Court recognized the dangers of solitary confinement[1] eighty years ago,[2] it is still a common means of prison discipline in almost all jurisdictions.[3] Moreover, it has often been upheld as a proper method of enforcing prison rules and discipline[4] and of administrative control of inmates considered to be a threat to themselves, to others, or to the safety and security of the institution.[5] Because of this mantle of precedent, only a few courts have challenged

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1 As used throughout this note, the term "solitary confinement" covers those forms of in-prison punishment that totally remove a prisoner from inmate society. Whatever other term is used—isolation, punitive segregation, confinement to a strip cell or the "hole"—the essential feature of solitary confinement is isolation from other prisoners and sometimes guards, and often a complete removal from sensory and physical stimuli.

2 *Ex parte* Medley, 134 U.S. 160 (1890). This case by no means rejected solitary punishment per se. It only held that a statute imposing the punishment of solitary confinement was an ex post facto law. However, the Court did recognize the adverse effects of solitary upon prisoners:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better . . . did not recover sufficient mental activity to be of any subsequent service to the community.

Id. at 168.

3 *See* S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 293 (1963) [hereinafter cited as RUBIN]. *See also* Teeters, *A Limited Survey of Some Prison Practices and Policies*, 14 PRISON WORLD 5 (May-June 1952).

4 The Federal Bureau of Prisons, under the direction of the Attorney General, has broad authority to provide for the discipline of federal inmates. *See* 18 U.S.C. §§ 4001, 4042 (1970). Broad discretion is also given to most state prison officials by statute. *E.g.*, CONN. GEN. STAT. REV. § 18-81 (1968); IND. ANN. STAT. § 13-239 (1956); MASS. ANN. LAWS ch. 124, § 1 (1965); N.Y. CORREC. LAW § 46 (McKinney Supp. 1970); OHIO REV. CODE ANN. § 5145.03 (Anderson 1970); PA. STAT. ANN. tit. 61, § 350 (1964). *See* Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 227 n.1 (1970).

5 Rogers v. Peck, 199 U.S. 425 (1905); Rooney v. North Dakota, 196 U.S. 319 (1905); Trezza v. Brush, 142 U.S. 160 (1891); McElvaine v. Brush, 142 U.S. 155 (1891); Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969); Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967); Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966); United States *ex rel.* Knight v. Ragen, 337 F.2d 425 (7th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965).

Since solitary confinement is authorized by statute in about half of the states and is used in almost every prison (RUBIN 293), some abuse is almost unavoidable. Approximately 24% of all prison disciplinary actions consist of solitary confinement. Jacob, *supra* at 234 n.30. *See also* Note, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671 (1967). There are few state court decisions upholding the use of solitary (*but see* McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957)), but its universal prevalence indicates that the states consider it legally permissible. RUBIN 293.

the concept of solitary confinement.[6] Those that have, usually on grounds of cruel and unusual punishment,[7] have discovered that barbarous conditions often accompany the use of solitary,[8] and have based

[6] *See, e.g.*, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). These cases relied on the cruel and unusual punishment clause of the eighth amendment. Solitary confinement, however, has also been successfully attacked on other grounds. In United States *ex rel.* Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964), a prisoner was ordered out of solitary where he had been confined during the pendency of his appeal. The court held that such confinement violated his fourteenth amendment right of access to the courts. *See also* Fulwood v. Clemmer, 206 F. Supp. 370, 377-79 (D.D.C. 1962). In Pierce v. LaValle, 293 F.2d 233 (2d Cir. 1961), solitary confinement for religious beliefs was found to be actionable under the Civil Rights Act (42 U.S.C. § 1983 (1970)). In Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970), the inmate was ordered released on equal protection grounds since there was no factual support for the authorities' explanation of why she was isolated from other prisoners. Due process may also be violated where no showing is made as to why the prisoner is in solitary. Smoake v. Fritz, 320 F. Supp. 609 (S.D.N.Y. 1970); Dabney v. Cunningham, 317 F. Supp. 57 (E.D. Va. 1970); *see also* Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966). Absence of even rudimentary disciplinary procedures prior to use of solitary also constitutes a due process violation. Carter v. McGinnis, 320 F. Supp. 1092 (W.D.N.Y. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970). Solitary has also been found to be an improper punishment for unconvicted detainees. *See* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); *contra*, Ruark v. Schooley, 211 F. Supp. 921 (D. Colo. 1962). The latter case, however, was dismissed for lack of federal jurisdiction and was prior to Robinson v. California, 370 U.S. 660 (1962), which extended the eighth amendment to the states. Thus *Ruark* is presumably no longer the law.

[7] U.S. CONST. amend. VIII.

[8] According to the allegations in Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), Lawrence Wright was confined in solitary for periods of 33 and 21 days. He charged that the cell was filthy, without adequate heat, and virtually barren, containing only a toilet and a sink, both of which were encrusted with slime, dirt, and human excrement. He was naked for 11 days and subsequently was only provided underwear. He had no soap, towel, toilet paper, toothbrush, or comb. Each day between 7:30 A.M. and 10:00 P.M., he said, he was required to stand at attention in front of his cell door whenever a prison official appeared, and he therefore could not sleep during this period. When he did sleep it was on a cold, rough concrete floor; moreover, he was confined in solitary during the winter, and since the windows were kept open, he alleged that he often could not sleep for fear he would freeze. His food was given to him without utensils in a bowl on the floor. He was denied access to all literature. This punishment, if proved, the court characterized as cruel and unusual. *Id.* at 520-22. The allegations were substantiated on remand. Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970).

In Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969), Don Lee Hancock alleged that he was confined in a five-by-eight foot, dirty, unlighted cell with no furnishings except a hole in the floor for a toilet. He was given no soap, towel, toilet paper, or other hygienic aids and was fed one slice of bread for breakfast and for supper. He was given a normal meal at noon, but it was in a paper container and he was forced to eat it without utensils. He also claimed that he was forced to sleep nude and without covers on the concrete floor of the cell. *Id.* at 789. The court stated that solitary confinement was not per se objectionable, but when imposed in conjunction with such conditions it constituted cruel and unusual punishment. *Id.* at 792.

Finally, Robert Jordan was allegedly confined for 12 days in a strip cell measuring

their decisions largely upon these conditions rather than upon the effects of solitary generally.[9] But solitary confinement, with or without egregious accompanying conditions, may itself be constitutionally questionable.

I

SOLITARY CONFINEMENT AS CRUEL AND UNUSUAL PUNISHMENT

The cruel and unusual punishment clause of the eighth amendment is both fluid and evolutionary, with contours difficult to define.[10] The courts have developed three interrelated tests to establish the boundaries of cruel and unusual punishment; each attempts to resolve the question of whether a "penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[11] The first approach is to ask whether under all the circumstances the punishment in question is "of such character . . . as to shock general conscience or to be intolerable in fundamental fairness,"[12] so that it does "more than offend some fastidious squeamishness or private sentimentalism."[13] Such a judgment must be made in light of developing concepts of elemental decency that "mark the progress of a maturing society."[14] Second, punishments may be cruel and unusual when "by their excessive length or severity [they] are

six feet by eight feet four inches. There was neither light nor ventilation in the cell. A hole in the floor served as a toilet and was flushed from the outside twice a day. The cell was never cleaned and during Jordan's confinement it was covered with human waste. He said that he had no means to clean his body or teeth, nor was he clothed for eight days, although he was subsequently given a pair of overalls. He was not provided with eating utensils. His bed reportedly consisted of an old canvas mat on the concrete floor; moreover, he could barely sleep for lack of heat in his cell. These conditions were found to violate the eighth amendment. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). For description of conditions in other solitary confinement cases, see Singer, *Confining Solitary Confinement: Constitutional Arguments for a "New Penology,"* 56 IOWA L. REV. 1251, 1254-58 (1971).

9 *See* Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969). In this case 400 days segregated confinement was found to be constitutional, whereas 2½ days confinement under conditions similar to those in *Wright, Jordan,* and *Hancock* (note 8 *supra*) was found to violate the eighth amendment. 302 F. Supp. at 1060-62.

10 *See* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878); *see also* Trop v. Dulles, 356 U.S. 86, 101 (1958); *Ex parte* Pickens, 101 F. Supp. 285, 288 (D. Alas. Terr. 1951).

11 Trop v. Dulles, 356 U.S. 86, 99 (1958).

12 Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965), *citing* Carey v. Settle, 351 F.2d 483 (8th Cir. 1965).

13 Rochin v. California, 342 U.S. 165, 172 (1952); *see also* Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967).

14 Trop v. Dulles, 356 U.S. 86, 101 (1958).

greatly disproportioned to the offenses charged."[15] Finally, a punishment may be cruel and unusual, even though applied in pursuit of a legitimate penal aim, if it goes beyond what is necessary to achieve that aim—that is, if a punishment is unnecessary and excessive in view of the purpose for which it is used.[16]

These three general tests[17] can best be applied to solitary confinement by separating its three distinct elements: (*1*) conditions accompanying confinement, (*2*) the length of confinement, and (*3*) the isolation inherent in the confinement, irrespective of other conditions or length.[18]

A. *Conditions of Confinement*

In *Wright v. McMann*,[19] a prisoner in solitary confinement sought injunctive relief. According to the complaint, his unheated cell had only a toilet and sink as furnishings. During the winter, for periods of thirty-three and twenty-one days he was confined in this cell with no clothing but underwear (and not even that for the first eleven days), given the most meager meals, and provided with no bed or soap. The Second Circuit declared that these allegations, if proved, constituted an adequate showing of cruel and unusual punishment and remanded the case for further proceedings.[20] The allegations were later substantiated.[21]

The conditions alleged in *Wright* are not unique; they have been

15 Weems v. United States, 217 U.S. 349, 371 (1910), *quoting* O'Neil v. Vermont, 144 U.S. 323, 339-40 (1891) (dissenting opinion). *See also* Watson v. United States, No. 21186 (D.C. Cir. Dec. 13, 1968), *quoted in* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 160 (2d ed. 1969).

16 Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). *See* Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910). For discussion of the applicability of this approach to solitary confinement, see text accompanying notes 44-64 *infra*.

17 Mr. Justice Fortas enunciated these three approaches in his dissent in Rudolf v. Alabama, 375 U.S. 889, 890-91 (1963). For a further refinement, see Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966).

18 The courts have rarely used this particular framework. *But see* Sostre v. McGinnis, 442 F.2d 178, 185 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 92 Sup. Ct. 719 (1972). Nevertheless, it is useful for purposes of analysis and because it facilitates the use of terms common in psychological studies of punishment. *See* E. BOE & R. CHURCH, PUNISHMENT: ISSUES AND EXPERIMENTS 300 (1968); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 492 (1971). Simply stated, "conditions" of confinement are the additional aspects of punishment other than the confinement itself. Isolation is the essence of the punishment in solitary confinement.

19 387 F.2d 519 (2d Cir. 1967).

20 *Id.* at 527.

21 Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970).

found in other recent cases as well.[22] But even if the conditions of solitary were more humane, its duration might still make it a form of unconstitutional punishment.

B. *Duration*

Duration of solitary confinement may in some cases be unlimited,[23] provoking a harmful psychological reaction in the prisoner. The need for specific limits on duration is supported by expert testimony of psychologists. In deciding *Wright* on remand,[24] the court relied heavily on the testimony of Dr. Joseph Satten,[25] a psychiatrist at the Menninger Clinic.[26] When asked what a prisoner's reaction would be to an indeterminate sentence of solitary confinement imposed by a rather arbitrary procedure, Dr. Satten said:

> Generally, that tends to have a harmful effect on the prisoner, in terms of increasing his resentment about the running of the prison, his suspiciousness in relationship to correctional officers, his rebelliousness towards society in general and his feeling that he is being kicked around. In addition, that kind of anger can overdevelop into psychiatric associations to a paranoid suspicious nature.[27]

A recent decision, *Sostre v. Rockefeller*,[28] dealt with the duration issue extensively, although it also considered other conditions accompanying solitary. *Sostre* attempted to set limits on the length of solitary confinement, stating that "to be constitutional, punitive segregation as

22 *E.g.*, Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). *See* note 8 *supra*.

23 *See* H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 351-52 (3d ed. 1959); Teeters, *supra* note 3, at 5-6. *See also* Knuckles v. Prasse, 302 F. Supp. 1036, 1061 (E.D. Pa. 1969).

24 Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970). Wright was awarded $1,500 damages under 42 U.S.C. § 1983 (1970) for the cruel and unusual punishment he suffered.

25 321 F. Supp. at 138. It should be noted that Dr. Satten did not completely rule out the value of solitary as a disciplinary device. Record at 469-72.

26 Since there are few psychological studies on the effects of solitary confinement on prison inmates (*but see* R. POOLEY, THE CONTROL OF HUMAN BEHAVIOR IN A CORRECTIONAL SETTING (1970)), Dr. Satten's testimony is of some significance, particularly in light of his long experience in prison psychology. Record at 413-17. *See also* Brief for Appellee at 42, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 92 Sup. Ct. 719 (1972).

27 Record at 433-34. Dr. Satten later gave two reasons for limiting lengthy solitary, even in the absence of arbitrary prison procedures: (*1*) "individuals that don't respond well to brief periods in punitive segregation usually have something wrong with them," and (2) "a system of indefinite punitive segregation is very easily subject to abuses." *Id.* at 450. *See* Wright v. McMann, 321 F. Supp. 127, 142 (N.D.N.Y. 1970).

28 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 92 Sup. Ct. 719 (1972).

practiced in Green Haven [prison] must be limited to no more than fifteen days and may be imposed only for serious infractions of the rules."[29] The Second Circuit in a split decision reversed *Sostre* in part.[30] The majority recognized the adverse psychological effects of prolonged solitary confinement, attested to by expert witnesses at the original hearing,[31] but held that solitary confinement was not unconstitutional per se.[32] The court stated that

> [a]lthough the conditions Sostre endured were severe, we cannot agree with the district court that they were "so foul, so inhuman,

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29 *Id.* at 871. The American Correctional Association recommends ordinarily no more than 15 days of solitary (AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 415 (3d ed. 1966)), as do the prison regulations of the District of Columbia (*see* Fulwood v. Clemmer, 206 F. Supp. 370, 378 (D.D.C. 1962)). A 30-day limit in Tennessee is mentioned in Hancock v. Avery, 301 F. Supp. 786, 788 (M.D. Tenn. 1969). However, the *Fulwood* case also demonstrated how prison officials can avoid such limits by leaving the inmate in solitary for the maximum period, removing him for a short period, and then putting him in again. 206 F. Supp. at 378-79. The *Model Penal Code* states that "[f]or serious or flagrant breach of the rules . . . the offender [may] be confined in a disciplinary cell for a period not to exceed thirty days." MODEL PENAL CODE § 304.7(3) (Proposed Official Draft, 1962). The recent case of Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970), recommends no more than 30 days. New Hampshire has a statutory limit of 30 days (N.H. REV. STAT. ANN. § 622:14 (1955)) and Missouri limits isolation on short food allowance to 10 days (MO. ANN. STAT. § 216.455 (Supp. 1969)). *See* Sostre v. McGinnis, 442 F.2d 178, 192-93 nn.19-21 (2d Cir. 1971). Until recently New York had a statute which permitted indefinite confinement in solitary. N.Y. CORREC. LAW § 140 (McKinney 1968). It is now repealed. *Id.* §§ 138-40 (McKinney Supp. 1971).

Recent concern over prisoners' rights has prompted the National Council on Crime and Delinquency to propose a Model Act which, among other things, would permit the use of solitary only in emergency situations and never as a punishment. The act sets no definite limit on the length of solitary confinement, but does provide limitations on its use. NATIONAL COUNCIL ON CRIME & DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS § 3 (1972).

30 Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). Two judges concurred in Judge Kaufman's majority opinion and two dissented. Two other judges, in a separate opinion, would have affirmed the lower court on the cruel and unusual punishment finding. The majority, however, reversed the lower court's findings of cruel and unusual punishment, but on other grounds continued the injunction against further use of solitary confinement against Sostre. *Id.* at 204. The majority affirmed the lower court's restoration of Sostre's good-time credit (*see* note 47 *infra*) and indicated that some procedural limits on solitary were necessary (*see* note 65 *infra*).

31 Mr. Rubin [former counsel for the National Council on Crime and Delinquency] testified that Sostre's segregated environment was degrading, dehumanizing, conducive to mental derangement, and for these reasons "a gross departure" from enlightened and progressive contemporary standards for the proper treatment of prison inmates. Dr. Halleck [a psychiatrist from the University of Wisconsin] feared that the isolation from human contact in punitive segregation might cause prisoners to hallucinate and to distort reality. *Long-term isolation might have so serious an impact, in fact, as to "destroy" a person's "mentality."* 442 F.2d at 190 (emphasis added).

32 *Id.* at 192.

> and so violative of basic concepts of decency" . . . as to require that similar punishments be limited in the future to any particular length of time.[33]

The *Sostre* majority thus confused two aspects of solitary confinement: accompanying conditions and duration. Assuming the conditions were perfect, the punishment could still be so disproportionate in length to the offense so as to place it within the eighth amendment's ban. Judge Feinberg's dissent recognized this confusion:

> The crucial holding of the majority opinion is the refusal to put any limit upon the period of solitary confinement. It is the unusual duration and the open-ended nature of the isolation that the district court and the experts regarded as inflicting the worst psychological harm. Accordingly, as we did in Wright v. McMann, . . . I would hold that the punishment here, "which could only serve to destroy completely the spirit and undermine the sanity of the prisoner," runs afoul of the eighth amendment.[34]

C. *Isolation*

Psychological effects of punishment were recognized as a possible element of an eighth amendment violation in *Trop v. Dulles*.[35] The Supreme Court stated that "punishment is offensive to cardinal principles for which the Constitution stands" when it "subjects the individual to a fate of ever-increasing fear and distress."[36] The *Wright* court and the lower court and dissent in *Sostre* echoed this view. The *Sostre*

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33 *Id.* at 191-92, *quoting* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (footnote omitted). In support of its conclusion that Sostre's solitary confinement was not cruel and unusual punishment, the majority took a rather interesting position: before a court declares a punishment unconstitutional under the eighth amendment, it should school itself "[i]n such objective sources as historical usage, . . . practices in other jurisdictions, . . . and public opinion . . . ." *Id.* at 191. The majority found that solitary was permissible based upon an analysis of these three sources.

Solitary does have a long history. *See Ex parte* Medley, 134 U.S. 160, 167-70 (1890). It was repealed as a punishment in England, however, in the days of William IV. 6 & 7 Will. 4, c. 30 (1836). It is true that solitary is a common practice throughout the United States, but the *Sostre* court seems to have neglected the fact—discussed in its own footnotes—that solitary is also often limited in duration. 442 F.2d at 192. *See also* note 29 *supra*.

34 Sostre v. McGinnis, 442 F.2d 178, 209 (2d Cir. 1971) (dissenting opinion), *quoting* Wright v. McMaun, 387 F.2d 519, 526 (2d Cir. 1967). The majority felt that it was impossible to separate duration from conditions and thus could not set a definite length of time beyond which solitary would be impermissible. 442 F.2d at 192-93. This refusal can only lead to case by case, after the fact determinations.

35 356 U.S. 86 (1958) (loss of citizenship as punishment for desertion held to violate eighth amendment). For a detailed analysis of mental suffering as possibility constituting cruel and unusual punishment, see Singer, *supra* note 8, at 1272-76.

36 *Id.* at 102.

lower court in particular would have based its finding of cruel and unusual punishment in part on the psychological effects of such confinement on the prisoner:

> This court finds that punitive segregation under the conditions to which plaintiff was subjected at Green Haven is physically harsh, destructive of morale, dehumanizing in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time . . . .[37]

Although it is true that the accompanying conditions and excessive duration of solitary often contribute to a prisoner's psychological injury, when these factors are absent isolation alone can still have damaging effects.[38] The key focus of the lower court in *Sostre* was neither the conditions nor duration of the punishment, but rather the fear that human isolation[39] might endanger the prisoner's sanity.[40]

This fear is supported by Dr. Satten's testimony on remand in *Wright*:

> [S]egregation from peers or compatriots tends to encourage the development of fantasy thinking and behavior in relationship with people which dulls the capacity to relate adequately to other people. And in a prolonged period or in an extreme form, upon certain inmates, it can even reach the stage of mental illness.[41]

The American Correctional Association has pointed out that "[i]solation may bring short-term conformity for some, but brings increased disturbances and deeper grained hostility to more."[42] And by Judge Feinberg's evaluation,

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37 Sostre v. Rockefeller, 312 F. Supp. 863, 868 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 92 Sup. Ct. 719 (1972). *See* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); *see also* Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969).

38 *See* Record at 445, Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970); *see also* Singer, *supra* note 8, at 1264-72.

39 312 F. Supp. at 868. The Second Circuit accepted this analysis on review. 442 F.2d at 185.

40 "Subjecting a prisoner to the demonstrated risk of the loss of his sanity as punishment for any offense in prison is plainly cruel and unusual punishment as judged by present standards of decency." 312 F. Supp. at 871. *See also Ex parte* Medley, 134 U.S. 160, 168 (1890).

41 Record at 426. Dr. Satten went on to describe this mental illness as

> periods of withdrawal from reality usually accompanied by delusions and hallucinations in which the prisoner is at least for a while in a world of his own without relationship to the world which is about him. Sometimes the medical word psychosis or psychiatric break is used to describe these states.

Id. See also Brief for Appellee at 41, Sostre v. McGiunis, 442 F.2d 178 (2d Cir. 1971).

42 AMERICAN CORRECTIONAL ASS'N, *supra* note 29, at 413. The American Correctional Association is a group of citizens, penologists, psychiatrists, and prison administrators representing all the states and the federal government, that seeks "to encourage a more

> [i]n this Orwellian age, punishment that endangers sanity, no less than physical injury by the strap, is prohibited by the Constitution. Indeed, we have learned to our sorrow in the last few decades that true inhumanity seeks to destroy the pysche rather than merely the body.[43]

II

PENOLOGICAL AIMS AND SOLITARY CONFINEMENT

It is clear, then, that in certain situations the conditions accompanying solitary confinement, its duration, and its inherent isolation will render it unconstitutional. However, the courts must go beyond a simple one-dimensional analysis of these factors in judging the constitutionality of a punishment. That is, the courts should consider solitary in relation to its success in achieving the penological aims intended—rehabilitation, restraint, deterrence, and retribution.[44] Thus even when a punishment is not unconstitutional because of its accompanying conditions, duration, or isolation, it may be so because of its lack of social or penal utility.[45] The question, therefore, is whether solitary confinement achieves the penological effects intended.

Solitary confinement is obviously retributive, but "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[46] Moreover, a prisoner is already being punished for his offenses against society;[47] further punishment should not be

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enlightened criminal justice in our society, [and] to promote improved practices in the treatment of adult and juvenile offenders . . . ." *Id.* at xix.

43 442 F.2d at 208 (dissenting opinion).

44 *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963); Williams v. New York, 337 U.S. 241, 248 (1949); Trop v. Dulles, 356 U.S. 86, 111-12 (1958) (concurring opinion); Rudolf v. Alabama, 375 U.S. 889, 891 (1963) (dissenting opinion).

45 "The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation." Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). *Cf.* Rudolf v. Alabama, 375 U.S. 889, 890-91 (1963) (dissenting opinion). *See also* Robinson v. California, 370 U.S. 660, 676 (1962) (concurring opinion); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966); Turner, *supra* note 18, at 501-03.

Interestingly, the majority in *Sostre* said that it did not question "the relevance to an inquiry under the Eighth Amendment of opinions which may represent a progressing sense of humaneness as well as a new calculation as to the efficacy of penal practices." 442 F.2d at 191.

46 Williams v. New York, 337 U.S. 241, 248 (1949).

47 "In a word, the sentence and all it implies is the punishment; the object of prison treatment should not be to increase the punishment but to reform the prisoner." SCOTTISH

applied without some limitations.[48] And even when the accompanying conditions and duration of the confinement are limited, isolation's psychological effects alone can be needlessly destructive.

Solitary does not serve the rehabilitative ideal, for the "use of punitive segregation does not help the resocialization or rehabilitation process but only makes it more difficult."[49] There seem to be two possible reasons for this difficulty. "[P]rolonged introspection, combined with an almost total absence of fresh stimuli, does not regenerate. On the contrary it demoralizes."[50] And "when the individual has displayed an acute need for support, help and understanding, he is instead removed from all human contact."[51]

In addition, there is evidence that solitary produces little deterrent effect. Approximately four of five prisoners who are confined in solitary have received solitary or a similar punishment before.[52] It seems that rather than deterring the prisoner, the additional punishment of solitary may make him more likely to commit another breach of discipline.[53] In fact, some inmates may receive behavioral reinforcement

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ADVISORY COUNCIL ON THE TREATMENT AND REHABILITATION OF OFFENDERS, REPORT ON THE SCOTTISH PRISON SYSTEM (1949), *quoted in* W. MOBERLY, THE ETHICS OF PUNISHMENT 260 (1968). Men, that is, "are sent to prison *as* a punishment and not *for* punishment." W. MOBERLY, *supra* at 260 (footnote omitted) (emphasis in original).

An inmate's term in prison is usually lengthened by solitary confinement. *See, e.g.*, 18 U.S.C. § 4165 (1970). The inmate cannot gain good-time credits while in solitary, and may even forfeit some or all of those already earned. Good-time is credited against an inmate's total sentence; its purpose is to reward good behavior and thus to provide an incentive for rehabilitation. It is common to reduce a sentence by seven to 10 days for each month served without a record of misbehavior. Jacob, *supra* note 4, at 231. Both the federal government and nearly every state have such statutes. RUBIN 307-14.

The lower court in *Sostre*, in finding the confinement there an illegal sentence, held that some procedural safeguards were necessary before good-time credit was revoked. It restored 124 1/3 days of Sostre's good-time credit. 312 F. Supp. at 884. This ruling was affirmed by the majority in Sostre v. McGinnis, 442 F.2d 178, 204 (2d Cir. 1971).

Some courts, however, hold that good-time is entirely a matter of grace (*e.g.*, Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957)) and thus that its computation is purely an administrative determination (*e.g.*, People *ex rel.* Gray v. Denno, 46 Misc. 2d 436, 259 N.Y.S.2d 652 (Sup. Ct. 1965); Commonwealth v. Heston, 292 Pa. 501, 141 A. 287 (1928)). Other courts have stated that they would intervene only when they believed that the prison officials acted arbitrarily and capriciously. *E.g.*, Powell v. Hunter, 172 F.2d 330 (8th Cir. 1949). *See* Jacob, *supra* note 4, at 248-49.

48 Carothers v. Follette, 314 F. Supp. 1014, 1029 (S.D.N.Y. 1970).

49 Record at 434, Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970).

50 W. MOBERLY, *supra* note 47, at 243-44.

51 Letter from Correctional Association of New York to New York State Assemblymen, March 27, 1970, on file at the *Cornell Law Review*.

52 FOX, *Prison Disciplinary Problems*, in N. JOHNSTON, L. SAVITZ & M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 393 (2d ed. 1970).

53 *Id.* at 398. *See also* R. POOLEY, *supra* note 26, at 19.

in the form of recognition and praise from other inmates for being able to "take" solitary.[54] Punishment as severe as solitary may also fail to discourage offenses by other inmates.[55]

Solitary, of course, does prevent breaches of discipline by the prisoner during the period of his confinement, but as a punishment it is completely disproportionate to most prison offenses, which range from assault[56] to dusty cell bars.[57] Discipline must be rationally scaled to the seriousness of the offense; solitary is too harsh a punishment for dusty cell bars, but it may be the only way to restrain a truly dangerous prisoner.

> If the evil of the punishment exceed the evil of the offence, the punishment will be unprofitable: the legislator will have produced more suffering than he has prevented; he will have purchased exemption from one evil at the expense of a greater.[58]

There are alternative disciplinary measures.[59] The American Correctional Association recommends that solitary be used only "when reprimands, loss of privileges, suspended sentences, and similar measures have been tried without satisfactory results and when the infractions are not serious enough to warrant bringing the inmate to trial in a criminal court."[60] Only through such limitations on the use

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54 R. KORN & L. MCCORKLE, CRIMINOLOGY AND PENOLOGY 445 n.11 (1959). Pooley also provides an interesting example. "The more frequently the subject was put into solitary confinement, the more frequently he would receive admiration and respect from his peers. Consequently, he would engage in disruptive behavior more frequently in order to be put in solitary confinement." R. POOLEY, *supra* note 26, at 5-6.

55 In so far as the prevention of crime by others than the person dealt with is concerned, psychologists agree and history demonstrates that neither fear of monetary amercement nor the physical distress of imprisonment are of material effect. What deterrence there may be springs from more subtle influences . . . . If this be so, punishment, in the sense of treatment administered for the primary purpose of causing suffering, is not necessary to attainment of the end sought.

J. WAITE, THE PREVENTION OF REPEATED CRIME 87-88 (1943). *See also* W. MOBERLY, *supra* note 47, at 260-61.

56 *See* Fox, *supra* note 52, at 396-97.

57 Sostre v. Rockefeller, 312 F. Supp. 863, 869 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 92 Sup. Ct. 719 (1972). For a long list of trivial prison disciplinary offenses, see D. CLEMMER, THE PRISON COMMUNITY 71 (1965); RUBIN 294 n.113.

58 J. BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 397 (J. Bowring ed. 1843).

59 For an innovative classification and punishment scheme using solitary confinement only as a last resort with many procedural safeguards, see Morris v. Travisono, 310 F. Supp. 857, 865-75 (D.R.I. 1970).

60 AMERICAN CORRECTIONAL ASS'N, *supra* note 29, at 413. The Association concludes that to use solitary "as a standard disciplinary action for almost the entire range of offenses is hardly a sensible solution to disciplinary problems." *Id.* at 412. *See also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 50-51 (1967).

of solitary can a penal system hope largely to avoid the physical and psychological dangers[61] isolation poses for inmates.

Solitary confinement as practiced today has little or no social utility. But courts, such as the majority in *Sostre*, refuse even to limit its use, often retreating instead to the outdated doctrine of noninterference with prison administrative processes.[62] What must be remem-

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[61] *See, e.g.*, the discussion of such dangers in *Ex parte* Medley, 134 U.S. 160, 168 (1890); Carothers v. Follette, 314 F. Supp. 1014, 1028 n.14 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F. Supp. 863, 868 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 92 Sup. Ct. 719 (1972); Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966). *See also* New York City Bd. of Correction, A Shuttle to Oblivion: A Report on the Life and Death of a Citizen, Raymond Lavon, in the Manhattan House of Detention for Men, Also Known as "Tombs" (Dec. 3, 1970). This report is an in-depth study of a prisoner from the time of his arrest on a drug charge to the time of his suicide in solitary confinement.

[62] Until recently federal courts refused to review cases that arose out of state prison disciplinary proceedings on the grounds: (*1*) that the eighth amendment's prohibition against cruel and unusual punishment did not apply to the states; (*2*) that state remedies should be utilized in the first instance; and (*3*) that courts should not interfere in the internal discipline of prisons. *See* Wright v. McMann, 387 F.2d 519, 522 (2d Cir. 1967). Any uncertainty as to the applicability of the eighth amendment to the states was removed by Robinson v. California, 370 U.S. 660 (1962). In Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court held that exhaustion of state remedies was not a prerequisite to acceptance of jurisdiction by a federal court. However, although the federal courts have accepted some state prisoners' suits, they are still reluctant to interfere in the internal discipline of prisons except in extreme cases. *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). As for the necessary showing required to overcome the noninterference doctrine, the federal courts of appeal have phrased the test in many different ways. *See, e.g.*, Ford v. Board of Managers, 407 F.2d 937, 940 (3d Cir. 1969) ("barbaric conditions"); Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968) ("unlawful and onerous treatment"); Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967) ("clear arbitrariness or caprice upon the part of prison officials"); Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965) ("extreme cases" of censorship or restriction of correspondence); Carey v. Settle, 351 F.2d 483, 485 (8th Cir. 1965) ("intolerable" discipline); Roberts v. Pegelow, 313 F.2d 548, 550 (4th Cir. 1963) ("vindictive, cruel or inhuman" treatment); *see also* White v. Clemmer, 295 F.2d 132, 134 (D.C. Cir. 1961) ("clear cases of illegality of action").

Confusion on when to intervene is basically owing to the difficulty of distinguishing between reasonable prison discipline and cruel and unusual or otherwise illegal punishment. The results have been seemingly inconsistent decisions. One court has declared unconstitutional a period in solitary of 2½ days. Knuckles v. Prasse, 302 F. Supp. 1036, 1062 (E.D. Pa. 1969). Another court has upheld a period of more than two years. Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967). Some prisoners have been unable to obtain relief, no matter how trivial the reasons for confinement and no matter how barbaric the confinement. *See* Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), where the court held that the use of tear gas 12 to 15 times a year in an isolation wing of a Virginia prison was a legitimate disciplinary measure and not cruel and unusual punishment. Nor was it cruel and unusual to put the prisoner in prolonged solitary confinement for infractions such as using legal papers supplied by the prison as scrap paper. *Id.* Recently, however, the Supreme Court reversed an Illinois case (Haines v. Kerner, 427 F.2d 71 (7th Cir. 1970)) which had dismissed an inmate's *pro se* complaint alleging that 15 days solitary confinement was cruel and unusual punishment and deprivation of due process.

bered is that prisoners have rights too,[63] which must be balanced against the legitimate interests of the state. Upon remand, the court in *Wright v. McMann,* in finding Wright's solitary confinement to violate the eighth amendment, stated,

> The consequences of abrupt and arrogant interference had to be weighed and balanced with the compelling interest to uphold federal constitutional rights in accord with modern precepts. The balance must be kept true as Justice Cardozo said, and there must be equal understanding of the prison administration problems as well as those of the inmates.[64]

CONCLUSION

To be constitutional, solitary confinement must be severely limited in its use, for it actually serves legitimate penal aims only in very limited circumstances. Even in such circumstances, however, isolation will take its psychological toll. Specific restrictions on duration and accompanying conditions must be set so that the use of solitary may become at once less frequent and more humane. Confinement exceeding these limits should be subject to judicial remedy.[65] The problem of isolation would thus continue, but on a greatly reduced scale. In addition, if procedural safeguards were available[66] to limit the use of

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The lower courts had based their dismissal on the noninterference doctrine and a finding that the complaint failed to state a cause of action. The Supreme Court, holding that there was error in dismissing the complaint without allowing the inmate to present evidence, reversed and remanded the case for an opportunity to offer proof. Haines v. Kerner, 92 Sup. Ct. 453 (1972) (per curiam). *See also* Hirschkop & Millemann, *The Unconstitutionality of Prison Life,* 55 VA. L. REV. 795 (1969).

63 Although historically prisoners were considered slaves of the state (Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1891)), the Supreme Court acknowledged in 1894 that they had some rights. *In re* Bonner, 151 U.S. 242 (1894). It is now recognized that a "prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945). The due process and equal protection clauses of the fourteenth amendment have been held to follow convicts into prison. Talley v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1965). *See also* Johnson v. Avery, 393 U.S. 483, 486 (1969); Price v. Johnston, 334 U.S. 266, 285 (1948); Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968).

64 321 F. Supp. 127, 146 (N.D.N.Y. 1970).

65 *See* NATIONAL COUNCIL ON CRIME & DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS § 6 (1972).

66 The lower court in *Sostre* also held that any solitary confinement would be unconstitutional without:

> 1) written notice [to the prisoner] of the charges against him (in advance of a hearing) which designated the prison rule violated; 2) a hearing before an impartial official at which he had the right to cross-examine his accusers and call witnesses in rebuttal; 3) a written record of the hearing, decision, reasons there-

solitary to only the most severe breaches of institutional regulations,[67] its proper role within the context of reasonable prison discipline might be determined, and possibly its social utility correspondingly increased.

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for and evidence relied upon; and 4) [opportunity to] retain counsel or a counsel substitute.

Sostre v. Rockefeller, 312 F. Supp. 863, 872 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGiunis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 92 Sup. Ct. 719 (1972). The Second Circuit reversed this part of the holding, but it did indicate that some procedural safeguards were necessary; the prisoner, for example, should be confronted with the accusation, informed of the evidence, and afforded a reasouable opportunity to explain his actions. 442 F.2d at 198. *See also* Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) (hearing rights similar to those granted in *Sostre* afforded to prisoners facing possible solitary confinement or postponement of parole); Carter v. McGinnis, 320 F. Supp. 1092, 1097 (W.D.N.Y. 1970); Carothers v. Follette, 314 F. Supp. 1014, 1029 (S.D.N.Y. 1970). The Model Act suggests a procedure iu which counsel is present and a permanent record kept for all cases affecting sentence or parole eligibilty. NATIONAL COUNCIL ON CRIME & DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS § 4 (1972). It should be noted, however, that attacking the absence of procedural due process in prison discipline may be a tactical mistake. By granting some procedural rights to prisoners, the courts are able to avoid reaching the issue of the consitutionality of solitary confinement itself.

[67] [Solitary] is a major disciplinary measure, which can have damagiug effect upon some inmates, and should be used judiciously when other forms of action prove inadequate or where the safety of others or the serious nature of the offense makes it necessary.

AMERICAN CORRECTIONAL ASS'N, *supra* note 29, at 413.