COMMENTS

PRISONER'S CONSTITUTIONAL RIGHTS: SEGREGATED CONFINEMENT AS CRUEL AND UNUSUAL PUNISHMENT

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

Sostre, a prisoner, sued New York correctional officers under the Civil Rights Act of 1871,[1] alleging that his placement in segregated confinement[2] was "cruel and unusual punishment." He had been punitively segregated for writing legal documents for a codefendant for possessing racially inflammatory writings and for failing to answer the warden's questions about his membership in a militant group. All of these violated prison rules, but it is apparent that his racial activism contributed to the decision to isolate him. In response to his segregation, Sostre grew increasingly obstinate. He refused to submit to searches which were a prerequisite to the ordinarily permitted daily exercise and refused to participate in the required group therapy program. Sostre's unwillingness to adhere to the prison rules and regulations precluded his release from segregation for more than a year before his suit was heard. He was ordered released by the trial court judge who held first, that the punitive segregation was a disproportional punishment,[3] and second that the conditions were not so

1. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides remedies at law and equity for persons whose rights, privileges or immunities secured by the constitution and laws of the United States are violated by persons acting under color of law.

2. N.Y. CORR. LAW § 140 (McKinney 1968) authorizes the warden to impose indefinite segregated confinement until a prisoner is "reduced to submission and obedience." This comment will not distinguish between "solitary confinement" and "segregated confinement." The courts have used the terms interchangeably. When they are distinguished in the cases, "solitary" denotes the more severe punishment.

3. The trial court found that there was a violation of three prison rules, but ruled that the cause of his segregation was the improper personal motives of the warden, not the conduct of the prisoner. The appellate court focused on the alleged violations and cited Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970) where it was held that the constitutional permissibility of placing an inmate in segregated confinement is to be judged on the reasonable relationship the challenged acts have to prison security and his punishment, and are not to be measured by the motivation of the prison officials.

intolerable as to be unconstitutional *per se* but were sufficiently severe that segregation for over fifteen days threatened a prisoner's sanity and therefore was cruel and unusual punishment. The Second Circuit reversed and *held*: plaintiff's segregated confinement did not violate the eighth amendment. Indefinite punitive segregation is not unconstitutional *per se*. Continued violation of a prison rule, represents a credible threat to prison security and indefinite segregation is a proper disciplinary response. The surrounding circumstances of Sostre's segregation, although severe, were not so inhuman as to be within the eighth amendment's prohibition of "cruel and unusual punishment."[4]

The eighth amendment's prohibition against "cruel and unusual punishment" was taken almost verbatim from the English law designed to preclude tortuous and barbarous punishments.[5] Originally, the amendment was read narrowly. Consequently, the case law was limited.[6] In 1910, a majority of the Supreme Court decided that the eighth amendment's meaning was not static.[7] Thus the cruel and unusual clause could acquire wider scope as "public opinion becomes enlightened by human justice."[8] This evolving standard was to be used to judge "cruel and unusual punishment." The amendment's prohibition covers three broad areas. First, a punishment is unconstitutional if it shocks the general conscience or conflicts with fundamental fairness.[9] Second, punishment disproportionate to the offense committed is unconstitutional.[10] In a dissenting opinion, Justice Goldberg proposed

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

5. *In re* Kemmler, 136 U.S. 436, 447 (1890). For an excellent survey of the history of the eighth amendment, *see* Comment, *The Cruel and Unusual Punishment Clause and the Substantive Law*, 79 HARV. L. REV. 635 (1966).

6. The Supreme Court has considered the question of what punishments are in violation of the eighth amendment only eleven times. Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459 (1947); Badder v. United States, 240 U.S. 391 (1915); Weems v. United States, 217 U.S. 349 (1910); Howard v. Flemming, 191 U.S. 126 (1903); O'Neil v. Vermont, 144 U.S. 323 (1892) (dissenting opinion); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878); Pervear v. Commonwealth, 72 U.S. 475 (1867).

7. Weems v. United States, 217 U.S. 349, 373 (1910).

8. *Id.* at 378.

9. Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965). *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 (1958) ("beneath the dignity of man"); Burns v. Swenson, 430 F.2d 771, 777-78 (8th Cir. 1970) ("of such inhumane and barbaric proportions so as to shock and offend a court's sensibilities"); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967) ("so foul, so inhuman, and so violative of basic concepts of decency").

10. Weems v. United States, 217 U.S. 349, 366 (1910); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (dissenting opinion).

that all punishment should be for a legitimate penal aim and the punishment cannot go beyond what is necessary to achieve that aim.[11]

The courts have recognized the peculiar problems associated with maintaining discipline in our prison system.[12] They have been reluctant to intervene in the prison's internal disciplines unless a fundamental right has been violated by the arbitrary or capricious action of prison officials.[13] Therefore, segregated confinement is not unconstitutional *per se*,[14] but is a legitimate disciplinary measure unless the

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11. This third area of proscripted punishment was first announced by J. Goldberg, in Rudolph v. Alabama, 375 U.S. 889, 890-91 (1963) (dissenting opinion). Whether it is significantly different from the disproportional test is not clear. There are conceivable situations where a court might hold a punishment prohibited by the disproportional test and not by this new test; *e.g.*, cutting off the prisoner's hands may well serve the legitimate penal aim of preventing pick-pocketing, and yet, clearly would violate the disproportional punishment rule. Examples of cases which do not fail the disproportional test while violative of the new test are more numerous; *e.g.*, the death penalty may not be disproportional to the offense of murder, however, life imprisonment may be just as effective in serving the penal aim. Several cases were originally classified within the disproportional test but now appear more appropriately placed within this third test. *See* Roberts v. Pegelow, 313 F.2d 548, 550 (4th Cir. 1963) (vindictive punishment prohibited); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (punishment must be reasonably related to the offense). Finally, it should be noted that it is not clear whether the word "unusual" has any qualitative meaning different from "cruel." It is clear, however, that distinctions have not been drawn and thus the courts will not hestitate to find punishment which is "cruel" and not "unusual" unconstitutional and vice versa. The trend seems to be to hold that "unusual" adverbially modified "cruel." Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1969).

12. Landman v. Peyton, 370 F.2d 135, 138 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967); Courtney v. Bishop, 409 F.2d 1185, 1187 (8th Cir. 1965); Hancock v. Avery, 301 F. Supp. 786, 791 (M.D. Tenn. 1969); Roberts v. Pepersack, 256 F. Supp. 415, 426 (D. Md. 1966). *See also* Note, *Effect Upon the Constitutional Rights of those Imprisoned*, 8 VILL. L. REV. 379 (1963).

The courts have generally recognized five valid reasons for imposing segregated confinement on an inmate: (1) where the prisoner is a threat to himself or to others, Wright v. McMann, 387 F.2d 519, 526 n.15 (2d Cir. 1967); Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967); (2) where the prisoner destroys the furniture in his cell, Courtney v. Bishop, 409 F.2d 1185, 1188 (8th Cir. 1969); (3) where the prisoner has made a bona fide escape threat, Krist v. Smith, 309 F. Supp. 497, 500 (S.D. Ga. 1970); (4) where the prisoner has disobeyed a valid prison rule or order, Winsby v. Walsh, 321 F. Supp. 523, 527 (C.D. Cal. 1971); Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962); (5) where the prisoner causes an increased likelihood of rebellion, Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962).

13. Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967); *see also* Comment, 23 ALA. L. REV. 143, 147 (1970).

14. Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Courtney v. Bishop, 409 F.2d

conditions are a threat to the prisoner's health[15] or the length or quality of the punishment is disproportionate to the offense.

Courts analyzing the conditions of segregated confinement generally hold that segregation may be harsh and unpleasant,[16] but basic sanitation and nutrition is required.[17] Inadequate lighting,[18] ventilation,[19] heating,[20] cleaning,[21] bedding,[22] nutrition,[23] medical care,[24] or oppor-

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1185 (8th Cir.), *cert. denied,* 396 U.S. 915 (1969); Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967); United States *ex rel* Knight v. Ragen, 337 F.2d 425 (7th Cir. 1964), *cert. denied,* 380 U.S. 985 (1965); Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964).

15. The following cases in which segregated confinement was adjudged unconstitutional relied at least in part on the conditions of the segregated confinement; Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); Howard v. State, 28 Ariz. 433, 237 P. 203 (1925). Other cases which held that the conditions of segregation were not so onerous as to be unconstitutional are as follows: Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Ford v. Board of Managers of New Jersey State Prisons, 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), *cert. denied,* 388 U.S. 920 (1967); Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); Kostal v. Tinsley, 337 F.2d 845 (10th Cir. 1964), *cert. denied,* 380 U.S. 985 (1965); Winsby v. Walsh, 321 F. Supp. 523 (C.D. Cal. 1971); Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970); Clinton v. Swenson, 320 F. Supp. 595 (W.D. Mo. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970); Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970); United States *ex rel* Keen v. Mazurkiewicz, 306 F. Supp. 483 (E.D. Pa. 1969); Veals v. Ciccone, 281 F. Supp. 1017 (W.D. Mo. 1966); Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966); Ruark v. Schooley, 211 F. Supp. 921 (D. Colo. 1962); Blythe v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961); Myron v. Wainwright, 225 So. 2d 351 (Fla. 1969).

16. Ford v. Board of Managers of New Jersey State Prisons, 407 F.2d 937, 940 (3d Cir. 1969); United States *ex rel* Keen v. Mazurkiewicz, 306 F. Supp. 483 (E.D. Pa. 1969).

17. Jordan v. Fitzharris, 257 F. Supp. 674, 682 (N.D. Cal. 1966).

18. Hancock v. Avery, 301 F. Supp. 786 (D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); *cf.* Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

19. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

20. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

21. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F. Supp. 786 (D. Tenn. 1969). *But see* Ford v. Board of Managers of New Jersey State Prisons, 407 F.2d 937 (3d Cir. 1969); Blythe v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961).

22. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F. Supp. 786 (D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966);

tunities to wash[25] are all factors which bear on a finding of cruel and unusual punishment. No single condition has ever by itself been held cruel and unusual; however, the cumulative effect of several conditions will bring solitary confinement within the prohibition of the eighth amendment. In two recent cases, federal courts considering the constitutionality of segregated conditions looked to the effect of the conditions of solitary confinement on the mental and emotional balance of the prisioner. In *Wright v. McMann*,[26] Judge Kaufman (author of the *Sostre* opinion) held that the intolerable conditions of solitary confinement at Dannemoa Prison threatened the sanity of a prisoner and therefore were cruel and unusual. In *Fulwood v. Clemmer*,[27] the court indicated that the effect of solitary confinement on the mental condition of the prisoners must be assessed on a case by case basis.

When analyzing the proportionality of the punishment, courts generally look to the length rather than the conditions of the segregation.[28] Long periods of segregation or indefinite segregation will be justified if a prisoner represents a threat to the lives of other prisoners[29] or to the orderly running of the prison.[30] However, punishment for a mere refusal to answer some questions[31] or the yelling of racial slogans[32] cannot be excessive.

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cf. Gordan v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948). *Contra,* Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966) where for a short period it was permissible.

23. Gordan v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); Howard v. Smyth, 28 Ariz. 433, 237 P. 203 (1915). *Contra,* Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967); Ford v. Board of Managers of New Jersey State Prisons, 407 F.2d 937 (3d Cir. 1969).

24. Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948). *But cf.* Courtney v. Bishop, 409 F.2d 1185 (8th Cir.), *cert. denied,* 396 U.S. 915 (1969); Blythe v. Ellis, 194 F.2d 139 (S.D. Tex. 1961).

25. Jordon v. Fitzharris, 257 F. Supp. 674 (S.D. Cal. 1966); *cf.* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962). *But cf.* Landman v. Peyton, 370 F.2d 135 (4th Cir.), *cert. denied,* 388 U.S. 920 (1967).

26. 387 F.2d 519 (2d Cir. 1967).

27. 206 F. Supp. 370 (D.D.C. 1962).

28. *See, e.g.,* Howard v. Smythe, 365 F.2d 428 (4th Cir. 1966); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

29. Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967) (two years of imprisonment).

30. Winsby v. Walsh, 321 F. Supp. 523 (C.D. Cal. 1971) (10 months of imprisonment).

31. Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966) (4 years of imprisonment).

32. Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (2 years of imprisonment).

In *Sostre*, the district court's finding that the punishment was disproportionate was overruled, in spite of the unimportance of the rule violated, on the grounds that the obstinate refusal to obey regulations was a threat to the order and security of the prison.[33] The alternative holding of the district court was that the conditions of Sostre's confinement would threaten a prisoner's sanity if imposed for more than fifteen days.[34] The district court did not rule that these conditions were absolutely unconstitutional but did hold that subjection to these conditions for over 15 days was absolutely unconstitutional. The majority overruled this finding. The validity of the *Wright* principle, that a threat to the prisoner's mental health is cruel and unusual, went unquestioned. Yet Judge Kaufman continued consideration of the indefinite period of segregation to the disproportionality issue; he did not consider the threat to the prisoner's mental health. The majority opinion noted the opportunity for exercise and group therapy, which was not accepted by Sostre but which would have made the confinement endurable. If the conditions of solitary were endurable, then the court was not going to abridge the right to utilize solitary confinement by imposing an absolute time limit on the length of the confinement.

There are at least two reasons militating against the court's conclusion. First, the mental health of the inmate may be threatened by the prolonged punitive segregation. This fear has been recognized by the court's decisions since the 1800's.[35] Just as a restricted diet may become hazardous to health, and cruel and unusual if it is continued for long periods,[36] solitary confinement may become a threat

33. 442 F.2d at 192-93. Other cases which have held continued segregation permissible so long as the prisoner has not been rehabilitated are: Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967); Courtney v. Bishop, 409 F.2d 1185 (8th Cir.), *cert. denied*, 396 U.S. 915 (1969); Winsby v. Walsh, 321 F. Supp. 523 (C.D. Cal. 1971); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970).

34. Sostre v. Rockefeller, 312 F. Supp. 863, 871 (S.D.N.Y. 1967).

35. An early case noted:

> The peculiarities of this system were the complete isolation of the prisoner from all human society and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being and no employment or instruction. . . . But experience demonstrated that there were serious objections to it. A considerable number of 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. . . .

Ex Parte Medley, 134 U.S. 160 at 168 (1889).

36. *See* cases cited note 23 *supra*.

to mental health if continued for an extended period. If it is cruel and unusual to threaten mental health, then courts will have to examine the conditions which will make it safe to extend solitary for long periods or limit the length of solitary to a safe period. The court in *Sostre* rejected the latter solution while failing to examine the condition of Sostre's solitary confinement to see if they could be safely extended indefinitely. Second, it is generally believed that "[e]xcessively long periods of punishment defeat treatment goals by embittering and demoralizing the inmate."[37] Prolonged punitive segregation cannot be justified as being rehabilitative or as being a deterrent when it increases hostility and is therapeutically counterproductive. The only other possible justification is prison security. Since prolonged solitary makes the prisoner increasingly hostile, the security of the prison will be increasingly threatened by the embittered inmate. A more rehabilitative method of discipline should be employed so that the inmate is not more disobedient when released than when he was placed in solitary confinement. Unfortunately, the court failed to consider Goldberg's proposed test, whether a legitimate penal aim[38] was achieved through the continued segregation of *Sostre*.

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37. THE AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS (1966). It is further stated that punitive segregation should only be used where "reprimands, loss of privileges, suspended sentences and similar measures" have been unsuccessful. When used it should be of as short a duration as possible, never exceeding thirty days. Those inmates who fail to rehabilitate after a short period can be handled better by different methods of punishment. Finally it is concluded *supra* at 413:

> (Punitive segregation) is a major disciplinary measure, which can have damaging effect upon some inmates, and should be used judiciously when other forms of action prove inadequate. . . . (It) may bring short term conformity for some, but brings increased disturbances and deeper gained hostility to more.

38. *See* Rudolph v. Alabama, 375 U.S. 889, 890-91 (1963) (dissenting opinion).