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IT WILL PROBABLY come as no surprise when I tell you that I unfortunately have no commission from President Nixon to invite Judge Spaeth to join our United States Court of Appeals in the Second Circuit where there are a few vacancies. I regret that I have no such authority, but I would ask that he at least give some consideration to putting in for a transfer. We sorely need him.

I would like to start off by saying that prisons are an abomination. They are an unmitigated evil, and I seriously question whether the amount of good that they do is in any way commensurate with the amount of harm that they cause. I suppose that a statistician could probably take the recidivism statistics in the United States and prove that there would be less crime in this country if there were no prisons at all. The claim that criminals can be reformed or rehabilitated by a prison term is sheer hypocrisy; an hypocrisy which has become well-institutionalized. In New York, we no longer call prisons prisons, or even reformatories; we call them correctional institutions. It is a very rare occurrence that a man comes out of prison a better man than when he went in. When that does happen — and it may happen from time to time — it is despite the prison sentence and not because of it.

Moreover, these results are inherent in the very concept of prison. It is absurd to say that we can teach a man to function in a society by removing him from it. I would nevertheless suggest that the problem of "prison reform," or, better characterized as the problem of "extension of rights to prisoners," is a matter of very great moment to us. It is not so important as "tearing down the prisons," but we are not here to discuss that this afternoon. It will not solve the problems of our society, or even all the problems posed by criminal activity in our society. Nevertheless, I would urge a very broad — in legal terms, an almost revolutionary — expansion of the rights of prisoners.

By revolutionary, I do not mean that it has not been suggested before. I mean that it has not been done. The reason for advocating the expansion of prisoners' rights is not because it is going to help rehabilitation. I do not think it will. I do not suggest this expansion

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because it is going to make prisoners or prisons easier to administer. In fact, it will probably make their administration more difficult. I have two reasons.

First, prisoners live under our Constitution, and are entitled to all of the rights enjoyed by anyone else, subject only to such modification as is necessary because of their status. This position has been stated over and over again by the courts.[1] Having said it, the courts — in somewhat typical fashion — proceed to disregard those fine, broad, sweeping generalities, some of which are so noble that we chisel them in stone on the facades of our courthouses. Instead, they go on to decide cases as if those words have never been spoken. I suggest that this principle be taken seriously and applied.

There are many groups in our society who, because of their status, are not entitled to the protection of every single provision of our Constitution. We all understand this and make any necessary adjustments. The most obvious example is, of course, people in the military. There are certain provisions of the Constitution that they do not enjoy, the principal one being that they do not have full liberty. Children do not have all the privileges of our Constitution; people who are mentally ill do not have the protection of all its provisions, and I have heard that there are some circumstances in which, perhaps, students do not have protection of all the provisions of the Constitution. But the Constitution gives all of these people its protection, to the greatest extent possible,[2] and the same rule should apply to prisoners. A heavy burden lies upon anyone who would deny this protection, and good cause ought to be required of those who would take from any prisoner any of his rights. This is not because I think the Constitution is necessarily the noblest document that has ever been written or that it contains all good. I do think, however, that the application of the Bill of Rights to the entire population of the community, as a general proposition, is good. It provides for people a measure of dignity and feeling of their own individual worth, and it is something upon which our society and our country is built. I don't think I have to argue or prove that people are entitled to constitutional rights. Rather, I think the burden is on anyone who would deny any of those rights.

Secondly, I suggest that perhaps the application of constitutional rights to persons in prison will mitigate the evil effects of imprisonment. The recognition of constitutional rights within the prisons is not likely to make very many people better. However, treating

1. *See, e.g., In re* Bonner, 151 U.S. 242 (1894); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).
2. *See, e.g., In re* Gault, 387 U.S. 1 (1967).

prisoners as men with substantial and enforceable rights, and with some vestige of dignity, may help check the deterioration of the spirit which normally takes place in a prison.

Let us examine specifically some of these constitutional rights. The first amendment says that all persons shall have freedom of speech, press, assembly, religion, and the right to petition for redress of grievances. There are 51 prison systems in the United States, and the variation between institutions is frequently very great. Any general statement, therefore, is subject to modification. However, few prisoners enjoy customary first amendment rights. For example, they do not have the right of free press, the right to write what they want, to publish what they want, to get their manuscripts out from jail without having a warden either stop or censor them.

There is litigation in Connecticut[3] now because Father Berrigan, incarcerated at Danbury, wants to write sermons which will be sent out of the prison through the normal course of mail, and will be distributed or delivered by his friends to churches throughout the country. He is not being permitted to do that. Why? I can see no reason why, in terms of his status as a prisoner, he should not be permitted to write what he wishes and to publish what he does write.

Similarly, a person ought to have a right to read whatever he wishes, whether it is something that is approved by prison authorities or not. Involved here is the right to get a book without waiting six months before a publisher sends it to the prison. In New York, for example, it is generally true that prisoners can get books, but they must come from the publisher directly and not from a bookseller. The theory is that there may be contraband — I assume narcotics — inserted somewhere in the binding of this book, and that to permit the prisoner to get a book from any conventional book store is dangerous. Presumably, it is believed that the publisher is less likely to put heroin in the binding. The rule is absurd because it takes time and effort and makes it difficult for prisoners to get books. It is an utterly pointless restriction.

I think prisoners ought to have the right to speak about and discuss their political views. Here, however, there are limitations; I do not suppose that mass meetings in prisons are practicable. One of the charges against Sostre[4] was that he wrote a letter to his lawyer in which he referred to an organization called RNA. The warden found this puzzling and when Sostre told him that it was the Republic of New Africa, the warden started to ask him many questions. Sostre

3. Berrigan v. Norton, 322 F. Supp. 46 (D. Conn. 1971).
4. Sostre v. McGinnis, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part,* 442 F.2d 178 (2d Cir. 1971).

refused to answer. This was one of the reasons that he received a year's solitary confinement.[5] Why should a prisoner be required to answer the warden's question as to what the Republic of New Africa is?

I believe that prisoners ought to have the right, either singularly or in groups, to petition — to petition the warden, to petition their government. Yet, in many prisons it is difficult for prisoners to send letters. The letters that they are able to send are read by their wardens and their keepers, with the result that the inmates are obviously hesitant about setting forth all of their complaints. I can see no reason why a letter to a court should be read by anyone other than the addressee, or why a letter by a prisoner to his lawyer should be opened by a warden.

The Constitution provides for due process of law. I would suggest that when a prisoner is to be punished for an infraction of the rules, certain regulations ought to be followed. The prisoner should have prior knowledge of the rules. He should receive written charges, and have a hearing by some impartial agent other than the warden. He should be confronted by the keeper or whomever else contends that he violated the rules, and have the opportunity to call witnesses and to cross-examine. There should be some sort of record kept, and some manner of appeal available. He should be entitled to counsel or at least a substitute who would, perhaps, be a prison social worker or a doctor.

This sounds difficult and complicated, but that is not necessarily so. I remember when the Supreme Court held in *Gideon v. Wainwright*[6] that every person charged with a criminal offense is entitled to a lawyer even if he is unable to afford one. Cries of distress went up all over the country, claiming that this rule was administratively impossible. Well, it did not turn out to be administratively impossible. The same thing happened when the Supreme Court held that juveniles were entitled to counsel.[7] The administrative problems were solved in those cases, and I see no reason why administrative problems arising from initiating due process procedures in prison cannot likewise be solved.

Sostre v. McGinnis[8] is an encyclopedia about what is wrong with prison systems. One of the charges against Sostre was that he translated a letter from English into Spanish which a Puerto Rican prisoner, who could not read English, had received from a court. This

5. 312 F. Supp. at 867–68.
6. 372 U.S. 335 (1963).
7. *In re* Gault, 387 U.S. 1 (1967).
8. *See* note 4 *supra*.

is a violation of the rules of the institution in which Sostre was confined.[9] Nowhere is it written that this is a violation, but it is nevertheless deemed to be one. Sostre additionally loaned copies of the Harvard Law Review, to which he was a subscriber, to other prisoners. This again was a violation.[10] Another thing that he did was to write out, in long hand, a certificate of reasonable doubt for a friend of his who was in another prison. Sostre attempted to send it by mail through the normal channels, and was not attempting to smuggle it out. This was a violation.[11] There was nothing in the rules concerning these violations, but as a result of them, Sostre spent a year in solitary confinement.

There is a theory in prison that no one prisoner is allowed to be nice to another. The reasoning behind the theory is that if Prisoner *"A"* is nice to Prisoner *"B"*, then he is going to expect some consideration for his kindness. The consideration can be any number of things; it can be money, or food, or things that are more serious such as homosexual conduct. The idea that we are creating a society in which an inmate is not allowed to be nice to anyone — that he is not allowed to lend a friend a book, or translate a piece of paper for him, or help him to get out of jail — is an abomination. That we have created an institution in which this kind of value system is permitted to exist, and then have taken inmates out of prison, sent them into society, and expected them to properly function, is so preposterous that I am not going to belabor the point.

Sostre had a hearing, if you want to call it that, before the warden. The warden was asked whether, in any of these hearings, the keepers are ever called in where there is a dispute of facts. The warden said no, he would not dream of doing that. It would destroy prison discipline. That is like saying that in a criminal arrest out on the street, one is not allowed to call the police officer to the stand. By the warden's reasoning, if you call the policeman and decide that he is a liar, then it is going to destroy the effectiveness of the police force. It was suggested to the warden that there might be a difference of opinion between the prisoner and the guard, and he was asked what he would do where such a difference of opinion existed. He answered: "Well, why should a guard lie?" I suggest that representation by counsel and some appellate procedure conducted by someone who is not intimately involved with the imposition of the discipline will do something — not an awful lot but still something — to ameliorate this unfortunate situation in prison and to present the

9. 312 F. Supp. at 869.
10. *Id.*
11. *Id.* at 867.

kind of a prison disciplinary system which is recognizable to people who have been brought up in this country.

Another area ripe for consideration concerns the nature of the punishment. There have been a number of cases on the question of cruel and unusual punishment.[12] We have reached the point now where punishment within a prison by flogging or any kind of physical assault is illegal.[13] But we have not advanced very much further than that. When Sostre was assigned to solitary confinement he stayed in a cell twenty-four hours a day for one year and five days. He was permitted about fifteen or twenty minutes a week out of that cell to take a shower. That was his punishment and I submit that it was cruel. But the Court of Appeals for the Second Circuit disagreed, and held that this was not cruel and unusual punishment.[14] I would grant, as the court points out,[15] that the treatment Sostre received was not as cruel as that meted out to the author of the recent book *Papillon,* which was a discussion of prison conditions on Devil's Island in French Guinea. This is a comparison I do not care to make. I have no doubt that penal conditions on Devil's Island are cruel. The Second Circuit also pointed out that Sostre was not completely cut off from human communication; he was so close to other prisoners that when one inmate in a nearby cell was beaten by the guards and hanged himself a few days later, Sostre was able to hear all the commotion when they cut the prisoner down.[16] He did have that much contact with other prisoners, but he remained in the standard four by eight cell for about 370 days getting out about fifteen minutes a week. Cruel and unusual? It is difficult to imagine a kind of treatment which is more likely to unbalance a person. Dr. Seymour Hallick, who has been a prison psychiatrist in the State of Wisconsin for many years, testified that the sort of sensory deprivation imposed by placement in a cell of this sort where the inmate did not even have control of the electric light and never got out of the cell at all, was the sort of thing which could, and under normal circumstances would, result in the development of a mental disorder such as paranoid schizophrenia.[17]

State officials in New York often charge that Sostre is paranoid. I do not believe he is, but I would really not be the slightest bit surprised if he were. He has spent previous time in solitary confine-

12. *See, e.g.,* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).
13. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).
14. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).
15. *Id.*
16. *Id.*
17. *Id.* (Feinberg, J., dissenting).

ment, the last time being because of his Muslim fight which Judge Spaeth spoke about,[18] and I have no doubt that he has been affected by such confinement. He is now concerned that he is going to get hurt or killed, or be "framed" on a new charge. His fears are probably very real, but if they are not, it only proves that the psychiatrist who testified knew what he was talking about. I would say that there is no occasion for solitary confinement, except in very unusual cases. Prison punishment can normally be handled with loss of prison privileges — loss of recreation, loss of commissary privileges, loss of television privileges and exercise and so forth for limited periods of time. The taking a man out of even the very limited society of a prison can have no possible purpose except to utterly destroy him.

I would also like to discuss the practice of censorship of mail. In most prisons, all incoming and outgoing mail is read. In New York up until the *Sostre*[19] decision — and this was almost the only point we won — when a lawyer wrote a letter to a prisoner, the warden would take a pair of scissors and would cut out of the letter those sentences that he thought the prisoner ought not to read. His standard was whether it applied to the prisoner's case. If the lawyer wrote and said "I saw your wife last week and she is doing well," that was cut out of the letter. This, unfortunately, is literally true. When the prisoner finally received his mail, all he had to read were four or five little strips of paper which had to do specifically with the case that was pending. All mail between a lawyer and a prisoner should be kept absolutely confidential. There is no occasion for anybody reading it. I assume the reason behind censorship is that the lawyer may plot with his client to break him out of jail. I doubt whether such a case has ever existed. I would suggest that while there may be occasion for examining incoming mail for contraband, there is no occasion for reading or opening outgoing mail at all.

I can see no reason why there should be restrictions on the prisoner's dress. Most of them wear uniforms so that the question of a shirt and trousers is not an issue. But there is an issue with respect to hairdo, beards and mustaches. Why shouldn't the prisoner be allowed to wear the kind of hair that he wants to wear? Most prisons have rather strict rules on this subject, and the harassment effect of such rules upon the prison population is unfortunate.

Our judicial system operates on a case-by-case basis. Judge Motley made an effort to break away from that by requiring the

18. Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961) and Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).
19. *See* note 4 *supra*.

prison system to set up rules with respect to the dissemination of political literature, and with respect to due process.[20] All of those rules were thrown out by the court of appeals.[21] I know that is the way our courts operate, but I suggest that a new look must be taken at this entire situation, or we might just as well forget about the rights of prisoners.

In summary, I would suggest that every time a prisoner seeks to assert a constitutional right, there should be a very heavy burden placed on those who would deny him that right. I also would suggest that to the extent to which we treat prisoners as inhuman brutes — as animals — to that extent they are going to respond as brutes and animals. And to the extent to which we treat them as human beings with rights and with dignity, perhaps at least many of them will respond in an appropriate fashion. The present prison system, with perhaps a half-dozen exceptions throughout the country, is really designed for only two purposes. One is to punish people, frequently all out of proportion to what is required in the situation; the other is to quarantine them, to get them off the streets so that they will not harm anyone. All the talk about reform and deterrence is nonsense.

20. 312 F. Supp. at 884–85.

21. *See* note 14 *supra.*