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A COMMENT ON SOSTRE v. MCGINNIS*

HERMAN SCHWARTZ†

Few decisions in the field of prisoners' rights were awaited as eagerly as the Second Circuit's ruling on February 24, 1971 in *Sostre v. McGinnis*.¹ The case raised almost every important current prisoners' rights issue—the propriety of lengthy and indefinite solitary confinement, interference with mail, procedural due process, exhaustion of remedies, free expression of radical ideas, inmate legal assistance, the legality of punitive and compensatory damages against state prison officials, to list but some. In recognition of the importance of these issues, the Second Circuit voted to hear the initial argument en banc, a procedure reserved for “extraordinary circumstances,” according to the court.²

The case also had some exceptional human factors. Plaintiff Martin Sostre is a prominent black militant. The proprietor of an Afro-Asian bookstore in Buffalo, New York, he was convicted of a drug charge during the Buffalo riots of 1967, and given an extremely severe 30–40 year sentence. The fairness of his conviction is still much disputed; Sostre served as his own defense counsel and drew a 30-day contempt sentence because of his exchanges with the court. The person to whom he allegedly sold drugs, a police informant, recently signed an affidavit recanting his testimony and at the present writing (February 1972) efforts are underway to return him to Buffalo for a *coram nobis* hearing. A book has been written about his trial and a defense committee has been formed; in Buffalo, “free Martin Sostre” has become a widespread rallying cry for protesting students and others. During his first prison stay (this is his second), he was a plaintiff in two of the first important prisoners' rights cases in New York, *Sostre v.*

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1. 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.*, *Sostre v. Oswald*, 92 S. Ct. 719 (1972).

2. *Id.* at 181.

McGinnis,³ and *Pierce v. LaVallee*,⁴ which gave prisoners certain limited rights. Prison officials consider him brilliant and dangerously charismatic.⁵

Finally, the case came to the court at a particularly climactic moment. Led to some extent by Federal District Judge Constance Baker Motley's opinion in *Sostre v. Rockefeller*⁶ in May, 1970 and by Judge Irving Kaufman's opinion in *Wright v. McMann*,⁷ federal judges in New York and elsewhere had begun to look critically at numerous prison practices.⁸ At the same time, federal and state judges began to protest the "tidal wave" of Civil Rights Act cases brought by prisoners and others. In December 1970, Judge Clarence Herlihy, Presiding Justice of the Appellate Division, Third Department, castigated the federal courts for interfering in state prison administration, focusing particularly on Judge Motley's opinion in *Sostre* and on Judge Morris Lasker's release of Angela Davis from solitary confinement;⁹ in January 1971, United States Court of Appeals Judge Henry J. Friendly fired off a particularly sharp blast at civil rights organizations and lawyers for allegedly bringing cases needlessly, observing that:

There is thus a responsibility, resting upon all counsel but especially upon those for civil rights organizations, not to swell the tidal wave of actions under the civil rights statute by bringing suits for declaratory or injunctive relief when no need for this exists.¹⁰

A few weeks later, Chief Judge James Foley of the Northern District of New York added his criticisms.¹¹ At about the same time, Chief Justice Warren E. Burger criticized attorneys for not bringing their attacks on state statutes initially before state courts.¹² On Tuesday, February 23, 1971, the Supreme Court

3. 334 F.2d 906 (2d Cir. 1964).

4. 293 F.2d 233 (2d Cir. 1961).

5. One of the disciplinary charges against him was found to have been motivated by a desire to keep him from mingling with other prisoners at a Fourth of July assembly.

6. 312 F. Supp. 863 (S.D.N.Y. 1970).

7. 387 F.2d 519 (2d Cir. 1967).

8. Examples of judicial scrutiny of prison practices are *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Clutchette v. Proconier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Nolan v. Fitzpatrick*, 326 F. Supp. 209 (D. Mass. 1971); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970).

9. *Davis v. Lindsay*, 321 F. Supp. 1134 (S.D.N.Y. 1970).

10. *Negron v. Wallace*, 436 F.2d 1139, 1141 (2d Cir. 1971).

11. *New York Law Journal* Jan. 25, 1971, at 1, col. 1.

12. *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (dissenting opinion).

cut down *Dombrowski v. Pfister*,¹³ and sharply curtailed federal court control over state criminal legislation and prosecutions.¹⁴ And on Wednesday, February 24, the Second Circuit came down with *Sostre v. McGinnis*, in a lengthy opinion by Judge Irving R. Kaufman, to which a few brief dissents and concurrences were added.

The decision was hailed as a new bill of rights for prisoners and the New York Times headlined its page 1 story with "Court Extends Convicts' Rights."¹⁵ Analysis of what the court did, rather than what it occasionally said, discloses a rather different result. Indeed, the decision definitively settled very few issues and much of what it did decide would not, by the court's own admission, do much to improve prison conditions.¹⁶

There are some seven areas in which the court—clearly or otherwise—said something of consequence. Put briefly, the results from the prisoner's viewpoint would seem to be these:

1. Federal jurisdiction—good but uncertain, and shortly thereafter, the good parts ignored for a while and then reinstated.
2. Solitary confinement and the eighth amendment—bad.
3. First amendment rights—nothing of consequence.
4. Mail—bad but perhaps not fatal.
5. Disciplinary due process—uncertain to poor.
6. Damages actions—fair.
7. Inmate legal assistance—little of consequence.

Before turning to the specific issues, it might be well to briefly set out some of the facts in the case and the details of Judge Motley's ruling.

A. *Sostre's punishment and Judge Motley's rulings*

On June 25, 1968, shortly after his arrival at Green Haven Prison, Martin Sostre was called into the office of the late Warden Harold T. Follette. After a discussion of certain alleged rule infractions, Follette sentenced Sostre to punitive segregation. Although Follette claimed to have based his decision on these

13. 380 U.S. 479 (1965).

14. *Younger v. Harris*, 401 U.S. 37, (1971).

15. N.Y. Times, Feb. 25, 1971, at 1, col. 8.

16. 442 F.2d 178, 205 (2d Cir. 1971).

alleged infractions, Judge Motley found that the punishment was really in retaliation for Sostre's political and legal activism, his threat to sue Follette for interfering with Sostre's mail, and for certain activities found by Judge Motley to be constitutionally protected.

Sostre was sentenced to segregation for an indefinite period until he agreed to abide by the rules of the institution or until he participated successfully in group therapy. He remained in segregation for over a year, until Judge Motley ordered his release, losing $124\frac{1}{3}$ days unearned good time in the process. The court of appeals found that Sostre was not, however, really isolated from other prisoners, and that he had refused to participate in a group therapy program. It also found that although he suffered greater deprivations than inmates in the general population, particularly with respect to reading matter, these hardships were above the threshold of inhumaneness despite the indefiniteness of the confinement. During this time, Sostre's mail was censored and matter excised from letters to his lawyers; a letter to a postal inspector was stopped. After Judge Motley ordered his release from segregation on a preliminary injunction in July 1968, he was again punished, this time for having "inflammatory racist literature" in his cell, including some of his own writings, and extracts from newspapers and magazines which he had been permitted to have. On the day he was released from segregation, he was punished by being confined in his cell for several days, "ostensibly because 'dust' was found on his cell bars."¹⁷

On May 14, 1970, Judge Motley ruled that Sostre's constitutional rights had been violated,¹⁸ and ordered that (1) before good time could be taken away, the prisoner was entitled to a recorded hearing before an impartial tribunal with counsel or a counsel substitute, where the prisoner could confront the evidence against him and cross-examine witnesses; the prisoner was also entitled to a written notice of charges, in advance of the hearing, stating the rule violated, and a written decision setting forth the basis for the findings; (2) officials could not censor or intercept mail to lawyers, courts, public officials, or other inmates about legal matters; (3) Sostre should not be prohibited from

17. *Id.* at 187 n.8.

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

helping other inmates with legal matters or lending them his legal materials, so long as a court-approved alternative was not available; and (4) Sostre should be allowed to possess political literature and to set forth his views, subject to court-approved limitations. The court ordered the defendants to submit rules relating to political literature and due process at disciplinary hearings and imposed compensatory and punitive damages. In the course of her opinion, Judge Motley also ruled that confinement to segregation for more than 15 days violated the cruel and unusual punishment clause of the Constitution.

The court of appeals reversed almost every part of Judge Motley's order except for the return of the 124 $\frac{1}{3}$ days good time, the propriety of the award of compensatory damages against Follette (who had since died), and the right to possess political literature, subjecting that right, however, to "reasonable regulation." The grounds for reversal varied substantially, however, and it is the scope and nature of these variations that make the opinion both complex and ambiguous.

B. *The Court of Appeals' Rulings*

1. *Federal jurisdiction.* The court held briefly and almost perfunctorily that: (a) it would have been futile to seek administrative redress and thus no resort to administrative remedies was necessary; (b) there was no need to exhaust any judicial remedies, since section 1983 of title 42 of the United States Code provides "a remedy in the federal courts supplementary to any remedy any State might have," citing *McNeese v. Board of Education*;¹⁹ and (c) because Sostre "is not challenging the validity of his sentence with the ultimate object of obtaining release from the penitentiary," citing *Hancock v. Avery*,²⁰ his petition was not a disguised habeas corpus petition requiring exhaustion of state remedies.

All of these principles are well-established, and would ordinarily occasion no comment except for one thing: the Second Circuit has been in the forefront of those seeking to force Civil Rights Act litigants into state courts. The previously noted comments by Judge Friendly and Judge Foley are instances of this

19. 373 U.S. 668, 672 (1963).

20. 301 F. Supp. 786, 791 (M.D. Tenn. 1969).

campaign. In this effort, the Second Circuit has created, by a remarkable *tour de force*, a doctrine of exhaustion of state administrative remedies,²¹ which finds little if any support in prior cases,²² and which has since been disapproved by the Supreme Court in *Wilwording v. Swenson*,²³ as well as a requirement that where federal equitable relief is sought, state legal remedies must be exhausted if they are adequate.²⁴ In *Sostre*, however, the quotation from *McNeese*, a "stench in the nostrils of strict constructionists" of federal power, to quote Learned Hand in a related context,²⁵ was given high prominence, perhaps indicating that the Second Circuit was not yet willing to consign section 1983 actions to the second-class citizenship shelf, where state judicial remedies are concerned.

The comment about the distinction between habeas corpus and section 1983 also reflected more than appeared on the surface. Some judges had intimated that because good time ultimately involved custody, all good time issues should be raised via habeas corpus, thus requiring exhaustion of state remedies as a prerequisite to federal court action. The affirmance of Judge Motley's order restoring the 1241 $\frac{1}{3}$ days unearned time seemed to indicate that a good-time loss does not involve habeas corpus. However, a cryptic footnote at the end of the opinion raised some doubts. After repeating that because *Sostre* had been confined for his political beliefs and legal efforts, he was denied the good time wrongly, the court dropped this aside:

In granting this relief to *Sostre*, we do not resolve the question whether a claim for relief grounded solely on the contention that good time was unconstitutionally withheld or forfeited would, standing alone, support an action under 42 U.S.C. § 1983, without compliance with the exhaustion requirement of 28 U.S.C. § 2254 (b), (c).²⁶

The implied distinction between a "claim . . . grounded solely on the contention that good time was unconstitutionally withheld" and other claims, is obscure, to say the least. Because

21. See *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969).

22. Compare *Edwards v. Schmidt*, 321 F. Supp. 68 (W.D. Wis. 1971).

23. 40 U.S.L.W. 3277 (U.S. Dec. 14, 1971).

24. See *Potwora v. Dillon*, 386 F.2d 74 (2d Cir. 1967); cf. *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967).

25. L. HAND, *THE BILL OF RIGHTS* 15 (1958).

26. 442 F.2d at 204 n.50.

most serious disciplinary matters involve the loss of good time (though the New York provisions are somewhat obscure on when good time is actually lost)²⁷ a broad-ranging definition of "claims grounded solely" would eliminate most disciplinary cases from section 1983.

Yet *Sostre* did involve a good time loss but was not treated as a *habeas* petition, apparently because the underlying contention involved many claims of unconstitutionality directed to first amendment and other improprieties. This is not atypical, for a challenge to the loss of good time frequently entails a challenge on some constitutional ground to the substance of the rule violated or the rules by which the penalty was applied. *Sostre* thus seemed to cut against a broad construction of claims "grounded solely on the contention that good time was unconstitutionally withheld or forfeited."

Part of the initial answer to questions raised by this implied distinction, came several weeks later in two 2-1 rulings reversing decisions from the Northern District of New York. In *Rodriguez v. McGinnis*,²⁸ and *United States ex rel. Katzoff v. McGinnis*,²⁹ the two *Sostre* dissenters, Judges Hays and Moore, were joined by Judge Friendly, in dismissing two prisoner actions brought under the Civil Rights Act. In *Rodriguez*, Judge Foley had found unconstitutional irregularities in the prisoner's punishment and ordered restoration of a certain amount of good time. In *Katzoff*, the prisoner lost some 50 days of unearned good time when he was punished for writing unflattering comments about prison administrators in a private diary; Judge Port ordered the time restored for violation of the first amendment. The effect of the restoration in both cases was to entitle the prisoner to immediate release under the state law on good time release. Both decisions were reversed on the ground that release from custody was not an available remedy under the Civil Rights Act, and that state remedies had not been exhausted.

In the *Rodriguez* opinion, Judge Hays used language as hostile to prisoners' actions as any appearing in opinions recently issued from a federal court. He wrote:

27. See N.Y. CORREC. LAW §§ 803.5, 804.4 (McKinney Supp. 1971); 7 N.Y. Official Compilation of Codes, Rules and Regulations, pts. 260-62 (1971).

28. 451 F.2d 730 (2d Cir. 1971), *aff'd on rehearing*, No. 34567 (2d Cir., Jan. 25, 1972).

29. 441 F.2d 558 (2d Cir. 1971), *rev'd per curiam*, No. 35253 (2d Cir., Jan. 25, 1972).

The federal court should refuse to interfere with internal state prison administration except in the most extreme cases involving a shocking deprivation of fundamental rights

At a minimum such cases should first be filtered through the state prison administrative process and the state courts.³⁰

Katzoff was disposed of summarily on the basis of *Rodriguez*. In neither case, did the majority even bother to cite *Sostre*, much less distinguish it. Judges Waterman and Smith dissented in the two cases.

Petitions for rehearing en banc were immediately filed in both cases as well as in *Kritsky v. McGinnis*,³¹ which had not yet been decided, and they were granted. Argument was set for November 4, 1971 before all nine active judges plus the three senior judges who had sat on the panels. On the basis of prior votes, the issue seemed close indeed, until *Wilwording v. Swenson*³² was decided by the Supreme Court on December 14, 1971. In *Wilwording*, a lengthy per curiam opinion in which six justices joined, and one—Mr. Chief Justice Burger—dissented on procedural grounds, the Supreme Court emphatically reasserted the doctrine that there is *no* exhaustion requirement, either administrative or judicial, for the invocation of 42 U.S.C. section 1983, and the Court stressed that this applied to prison suits as well. Said the Court:

State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. *Houghton v. Shafer*, 392 U.S. 639 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.' *Id.*, at 640.³³

Wilwording blew the three cases wide open. The result was a brief order affirming the district court in all three cases by a 9-3 vote and some seven opinions.³⁴ Chief Judge Friendly and newly appointed Judge Mulligan concurred in affirmance very regretfully, virtually inviting the state to seek certiorari, an invitation that will probably not go begging; Judge Lumbard, joined by

30. 451 F.2d 730, 732 (2d Cir. 1971).

31. No. 35253 (2d Cir., Jan. 25, 1972), *aff'g* 313 F. Supp. 1247 (N.D.N.Y. 1970).

32. 40 U.S.L.W. 3277 (U.S. Dec. 14, 1971).

33. *Id.* at 3278.

34. *Rodriguez v. McGinnis*, Nos. 34567, 35300 & 35253 (2d Cir., Jan. 25, 1972).

Judges Hays and Moore, dissented vigorously and argued that all prisoner petitions be required to pass a state court screen before getting into federal court; there was a lengthy concurrence by Judge Mansfield, who agreed with Judge Lumbard but felt constrained by *Wilwording*. And there were four opinions by Judges Smith, Kaufman, Feinberg and Oakes, asserting the propriety of federal jurisdiction and, to various degrees, rejecting the views of Judges Mansfield, Friendly and Lumbard. Judging from these opinions, but for *Wilwording*, the court might well have split 6-6. Because the author was counsel in *Katzoff* and petitions for certiorari will probably be filed, no further comments will be made on this issue.

2. *Segregation and the eighth amendment.* This is one of the more disappointing parts of the opinion. Not only was Judge Motley's 15-day limitation on segregation disapproved, but the court expressly sanctioned indefinite confinement until the inmate's attitude improves or until he has "successfully participated" in group therapy, which probably amounts to the same thing. The prison administrator's judgment as to attitude is subjective, if not worse, and usually unreviewable, even by administrative superiors. Moreover, the court's explicit rejection of the eighth amendment as a tool to strike at a practice which it apparently considered "counterproductive as a correctional measure and personally abhorrent," because by some measure the practice was not sufficiently "barbarous" or "shocking to the conscience,"³⁵ is an ominous indication of how limited this court considers the eighth amendment to be.

The court did leave a door open. In rejecting Judge Motley's holding that the punishment was grossly disproportionate, the court dropped a footnote noting that it was relying on "the seriousness of the multiple offenses charged against Sostre . . . and express[ed] no view as to the constitutionality of such segregated confinement . . . for lesser offenses" ³⁶

This issue of indefinite confinement produced the longest single disagreement with the majority—Judge Feinberg's dissent from the majority's "refusal to hold that there must be a definite limit on how long a prisoner may be kept in punitive segregation

35. 442 F.2d at 191.

36. *Id.* at 194 n.28.

or solitary confinement,"³⁷ and its narrow reading of the eighth amendment. And this sharp disagreement puts the problem with the eighth amendment very neatly—what is "cruel and unusual" to one man may be acceptable to another, and few guides are available. Yet, the truth is that deprivations that are "counter productive" and "abhorrent," are really what prisons are all about,³⁸ and it would have been a great spur to prison reform if the Second Circuit had gone that route. An all-too-long "brief" commentary is hardly the place to explore the opportunities for decency and the pitfalls of subjectivity opened up by the eighth amendment. But it is sad to see a court almost explicitly reject the use of that potentially great weapon of humaneness while fully aware of the need therefor.³⁹

37. *Id.* at 207 (Feinberg, J., dissenting).

38. See generally Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFFALO L. REV. 669 (1972).

39. For a fine analysis of this part of the opinion, as well as of the due process issues, see Singer, *Confining Solitary Confinement: Constitutional Arguments for a "New Penology"*, 56 IOWA L. REV. 1251 (1971).

The impact of *Sostre* on other courts is reflected in the Fifth Circuit's refusal to prohibit solitary confinement involving lightless cells, limited bedding and minimal food. *Novak v. Beto*, 453 F.2d 661, 665 n.1 (5th Cir. 1971). Directly relying on *Sostre* and quoting that opinion several times, the majority said "the courts simply are not equipped to police the prisons." *Id.* at 671. Judge Tuttle dissented, in what must surely be one of the finest expressions of the judicial conscience, and worthy of extended quotation:

For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts, or, as stated by the Supreme Court in *Trop v. Dulles*, the application of 'evolving standards of decency' 356 US 86 . . . (1957).

This, therefore, poses a further difference between the members of the court. If, as is stated by the majority, they 'are deeply troubled by the lightless cell, the limited bedding, [a blanket, according to the findings of the trial court] and the minimal food provided prisoners in solitary confinement in Texas', then I do not agree with them that we are limited by what has been done by other courts or by the 'general practices of our society.'

As to the limiting effect of the 'extant law,' which I shall undertake to analyze below, we must remember that in each of the cases referred to in the opinion in which cruel and unusual punishment was found to exist, *some* court had to take at least a short step beyond what had previously been decided. This, in fact, is the genius of the common law. I think it is the duty of the court whose members are 'deeply troubled' by these conditions to seek a means of removing them that may offer more promise than merely saying that 'prison reform is primarily a task for legislators and administrators.'

I feel that it is permissible for us to take judicial notice, as the majority apparently did, of the current spate of criticisms of our penal systems. It would be utterly unrealistic to ignore the fact that penal reform comes more slowly than progress in other activities of our society which seem to have much higher

3. *Political beliefs and legal representation.* Here, the court came out strongly in favor of the prisoner—but on an almost incontrovertible issue: the right merely to possess political and other writings. Even here, the ruling was only that Sostre could not be *punished* for his mere possession—the court commented that “[a]ny real threat to prison security that Sostre’s possession of his writing might have posed could have been met by confiscation rather than punishment,”⁴⁰ the threat apparently being a risk of circulation. But when is there not a risk of circulation? The court noted in a footnote that were such suppression to be attempted, a “clear and present danger” analysis might be necessary,⁴¹ but in the text immediately preceding, the

priorities. To leave the prisoners to the tender mercies of the legislatures and thereafter to the administrators who are denied the means to accomplish the reforms, seems to me to hold out slight, if any, hope that these ‘deeply troubling’ conditions will be outlawed.

For this court to tell the prisoner to look to the legislature and an administrator who has condoned, and still excuses them, would seem to me but an empty gesture, and calls to mind an answer right out of Aeschylus: ‘Hollow words, I deem are worst of ills’. *Prometheus Bound*.

In sum, I think this is an area in which the court should move. Such action by us is not only justified, it is called for if the Anglo-Saxon system of justice is to remain living and vigorous. The Supreme Court, in *Bartkus v. Illinois*, 359 US. 121 at pg. 128 . . . , speaking through Mr. Justice Frankfurter, stated:

‘The Anglo-American system of law is based not on transcendental revelation but upon the *conscience of society* ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.’ (emphasis supplied)

The duty of a court like ours to act in such a matter has, I think, been expressed with his usual great felicity by Judge Learned Hand:

‘[The common law] must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation. Yet with this piety must go a taste for courageous experiment, by which alone the law has been built as we have it, an indubitable structure, organic and living. It is in this aspect that the profession of the law is in danger of failing in times like our own when deep changes are taking place in the convictions of men. It is not as the priest of a completed revelation that the living successors of past law makers can most truly show their reverence or continue the traditions which they affect to regard. If they forget their pragmatic origin, they omit the most pregnant element of the faith they profess and of which they would henceforth become only the spurious and egregious descendants. Only as an articulate organ of the half-understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present, can they continue in the course of the ancestors whom they revere.’ ‘The Art and Craft of Judging—The Decisions of Judge Learned Hand’, Hershel Shanks, page 17.

40. 442 F.2d at 203.

41. *Id.* at 202 n.48.

court stressed the deference to the warden's judgment "if there existed the risk of . . . circulation among other prisoners."⁴²

In short, the court again left a door wide open for action counter to the main thrust of its ruling.

4. *Mail.* The court's decision on mailing rights, taken by itself, is a virtually unmitigated disaster for the cause of prisoners' rights. While accepting the view that prison administrators cannot normally delete matter from letters to courts, lawyers and public officials, and while recognizing the importance of correspondence, the court allowed prison officials to open and read *all* mail—incoming and outgoing—to courts, lawyers, and others on the ground that the mail might contain contraband, escape plans or communications "about restricted matters," whatever those are. This ruling falls far short of what many states and the federal system have found acceptable by regulation, and what other courts have ordered.⁴³

If a lawyer visits, the inmate can talk confidentially to him, and one can assume the same holds true for a judicial, legislative or administrative official. Why then can't he do so by mail? This is especially true with respect to outgoing mail to judges, public officials and counsel: what contraband or escape plans or other "restricted matters" will be in a letter to a court? And would any lawyer or inmate ever put escape plans in a letter, even if sealed?

Without such sealed letters, confidential communication is virtually impossible. Partly because of the practice of building prisons in forsaken areas of the countryside, miles from any large cities, it is very difficult to visit inmate clients more than infrequently; telephone calls are not permitted; and censorship itself often consumes many days, as letters lie waiting for the censor to get around to them. The rich defendant can, of course, pay his lawyer to visit often, but the poor man cannot, and most prisoners are very poor. Where suits against the prison system or individual guards are involved, the mails are virtually useless, for who will disclose confidential information or litigation tactics to one's

42. *Id.* at 202.

43. Recent and not so recent regulations in California, Michigan, Virginia, Pennsylvania, Nevada, and many other states attest to the lack of danger from sealed letters to counsel and others; and many other states, *e.g.* Connecticut, New Jersey, among others, merely allow the opening of such incoming letters to search for contraband but not the reading thereof.

adversary or give advice about how to deal with that adversary? Also, many prisoners are reluctant to name people for fear of retaliation. Yet, as so many administrators have concluded, the dangers to prison security are really negligible.⁴⁴

In short, the court of appeals took an extremely retrogressive step in an area that its own rhetoric recognized as extremely important. Here too, there is one possible out, though this one was hardly intended: the question of sealed mail was not briefed or argued by the parties and Judge Motley never even considered it. The court's statement was thus pure *obiter dictum*, and should not bind judges faced squarely with the issue.

Recently, however, the Second Circuit reaffirmed its ruling that prison officials could open and read lawyer-inmate mail. In an opinion by Judge Lumbard, the court modified the district court's order "prohibiting censorship or interference 'in any way with any correspondence' between [a prisoner] and his attorney." In his concurring opinion, however, Judge Oakes left the door slightly ajar, saying:

Given appropriate circumstances, however, I believe this court should not hesitate to accept the invitation of *Sostre* to expound 'a more precise deliniation of the boundaries of this protection . . . ' 442 F.2d 178, and if in doing so we necessarily draw them somewhat differently from *Sostre* itself, that is not impermissible. See Note, Prison Mail Censorship and the First Amendment, 81 Yale L.J. 87 (1972).⁴⁵

Whether the Second Circuit will follow Judge Oakes' suggestion will soon be disclosed. Two cases squarely raising the issue are currently before the court. The first involves pre-trial detainees in a county jail; the other, federal prisoners at Danbury.⁴⁶

In a perhaps ironic twist, three weeks after *Sostre* was decided, the New York Correctional Department voluntarily adopted a policy of permitting sealed letters from inmates to public officials, judges, or to any attorney; incoming letters from such persons will not be read or censored though they will be opened

44. *Id.*

45. United States *ex rel.* Mosher v. LaVallee, — F.2d —, No. 35573 at 2150 (2d Cir., Mar. 16, 1972).

46. Wilkinson v. Skinner, Civil No. 72-1166 (2d Cir., filed Jan. 6, 1972); Howard v. Norton, Civil No. 72-1149 (2d Cir., filed Jan. 1, 1972).

by the inmate in a guard's presence to check for contraband.⁴⁷ The inconsistent combination of judicial permissiveness and administrative self-restraint is a good illustration of why the court should not have reached out to decide something that was not argued: if the issue had been briefed by the parties, counsel for the state could have informed the court before the decision came down that the mail regulations were in the process of revision, as they had been for some time.

5. *Disciplinary due process.* At first blush, this too seems to be a disaster area for prisoners. Yet here the opinion's rhetoric is much worse than its holding. Although the court expressly overturned Judge Motley's landmark ruling requiring counsel or substitute counsel, confrontation and cross-examination, an impartial tribunal, written charges and a reasoned opinion, it did so in very limited manner.

First Judge Kaufman wrote:

We therefore find ourselves in disagreement with Judge Motley's conclusion that *each* of the procedural elements incorporated in her mandatory injunction are necessary constitutional ingredients of *every* proceeding resulting in serious discipline of a prisoner.⁴⁸

And then in the court's conclusion, he declared:

Although not necessary to the disposition of Sostre's complaint, the district court held that several elements of trial-type procedure . . . were required by due process in *every* instance of prisoner discipline resulting in [good time consequences] [T]he district court was in error. *All* of the elements of due process recited by the district court are not necessary to the constitutionality of *every* disciplinary action taken against a prisoner.⁴⁹

In explanation, the court stressed the need for more information from empirical surveys and studies of prison disciplinary procedures, though what the court is seeking other than time is far from clear. It expressly refused to pass on the adequacy of the New York State disciplinary regulations, effective October 19, 1970.

If the phrases and words I have underlined are significant—

47. See N.Y. DEP'T OF CORRECTIONAL SERVICES, Administrative Bull. No. 20 Jan. 31, 1972.

48. 442 F.2d at 198 (emphasis added).

49. 442 F.2d at 203 (emphasis added).

and the opinion is one in which words are used carefully—then the court is simply saying that it is not yet ready to order *all* that Judge Motley required, in *every* serious case. Some or all may still come to be required in some and perhaps all cases, but not at this time. The matter is thus left open for case-by-case litigation, where the issues *will* “be necessary to the disposition of . . . [the] complaint” and a full record can be developed on each issue.

Admittedly the court surrounded these negations of *universal* due process requirements with critical comments of Sostre’s claims that confrontation and cross-examination were necessary, noting how rarely these protections were afforded in prisons. And its two references to the bare minima in most cases—confrontation with the accusation, information as to the evidence against the inmate, a reasonable opportunity to explain, and “a reasonable investigation into the relevant facts”—clearly omit most of what Judge Motley thought necessary. But, as Judge Waterman noted in his concurrence, “it does seem clear that decision as to what are wholly acceptable minimum standards are left for another day through case-by-case development.”⁵⁰ For example, the court did not pass on the requirement of an impartial tribunal, except to refer noncommittally to Judge Mansfield’s requirement of a “relatively objective tribunal” in *Carothers v. Follette*;⁵¹ its reference to “simple facts” providing less need for confrontation and cross-examination leaves the door open for seeking such protection where the facts are not so “simple,” such as where eyewitness identification or alibis are involved. Again, however, few district judges are likely to venture into such areas, and it will take several appeals to determine the exact scope of the opinion.

This open-ended view of the opinion was apparently adopted by Judge Roszel Thomsen in Baltimore a week after *Sostre* in *Bundy v. Cannon*;⁵² a far-reaching decision granting broad due process relief. Other cases have explicitly rejected *Sostre* in this area.⁵³

6. *Damage actions.* The primary significance here is that the court accepted Judge Motley’s factual findings in favor of

50. 442 F.2d at 206 n.2 (Waterman, J., concurring).

51. 314 F. Supp. 1014, 1028 (S.D.N.Y. 1970).

52. 328 F. Supp. 165 (D. Md. 1971).

53. *See, e.g.,* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Proconier, 328 F. Supp. 767 (N.D. Cal. 1971).

Sostre's version of the reasons for his punishment, and rejected Warden Follette's story. Admittedly, it might have been difficult to overturn Judge Motley on this issue, but the stories were so far apart and the charge of impropriety against Follette so serious, that a reversal on the issue was not beyond consideration. Moreover, the court added its own reason for believing Sostre, namely, Follette's failure to give Sostre the trial (such as it was) required by the *New York Department of Corrections Employees' Rule Book*. The opinion thus offers hope that the inmate's side of the story will not automatically be disbelieved.

The denial of punitive damages was really not surprising—punitive damages are hard to obtain in Civil Rights Act proceedings anyway, particularly in an area where the law is changing rapidly. The court's reason—"Warden Follette's improper conduct . . . reflected no pattern of behavior"—is a little unrealistic to anyone familiar with the casualness with which prison administrators put men in segregation. But the record may have been thin on this point, and though punitive damages might have helped by bringing more lawyers into prison litigation, it was unrealistic to expect that the punitive damages award would survive.⁵⁴

7. *Inmate legal assistance.* Sostre was punished for trying to help other inmates with their legal affairs. The court denied him relief because it found that he had not obeyed the prison regulation requiring him to seek permission to provide such help. The court justified this, and a similar rule about lending legal materials as necessary to prevent abuses of one prisoner by another.

The possibility that such legal assistance can be regulated raises another possibility expanding that point: given the acknowledged lack of legal help for prison inmates, as to which no ready solution is in sight, why cannot the jailhouse lawyer be brought out into the open, formalized as a regular prison service, and expanded to include representation at hearings and the like? As with so many forbidden commodities, the prohibition or scarcity of which provides an opportunity for an illicit and profitable monopoly, the best way to deal with the illegality is to legalize

54. See Judge Foley's refusal to grant such damages in *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970) where the court *did* find cruel and unusual punishment.

and regulate it.⁵⁵ Such a course is much easier of course where, as here, there is no real controversy about the value or propriety of the service provided. In *Bundy*, Judge Thomsen expressly ordered the Maryland authorities to abide by their own rules allowing inmates to ask other inmates to help them in serious disciplinary proceedings.

CONCLUSION

So there it is: a cautious opinion, full of good intentions and dubious rulings, leaving many of the most important issues "for another day"; above all, an opinion fearful of judicial intrusion at this time into a strange and volatile area. Indeed, the opinion closes with something of an apology for how little it does to advance the cause of humane prison conditions:

It is appropriate, lest our action today be misunderstood, that we disclaim any intent by this decision to condone, ignore, or discount the deplorable and counter-productive conditions of many of this country's jails and prisons. We strongly suspect that many traditional and still widespread penal practices, including some which we have touched on in this case, take an enormous toll, not just of the prisoner who must tolerate them at whatever price to his humanity and prospects for a normal future life, but also of this society where prisoners return angry and resentful.⁵⁶

But it ends on a ringing affirmation of judicial impotence:

We do not doubt the magnitude of the job ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities.⁵⁷

The problem, however, is that as we have seen again and again the "legislators, executives and citizens" will not move until forced to by the courts, and this is especially true when it comes to money for prisons, as all penologists and correctional administrators know and bemoan. Indeed, some administrators

55. See Schelling, *Economic Analysis of Organized Crime*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 114, 116-17 (Appendix D) (1967).

56. 442 F.2d at 205.

57. *Id.*

have said privately that if a lawyer can get a court order, they will be able to go to the legislature and ask for the requisite resources, but they cannot move on their own, especially if there are fiscal implications. Civil rights lawyers in the South heard similar comments from Southern school boards. Fortunately or otherwise, it is a fact of American political and social life that the courts must often lead in matters of public morality and only judges with life tenure can safely do so. After all, is that not partly what the life tenure is for?

Moreover, the judicial activism must be federal for other reasons as well. Despite the fashionable bows to the state courts' sympathy for federal constitutional claims, state judges are usually not interested in even hearing them. For example, Auburn prison in New York, has been experiencing a series of disturbances ever since early November. Prisoners have claimed violations of a whole range of constitutional rights, involving mail, due process, medical care, and abuse of various kinds. Many filed habeas corpus petitions in state court and on December 29, 1970, many of these received the same response:

The respondent [prison superintendent], not the Court, is charged with institutional discipline and administration. Furthermore, the petition fails to comply with CPLR 7002(c)1.⁵⁸

CPLR 7002 (c)1 requires an affidavit setting out the name of the custodian and other purely formal matters about the detention. Months will pass before any appeals can be heard, and if the prisoners do not try to figure out and comply with CPLR 7002 (c)1, the appellate courts may also dismiss these *pro se* complaints on minor procedural grounds.

Numerous additional examples of this attitude are available, though of course some state courts and judges are sometimes more receptive.⁵⁹ But there are relatively few instances of the latter, and a *de jure* or *de facto* limitation on federal court activity will effectively deny all judicial relief to state prisoners.

Finally, no one is really asking the courts to run the penal system, or to devise a successful correctional system. Prisoners

58. *People ex rel. Diaz v. Fritz*, Civil No. 70-8275, *People ex rel. Cunningham v. Fritz*, Civil No. 70-8274, *People ex rel. Rudder v. Fritz*, Civil No. 70-8279 (Sup. Ct., Cayuga County, Dec. 29, 1970).

59. *See, e.g., People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

and their lawyers are asking only that certain bare minima of decency and rationality not be ignored just because a man has been convicted of a crime. Indeed, why are prisons so much more difficult to oversee for constitutional violations than schools, unions, political apportionment, welfare, administrative bureaucracies, and the whole range of areas in which American courts hear so many "urgent social and political conflicts"? Is it really so much harder for a court to deal with prisons than with companies in bankruptcy, huge antitrust suits,⁶⁰ railroad receiverships, labor unions, and the like? Courts in particular would seem to have both an obligation and an opportunity to make themselves knowledgeable about the prisons to which they and other judges send people and which are so fundamental a part of the administration of justice.

Luckily the *Sostre* opinion leaves ample room for this, and perhaps this is all that could be expected from a relatively conservative court in a very conservative time. In a sense, the decision is a holding action, finally deciding relatively little, which may explain why there were so few dissents on so wide a range of vital issues. If future cases are chosen carefully and the issues adequately briefed and factually supported, we may yet see some decency and fairness in what remains cruel but all-too-usual punishment.

Postscript—May 1972

Unfortunately, even the bloodiest of prison riots seems unable to move state legislators. The 1972 New York and California legislatures have refused to enact any of the significant reforms proposed in the wake of the forty-three dead at Attica and the somewhat less bloody disturbances at San Quentin.

60. Compare Judge Medina's efforts to educate himself about the investment banking industry described in *United States v. Morgan*, 118 F. Supp. 621, 650 (S.D.N.Y. 1953).

APPENDIX*

The Board of Editors
New York Law Journal
258 Broadway
New York, New York 10007

Gentlemen:

In a recent article published by the New York Law Journal, Professor Herman Schwartz has expressed certain opinions concerning the decision of the Court of Appeals for the Second Circuit in *Sostre v. McGinnis*. Although it would be inappropriate to take issue with him on specific portions of the Court's decision because the case is still in litigation and the Attorney General, of course, represents the State officials, I would like to offer the following observations.

One of the crucial issues pervading the *Sostre* case was whether many aspects of the correctional process were to be supervised by the State Department of Correction or by any of the federal district judges. The Circuit Court's opinion attempts to effect a compromise between the inmate's right to protection from asserted unconstitutional treatment and the state's power to administer its penal system. The Court's opinion provides that particular rights will be recognized by the federal courts, while the state officials remain free to promulgate rules and regulations governing specific conditions of confinement.

Professor Schwartz laments what he perceives to be a lack of judicial activism in the Court's approach because he disagrees with the Court's conclusion that other branches of government and concerned citizens are better suited than the judiciary to initiate correctional reform. However, his assertion that legislators, executives and citizens will not move until forced to by the courts is contradicted by recent events. For example, as he acknowledges, the State Department of Correctional Services amended its mail censorship rules to provide for sealed communications between inmates and courts, public agencies and attorneys, although the Department was not compelled to do so by the *Sostre* decision.

In 1970 the New York Legislature amended the Correction Law to prohibit segregated confinement under conditions which might be considered degrading. As a result of this, the Department of Correctional Services promulgated substantial revisions in its rules and regulations governing the form of prison disciplinary proceedings and the conditions in segregation units. The Department has promulgated new guidelines governing the receipt of political literature and is currently developing a com-

* The letters printed herein represent an exchange that occurred between Professor Herman Schwartz and Hillel Hoffman, Assistant Attorney General of the State of New York. The exchange was prompted by an article, Schwartz, *Prisoners' Rights and the Courts*, New York Law Journal, June 10 & 11, 1971, at 1, col. 4, which discussed the decision in *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970). These letters are reprinted by permission of the *New York Law Journal*.

prehensive program to expand its relationships with the community and the news media.

The reports and studies of the New York City Board of Correction, the public hearings conducted by the Subcommittee on Penal and Judicial Reform of the New York City Council's Public Safety Committee, and the creation of paraprofessional ombudsmen by the Legal Aid Society and the New York City Department of Correction, are other examples of efforts being made by legislators, executives and citizens to improve penal conditions.

It is illogical to argue that the United States Court of Appeals should not have left the primary supervision of state penal institutions to the very state officials who are charged with managing those institutions. Although Professor Schwartz contends that no one is really asking the courts to run the penal system, this result would surely occur if the federal judiciary established constitutional rules governing most aspects of prison disciplinary proceedings, mail censorship, inmate legal assistance, possession of political literature, good behavior allowances, segregated confinement, the use of psychiatric observation cells, medical treatment, and other matters that have been the subjects of recent cases. The list could be endless. The danger of federal usurpation is even greater in cases where the District Courts as in *Sostre* and *Wright v. McMann*, 321 F. Supp. 127 (N.D. N.Y. 1970), have required the State Department of Correctional Services to submit to such courts rules and regulations for their prior approval.

One need only look at the incredibly protracted litigation involving legislative reapportionment to understand why the Court of Appeals was reluctant at this time to involve the federal courts further in the supervision and management of state prisons. The *Sostre* decision must be viewed against a background of increasing activity on behalf of penal reform, which has arisen from many sources. This activity belies the notion that the federal courts must take the initiative in improving state correctional systems.

Hillel Hoffman
Assistant Attorney General
State of New York

The Editor
The New York Law Journal
258 Broadway
New York, New York 10007

Dear Sir:

It is hardly surprising that Mr. Hillel Hoffman, who so skillfully argued for New York State in *Sostre v. McGinnis* (#35038 2nd Cir. 1971), rises to defend those aspects of the decision dampening judicial activism. Mr. Hoffman's points deserve a more substantive response, however, than

this obvious (and irresistible) debater's point, and I am grateful to the Editors of the Law Journal for space to reply.

Mr. Hoffman's contention seems to be that federal judicial intervention in prison problems is both unnecessary and "illogical" because "recent events" disprove the assertion that state "legislators, executives and citizens will not move" otherwise. However, analysis of the reasons, nature and effect of such moves cuts against this contention.

In the first place, almost no legislative or executive efforts at improvement have taken place until after the federal courts forced such a response. New York City allowed journalists access to prisons two days before a suit was to be filed. In New York State, prisoners could not even sue in state courts against the most shocking abuses until *Wright v. McMann*, 387 F.2d 519 (1967); § 79-c of the New York Civil Rights Law, allowing injunctive suits by prisoners against constitutional abuses was not enacted until 1969 and damage suits by prisoners are still not allowed in New York. Indeed, is it more than inadvertence that Mr. Hoffman omits the state courts from his list of those whom "recent events" allegedly show to be moving? Moreover, the most recent legislative events are those of the 1971 legislature, which passed virtually none of the substantial number of rather modest penal reform bills; the 1970 amendments mentioned by Mr. Hoffman are largely organizational and, where pertinent, largely verbal. *E.g.*, prisons are renamed "correctional facilities," guards are "correctional officers". The prohibition of degrading conditions is still to be proven more than rhetorical, as recent events at Auburn show.

Secondly, the vaunted administrative disciplinary rules were not promulgated until after Judge Motley's decision in *Sostre* and they are currently under attack as grossly inadequate. Some rather more significant changes may be in the making on an administrative level in the area of censorship, but here again most of these have followed federal court decisions striking down state restrictions, *e.g.*, *Carothers v. Follette*, 314 F. Supp. 1014 (S.D. N.Y. 1970); *Pugach and Candelaria v. Mancusi*, 1970 Civ. 491 and 541 (W.D.N.Y. 1970); *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D. N.Y. 1970). The extent of such changes is still unclear, though we are hopeful. And even after administrative changes are made centrally, the wardens and superintendents often keep operating as they always have. It is, of course, dangerous to infer causality from temporal sequence, but the case for such an inference is surely as strong here as in most instances.

As to reports and studies by private and public groups, nothing is more disheartening than reading the very same grievances and suggestions in reports over a century ago.

Finally, Mr. Hoffman claims that in seeking to introduce minimum constitutional standards into the state penal systems, the federal courts will really be "running" these institutions. This must surely be the most dog-eared item in the state's form files, for this cry is routinely raised whenever federal courts try to introduce some decency and fairness into state institutions that have little of either when solely under state supervision,

e.g., criminal justice, mental commitments, welfare, school segregation, and apportionment.

To support his fears, Mr. Hoffman conjures up the spectre of the "incredibly protracted litigation involving legislative apportionment" recurring in prison litigation. But apart from the fact that very little prison litigation to date has been particularly protracted, is Mr. Hoffman really arguing that the nation would have been better off had the courts continued to ignore the gross malapportionment perpetrated by state legislatures? Does anyone really believe that the state officials would have adopted fair apportionment formulas and cut their own political throats, had *Baker v. Carr* gone the other way? Indeed, the analogy is particularly apt, but in *favor* of judicial intervention.

There are indeed a few signs of self-improvement in state and local penal systems, but there have been many such signs in the past, and they have generally petered out. One of the most significant new factors making for more lasting reform are the federal courts, prodded by the civil rights movement and black militancy. If such federal court action proves futile, then given budgetary constraints, long-term public indifference, institutional fossilization and human shortcomings, the only other likely pressure for reform will be from prison riots, as in New York City and Auburn, surely a less desirable alternative, indeed.

Herman Schwartz
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