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CRIMINAL LAW

THE FIRST AMENDMENT RIGHTS OF PRISONERS

BARRY M. FOX*

"Whatever may once have been the case, it is not doubtful now that the Constitution, and notably the First Amendment, reaches inside prison walls. The freedoms of conscience, of thought and of expression, like all the rest of life, are cramped and diluted for the inmate. But they exist to the fullest extent consistent with prison discipline, security and 'the punitive regimen of a prison. . . .'"¹

BACKGROUND AND HISTORY

THE DEMISE OF THE "HANDS-OFF" DOCTRINE

Until quite recently judicial review of prisoners' complaints, including those protesting abrogation of first amendment rights, have been almost universally avoided by the courts for a combination of reasons commonly termed as a group, the "hands-off" doctrine.² In many jurisdictions the hands-off rationales, often in modified forms, remain the basis of decisions limiting prisoners' rights.³ The doctrine states that "courts are

without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."⁴ Courts have justified the doctrine procedurally by citing the separation of powers of the judicial and executive branches.⁵ In cases involving state prisoners in federal courts the decisions have rested on considerations of federalism as well.⁶ Courts and commentators have variously

ronery, 216 F. Supp. 910, 911 (W.D.Pa. 1963). Cf. United States *ex rel.* Hoge v. Maroney, 211 F. Supp. 197, 198 (W.D.Pa.), *aff'd sub nom.* United States *ex rel.* Hoge v. Bolsinger, 311 F.2d 215 (3rd Cir. 1962), *cert. denied*, 372 U.S. 931 (1963).

⁴ *Banning v. Looney*, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954). See also *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951) ("[I]t is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."); *Powell v. Hunter*, 172 F.2d 330, 331 (10th Cir. 1949) ("The court has no power to interfere with the conduct of the prison or its discipline. . . ."); *Peretz v. Humphrey*, 86 F. Supp. 706, 707 (M.D. Pa. 1949) ("nor is it within the province of the courts to superintend the treatment of prisoners in penitentiaries, or to interfere with the conduct of prisons or their discipline. . .").

⁵ See, e.g., *United States v. Marchese*, 341 F.2d 782, 789 (9th Cir. 1965) ("The federal prison system is operated in all its aspects by . . . the executive branch of the government, and not by the judiciary. . . ."); *Tabor v. Hardwick*, 224 F. 2d 526, 529 (5th Cir. 1955) ("The control of federal penitentiaries is entrusted to the Attorney General . . . who, no doubt, exercise[s] a wise and humane discretion in safeguarding the rights and privileges of prisoners. . . ."); *Williams v. Steele*, 194 F.2d 32, 34 (8th Cir. 1952); *Powell v. Hunter*, 172 F.2d 330 (10th Cir. 1949); *Lewis v. Gladden*, 230 F. Supp. 786, 788 (D.Ore. 1964) ("[T]he administration of penal institutions is for the executive, rather than the judicial, branch of our Government.") (The case involved a state prison); *Complaints of Convicts* at 515-16.

⁶ See, e.g., *Shobe v. California*, 362 F.2d 545 (9th Cir. 1966); *Gurczynski v. Yeager*, 339 F.2d 884, 885 (3d Cir. 1964); *Hatfield v. Bailleaux*, 290 F.2d 632, 640 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); *Oregon ex rel. Sherwood v. Gladden*, 240 F.2d 910, 911 (9th Cir. 1957); *Ortega v. Ragen*, 216 F.2d 561, 562 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955). See generally Note, *Constitutional Rights of Prisoners; The Developing Law*, *supra* note 2, at 985-87. See also *Cruz v. Beto*, 329 F. Supp. 443, 445 (S.D. Tex. 1970), *aff'd per curiam*, 445 F.2d 801 (5th Cir. 1971) ("Rules and regulations concerning prison discipline and

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¹ *Sobell v. Reed*, 327 F. Supp. 1294, 1303 (S.D.N.Y. 1971).

² The phrase is said to have originated in *Fritch, Civil Rights of Federal Prison Inmates* 31 (1961). *Goldfarb & Singer, Redressing Prisoners' Grievances*, 39 *Geo. Wash. L. Rev.* 175, 181 n. 20 (1970) [hereinafter cited as *Goldfarb & Singer*]. For the origins, formulations, and effects of the doctrine see Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *Yale L.J.* 506 (1963) [hereinafter cited as *Complaints of Convicts*]. See generally *Goldfarb & Singer* at 181-84; Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 *U. Pa. L. Rev.* 985 (1962).

³ See, e.g., *Wilson v. Kelley*, 294 F. Supp. 1005, 1012 (N.D.Ga. 1968), *aff'd per curiam*, 393 U.S. 266 (1969). Recent cases sometimes modify the "hands-off" doctrine to exclude review of all matters of prison administration unless these administrative powers were exercised in a clearly arbitrary or abusive manner. See, e.g., *Bethea v. Crouse*, 417 F.2d 504, 505-06 (10th Cir. 1969); *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964); *U.S. v. Blierly*, 331 F. Supp. 1182, 1184 (W.D.Pa. 1971); *United States ex rel. Cobb v. Ma-*

attributed the doctrine to such underlying judicial considerations as the lack of judicial expertise in penology⁷ or in the administration of prisons, the fear that judicial intervention will subvert prison discipline,⁸ and the apprehension that judicial efforts to review prison officials' treatment of prisoners might open a "Pandora's Box" leading to judicial supervision of every aspect of prison life.⁹

The hands-off doctrine has been greatly weakened in recent years,¹⁰ and its underpinnings have been found wanting. The separation of powers argument is inconsistent with administrative law doctrine. In similar situations involving the constitutionality of the actions of administrative agencies, courts have rarely precluded judicial review, even in cases where enabling statutes labeled the action by the administrator "final."¹¹ Indeed in recent years judicial review has been expanded to many new areas of administrative decision-making.¹² In the area of first amendment

rights in particular, the judicial mandate to review administrative action is nearly absolute:

Broadly speaking, agency action attacked on constitutional grounds "could be immune from judicial review, if ever, only by the plainest manifestation of congressional intent to that effect." . . . But the case against such immunity is clear in the domain of the First Amendment.¹³

In *Brown v. Peyton*,¹⁴ a case in which Black Muslim inmates claimed violations by prison officials of their first amendment rights to freedom of religion, the Fourth Circuit recognized the necessity for courts to review the decisions of prison administrators to insure that the constitutional rights of inmates are protected:

[P]rison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions. . . . We do not denigrate their views but we cannot be absolutely bound by them.¹⁵

Similarly, considerations of federalism cannot properly be asserted when violations of constitutional rights are claimed by state prisoners.¹⁶ As the Supreme Court decided in *Johnson v. Avery*,¹⁷ a case involving the constitutional right of access to court of Tennessee prisoners: "There is no doubt that discipline and administration of state deten-

security are matters of state concern and federal courts will not inquire into them unless in exceptional circumstances." *Walker v. Pate*, 356 F.2d 502, 504 (7th Cir.), cert. denied, 384 U.S. 966 (1966).

⁷ Cf. *Carothers v. Follette*, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970). This basis for "hands-off" is often suggested, rather than stated. See, e.g., *Fussa v. Taylor*, 168 F. Supp. 302 (M.D. Pa. 1958); *Peretz v. Humphrey*, 86 F. Supp. 706 (M.D. Pa. 1949); *Commonwealth ex rel. Smith v. Banmiller*, 194 Pa. Super. 566, 168 A.2d 793 (1961). See generally *Goldfarb & Singer* at 181-82.

⁸ See, e.g., *Golub v. Krinsky*, 185 F. Supp. 783, 784 (S.D.N.Y. 1960).

⁹ See *Barnett v. Rodgers*, 410 F.2d 995, 1004 (D.C. Cir. 1969) (Tamm, J., concurring in the result).

¹⁰ See *infra* notes 24-43 and accompanying text. See also *Cooper v. Pate*, 378 U.S. 546 (1964) (allegation in state prisoner's suit brought under the Civil Rights Act, 42 U.S.C. § 1983, that he was denied permission to purchase certain religious publications, and denied privileges accorded other prisoners, solely because of his religious beliefs, held to state a cause of action).

¹¹ See, e.g., *Estep v. United States*, 327 U.S. 114, 119-20 (1946); *Wolff v. Local Bd. No. 16*, 372 F.2d 817, 822-23 (2d Cir. 1967), noted in 81 HARV. L. REV. 685 (1968). See generally 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 28.10-15 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 595 (1965).

¹² E.g., *Goldberg v. Kelley*, 397 U.S. 254 (1970) (welfare rights). In *Sobell v. Reed*, 327 F. Supp. 1294, 1301-02 (S.D.N.Y. 1971), the court spoke to the question of judicial review of the decisions of a parole board restricting the first amendment rights of parolees:

But it is urged that the [Parole] Board's action is outside the court's power of review. It would be surprising, and gravely questionable, if Congress had meant to confer such final authority upon any administrative agency, particularly one that makes no pretense to learning in constitutional law. It would be bizarre to hold . . . that assertions of

constitutional rights like those made here may be overridden without ever being faced and decided by any tribunal of any kind.

The court went on to say that "the fundamental issues of constitutional law are considered . . . as . . . essentially identical [for parolees and prisoners]." *Id.* at 1304 n.8.

¹³ *Id.* at 1302. The court quoted from *Gonzalez v. Freeman*, 334 F.2d 570, 575 (D.C. Cir. 1964). Courts often label first amendment freedoms "preferred rights." See, e.g., *Rowland v. Sigler*, 327 F. Supp. 821, 824 (D. Neb.), *aff'd sub nom.* *Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971).

¹⁴ 437 F.2d 1228 (4th Cir. 1971).

¹⁵ *Id.* at 1232. See also *Muniz v. United States*, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963): "But a mere grant of authority [over prisoners, granted to the Bureau of Prisons] cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does not follow that their actions are immune from judicial review."

¹⁶ *Clutchette v. Proconier*, 328 F. Supp. 767, 771-72 (N.D. Cal. 1971). See *Gilmore v. Lynch*, 319 F. Supp. 105, 109 n.6 (N.D. Cal. 1970), *aff'd per curiam sub nom.* *Younger v. Gilmore*, 404 U.S. 15 (1971); *Nolan v. Scafati*, 306 F. Supp. 1, 2 (D.D.C. 1969). Cf. *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963).

¹⁷ 393 U.S. 483, 486 (1969). See also *Bland v. Rogers*, 332 F. Supp. 989, 993 (D.D.C. 1971).

tion facilities are state functions. They are subject to federal authority only when paramount federal constitutional or statutory rights intervene." Legitimate constitutional complaints of inmates are always paramount to state claims of federalism.

The underlying reasons given for the hands-off doctrine—that courts lack expertise in the administration of prisons or in penology, that court intervention in the prisoners' rights area will subvert prison discipline, or that judicial review of prisoners' complaints will open a "Pandora's Box" of litigation—seem equally unpersuasive. Although it is true that judges usually lack experience in running prisons, they also lack experience in running welfare offices, schools, or draft boards, but they have intervened in these areas in the past when constitutional rights were at stake.¹⁸ Courts traditionally meet such problems by use of expert witnesses.

The argument for judicial intervention in the correctional area, assuming questions of constitutional magnitude have been raised, is, in fact, much more persuasive than in the cases of the suggested analogies, in that the judiciary is intimately involved in the correctional process. The courts are responsible for the presence of every man assigned to sentenced institutions.¹⁹ Furthermore, judges not only decide through bail setting and parole procedures which pre-trial defendants are incarcerated and which are released, but in many jurisdictions they also retain control over the defendants throughout the period of pretrial incarceration.²⁰ Judges have also traditionally made sentencing decisions on the basis of presentencing reports which are replete with psychological and sociological factors about defendants, factors presumed relevant to penological prescription. As a result, the sentencing procedure itself may be viewed as a fundamental part of the treatment, as well as the punishment of an offender. To deny the judiciary review of the treatment of an offender after making such a primary "rehabilita-

tive" decision is inconsistent. To further make judicial review of prison administrative decisions an exception to the general presumption of reviewability of administrative action is highly illogical.

The argument that judicial intervention, through abrogation of the hands-off doctrine, would undermine prison discipline is unrealistic.²¹ The argument fails to take into account that prison officials need not fear court intervention unless the complained of administrative acts or regulations infringe the constitutionally protected rights of inmate complainants. Even if the inmate's litigation is successful, the time lag between punishment for the prohibited act and eventual judicial vindication is too great to encourage the inmate to disobey the jailer's directives. Furthermore, in analogous circumstances courts have required that complainants first comply with official directives, though they consider them to be improper, and then sue on their rights.²² Finally, the inmate knows that he will suffer short-term punishment for the prohibited act, even though he eventually wins his court suit.

While judicial abstention on prisoners' rights issues is one method of avoiding the problem of a plethora of litigation requiring judicial review of numerous narrow issues concerning the day-to-day activities of inmates, it is not a constitutionally acceptable means of doing so.²³ Rather, the constitutional mandates of the first amendment are better served by carefully laid out standards which protect the inmates' rights while at the same time promoting the appropriate state interests, including the minimization of frivolous litigation. Recent cases rejecting simple but unjust resolutions of inmate complaints have set out such standards.

EVOLUTION OF THE STANDARD USED TO WEIGH PRISONERS' FIRST AMENDMENT RIGHTS

Access to courts was the first area in which courts broke with the hands-off doctrine.²⁴ This

¹⁸ See, e.g., *Goldberg v. Kelley*, 397 U.S. 254 (1970) (welfare); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971) (schools); *Wolff v. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967) (draft boards).

¹⁹ This kind of follow-up responsibility has been acknowledged in a few instances by courts. *Complaints of Convicts* at 516 n.55. See, e.g., *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

²⁰ See, e.g., N.Y. CRIM. PROC. LAW §§ 500.10.4, 510.10 (McKinney 1971).

²¹ See *Complaints of Convicts* at 522; Goldfarb & Singer at 182.

²² *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Nelson v. United States*, 208 F.2d 211 (10th Cir. 1953). See also *People v. Whipple*, 100 Cal. App. 261, 279 P. 1008 (1929) (Alleged brutality of prison camp custodian held not to justify prisoner's attempted escape).

²³ Cf. *Nolan v. Fitzpatrick*, 451 F.2d 545, 549, quoted in text accompanying note 154 *infra*. See also notes 24-43 *infra* and accompanying text.

²⁴ See *Ex parte Hull*, 312 U.S. 546 (1941).

series of cases at once created precedent for prisoners' rights while ensuring inmates access to the courts for assertion of these rights.²⁵ The first case to suggest important limitations on the hands-off doctrine was *Coffin v. Reichard*.²⁶ In that case, the Court of Appeals for the Sixth Circuit established the basic standard by which many future prisoners' rights cases would be decided:

A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.²⁷

However, though this standard clearly recognized that prisoners possessed constitutional rights, it left available a broad basis for the denial of many rights. Imprisonment expressly takes away freedom of movement. Courts have ruled that, at the same time, it impliedly takes away other rights considered necessary for or consistent with, the purposes or "underlying considerations" of imprisonment.²⁸

The *Coffin* standard has been modified and clarified in succeeding years. In its newer form, the standard has often been applied to review restrictions on first amendment rights.²⁹ In *Carothers v. Follette*,³⁰ a case involving the punishment of a prisoner for including statements critical of the

prison administration in letters to his family, the standard was expressed thus:

[A]ny prison regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably... and necessarily... to the advancement of some justifiable purpose of imprisonment.³¹

In *Nolan v. Fitzpatrick*,³² a recent First Circuit case which concerned the right of inmates to send letters to the press, the court divided the "justifiable purpose[s] of imprisonment" into purposes of the criminal law and purposes of prison administration. In the former category the court listed the generally recognized goals underlying our penal system: retribution, deterrence, rehabilitation and security of the public (restraint). The purposes of prison administration include those aspects of imprisonment made necessary by the existence of the penal system itself: the security of prisoners and guards (sometimes more broadly stated as maintenance of internal institutional order) and the minimization of the expenses of prison administration. Courts have accepted the need for various limitations on the first amendment rights of prisoners on the basis of claims of prison officials that one or more of these purposes would be served.³³

Recently, several courts have given much greater force to the *Carothers* standard by requiring prison officials to define and relate specific purposes of imprisonment to specific restrictions on inmates' rights.³⁴ Previously, a mere general allegation by prison officials that a restriction was related to the purposes of imprisonment had been sufficient to justify the restriction.

Other courts have set out a "balancing of interests" test which is broader than the "justifiable purposes" test of *Carothers*:

²⁵ *Id.* at 1024 (footnote and citations omitted).

²⁶ 451 F.2d 545, 548-50 (1st Cir. 1971).

²⁷ Even courts granting first amendment rights to inmates have stated that these goals and purposes are the basis for some restrictions on inmates' first amendment rights. *See, e.g., Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971); *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970). *But see Morales v. Schmidt*, 340 F. Supp. 544 (E.D.Wis. 1972) (inmate has free speech right to write love letters to his wife's sister). *See also Complaints of Convicts* at 515-26.

²⁸ *See, e.g., Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971); *Sobell v. Reed*, 327 F. Supp. 1294, 1305 & n.11 (S.D.N.Y. 1971).

²⁵ *See Johnson v. Avery*, 393 U.S. 483, 485-86 (1969); *Long v. District Court*, 385 U.S. 192 (1966); *Smith v. Bennett*, 365 U.S. 708 (1961); *Ex parte Hull*, 312 U.S. 546, 549 (1941); *United States v. Simpson*, 436 F.2d 162, 166-70 (D.C. Cir. 1970); *Burns v. Swensen*, 430 F.2d 771, 777 (8th Cir. 1970); *Nolan v. Scafati*, 430 F.2d 548, 551 (1st Cir. 1970); *Gittlemacker v. Prasse*, 428 F.2d 1, 7 (3d Cir. 1970); *McDonough v. Director*, 429 F.2d 1189, 1192 (4th Cir. 1970); *Conway v. Oliver*, 429 F.2d 1307, 1308 (9th Cir. 1970); *Wimberly v. Field*, 423 F.2d 1292 (9th Cir. 1970); *Sigafus v. Brown*, 416 F.2d 105 (7th Cir. 1969); *Beard v. Alabama Board of Corrections*, 413 F.2d 455 (5th Cir. 1969); *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967); *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966). *See generally Goldfarb & Singer* at 183.

²⁶ 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

²⁷ 143 F.2d at 445.

²⁸ In *Price v. Johnston*, 334 U.S. 266, 285 (1948) the Supreme Court stated: "Lawful incarceration brings about the necessary withdrawal or limitations of many privileges and rights, a retraction justified by the considerations underlying our penal system." *See also Comment, The Right of Expression in Prison*, 40 S. CALIF. L. REV. 407, 410-12 (1967).

²⁹ *See, e.g., Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Gilmore v. Lynch*, 319 F. Supp. 105, 108-09 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971); *Carothers v. Follette*, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970).

³⁰ 314 F. Supp. 1014 (S.D.N.Y. 1970).

[T]he asserted interest of the State in enforcing its rule is balanced against the claimed right of the prisoner and the degree to which it has been infringed by the challenged rule [or official action].³⁵

Courts have found "state interests" to be much the same as the "justifiable purpose[s] of imprisonment" in the *Carothers* standard as enunciated in the *Nolan* decision. Unlike the *Carothers* standard, in reviewing the constitutionality of prison regulations or of the actions of prison officials the balancing of interests test considers the importance of the infringed inmate right and the level of the infringement, in addition to the importance of the state interest or purpose supporting the regulation or official action. This difference between the tests is particularly important when first amendment rights are at issue, because these rights have been given great emphasis by past and present case law.³⁶ Indeed, courts employing the balancing of interests test in reviewing inmate complaints have stated that when first amendment rights have been infringed, the burden on prison officials to justify restrictions is especially heavy, requiring a showing of the "most compelling" state interest.³⁷ In an important parallel development several courts,³⁸ citing as precedent earlier non-prison cases,³⁹ have held that the purposes of imprison-

ment, including restraint, must be achieved through means which least restrict the first amendment rights of those incarcerated.

Taken together, the "balancing of interests" and "least restrictive means" tests suggest the fairest future approach for reviewing the first amendment rights of prisoners. The former test permits first amendment rights of inmates to be restricted only when a compelling state interest is served in a meaningful way by the restriction and the corresponding burden on first amendment rights is not too great. The least restrictive means test complements the balancing test. It requires that in cases in which some infringement of inmates' first amendment rights is necessary to achieve important penological goals, the level of infringement be as small as possible. And when these goals, though compelling and though served by the infringement, can also be achieved without infringing these rights, the goals must be so achieved.⁴⁰

The two tests are the same or similar to tests used by many courts in the past to review infringements on the first amendment rights of free citizens.⁴¹ They are the best tests for defining inmate first amendment rights as well. As the court stated in *Rowland v. Sigler*:

The 'sensitive tools' [required to draw the line between legitimate and illegitimate speech] do not change merely because the context of enforcement is a prison. Upholding of a subjugation of preferred First Amendment rights by deferring to the

of rights. See also *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968). The same least constitutionally restrictive alternatives test would seem to require that punishment necessary to maintain internal discipline should also avoid constitutional deprivations so far as possible.

³⁵ Some courts have used the "least restrictive means" and "balancing of interests" tests interchangeably, letting either one function for both. However, though the two are closely related, each does serve a distinct purpose. Thus, the state interest behind a particular action or regulation might support some restriction on inmates' first amendment rights but the action or regulation might still be unconstitutional because it was not the least restrictive means of achieving that state interest. Conversely, although certain actions may be the least constitutionally restrictive means of achieving a particular state interest, the interest itself might not be compelling enough to justify any restriction on inmates' first amendment rights. In prisoners' rights cases a few courts have begun to use the two tests together. See *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Palmigiano v. Travisono*, 317 F. Supp. 776, 786 (D.R.I. 1970).

⁴¹ See, e.g., *Rowan v. Post Office Dept.*, 397 U.S. 728, 737 (1970) (balancing of interests test); *Shelton v. Tucker*, 364 U.S. 479 (1960) (least restrictive means test).

³⁵ *Gilmore v. Lynch*, 319 F. Supp. 105, 109 (N.D. Cal. 1970); *aff'd per curiam sub nom. Younger v. Gilmore* 404 U.S. 15 (1971). See *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971) ("[P]rison rules must bear a reasonable relationship to valid prison goals, and rules which infringe upon particularly important rights will require a proportionately stronger justification [citing *Gilmore*]"). See also *Knuckles v. Prasse*, 435 F.2d 1255, 1257 (3d Cir. 1970); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969).

³⁶ See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³⁷ See, e.g., *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Rowland v. Sigler*, 327 F. Supp. 821, 824 (D. Neb.), *aff'd sub nom. Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971); *Fortune Society v. McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970). See generally *NAACP v. Button*, 371 U.S. 415, 438 (1963).

³⁸ See, e.g., *Barnett v. Rodgers*, 410 F.2d 995, 1000-01 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Palmigiano v. Travisono*, 317 F. Supp. 776, 786, 788 (D.R.I. 1970).

³⁹ See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960): "[E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Note that this requirement would reach judicially or legislatively mandated withdrawal of constitutional rights of inmates, as well as administrative actions resulting in such withdrawal or limitation

discretion of the prison warden by means of a 'hands-off' doctrine falls short of the duty of a federal court. *This does not mean that the circumstances peculiar to prison confinement are irrelevant in applying the First Amendment tests. It does mean that the strict tests should not be abandoned to the less precise rules that were developed to prevent undue intrusion into state penal affairs.*⁴²

The *Rowland* court concluded:

It is obvious . . . that mere imprisonment physically hinders speech and the exercise of religious acts, and the need of the state to imprison justifies the limitations on speech and religion to the extent that the limitations are unavoidable. The burden is on the state, however, to show a pressing need for imposing any particular restraint sought to be imposed beyond those inherent in the mere fact of imprisonment.⁴³

FIRST AMENDMENT RIGHTS OF SENTENCED PRISONERS

After access to courts, the next area of prisoners' rights recognized by the courts was that of freedom of religion.⁴⁴ Indeed, until quite recently religious freedom had been the only first amendment freedom explicitly recognized by the courts. Other judicial rulings granting inmates greater freedom of speech, assembly, or mailing privileges were based primarily on some other constitutional protection: access to court,⁴⁵ religious freedom,⁴⁶ equal protection or freedom from discrimination.⁴⁷ A series of recent decisions has now created a definite area of first amendment rights for inmates in addition to that of religious freedom.⁴⁸

⁴² 327 F. Supp. 821, 827 (D. Neb.), *aff'd sub nom. Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971) (emphasis added).

⁴³ 327 F. Supp. at 824. This paper will discuss limitations on first amendment rights of inmates imposed by prison administrators, which, though justified as necessary to achieve a particular goal of the criminal law or to advance some purpose of prison administration, usually go beyond "those [restraints] inherent in the mere fact of imprisonment." See notes 44-169 *infra* and accompanying text. It must be recognized, however, that there is a gray area between some of these restrictions on first amendment rights and those that are unavoidably linked to incarceration.

⁴⁴ See Goldfarb & Singer at 216-18; Note, *Constitutional Rights of Prisoners: The Developing Law*, *supra* note 2, at 997-1001.

⁴⁵ See, e.g., *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966).

⁴⁶ See, e.g., *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968).

⁴⁷ See, e.g., *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968).

⁴⁸ See notes 84-169 *infra* and accompanying text.

FREEDOM OF RELIGION

Although outside of prison religious freedom has received no greater protection than have other first amendment freedoms,⁴⁹ for many years religious freedom has received more sympathetic treatment from courts reviewing the actions of prison officials than have the other "preferred freedoms" of the first amendment.⁵⁰ This is at least partly due to an assumption, by courts as well as prison administrators, that religious belief is an important step towards rehabilitation.⁵¹ The tranquil acceptance of this and other assumptions have in recent years received their most serious test due to the increasing popularity within prisons of the Black Muslim religion. Unusual both for its doctrines, which include that of black racial supremacy,⁵² and for its ministry and congregation, which include large numbers of inmates and ex-inmates,⁵³ this single religion has been responsible for much of the litigation concerning religious freedom in prisons.

In non-prison cases, state discrimination against a religion based on illegitimacy of the religion has always been viewed as highly suspect by the reviewing courts.⁵⁴ Though often pointing out its unusual features, courts have recognized Islam as a legitimate religion both in prison and in society at large.⁵⁵ Even when recognizing a religion's legitimacy, however, courts have distinguished between an absolute right to religious belief as opposed to a

⁴⁹ See, e.g., *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("The First Amendment gives freedom of mind the same security as freedom of conscience. . . . Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.")

⁵⁰ See Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488, 1500 (1962).

⁵¹ See, e.g., *Brown v. Peyton*, 437 F.2d 1228, 1230-31 (4th Cir. 1971); *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969); Comment, *supra* note 50, at 1500.

⁵² See *Long v. Parker*, 390 F.2d 816, 819-20 (3d Cir. 1968); Note, 75 HARV. L. REV. 837, 838-39 (1962). See generally C. LINCOLN, *THE BLACK MUSLIMS IN AMERICA* (1961).

⁵³ See Comment, *supra* note 50, at 1491.

⁵⁴ See, e.g., *United States v. Ballard*, 322 U.S. 78, 86-87 (1944); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

⁵⁵ See, e.g., *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971); *Fulwood v. Clemmer*, 206 F. Supp. 370, 373 (D.D.C. 1962). See also *Clay v. United States*, 403 U.S. 698, 700-01 (1971).

qualified right to religious activity.⁵⁶ Yet such a distinction is often a difficult one to make in reality. A guarantee of belief without a guarantee of the corresponding practice is barren indeed.⁵⁷ One reason that Muslims have run into severe problems in prison is that the practices of the religion are so at odds with normal prison procedure. For example, Muslim dietary law requires a pork-free diet, yet in most prisons pork-cooked food is included at every meal.

Unfortunately, a majority of cases supporting religious freedom in prisons are based on equal protection of the law, rather than on a finding of first amendment right to religious practice in prison.⁵⁸ The implication of these rulings is that even if prison administrators may not discriminate against the practice of a particular religion, there is no guarantee that they may not limit the practice of all religions, so long as they do so equally. Nor do these cases hold even the right to equal treatment of religions to be absolute. Under these rulings, if prison officials can make an affirmative showing that the religious sect in question abuses the right to gather and worship, reasonable limitations may be imposed.⁵⁹ Furthermore, the opinions have stated that considerations of security or administrative expense may justify otherwise discriminatory limitations on the religious activity of a particular sect, even absent any such abuse.⁶⁰

⁵⁶ This distinction has been drawn in both non-prisoners' and prisoners' rights cases. See, e.g., *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Long v. Parker*, 390 F.2d 816, 820 (3d Cir. 1968); *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967).

⁵⁷ Cf. *Sostre v. McGinnis*, 442 F.2d 178, 202 (2d Cir. 1971).

⁵⁸ See, e.g., *Walker v. Blackwell*, 411 F.2d 23, 29 (5th Cir. 1964); *Long v. Parker*, 390 F.2d 816, 821 (3d Cir. 1968). But see *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971) ("While [Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961)] if read narrowly, may be treated as an equal protection case, [Cooper v. Pate, 378 U.S. 546 (1964)] certainly proceeds on the broader basis of the first amendment.").

⁵⁹ Cf. *Long v. Parker*, 390 F.2d 816, 822 (3d Cir. 1968).

⁶⁰ See *id.* Equal protection questions are raised when prisons refuse entry only to ministers with criminal records, as a result of blanket rules against visits by ex-convicts. These rules are commonly justified on both rehabilitative and security considerations. Such rules would affect, in all but rare instances, Muslim ministers only, and therefore the Muslim flock. A New York court ruled in a related case that if some ministers were to be fingerprinted, considerations of equal protection required that all ministers be fingerprinted. *SaMarion v. McGinnis*, 35 App. Div. 2d 684, 314 N.Y.S.2d 715 (1970). A similar question arises when

In both *Walker v. Blackwell*⁶¹ and *Long v. Parker*⁶² Black Muslim inmates were required to prove unequal protection of the law in order to succeed in having the courts order prison administrators to grant Muslims the right to certain previously prohibited religious activities. In *Long* the court required that in order to gain the right to receive *Muhammad Speaks*, a Muslim weekly, complainants had to show that the publication "is basic religious literature essential to their belief in and understanding of their religion" and also that "the receipt of literature of similar [religious] relevance is permitted prisoners of other faiths."⁶³ Even after proving the religious importance of receiving

Muslim inmates are refused permission to write to their religious leader Elijah Muhammad. Courts have generally allowed inmates to write to other spiritual leaders. In *Walker* the court ruled that the letters must be sent to the Muslim leader, based on its finding that Elijah Muhammad, if he had ever been a prisoner, had not been in prison for over 25 years and had in any event led an exemplary life during that period of time.

Services must be permitted equally for all religions, though the time and frequency may be controlled in light of security considerations. See *Walker v. Blackwell*, 411 F.2d 23, 25-26 (5th Cir. 1969). See also *Cruz v. Beto*, 329 F. Supp. 443 (S.D. Tex. 1970), *aff'd per curiam*, 445 F.2d 801 (5th Cir. 1971) (inmates, as distinguished from clergy, might be prevented from conducting their own religious services, so long as inmates of other religious sects were also prevented from doing so). Protected religious services constitute the only court-approved right to inmate assembly to date. The right of inmates to wear religious medals has received uneven treatment. Generally, they can be outlawed entirely as dangerous, but prison officials cannot discriminate among medals of various religions. See *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962). Though no court has expressly so stated, the wearing of religious medals is not considered a central requirement to most religions, and therefore, the denial of such activity constitutes only a mild restriction on first amendment rights. Bibles, however, must be allowed in the institutions; this is true even of the controversial Koran. *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971). However, it might be considered permissible for officials to restrict circulation of the Koran to Muslims if it is felt that more general circulation might create a "clear and present danger." See notes 127-45 *infra* and accompanying text. While bibles may actually be more dangerous than religious medals as weapons of destruction, (bibles are more useful than are medals for stuffing plumbing facilities or setting fires, the two most common problems faced by prison maintenance staff) these holy books must be made available to inmates, presumably because they are much more important to religious exercise than are medals.

⁶¹ 411 F.2d 23, 28 (5th Cir. 1969).

⁶² 390 F.2d 816 (3d Cir. 1968).

⁶³ 390 F.2d at 822.

Muhammad Speaks and that prisoners of other religious sects were permitted to receive similar publications, under *Long*, inmates still would not have the right to receive the publication if it created "a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institutions."⁶⁴

In *Walker* the court granted certain requested rights to Muslims but refused them the right to special after-sunset meals during the month of December (Ramadan) and the right to listen to daily radio broadcasts of Elijah Muhammad, though other non-religious radio programs were already broadcast to inmates during the same hour. The court found that equal protection of religions did not require that Muslims be allowed either activity as "there [was] no purposeful discrimination as among the various religious sects in prison as to diet,"⁶⁵ and no similar religious radio programming was being directed at other religions.⁶⁶ The court further justified the two restrictions based upon very general allegations of prison officials that both activities would cause security problems and increase the cost of running the prisons.

The *Walker* and *Long* courts seem wrong in their requirement that equal protection be the sole basis for religious freedom in prison. The Fourth Circuit in *Brown v. Peyton*⁶⁷ specifically stated that religious freedom for prisoners need not be based on equal protection considerations. Outside of prison, the first amendment has been held to pro-

tect all religious activity not otherwise harmful to society.⁶⁸

Even accepting the limitation, however, the *Long* and *Walker* courts have interpreted equal protection too narrowly. Merely testing whether other religions have been granted the right to the same type of activity is not sufficient. All religions have different practices; the Muslim religion is quite different from Christianity. As Christianity has no dietary restrictions comparable to those required by Islam, it is not surprising that Christians in the institutions had not been granted similar special dietary privileges.⁶⁹ The better test for equal protection of religion would be equal protection of those activities that play an equally important role in the practice of each religion, even if the activities themselves are in no other way analogous. The Muslim activity might be denied only if it presented a much greater security or administrative problem than the comparatively important Christian activity.⁷⁰

In *Barnett v. Rodgers*,⁷¹ a case involving Muslim dietary laws, the test for the constitutionality of restrictions on religious activities of inmates was set forth as a balancing of state versus individual interests. The court stated that because religious freedoms are so important in our society, only a "compelling state interest" is sufficient to justify restrictions on religious practice.

The state interest in rehabilitation is never a reason for limiting religious activity of inmates,

⁶⁸ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

⁶⁹ The court in *Barnett v. Rodgers*, 410 F.2d 995, 1001 (D.C. Cir. 1969), said:

"[Prison officials] stated that menus are prepared without regard for other religions as well, explaining that the usual serving of fish for one meal on Friday is not 'just for Catholics. It's just a tradition, the same as turkey for Thanksgiving.'"

⁷⁰ In *Abernathy v. Cunningham*, 393 F.2d 775 (4th Cir. 1968), *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964), and *Cruz v. Beto*, 329 F. Supp. 443, 446 (S.D. Tex. 1970), *aff'd per curiam*, 445 F.2d 801 (5th Cir. 1971), valid disciplinary and security reasons were found to justify restrictions on the practice of non-Christian faiths. On this question not only expert witnesses but commonly known facts should be considered as well. In *Walker v. Blackwell*, a mere assertion that movement of Muslims to after-sunset meals during Ramadan (December) presented security and expense problems was accepted by the court. 411 F.2d at 25-26. The court did not consider the fact that in December sunset is quite early and the time of supper may already be close to sunset. Perhaps all that was involved was having all inmates brought down a few minutes later for that month. This might involve some scheduling changes for guards, but these should be required if the religious activity is an important one.

⁷¹ 410 F.2d 995 (D.C. Cir. 1969).

⁶⁴ *Id.* (footnote omitted).

⁶⁵ 411 F.2d at 26.

⁶⁶ The treatment by the court of the question of the importance of the denied rights to the practice of Islam is most interesting. Special meals at Ramadan were dismissed as "those minor restrictions on the practice of the faith of Islam." 411 F.2d at 26. No expert testimony is stated on the importance of this practice to the religion. Presumably the Judaeo-Christian court made a reasoned decision on the subject. As to the radio program, the court held that "petitioners have failed to show that the broadcast was essential to the spiritual well-being of the petitioners, rather than merely a source of '... spiritual rest and consolation and inspiration...' to them." 411 F.2d at 28. The distinction seems a fuzzy one. Compare *Rowland v. Jones*, 452 F.2d 1005, 1006 (8th Cir. 1971), affirming the right of inmates to wear Martin Luther King medals. The court regarded "as an intrusion of a prisoner's First Amendment rights the granting of possession of some medals and not others, contingent upon their meeting an official standard of orthodoxy."

⁶⁷ 437 F.2d 1228, 1230 (4th Cir. 1971). See also *Rowland v. Sigler*, 327 F. Supp. 821, 824-25 (D. Neb.), *aff'd sub nom. Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971).

as such activity is thought to play a positive rehabilitative role.⁷² Nor under the least restrictive means test may deterrence and retribution be achieved through limiting religious activity of inmates, as these goals of the criminal law can be equally well achieved by prison officials without restricting such constitutionally protected inmate activity.

Only the state interests in restraint, internal institutional order, and the minimization of administrative costs, remain as the possible bases for limitations on inmates' religious activity. Under the balancing test, these interests must be weighed against any corresponding infringements on religious rights. On the questions of security and internal institutional order, *Barnett*, quoting from *Sherbert v. Verner*,⁷³ stated that "[O]nly the gravest abuses [of religious activity], endangering paramount interests' can engender permissible limitations on free exercise."⁷⁴ *Barnett* held that, in addition, the State must prove that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."⁷⁵ Like *Barnett*, *Rowland v. Sigler*⁷⁶ placed the initial burden on the state to prove a "compelling" security interest necessitating restrictions on religious practice "beyond those inherent to the mere fact of imprisonment."⁷⁷ To meet this burden, prison administrators should demonstrate that each restriction is directly and substantially related to compelling security interests.

Using the above formulae courts should uphold far fewer restrictions on the religious practices of inmates based on claimed security requirements. Rather, religious activities might be limited as to time, place, size of group and perhaps group composition, but not prohibited.⁷⁸

Several courts have accepted the state interest in reducing the expense of prison administration as a justification for limiting inmate religious activities.⁷⁹ In *Walker*, for example, the court sus-

tained the refusal of authorities to provide inmates with pork-free meals during Ramadan partially because of the extra expense involved. However, future courts, using a balancing of interests test, should find that few limitations on free exercise are constitutionally justified by financial considerations. The state interest in such budget restrictions should rarely rate the label of "compelling."

Even if the state interest in minimization of prison expenses is a justification for some limitation on free exercise, no court has yet addressed the legal consequences of the fact that in many of our jails and prisons the Muslim religion is a very popular, if not the most popular, religion among inmates. For example, it has been held that a state need not provide a paid full-time chaplain for every denomination.⁸⁰ The courts have held that such expense would be inconsistent with the interest of the state. But if Islam is the chief religion, it would seem that the one full-time paid chaplain must be of that religion. The popularity of the religion may also require greater state expenditures to accommodate the needs of the imprisoned congregation than were required when the religion was a minority one.⁸¹

The balancing of interests and least restrictive means tests portend further expansion of inmate religious rights. Though religious freedom has already been given more judicial support than other first amendment freedoms for inmates, further gains can be expected as courts scrutinize more carefully official claims of security requirements and budget restrictions. The chief beneficiaries of such gains would be Black Muslims, a growing segment of our prison society, who have been subjected to many restrictions in the past.

Establishment Clause

Courts have not yet directly faced the issue of the constitutional rights of inmate atheists and agnostics. The Establishment Clause of the first amendment would seem to require that these inmates be

Cir. 1971); *Walker v. Blackwell*, 411 F.2d 23, 26 (5th *Cir.* 1969).

⁸⁰ *Gittlemacker v. Prasse*, 428 F.2d 1, 4-5 (3d *Cir.* 1970).

⁸¹ Thus, while it has been held that at least some food at all meals must be pork free, administrators have not yet been ordered to provide a completely pork-free diet. If the effect on the exercise of religion by the majority of the inmates is weighed against the small extra cost, if any, of providing entirely pork-free meals, the provision of such a diet would seem to be required.

⁷² See note 51 *supra* and accompanying text.

⁷³ 374 U.S. 398, 406 (1963).

⁷⁴ 410 F.2d 1000 (footnotes omitted).

⁷⁵ *Id.*, quoting from *Sherbert v. Verner*, 374 U.S. at 407.

⁷⁶ 327 F. Supp. 821 (D. Neb.), *aff'd sub nom.* *Rowland v. Jones*, 452 F.2d 1005 (8th *Cir.* 1971).

⁷⁷ *Id.* at 824. See note 43 *supra*.

⁷⁸ It might be necessary in certain situations to refuse attendance to those obviously antagonistic to a particular religion. Cf. *Shakur v. McGrath*, No. 69 Cr. 4493 (S.D.N.Y. Mem. Dec. 31, 1969) (limiting circulation of Black Panther newspaper to Panther members only).

⁷⁹ See, e.g., *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th

granted rights to freedom of movement, assembly, and visits for non-religious purposes equal to those granted to other inmates for religious purposes. To deny such rights to atheists and agnostics is for the state to greatly encourage religious activity, because it is well known that prisoners are willing to go to great lengths to have visitors or attend meetings in order to alleviate the prison monotony. Although the denial of these rights to atheists and agnostics would encourage religious activity in general rather than participation in a particular religion,⁸² such an approach runs afoul of the Establishment Clause because the state thus grants important freedoms to inmates who practice a religion while denying them to those who do not. The unfairness of this approach is magnified by the fact that parole boards consider an inmate's religious activity in determining fitness for release. This procedure not only encourages atheists and agnostics to practice the religions favored by parole board members, but also may force inmates who practice religions less represented on the board to switch religions while in prison, thus violating both the Establishment and Free Exercise Clauses of the first amendment.⁸³

RIGHT TO INCOMING AND OUTGOING MAIL

Courts have read the Free Speech Clause of the first amendment to include the right to correspond with others.⁸⁴ The earliest cases protecting the mailing rights of inmates covered letters and papers sent to and from courts.⁸⁵ Presently, many

⁸²In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), the Supreme Court stated that: "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance . . . is voluntary can free it from the limitations of the Establishment Clause. . . ." And in *Abington School Dist. v. Shemp*, 374 U.S. 203, 222 (1963), the Court stated that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

⁸³The Supreme Court made clear its general disapproval of such a result in *Engel v. Vitale*, where it said: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." 370 U.S. at 431.

In a recent development, the court in *Therault v. Carlson*, 334 F. Supp. 375 (N.D. Ga. 1972), prohibited clergymen from submitting reports to the parole board about inmates' religious activities, because such practices involved the government in violation of the neutrality it must observe with respect to religion. Such practices compel inmates to participate in religious activity by punishing the non-believer.

⁸⁴*See, e.g., Palmigiano v. Travisono*, 317 F. Supp. 776, 786 (D.R.I. 1970).

⁸⁵*Cf. Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir.

courts find an almost absolute right for inmates to correspond with courts free of censorship.⁸⁶

Other early cases involving the right of inmates to send and receive mail have been based on equal protection of religion⁸⁷ and race.⁸⁸ Although these cases speak about first as well as fourteenth amendment rights, they are based primarily on earlier court decisions in the equal protection area. This line of cases, as well as a line of sixth amendment cases, provided an important bridge to recent cases which established a prisoner's right to correspondence based solely on the Free Speech Clause.

Closely related to inmate communication with courts, is inmate communication with attorneys, again involving both sixth and first amendment rights. Although the right to counsel and the special attorney-client privilege should play important roles in this area,⁸⁹ courts for a long time have found a more limited freedom of communication for inmate-attorney correspondence than for court mail.⁹⁰ In many jurisdictions this remains the rule today.⁹¹ The theory behind these restric-

1963), *cert denied*, 376 U.S. 920 (1964). Although *Stiltner* dealt with a prisoner's action brought under the Civil Rights Act, 42 U.S.C. § 1983, the court noted that § 1983 protects only federal constitutional and statutory rights. 322 F.2d at 315. The court summed up its feelings by noting that, "[R]easonable access to the courts is basic to all other rights protected by the Act, for it is essential to their enforcement." *Id.* at 316.

⁸⁶*See, e.g., Meola v. Fitzpatrick*, 322 F. Supp. 878, 885 (D. Mass. 1971); *Carothers v. Follette*, 314 F. Supp. 1014, 1022-23 (S.D.N.Y. 1970); *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir. 1966).

Throughout the discussion herein, censorship refers to the reading of inmate mail, whether or not material is withheld or deleted. This practice differs from a total ban on all mail on the one hand, and mere inspection not including reading, on the other. *See* notes 109-11 *infra* and accompanying text.

⁸⁷*See, e.g., Walker v. Blackwell*, 411 F.2d 23, 28-29 (5th Cir. 1969).

⁸⁸*See, e.g., Jackson v. Godwin*, 400 F.2d 529, 535 (5th Cir. 1968).

⁸⁹The court in *Marsh v. Moore*, 325 F. Supp. 392, 394 (D. Mass. 1971), noted that the privileged nature of confidential communications between attorney and client was an incident of the right to counsel. *See also Fleeley v. McGrath*, 314 F. Supp. 679, 680 (S.D.N.Y. 1970).

⁹⁰An example is *Brabson v. Wilkins*, 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967), where the Court of Appeals upheld as "reasonable" the Appellate Division's limitation of an anti-censorship order regarding prisoner-attorney correspondence to matters relating to the legality of the prisoner's detention and the treatment received. *Id.* at 437, 227 N.E.2d at 384, 280 N.Y.S.2d at 563.

⁹¹*See Cox v. Crouse*, 376 F.2d 824, 826 (10th Cir.), *cert denied*, 389 U.S. 865 (1967). The court, while agreeing with the trial judge that the actions of the prison authorities in opening the prisoner's mail to his attorney and communicating the contents to the state attor-

tions is that an attorney may sometimes be used by third persons as a conduit for the transmission of dangerous messages such as escape plans or for the smuggling of contraband into the prison.

Some courts have been even more restrictive, allowing deletion of all material not related to the legality of an inmate's detention or treatment.⁹² This is a particularly dangerous rule because the censoring officer deciding on the legal relevance of the letter is almost never an attorney, and the extent to which seemingly general information can be useful to an attorney in bringing meaningful litigation may not be obvious to the layman. Moreover, censoring officers are particularly sensitive to information critical of the conduct of the prison administration, information which can be especially important to prisoners' attorneys.⁹³

Recently, several courts employing the balancing of interests test have found that if the asserted interest of the state in censoring inmate-attorney correspondence is weighed against the associated infringement of first, fifth and sixth amendment rights of the inmate, such censorship must be ended.⁹⁴ The likelihood of abuse of mailing privileges by attorneys would be small.⁹⁵ In the words of Judge Learned Hand, "the gravity of the evil [must be] discounted by its improbability."⁹⁶ The

ney general were highly improper, held that such censorship was allowed by established law. *See also* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965). The court there upheld prison censorship of attorney-client prisoner-mail on a modification of the hands off doctrine and a determination that the correspondence was not confidential.

⁹² *See* Brabson v. Wilkins, 19 N.Y.2d 433, 437, 227 N.E.2d 383, 384-85, 280 N.Y.S.2d 561, 563 (1967). *Cf.* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965).

⁹³ Official abuse of the censorship right can take many forms. In Rhinehart v. Rhay, 314 F. Supp. 81, 82-83 (W.D. Wash. 1970), letters to an inmate's attorney were withheld because they referred to "boundless" acts of "oral sodomy" among inmates and thus violated prison regulations against letters containing vulgar or obscene matter or complaining about prison policies. The court supported the activities of the prison authorities in the case:

The intercepted letters were withheld not for the purpose of interfering with the attorney-client relationship, but because of extraneous comments contained therein that the defendants believed to be otherwise objectionable and in violation of prison regulations.

314 F. Supp. at 82.

⁹⁴ *See, e.g.,* Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

⁹⁵ Palmigiano v. Travisono, 317 F. Supp. 776, 789 (D.R.I. 1970) ("There is no logical nexus between censorship of attorney-inmate mail and penal administration.")

⁹⁶ United States v. Dennis, 183 F.2d 201, 212 (2d

problem of contraband can be met by exposing incoming attorney correspondence to the least constitutionally restrictive procedure sufficient to avoid the potential abuse: permitting only that the prison guard open the envelope and examine its contents in the presence of the inmate without reading any matter therein.⁹⁷ The possibility that escape plans will be communicated in attorney-inmate correspondence is an unrealistic rationale for mail censorship. Inmates and attorneys are permitted private verbal consultation in almost all prisons.⁹⁸ If they were conspiring towards the inmate's escape this mechanism would be available despite censorship of their mail.⁹⁹

Weighed against the small likelihood of abuse is the severe infringement on constitutional rights caused by censorship of correspondence between inmate and counsel.¹⁰⁰ Some courts have found that the "chilling effect" on the voicing of legitimate complaints to counsel caused by this censorship is great even if censoring officers do not abuse their role through arbitrary action.¹⁰¹ The onus of this censorship is even greater when it is considered

Cir. 1950), *aff'd*, 341 U.S. 491 (1951): "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger."

⁹⁷ In *Marsh v. Moore*, 325 F. Supp. 392, 395 (D. Mass. 1971), the prison guards were permitted only to use a fluoroscope or a metal detector device, or to manipulate envelopes in order to search incoming attorney mail for contraband. *See also* Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); Peoples v. Wainwright, 325 F. Supp. 402, 403 (1971). In *Peoples* the court entered an order granting relief pursuant to Fed. R. Civ. P. 23(d). The court expressly disclaimed a constitutional ground for its order.

⁹⁸ *See, e.g.,* Palmigiano v. Travisono, 317 F. Supp. 776, 789 (D.R.I. 1970). The right to private consultation with counsel has been consistently supported by the courts. *See, e.g.,* Haas v. United States, 344 F.2d 56, 65 (8th Cir. 1965); Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951). *Cf.* Smith v. Peyton, 276 F. Supp. 275, 277 (W.D. Va. 1967) (guard may be present in attorney room but may not listen to conversation). *See also* Rhem v. McGrath, 326 F. Supp. 681, 691 (S.D. N.Y. 1971).

⁹⁹ One court, however, has justified censorship of attorney-inmate correspondence based on the very fact that the confidential nature of the relationship can be preserved through face-to-face consultation. *Rhem v. McGrath*, 326 F. Supp. 681, 691 (S.D.N.Y. 1971). This judicial position seems constitutionally unsound because indigent inmates are represented by public defenders, attorneys who because of heavy court schedules have little time for client visits and must therefore depend on written correspondence for confidential information.

¹⁰⁰ *Wright v. McMann*, 321 F. Supp. 127, 142 (N.D. N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776, 789 (D.R.I. 1970).

¹⁰¹ *See* Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972).

that much of the legal discussion between inmate and prisoner will be in contemplation of possible suit against the very administration responsible for censoring the mail.¹⁰²

In cases involving the more general mailing rights of inmates, various courts have accepted each of the underlying goals of the criminal law—rehabilitation, retribution, deterrence, and restraint—as well as each of the purposes of prison administration, as state interests or justifiable purposes of imprisonment supporting censorship practices.

Based on these claimed state interests, courts have permitted extensive censorship of incoming and outgoing mail. In addition, prison officials have been granted broad discretion to refuse incoming publications.¹⁰³ However, greater future use by courts of the balancing of interests and least restrictive means tests, including closer judicial scrutiny in determining the true nature and level of the state interest in censorship, should lead to court-enforced reduction or cessation of present prison censorship practices.

Courts have justified restrictions on mailing rights of inmates as appropriate to the goal of rehabilitation,¹⁰⁴ despite the opinions of several leading penologists cited in recent cases¹⁰⁵ that the state interest in rehabilitation actually warrants

¹⁰² In the past one administrator was so bold as to state that the reading of outgoing inmate mail was necessary for proper preparation for future inmate suits. See Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 806 n.62, 823 (1969). Another administrator made copies of all such attorney-prisoner letters and sent them to the state attorney general. *Cox v. Crouse*, 376 F.2d 824 (10th Cir.), cert. denied, 389 U.S. 865 (1967).

¹⁰³ The New York State rule reads: "Newspapers, magazines, and books approved by the Warden may be received by an inmate provided his behavior is good." NEW YORK STATE DEPARTMENT OF CORRECTIONS, INMATES' RULE BOOK 14 (1961), cited in Turner, *Establishing the Rule of Law in Prison: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 485 n.80 (1971).

¹⁰⁴ See, e.g., *Desmond v. Blackwell*, 235 F. Supp. 246 (M.D. Pa. 1964), *aff'd sub nom. Long v. Blackwell*, 351 F.2d 950 (3d Cir. 1965), *vacated*, 384 U.S. 32 (1966), *on remand, sub nom. Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Fussa v. Taylor*, 168 F. Supp. 302, 303 (M.D. Pa. 1958). See also cases cited in note 33 *supra*.

¹⁰⁵ See *Nolan v. Fitzpatrick*, 326 F. Supp. 209, 212 (D. Mass. 1971) (testimony of Dr. Lloyd Ohlin), quoted *infra* in text accompanying note 156; *Palmigiano v. Travisono*, 317 F. Supp. 776, 786 (D.R.I. 1970). Other penologists agree. See, e.g., H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 492 (3d ed. 1959). See also G. SVIKES, *THE SOCIETY OF CAPTIVES* 122-29 (1958); Comment, *Prisoner Correspondence*, 62 J. CRIM. L. C. & P.S. 40 (1971).

expansion of opportunities for inmates to communicate with the outside world. Furthermore, no court has struck down the regulations common to most prisons which limit the number of correspondents to whom a prisoner may write or from whom he may receive mail.¹⁰⁶ Not only are the number of correspondents limited, but also prison officials must approve individual correspondents.¹⁰⁷ Courts have approved the first restriction as necessary to keep down the cost of censoring inmate mail. The latter restriction is thought to provide prison officials with a mechanism for preventing inmates from corresponding with those on the outside who might deter rehabilitation, as well as aid escape or send contraband.

A number of considerations militate in favor of striking down general mailing restrictions on the ground that they actually *interfere* with post-release success. An inmate must contact many people in anticipation of his release. The most obvious of these are possible employers, persons running school programs, rehabilitative programs or drug programs, and former acquaintances who can be helpful in these areas. Administrative roadblocks will dissuade many inmates from pursuing these several paths to possible post-release adjustment. Most of these men and women have met with frustration in trying to set up a stable life on the outside before. If an important purpose of imprisonment is to lead offenders away from future criminal activity, impediments to communication with persons on the outside who could help them to do so seems clearly counterproductive. Nor is the likelihood of successful reacclimation enhanced when the inmate is isolated from the outside world in which his problems arose and is instead forced to concentrate on the artificial world of prison. This isolation makes it impossible for the inmate to learn to react in more constructive ways to his former environment.¹⁰⁸ All of this suggests that the

¹⁰⁶ See *Lee v. Tahash*, 352 F.2d 970, 972-73 (8th Cir. 1965). Often the number of letters is controlled too. In *United States ex rel. Lee v. Illinois*, 343 F.2d 120 (7th Cir. 1965), the maximum number of letters that a prisoner might have in his cell was limited to fifteen for fire prevention purposes.

¹⁰⁷ See *Fussa v. Taylor*, 168 F. Supp. 302 (M.D. Pa. 1958). See also cases cited in note 109 *infra*.

¹⁰⁸ If, for example, a source of strain for him has been domestic problems, he cannot try to work them out before release if he is isolated from his family during that period. Relatively unhindered communication would allow the inmate to work out the problem with his family before he returned to the street. The return to his family would of course provide him with an important anchor upon release. The present system of

state interest in rehabilitation should be weighed in the balancing test on the side of *greater* mailing rights for inmates.

More specifically, few courts have ordered an end to the regulations in force in many prisons prohibiting an inmate from writing to any ex-offender.¹⁰⁹ This blanket rule has been justified on the theory that other ex-offenders will be a bad influence on the inmate. It is absurd, however, to deny to an inmate, on rehabilitative grounds, the opportunity to communicate with ex-offenders on the outside while at the same time forcing him to live with hundreds of recently convicted men in the closest of circumstances—circumstances in which the first offender is often housed with multiple offenders; the petty criminal with the professional criminal. The claimed state interest is simply not realistically served in such an instance.¹¹⁰ This and similar irrationalities are not lost on the inmates. Such restrictions are also probably counterproductive from the point of view of rehabilitation in that they teach inmates the inconsistent nature of the law and consequently a disrespect for authority.¹¹¹

Closely related are limitations on inmate mailing rights based on administrative considerations, which also have a negative impact on rehabilitation. Many prisons, for example, do not allow an inmate to conduct a business while he is incarcerated,¹¹² no matter how legitimate the business

may be. The justifications for this restriction range from refusal to allow inmates in pursuit of personal gain to cause expenditure of prison monies (such as the time of officers to censor the letters) to a fear that the conduct of a profitable business will provide the inmate with money to buy favors from guards and other inmates.¹¹³ The former argument is weak at best: if the censorship itself is unnecessary there is no cost to the state. The latter justification for such restriction is invalid under the least restrictive means test. Disallowing all business correspondence is not the constitutionally least restrictive method of avoiding the feared abuse: it would be sufficient to simply limit the money that an inmate is allowed to bring into the prison; the inmate could deposit the remainder on the outside for post-release use. As the availability of money and a business position are so important to the post-release success of the ex-offender, there is actually a strong state interest in encouraging legitimate business interests among inmates.

Two other goals of the criminal law, retribution and deterrence, may be served by restricting inmate mailing rights. Again, however, because these goals can be equally well achieved by other means, the least restrictive means test requires that the goals not be achieved by such constitutionally burdensome restrictions.¹¹⁴

Of the four underlying goals of the criminal law, only security (restraint) remains as a state interest which might possibly justify restrictions on inmate mailing rights.¹¹⁵ Mail restriction and censorship practices have been justified as necessary to detect escape plans and to prevent the introduction of contraband into the prisons. The likelihood of detecting escape plans in inmate correspondence would appear to be slim, the more so since such plans could be communicated during visits which

isolation followed by release may be one reason for the generally high recidivism rates found in many studies.

¹⁰⁹ See, e.g., *Desmond v. Blackwell*, 235 F. Supp. 246 (M.D. Pa. 1964), *aff'd sub nom. Long v. Blackwell*, 351 F.2d 950 (3rd Cir. 1965), *vacated*, 384 U.S. 32 (1966), *on remand, sub nom. Long v. Parker*, 390 F.2d 816 (3d Cir. 1968). This can be an important restriction on the first amendment rights of an individual who has numerous acquaintances who, living in the poorer urban areas, have accumulated a criminal record. It is now the federal rule that a criminal record is only one factor in approving a correspondent. *Walker v. Blackwell*, 411 F.2d 23, 29 (5th Cir. 1969).

¹¹⁰ The total ban is not justified by security considerations because mere censorship, see note 86 *supra*, of mail from correspondents with criminal records would satisfy state security interests.

¹¹¹ See *Jackson v. Godwin*, 400 F.2d 529, 535 (5th Cir. 1968):

[T]o the extent that prison regulations are designed to teach the prisoners to live in conformity with the norms of society, the sporadic and discretionary enforcement of unreasonable regulations, it appears to us, is more likely to breed contempt of the law than respect for, and obedience to it. Unrestricted, arbitrary and unlawful treatment of prisoners would eventually discourage prisoners from cooperating in their rehabilitation.

¹¹² *United States ex rel. Wagner v. Ragen*, 213 F.2d 294 (7th Cir. 1954); *Stroud v. Swope*, 187 F.2d 850 (9th

Cir. 1951). See also Hartung & Floch, *A Social-Psychological Analysis of Prison Riots: An Hypothesis*, 47 J. CRIM. L. C. & P. S. 51 (1956).

¹¹³ Comment, *supra* note 28, at 420.

¹¹⁴ Moreover, retribution and deterrence, the punitive aspects of incarceration, should be determined by the legislature and the court. "[A]ny further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subjected to judicial scrutiny [as violations of due process]." *Jackson v. Godwin*, 400 F.2d 529, 535 (5th Cir. 1968). See also *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961); *Complaints of Convicts* at 519-20.

¹¹⁵ Several courts have come to this conclusion in deciding first amendment cases. See, e.g., *Fortune Society v. McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971). Security of guards and inmates are included as state interests in this discussion.

are usually unmonitored.¹¹⁶ Thus the state interest in security, though an important one, is simply not served to any great degree by restrictions on inmate correspondence. Moreover, the bases for such limitations must be weighed against the important infringements on prisoners' rights associated with the censorship. The most important of these infringements are the severe limitations on the absolute number of letters and correspondents made necessary by the administrative costs of the censorship itself. However, if the state interest in censorship is not great, the costs of maintaining the system should not justify further restrictions on mailing rights.

Contraband such as escape tools, weapons, and drugs entering the prison would represent a threat to security. However, the risk can be fully met by having incoming mail inspected but not read. To prevent abuses, inspections should be conducted in the sight of the inmate receiving the letter.

The availability of censorship provides prison personnel with the opportunity to read and censor perfectly legal correspondence which contain statements that can be construed as critical of the prison administration. The inmates' knowledge that censorship exists will have an important "chilling effect" on the thoughts they are willing to express in outgoing correspondence.¹¹⁷ Thus, the practice tends to isolate inmates from constructive contacts with the outside world. Also, an important channel for the reduction of inmate tension is closed. To a significant extent, therefore, harsh censorship practices probably serve to hinder rehabilitation of inmates and may actually increase security problems within prisons. At best, the state interest in censorship is unclear; the corresponding infringement on inmates' first amendment rights is severe.

While the court in *Palmigiano v. Travisono*¹¹⁸

¹¹⁶ See *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970). Moreover, in most institutions the chance of escape is small enough, and the punishment upon being caught great enough, to dissuade the vast majority of inmates from trying.

¹¹⁷ See *Carothers v. Follette*, 314 F. Supp. 1014 (S.D. N.Y. 1970). See generally *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The court in *Carothers* found that criticism sent to those outside could hardly be a threat to security or anti-rehabilitative. Indeed, the court stated, "such comments, even if they momentarily cause chagrin to prison officials, may act as a form of healthy catharsis in the case of an introvert." 314 F. Supp. at 1025.

¹¹⁸ 317 F. Supp. 776, 785 (D.R.I. 1970). Nor did the court find that aspect of restraint involving protection of the public from threatening letters from inmates an appropriate basis for censorship: "Officials of the Adult Correctional Institution have also taken it upon them-

questioned whether "the purposes of imprisonment" justified censorship of inmate correspondence and found "justification only for fewer restrictions because total censorship serves no rational deterrent, rehabilitative or prison security purposes," the court in *Morales v. Schmidt*¹¹⁹ went even further, stating that prison rules denying any "fundamental" rights require a most "compelling" state interest. The court stated that the need for internal discipline or the protection of guards, inmates, or administration would not by itself constitute such an interest: "if the functions of deterrence and rehabilitation cannot be performed in a prison without the imposition of a restrictive regime not reasonably related to those functions, it may well be that those functions can no longer be performed constitutionally in a prison setting."¹²⁰

The best rule would be no censorship or any other limitation on outgoing mail. Incoming mail should be inspected for contraband only.¹²¹ As the administrative cost of such inspection should be low, it should not necessitate further interference with the rights of inmates.

Incoming Publications

A number of courts have ruled recently on prisoners' rights to receive outside publications. The court in *Rowland v. Sigler*¹²² stated that the first amendment protects an inmate's right to receive ideas as well as to express them. In *Fortune Society v. McGinnis*¹²³ the right of inmates to

themselves to read and screen outgoing mail to protect the public, including the courts, from insulting vulgar letters. This is not their function—they are not the protectors of the sensibilities of the public which can protect itself." *Id.* at 788. The court concluded:

[T]he reading of any outgoing mail is unnecessary and in violation of the First Amendment rights of the parties involved unless pursuant to a duly obtained search warrant, and in the absence of the same no outgoing prisoner mail may be opened, read, or inspected.

Id. at 791.

¹¹⁹ 340 F. Supp. 544 (E.D. Wis. 1972). The court found that the amorous letters of an inmate to his wife's sister were constitutionally protected.

¹²⁰ 340 F. Supp. at —.

¹²¹ The possibility would exist under such a system that pornographic material might enter the prison. The state interest, however, in avoiding this occurrence does not justify the censorship of inmate mail which would be necessary to prevent it. Indeed, the entrance of such material might even play a positive role to the extent it helped to reduce the level of sexual tension among inmates. The pornography question more often arises in the context of incoming publications, discussed *infra* note 146 and accompanying text.

¹²² 327 F. Supp. 821 (D. Neb.), *aff'd sub nom.* *Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971). See also *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971).

¹²³ 319 F. Supp. 901 (S.D.N.Y. 1970). See also *God-*

receive the newsletter of the society of ex-offenders was upheld. The newsletter contained information on prison reform, rehabilitation programs, and the activities of the organization. After noting the important nature of the right involved, and stating that "[c]ensorship is utterly foreign to our way of life, it smacks of dictatorship," the court, citing several earlier decisions regarding the first amendment rights of prisoners, stated:

Only a compelling State interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights.¹²⁴

The court thus refused to recognize rehabilitation, deterrence, or retribution as state interests justifying restriction on inmates' first amendment rights. Also, the court stated that the fact that the journal criticized the prison administration was no reason to ban or otherwise censor the publication. In the words of the court:

Correctional and prison authorities . . . are not above criticism, and certainly they possess no power of censorship simply because they have the power of prison discipline.¹²⁵

Using language from *Long v. Parker*,¹²⁶ the court stated that to justify the ban on the publication:

"[P]rison officials must prove that the literature creates a clear and present danger of a breach of prison security . . . or some other substantial interference with the orderly functioning of the institute."¹²⁷

The evidence of danger would have to be more than "mere speculation that such [literature] may ignite racial or religious riots in a penal institution."¹²⁸

The court in *Fortune Society* found that the state had not made a sufficient showing that the

society's newsletter was a security risk. Though the opinions of New York State prison officials were held to be important, the experience of the neighboring New York City prisons, which permitted inmates to receive the publication, was held to have even greater probative value on the question of whether the publication posed a "clear and present danger."¹²⁹

Despite the positive outcome of this case, continued used by courts of the "clear and present danger" test to determine the availability of publications to inmates seems ill-advised. First, there is no hard evidence that any publication constitutes a clear and present danger.¹³⁰ Faced with the question as to whether a problem inmate should be denied the right to *Muhammad Speaks*, a journal which prison officials considered "racist," the court in *Rowland v. Sigler*¹³¹ stated:

Viewed in its entirety, the sum of the evidence is that the plaintiff is and has been a belligerent and uncooperative inmate, but nothing ties his attitudes to his race or his racial views. Only by speculation can it be said that his receiving of *Muhammad Speaks* would promote the attitudes which the prison administration understandably decries.¹³²

There is no doubt that inmates are subject to unusually great tensions,¹³³ especially racial tension. Yet, the possibility seems equally as great that such "political" publications will diffuse tension by creating greater inmate awareness of the societal basis for these tensions, as that such publications will trigger aggressive acts based on that tension.¹³⁴

¹²⁹ 319 F. Supp. at 905. See *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971). See also *Owens v. Brierly*, 452 F.2d 640 (3d Cir. 1971); *Sostre v. Otis*, 330 F. Supp. 941 (S.D.N.Y. 1971). If a publication might create a danger from those hostile to its doctrine a less constitutionally restrictive means than banning the publication from the prison might be to limit its circulation therein to those who adhere to the doctrine. See *Shakur v. McGrath*, No. 69 Cr. 4493 (S.D.N.Y. Mem. Dec. 31, 1969).

¹³⁰ Of course the test has often been applied in non-prison cases as well. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

¹³¹ 327 F. Supp. 821 (D. Neb.), *aff'd sub nom.* *Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971).

¹³² *Id.* at 827.

¹³³ Thus it has been suggested that a "clear and present" danger may exist in prison in situations in which the danger would not be equally great outside of prison. See, e.g., *Goldfarb & Singer* at 222; Comment, *supra* note 28, at 414.

¹³⁴ Cf. *In re Harrell*, 2 Cal.3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970). Many of the publications

win v. Jackson, 400 F.2d 529 (5th Cir. 1969); *Payne v. Whitmore*, 325 F. Supp. 1191 (N.D. Cal. 1971).

¹²⁴ 319 F. Supp. at 904.

¹²⁵ *Id.* at 905.

¹²⁶ 390 F. 2d 816, 820 (3d Cir. 1968).

¹²⁷ 319 F. Supp. at 905.

¹²⁸ *Id.* The court in *Long* also stated that broad claims that *Muhammad Speaks* was "highly inflammatory," or "[m]ere antipathy caused by statements derogatory of, and offensive to, the white race [are] not sufficient to justify the suppression of religious literature even in a prison." 390 F.2d at 822.

When racial tensions are responsible for discipline problems in prison the surest solution would appear to be segregation of the races. Yet courts have held such segregation to be constitutionally impermissible despite the apparent state interest involved.¹³⁵ In the case of banned publications the connection between restrictions on constitutional rights and a corresponding improvement in internal discipline is much less clear than in the case of segregation. There is no reason for courts to give inmates' rights to freedom of speech any less protection than that presently given to their rights to equal protection and freedom from discrimination.

Indeed, this first amendment right deserves the greatest protection. In a democratic society the free expression and reception of all political points of view serves the highest state interest. As the court stated in *Fortune Society*, "[f]ree discussion of the problems of society is a cardinal principal of Americanism. . . ." ¹³⁶ The importance of the right to receive political publications of a controversial nature was stressed by the Supreme Court in *Lamont v. Postmaster General*.¹³⁷ Incarcerated men will almost certainly be faced with controversial

banned to date do not advocate violence. The *New York Times* compiled the following list of reading banned in various New York State prisons: "The Jefferson Bible," The Blackstone Law Course, Psychology Today, National Geographic, newsletters of the Mattachine and Fortune Societies, Koestler's "The Ghost Machine," Gay's "The Enlightenment," Ferkiss' "Technological Man," Kaslow's "The Changeless Order," Carlson's "Modern Biology," Matson's "Being, Becoming and Behavior," Levitas' "Culture and Consciousness," Erikson's "Youth and Crisis," Levi-Strauss' "The Savage Mind," Von Bertalanffy's "Robots, Men and Minds," Moorehead's "The Fatal Impact," Friedman's "To Deny Our Nothingness," Jung's "Man and His Symbols," McLuhan's "Understanding Media," Lung-er's "Mind: An Essay on Human Feeling," Bettelheim's "The Empty Fortress," Lewis's "La Vida," Silberman's "Crisis in Black and White," Edwards' "The Rage of India," Sinclair's "The Cry for Justice," and Zaidenberg's "The Emotional Self." N.Y. Times, Dec. 12, 1971, § 7, at 47. Indeed, *Fortune Society Newsletter* and *Muhammad Speaks* can be said to advocate rehabilita-

¹³⁵ The court in *Gilmore v. Lynch*, 319 F. Supp. 105, 109 n.6 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971), stated:

Thus, the right of a prisoner not to be subjected to racial discrimination is so paramount that it will prevail over even a strong showing that racial segregation of inmates tends to lessen intramural strife and disciplinary problems.

See *Lee v. Washington*, 390 U.S. 333 (1968). *But see* *Stroman v. Griffin*, 331 F. Supp. 226 (S.D. Ga. 1971); *Rentfrow v. Carter*, 296 F. Supp. 301 (N.D. Ga. 1968) (prisons can segregate inmates by race when racial tensions cause an extremely dangerous situation within the prison).

¹³⁶ 319 F. Supp. at 905.

¹³⁷ 381 U.S. 301 (1965).

political ideas after release. It is, therefore, anti-rehabilitative to prevent the inmates from confronting these ideas in an environment in which they can be digested and thought through thoroughly.

Second, the "clear and present danger" test is too vague and too likely to lead to the abuse of important constitutional rights of inmates such as equal protection and freedom of speech.¹³⁸ In employing a vague test like "clear and present danger," courts have not taken into account those who will implement the test. Censorship officers are usually lower-rank correctional personnel, most often white.¹³⁹ They are almost always without extensive training in penology.¹⁴⁰ Too often they censor that which *they* would consider inappropriate reading.¹⁴¹ However, they have no recognized sensitivity to the needs of people of a different race and background. It is important to note the words of a black federal judge facing the issue of the appropriateness of permitting political literature into prison:

It is not a function of our prison system to make prisoners conform in their political thought and belief to ideas acceptable to their jailers. . . . [Rather, the] function is to try to rehabilitate the law-breaker by convincing him of the validity of our legal system.¹⁴²

The present system of censorship does not do this.

Even if there were such a thing as ideas which are a "clear and present danger," it is unrealistic to think that banning certain publications or even

¹³⁸ See note 134 *supra* and note 141 *infra*. In the rare case of a publication which merely explained escape technique, prohibition would still be proper. *Cf. Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting).

¹³⁹ In *Sostre v. Rockefeller*, 312 F. Supp. 863, 876 (1970), *modified sub nom. Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), Judge Motley pointed out that while seventy percent of the New York State prison population were non-whites, only two percent of the entire guard force was black or Puerto Rican, and these few were assigned to inferior positions.

¹⁴⁰ In New York City, for example, guards receive four weeks of training in which to learn all aspects of correctional work. RULES AND PROCEDURES OF THE DEPARTMENT OF CORRECTION OF THE CITY OF NEW YORK § 3.126 (1966).

¹⁴¹ See, e.g., list in note 134 *supra*. It is not an official state policy which keeps out these books, but rather the list is the result of decisionmaking in individual institutions. See also Jack Newfield, "Prison Censors," *Village Voice*, Feb. 10, 1972, at 1, for examples of books denied to inmates by individual censoring officers, *Cf. Palmigiano v. Travisono*, 317 F. Supp. 776, 790 (D.R.I. 1970).

¹⁴² *Sostre v. Rockefeller*, 312 F. Supp. 863, 876 (S.D.

censoring incoming mail will have more than a marginal effect on the spread of such ideas within the prison. For, as the court pointed out in *Nolan v. Fitzpatrick*,¹⁴³ "prisoners are quite well able to proselytize directly." Official attempts to keep out controversial literature probably does not improve security, but rather reinforces the position of those in the inmate society who already espouse those controversial views. It also serves to teach inmates disrespect for their jailers.

If the "clear and present danger" test is still to be employed by courts, in the future they should do so only in the context of the principles set out by Professor Freund in *On Understanding the Supreme Court*.¹⁴⁴

The truth is that the clear-and-present-danger test is an over simplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.¹⁴⁵

Closely related to the above is the question of allowing inmates to receive or possess pornography. At the very least, censorship must be more specific than a general ban on "obscene" literature. That standard would provide correctional personnel with the opportunity to abuse the censorship regulations by violating the rights of prisoners to receive political and literary publications. At least one court, wishing to avoid such abuse, has limited censorship only to those publications failing to meet obscenity standards set out by the Supreme Court.¹⁴⁶

N.Y. 1970) (*Motley, J.*), *modified sub nom. Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc).

¹⁴³ 451 F.2d 545, 549 (1st Cir. 1971).

¹⁴⁴ P. FREUND, *ON UNDERSTANDING THE SUPREME COURT* (1949).

¹⁴⁵ *Id.* at 27-28.

¹⁴⁶ *Palmigiano v. Travisono*, 317 F. Supp. 776, 790-91 (D.R.I. 1970), suggested use of the test enunciated in *Roth v. United States*, 354 U.S. 476 (1957), because later Supreme Court tests would be difficult for prison personnel to follow. The court criticized the system then in use:

Defendant officials have given an untrained custodial officer unbridled discretion to screen out

To date, the various standards, including the balancing of interests test as employed by most courts to determine the constitutionality of censorship practices, have been insufficient on at least two counts. Though courts now require officials to associate each restriction on inmate correspondence with a specific "underlying consideration" or "compelling" state interest, many courts have not gone so far as to consider whether the restriction will actually serve the associated penological goal in any meaningful way. Indeed in many instances the restrictions may actually have important negative impacts on achieving penological goals. Nor have courts considered the likelihood that the availability of the restriction will be abused by the prison staff. On this last point they have not realistically considered the level of personnel making many of the censorship decisions, nor indeed the lack of penological training of prison officials in general.

Related Rights of Outside Correspondents

At least two courts¹⁴⁷ have recognized that the first amendment rights of the outside correspondent, as well as those of the inmate, are infringed upon by prison censorship rules. This recognition has obvious importance—however appropriate limitations on the constitutional rights of inmates may be, the first amendment rights of free correspondents must be broad indeed. One court¹⁴⁸ has recognized that the broad rights of the press to circulate printed material includes the right to send such material into prisons.

RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES

Several courts have granted prisoners an abso-

any material which in his subjective opinion he believes to be pornographic. This, of course, is not a legitimate method of preventing hard core pornography from entering the [prison].

¹⁴⁷ *Palmigiano v. Travisono*, 317 F. Supp. 776, 786 (D. R. I. 1970). See also *Landman v. Royster*, 333 F. Supp. 621, 657 (E.D. Va. 1971) ("Interruption of mail to public officials infringed upon . . . the right of legislators to be informed.")

¹⁴⁸ *Palmigiano v. Travisono*, 317 F. Supp. 776, 786 (D. R. I. 1970). Compare *Burnham v. Oswald*, 333 F. Supp. 1128 (W.D.N.Y. 1971). (The court rejected the claim of newsmen that their constitutional rights were infringed by denial of their request to the Attica Superintendent for permission to interview inmates so that they might get all sides of the story for the public), *with Washington Post Co. v. Kleindienst*,—F. Supp.—(D.D.C. 1972) (blanket denial of press request to interview inmates held unconstitutional as abridging the public's right to know).

lute right to send letters to public officials.¹⁴⁹ These decisions have been based on the first amendment clause guaranteeing the right to petition for redress of grievances. A recent First Circuit decision, *Nolan v. Fitzpatrick*,¹⁵⁰ extended this inmate right to include letters sent to the press and media. While the district court's decision in *Nolan*¹⁵¹ was based primarily on the right to petition for redress of grievances, the court of appeals based its decision on freedom of the press as well. However, the root justification for both decisions was really the same—the need of inmates to let the public know about conditions within our prisons. The district court held that:

[Inmates] have the right to appeal for redress of grievances not only to the courts and to the elected and appointed representatives of the people, but to the people themselves, and . . . such people are best reached by communications with the news media. . . .

[S]ome grievances of prisoners may be legitimate and yet may not be within the potential practical political achievements of a governor and of a legislature without an increased sensitivity and awareness in the part of the general public. . . .¹⁵²

The court of appeals expanded on this last theme:

[W]e rely primarily on the fact that the condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear. This does not depend upon a determination that wardens are unsympathetic to the need to improve prison conditions. But even a warden who pushes aggressively for reforms or larger appropriations within his department and before appropriate officials and legislative committees may understandably not feel it prudent to push for more public laundering of institutional linen.¹⁵³

The First Circuit also ruled in *Nolan* that the

¹⁴⁹ See, e.g., *Palmigiano v. Travisono*, 317 F. Supp. 776, 788–89 (D.R.I. 1970). This is the rule in federal prisons. See *Turner*, *supra* note 103, at 478 n.32.

¹⁵⁰ 451 F.2d 545 (1st Cir. 1971).

¹⁵¹ 326 F. Supp. 209 (D. Mass. 1971).

¹⁵² *Id.* at 216. Although the court of appeals reversed the district court, it did so on the grounds that the district court's guidelines still left the warden too much discretion to limit such mailing of letters to the press.

¹⁵³ 451 F.2d at 547–48. See also *Washington Post Co. v. Kleindienst*,—F. Supp.—(D.D.C. 1972).

claimed state interest in minimizing the expense of administration did not justify the refusal of prison officials to approve the requests of inmates to send letters to the press:

A flat ban on all letters to the press is obviously inexpensive to administer. It requires little of the censor's time to stamp "Rejected" on a letter, and prison officials need not spend time responding to issues which these letters raise. But on the present facts, the state interest in minimizing expenses does not rise to the level of an "important or substantial" interest.¹⁵⁴

The court also denied the claims of prison officials that state interests in deterrence, retribution, restraint or rehabilitation justified the restrictions on inmate attempts to correspond with the press. Indeed, both the district and appellate courts found that allowing inmates to post such letters served several positive penological goals. The writing of such letters might be rehabilitative to the men involved. At the same time it would diffuse inmate hostility if the men knew that the public could become aware of their grievances through means other than riots.¹⁵⁵ On these points the district court quoted testimony of Professor Lloyd Ohlin of Harvard Law School who stated that although he could not be sure whether prisoner-press correspondence is a "good or a bad thing from the penological viewpoint," due to the total lack of research on the subject, he did feel that:

[T]here is a good chance that letting prisoners correspond with newspapers and broadcasters would facilitate prison discipline by providing prisoners with a nonviolent and effective outlet for their grievances.¹⁵⁶

Professor Ohlin further suggested that if the public were sensitive to prison conditions, prison reform might even be forthcoming as result of those letters.

As to the applicability of the twin state penal interests of retribution and deterrence to the ban on letters to the press, the First Circuit noted that:

[T]he important question is not whether this ban may conceivably have a deterrent or retributive effect, but whether the use of this ban is essential

¹⁵⁴ 451 F.2d at 549–50. See also *Brenneman v. Madigan*, — F. Supp. — (N.D. Cal. 1972).

¹⁵⁵ *But cf.* *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966) (court refused to overrule the punishment meted out to a prisoner for posting within the prison a copy of a letter that he had sent to the governor stating the prisoners' grievances and urging prison reform).

¹⁵⁶ 326 F. Supp. at 212.

to achieving those effects. In holding that prisoners retain certain rights in prison, the courts have implicitly held that certain deprivations are not essential to the furtherance of these purposes: the argument which would justify all rules proves too much. *Lacking evidence that the deprivation which a ban on letters to the press imposes is essential to deterrence or retribution, we hold that it is not.* A similar "all-rules" argument as to rehabilitation, that prisoners must learn to follow rules in order to become acceptable members of society, is similarly unpersuasive.¹⁵⁷

Thus, as in the case of inmate letters to public officials, no state interest in either the goals of the criminal law or in the purposes of prison administration were found to be compelling enough to justify the placing of restrictions on inmate letters to the press.

INMATE MANUSCRIPTS

Many prisons have regulations prohibiting or limiting the rights of inmates to write or publish manuscripts.¹⁵⁸ Again, the rationale for such regulations must be rooted in a legitimate state interest. The fear most commonly voiced by courts in support of such an interest is that an inmate manuscript circulated among fellow inmates could threaten the security of the prison. In *Sostre v. McGinnis*,¹⁵⁹ the Second Circuit indicated that prison officials might seize a manuscript if limitations on circulation proved unenforceable and if

¹⁵⁷ 451 F.2d at 551 (emphasis added).

¹⁵⁸ See, e.g., *United States v. Maas*, 371 F.2d 348 (D.C. Cir. 1966); *Davis v. Superior Court*, 175 Cal. App. 2d 8, 345 P.2d 513 (1959). The New York City regulation on inmate manuscripts is fairly typical:

No manuscript prepared by any inmate shall be permitted to leave any institution until it has been reviewed and approved by an employee or committee as the head of institution shall designate. No manuscript shall be cleared for mailing if it contains:

- a. Plagiarized material.
- b. Any libelous, lewd or pornographic material.
- c. Any material criticizing any governmental, judicial or law enforcement agency or institution or any personnel connected therewith.
- d. Any material which appears to glorify crime or delinquent conduct or which deals with the technique of committing crimes.
- e. Any material which might be offensive to any race, nationality, religious faith, political party or other group of citizens.
- f. Reference to the fact that the writer is an inmate of a correctional institution.

RULES AND PROCEDURES OF THE DEPARTMENT OF CORRECTION OF NEW YORK CITY § 4.199 (1966).

¹⁵⁹ 442 F.2d 178, 202 (2d Cir. 1971).

the manuscript presented a "clear and present danger."

Such apprehension over the circulation of a manuscript throughout the inmate population hardly justifies a complete prohibition against inmate writing. First, as in the case of incoming publications, few, if any, manuscripts will present a danger to security and discipline sufficient to justify seizure. Second, even if a manuscript were to pose too great a threat to security to be circulated throughout the prison, there is no state interest which justifies prohibiting manuscripts from being mailed to the outside for publication. Indeed, the publication of inmate literature could serve as a source for redressing prison grievances and at the same time help to reduce inmate tensions.

No other state interest is served by limiting inmate writing; in fact, the state interest in rehabilitation may be served by such activity. Also, as in the case of censorship of incoming publications, the seizure of inmate manuscripts will do little to prevent inmates from communicating the ideas contained therein; official seizure may indeed be the best means of promoting these ideas. In total, the marginal increase in inmate tensions created by the possibility that a "dangerous" manuscript will be circulated does not seem comparable to the importance of the restricted right. This is especially true when the likelihood of official abuse, including the prohibition or seizure of manuscripts merely critical of prison conditions, is considered in the balance.

SPEECH AND ASSEMBLY

No prisoners' rights to non-religious speech or assembly have yet been recognized by courts reviewing inmate complaints. These two first amendment rights are, of course, closely linked, especially in prison. There, severe restrictions on freedom of movement often makes speech with even one other chosen person difficult. These restrictions are based on the belief that the chief concerns of prison administrators and the state interests most often recognized by courts—restraint and security of guards and prisoners—are closely related to restrictions on inmate movement. Courts are, therefore, very hesitant to order the greater inmate movement that would be necessary for even limited assembly and speech.

Courts have found, however, a right to speech and assembly when religious practice is involved.¹⁶⁰

¹⁶⁰ *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969);

Similarly, many courts, including the Supreme Court, have declared constitutionally protected the right of one prisoner to receive legal help from another when professional counsel is not sufficiently available.¹⁶¹ While both of these rights may be reasonably limited as to time and location based on security considerations, neither can be denied.

Recent decisions concerning inmate correspondence have stated that the inmate's right to free speech is no less a "preferred constitutional right" than is freedom of religion or right to counsel. This has always been true outside of prison.¹⁶² A prisoner's right to non-religious or non-legal speech should warrant no less judicial protection than its less secular counterparts. The state interest in restricting more general inmate speech is not any greater than it is for religious speech; surely the security considerations are the same. Courts have also begun to recognize that non-religious speech can be just as important to rehabilitation as is its religious counterpart. As one court recently stated:

[W]e doubt whether preparation of a prisoner for return to civilian life is advanced by deadening his initiative and concerns for events within the prison itself.¹⁶³

Inmate communication within prison may serve as a model for relationships after release.

The least restrictive means doctrine would require accommodation of security interests with first amendment rights, as is done in the case of religious assembly, rather than permitting a total ban on inmate speech and assembly.¹⁶⁴ For example,

Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969); *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967); *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964); *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971); *Glenn v. Wilkinson*, 309 F. Supp. 411 (W.D. Mo. 1970); *Knuckles v. Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969); *Banks v. Havener*, 234 F. Supp. 27 (E.D. Va. 1964).

¹⁶¹ See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969); *Beard v. Alabama Board of Corrections*, 413 F.2d 455 (5th Cir. 1969); cf. *Gilmore v. Lynch*, 319 F. Supp., *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

¹⁶² See note 49 *supra*.

¹⁶³ *Carothers v. Follette*, 314 F. Supp. 1014, 1025 (S.D.N.Y. 1970). See also *Sobell v. Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971). The court in *Sobell* rejected the claimed state interests in restricting the rights of parolees to free speech and assembly. The decision is particularly relevant because the court in reaching its conclusions assumed the fundamental issues of constitutional law to be the same for parolees as for prisoners. See *contra*, *Evans v. Moseley*, 455 F.2d 1084 (10th Cir. 1972).

¹⁶⁴ See note 78 *supra*.

inmate assembly might be limited to protected areas when sufficient correctional manpower were available. At other times printed material might be circulated in lieu of speech and assembly.

Courts must begin to put to the closest scrutiny limitations on inmate speech and assembly justified by prison administrators as necessary to security.¹⁶⁵ Prison officials are concerned with maintaining security almost to the exclusion of other interests. Their conservatism on this issue is understandable; they are in the news only when escapes, riots, or inmate deaths occur. Success in other penological areas is more subtle, less visible, and therefore almost never rewarded. Because of this, it is necessary for the courts to be especially zealous in protecting inmate speech and assembly by demanding that prison officials use means which least restrict inmate first amendment rights while maintaining the security of guards, inmates, and the public.

An equally important prisoners' right is that of verbal communication with those on the outside. To date, courts have condoned severe limitations on the permitted numbers of visits and visitors, realizing the difficult logistical and security problems involved in moving inmates to the visiting room and observing their behavior therein. In many prisons only visits by close relatives are permitted, and it is not clear from opinions to date whether courts consider even these visits to be constitutionally protected.¹⁶⁶

The right to receive visits, like the right to receive mail, is a most important one from a rehabilitative as well as a constitutional point of view. Many of the arguments supporting expanded mailing rights also support broader visitation rights as well.¹⁶⁷ Inmate tensions are generally reduced with increased visits, and the chances for successful inmate reintegration after release are generally enhanced.¹⁶⁸ As in the case of inmate assembly,

¹⁶⁵ Cf. *Fortune Society v. McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970).

¹⁶⁶ *Rowland v. Wolff*, 336 F. Supp. 257 (D. Neb. 1971) (visits of half sister of inmate not constitutionally protected).

¹⁶⁷ See generally notes 84-157 *supra* and accompanying text. It is important to note that many new prison facilities are being built far from population centers. This represents a very real restriction on the visitation rights of those on the outside who are interested in the prisoner. The constitutionality of locating prisons far from urban population centers is particularly called into question by the fact that this situation interferes far more with visitation opportunities for the poor, than for the non-poor.

¹⁶⁸ See Comment, *supra* note 28, at 418. Nor should

courts must challenge claims by prison officials regarding the necessity of restrictions on visitation when it is demonstrated that security considerations can be accommodated with fewer restrictions on this important inmate right.¹⁶⁹

FIRST AMENDMENT RIGHTS OF DETENTION PRISONERS

Prison and jail officials in many jurisdictions have been restricting the first amendment rights of pre-trial prisoners as severely as the rights of those already convicted and sentenced. Only in recent years have courts indicated that such treatment of detainees is unconstitutional. In *Hamilton v. Love*¹⁷⁰ the court, ruling on the constitutional rights of detainees, held:

It is a fundamental constitutional tenet that those similarly classified must be similarly treated, and that the system of classification itself must bear a rational relationship to legitimate state purposes. Under the equal protection clause, it would not seem possible to be able to classify detainees, awaiting trial, in the same group with those persons who have been convicted of crime and sentenced to prison. And yet, that appears to be what we have been doing as a practical matter, not only locally, but across the nation. Ironically, the lot of those detained while awaiting trial appears to be worse than that of those convicted and serving their sentences in the usual penitentiary systems.¹⁷¹

Because they are presumed to be innocent,

this communication be restricted because it is critical of the prison administration. Such criticism may be an important part of an inmate readjustment as it shows it develops his critical capacity. At the same time it may serve to reduce his anxieties, thus being an important aid to prison discipline as well. See *Nolan v. Fitzpatrick*, 326 F. Supp. 209, 212 (D. Mass. 1971) (testimony of Dr. Lloyd Ohlin). Indeed, an open channel for voicing criticism both within and outside of the institution has been suggested as the best means of avoiding riots. *Id.*

¹⁶⁹ In considering expanded visitation rights in light of security requirements, courts should take notice of such supplemental forms of communication as telephones and closed circuit television, which provide a communications link with those on the outside, while greatly reducing security problems. While these devices ought not to replace face to face visits for humanitarian reasons, they could be used as a constitutionally acceptable supplement to such visits. Although the state interest in prison security is understandably great, the interest in maintaining prison costs at their present unconscionably low level is less obvious; greater expenditures necessary to improve inmate communication, should be required in the future.

¹⁷⁰ 328 F. Supp. 1182 (E.D. Ark. 1971).

¹⁷¹ *Id.* at 1191.

courts have ruled that detainees must be classified more closely to accused individuals free on bail constitutionally reinforced by the fact that in most jails, but for the poverty of the accused, a large percentage of those detained would be free on bail with no restraints.¹⁷²

Some courts, without speaking of constitutional classification as such, have employed a balancing test of state versus individual interests.¹⁷⁴ Because for pre-trial prisoners the only recognized state interests are restraint and the purposes of prison administration, all restrictions on first amendment rights of detainees must be directly related to these interests.¹⁷⁵ Restrictions on constitutional rights of detainees based on considerations of rehabilitation, deterrence, or retribution are therefore unconstitutional.¹⁷⁶

Courts in recent years have listed many first amendment rights which detainees retain in prison—rights not yet granted to sentenced inmates. Most reviewing courts have ruled that there must be no censorship of outgoing mail nor restrictions on those to whom mail may be sent,¹⁷⁷ as

¹⁷² *Id.* at 1192. See generally Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941 (1970).

¹⁷³ In a recent survey in New York City it was estimated that on an average day in 1970, about 50 percent of all detention inmates were held on bails under \$1500. J. Edelman, R. McLean, B. Schwartzfarb, *A Profile of New York City Correctional Inmates (May 1970)* (Rand Institute, New York, N.Y.).

The *Love* court stated, 328 F. Supp. 1182, 1191:

As pointed out above, most of the inmates of the Pulaski County jail are there because they do not have the financial resources to pay bondsmen the necessary money to obtain their release. The testimony revealed that there are in excess of 1300 persons awaiting trial in the state courts of Pulaski County. Some 90 percent are free and walking the streets of this and other communities. Many of these, who are free upon bond, have criminal records considerably worse than some of those who are presently in the Pulaski County jail. Nevertheless, they are free because they had something else: money.

See also *Butler v. Crumlish*, 229 F. Supp. 565 (E.D. Pa. 1964).

¹⁷⁴ See, e.g., *Seale v. Manson*, 326 F. Supp. 1375, 1379 (D. Conn. 1971).

¹⁷⁵ *Seale v. Manson*, 326 F. Supp. at 1379; *Davis v. Lindsay*, 321 F. Supp. 1134, 1139 (S.D.N.Y. 1970). See also *Hamilton v. Love*, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971); *Tyler v. Ciccone*, 299 F. Supp. 684, 687 (W.D. Mo. 1969).

¹⁷⁶ *Seale v. Manson*, 326 F. Supp. at 1379.

¹⁷⁷ *Jones v. Wittenberg*, 330 F. Supp. 707, 719 (N.D. Ohio 1971). See *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970). But see *Seale v. Manson*, 326 F. Supp. 1375, 1383 (D. Conn. 1971) ("unfettered mail and visitation privileges will seriously hamper prison security and discipline").

the state has no interest in preventing detainees from writing to those who might be thought to be negative influences.¹⁷⁸ At least one court has required that detainees be provided telephone calls to and visits by friends and relatives.¹⁷⁹ The court in *Jones v. Willenberg* ruled that incoming mail to detainees may be inspected for contraband only; it may not be read.¹⁸⁰ Only those incoming publications which would come clearly within the Supreme Court's definition of pornography have been unanimously ruled out of pre-trial detention institutions.¹⁸¹ Courts have thus granted detainees many of the first amendment rights which this article suggested should be granted to sentenced inmates as well.¹⁸²

IMPLICATIONS OF THE DETENTION— SENTENCE DICHOTOMY

Sentenced inmates should minimally be granted all of the first amendment rights recently granted to detainees. It is true that in addition to matters of prison administration itself, the only explicitly recognized state interest in imprisoning pre-trial defendants is to ensure their appearance in court, while sentenced inmates are imprisoned in order to rehabilitate them, deter them from further crime, and "punish" them in proportion to their crimes. However, as pointed out earlier, penologists generally agree that expansion rather than restriction of first amendment rights of prisoners best serves

¹⁷⁸ These cases have not explained why escape plans are less of a problem with detainees. *But see* Conklin v. Hancock, 334 F. Supp. 1119 (D.N.H. 1971); Seale v. Manson, 326 F. Supp. at 1383.

¹⁷⁹ *Brenneman v. Madigan*, — F. Supp. — (N.D. Cal. 1972).

¹⁸⁰ 330 F. Supp. 707, 719 (N.D. Ohio 1971).

¹⁸¹ *Id.* at 719-20. *See* Palmigiano v. Travisono, 317 F. Supp. 776, 789-90 (D.R.I. 1970) (incoming mail from approved addressees may not be read; mail from others may be read, but can be censored only for "highly inflammatory writings and hard core pornography").

¹⁸² Ironically, pre-trial detainees have, in the past, often been subjected to institutional conditions far worse than those faced by sentenced inmates because many detention facilities were originally planned for smaller, shorter-term populations than they now contain. Sentenced institutions, because they are often better equipped for visits and other inmate movement, have provided sentenced inmates with greater opportunities to exercise first amendment rights than exist for detainees. Several recent decisions, however, suggest a future willingness of courts to order conditions in detention institutions improved if poor conditions interfere with the exercise of protected first amendment rights of pre-trial prisoners. *See, e.g.*, *Hamilton v. Love*, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971); *Jackson v. Hendrick*, 11 BNA CRIM. L. REPTR. 2088 (Phila. County Ct. Common Pleas, April 4, 1972) (court found entire Philadelphia prison system unconstitutional).

rehabilitation. Retribution and deterrence though perhaps served by directly restricting first amendment rights, are equally well served by other constitutionally less restrictive forms of punishment.¹⁸³ Thus, only restraint and the purposes of prison administration, including the security of inmates and guards, remain as underlying considerations for withdrawing first amendment rights from sentenced inmates.

Both detainees and sentenced inmates must thus lose some first amendment rights, based solely on considerations of prison administration and security. As a practical matter however, the large majority of the sentenced population, and particularly that segment with short sentences, would seem to present fewer security problems than the detention population. Prison administrators generally have much more information on sentenced prisoners, including background data, psychological difficulties and potential dangerousness, enabling them to better predict security risks. Sentenced inmates are more certain of their term of stay and are interested for the most part in simply serving out their time. In many jurisdictions prisoners have the added incentive of possible early release based on "good behavior" during incarceration.¹⁸⁴

Detainees, on the other hand, are generally uncertain about their future and face almost constant pressure and anxiety caused by numerous court appearances and plea bargaining sessions. Whereas sentenced institutions have a fairly stable population, detention institutions have a high turnover rate, with some men detained for many months and many others out within a week. This means a constant influx of new pre-trial prisoners about whom virtually nothing is known. Because detainees are placed in detention only hours after arrest, they may be undergoing drug or alcohol withdrawal, or may be in shock or in an otherwise extremely upset emotional state. Finally, at present, the sentenced institutions, as compared to detention prisons, usually provide inmates with facilities which are less crowded, with less population fluctuation, and with better medical and psychiatric care and better social services support. These factors can mean lower levels of inmate tension and frustration in sentenced institutions. From a security and restraint point of view, then, it would seem that sentenced institutions should properly be no more,

¹⁸³ *See* note 105 *supra*.

¹⁸⁴ *See, e.g.*, N.Y. CORRECTION LAW §§ 230, 230-a (McKinney 1968).

and perhaps even less, restrictive than should prisons for pre-trial detainees.¹⁸⁵

Constitutional considerations have been held to require that detained inmates should be free of interference with outgoing mail, free of censorship of incoming mail and publications, and should have the right to expanded visiting privileges. Since there is no greater state security, or other, interest in denying these same rights to sentenced men and there is no less infringement of important constitutional freedoms if these rights are denied to them, sentenced inmates should also be granted these rights. There have as yet been no court rulings granting detainees the rights to speech and assembly within prison. As such rulings occur in the future—and decisions to date would suggest that such rights will be granted to detention inmates first—these rights should be extended to sentenced inmates.

SUMMARY

The balancing of interests and least restrictive means tests provide the proper standards for the future expansion of inmate first amendment rights within the context of actual institutional security needs. Courts have moved in the right

¹⁸⁵ Groups of particularly "safe" sentenced men might be given even fuller first amendment freedom under a classification system. (To some extent this is now done by institutional assignment.) The main problem with such a system would be the likelihood of official abuse via assignment of inmates to lower classification for political or religious beliefs. Careful court scrutiny might still make such a system feasible, however.

direction in granting greater first amendment rights to detainees; these greater constitutional protections should be extended to sentenced inmates as well. Courts have granted both sentenced inmates and detainees expanded rights to religious assembly and speech; other first amendment rights deserve equal protection. At the same time, courts must begin to more carefully scrutinize security claims of prison officials, and, in so doing, consider the people making daily decisions involving inmate rights and set out principles which are not easily subject to abuse.¹⁸⁶

In considering inmate claims to greater first amendment rights, reviewing courts should consider carefully the words Justice Frankfurter wrote in a similar context:

Freedom of expression is the wellspring of our civilization—the civilization we seek to maintain and further. . . . The treatment of its minorities; especially their legal position, is among the most searching tests of the legal civilization attained by a society. *It is better for those who have almost unlimited power of government in their hands to err on the side of freedom.*¹⁸⁷

State interests on many levels will be best served by greater not lesser first amendment rights for our incarcerated minority.

¹⁸⁶ Courts also must apply the "least restrictive means" test to all official actions justified as necessary to security.

¹⁸⁷ *Dennis v. United States*, 341 U.S. 494, 548-50 (1951) (Frankfurter, J. concurring) (emphasis added).