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Prison Mail Censorship and the First Amendment

The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . .1

In communicating with persons outside the penitentiary, prisoners using the mails are frequently subjected to regulations which permit prison officials to censor almost all correspondence for virtually any reason.2 Although in any other context, such inhibitions on personal and political expression would be viewed with grave suspicion,3 in reviewing prison mail censorship, the courts typically defer to the discretion and authority of prison administrators and refuse to apply traditional First Amendment standards.4

This Note will argue that the First Amendment is fully applicable to prison mail regulation. In doing so, it will survey existing restrictions on prisoner correspondence, criticize present standards of review, suggest appropriate First Amendment tests, and attempt to define the maximum scope of prison mail censorship permissible under the First Amendment.

I. Present Practices

Under presently operative judicially sanctioned prison mail regulations, administrators possess nearly all the powers of an absolute censor.5 The right to correspond is generally treated as a special dispensation which will not be granted to an inmate unless he signs a

2. Common regulations are described at pp. 87-90 infra. Though it is impossible to calculate how many inmates are directly affected by mail regulations, there are currently 160,000 inmates (21,000 of them federal) in 4057 penal institutions in the United States. Newweek, March 8, 1971, at 27; Berrigan v. Norton, 322 F. Supp. 46, 50 (D. Conn. 1971), aff'd, No. 71-1383 (2d Cir. Nov. 26, 1971).
3. Restrictions in other contexts on the use of the mails have often been struck down. See, e.g., Blount v. Rizzi, 400 U.S. 410 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965).
5. New York State's rule, for instance, vests unfettered discretion in the warden. See NEW YORK STATE DEPARTMENT OF CORRECTIONS, INMATES' RULE BOOK 14 (1961) ("Newspapers, magazines, and books approved by the Warden may be received by an inmate provided his behavior is good."), quoted in Turner, Establishing the Rule of Law in Prisons: A Manual for Prisoner Rights Litigation, 23 STAN. L. REV. 473, 485 n.80 (1971).

For other discussions of the extent of mail censorship, see Symposium, Prisoners' Rights

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form authorizing prison officials to inspect and censor his correspondence. Even then, inmates usually are not permitted to correspond with persons possessing criminal records, and may be further restricted to writing to only a small number of “approved” correspondents.

In communicating with the limited group of persons acceptable to the prison administration, prisoners can expect their mail to be inspected by members of the prison staff. While a very few institutions allow inmates to send uninspected, uncensored mail to attorneys, courts and public officials, the vast preponderance demand inspection of all mail, including correspondence with attorneys general, governors, and the President and Vice-President. 


8. In Texas, for instance, the list is limited to five relatives. Texas Dep’t of Corrections, Rules and Regulations (1968), cited in Turner, supra note 5, at 486 n.91. In the federal system, up to twelve correspondents are allowed. Policy Statement, supra note 6, at 1; Manual Bulletin, supra note 7, at 31.

9. At least one state, Washington, has abandoned the policy of reading prisoner mail, although incoming envelopes are opened to check for contraband. Turner, supra note 5, at 480 n.40. But cf. note 15 infra.

10. This is true of Rhode Island, where a federal district court enjoined all inspection and censorship of correspondence with these groups. Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). In the federal system, uninspected mail may be sent to courts having jurisdiction over the inmate, to the President, Vice-President, Members of Congress, governors, attorneys general, the Surgeon General, the Secretaries of the military services, and the Board of Parole. Bureau of Prisons, U.S. Dep’t of Justice, Policy Statement 7300.2A (1967).

11. Censorship of letters to these officials, however, is not normally allowed. Jacob, supra note 5, at 238-39. Correspondence with attorneys is not inspected in Washington, see note 9 supra, Rhode Island, see note 10 supra, and California, see Turner, supra note 5, at 480 n.40, but is inspected in the federal system, see Jacob, supra note 5, at 238 n.52. In particular, the federal Manual Bulletin, supra note 7, at 2, provides:

Inmates shall be permitted to correspond with attorneys of record with whom contracts have been executed, without limitation. Such correspondence shall be regarded
Furthermore, prisoners typically may discuss only prescribed subjects in their correspondence. For example, in the case of prisoner manuscripts the Federal Bureau of Prisons' regulations specify:

An inmate may be permitted to submit a manuscript to a publisher or editor only after review and specific approval by the Bureau . . . . A manuscript shall not be approved or released if it deals with the life history or the criminal career of the writer or that of any other inmate, or if it is libelous, lewd, obscene, or pornographic.12

Similarly, it is not unusual for regulations to proscribe correspondence if "[i]t contain [sic] criminal or prison news,"13 to admonish the inmate to "stick to your subject,"14 and to ban letters that are not of a purely social nature.15

Naturally, such broad powers of censorship do not go unused. In Carothers v. Follette,16 for example, an inmate attempted to send his parents a letter which criticized the prison system and questioned as 'privileged' and shall be subject to inspection only to the extent to prevent the introduction of contraband or otherwise protect the good order and security of the institution.

The Bulletin further provides that each federal correctional institution has the "responsibility for developing and promulgating . . . such regulations as will achieve [the institution's] desired objectives." Id. at 1.


15. Business correspondence is usually explicitly prohibited. The Manual Bulletin, supra note 7, at 2, states: [N]o inmate may be permitted to direct his business, no matter how legitimate his business might be, while he is in confinement. This does not go to the point of prohibiting correspondence necessary to enable the inmate to protect and husband the property and funds that were legitimately his at the time he was committed to the institution. See also Policy Statement, supra note 6, at 1-5; Beyond the Ken of the Courts, supra note 5, at 539; pp. 103-04 infra. Religious correspondence has generally been protected by courts. See, e.g., Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Peek v. Ciccone, 288 F. Supp. 329, 334, 338 (W.D. Mo. 1968); Cooper v. Pate, 324 F.2d 165 (7th Cir. 1963), rev'd per curiam, 378 U.S. 546 (1964), on remand, 382 F.2d 518 (1967); Mitford, N.Y. Times, Oct. 3, 1971, § 7 (Book Review), at 7, cols. 1-4.

the competence of the staff.\textsuperscript{17} Prison officials not only censored the entire letter, but also charged the convict with “making derogatory and lying statements about the Department of Correction and administration of this Institution,” an offense for which he was punished by deprivation of “good time.”\textsuperscript{18} The Carothers case is by no means unique. Censorship is often accompanied by severe punishment,\textsuperscript{19} and prison administrators have gone to great lengths to enforce inspection and censorship rules.\textsuperscript{20}

II. The Limited Quality of Judicial Review

While in non-prison contexts courts have not hesitated to strike down regulations which vest in administrative officials unrestricted control over First Amendment conduct,\textsuperscript{21} until very recently the nearly universal response of the courts to prison mail regulations—even those which prison officials admit are devoid of any well-defined standards to guide administrative discretion\textsuperscript{22}—has been that “the control of prison mail regulation is a matter of prison administration.”\textsuperscript{U} This reluctance to review complaints which involve “prison administration” is usually phrased in terms of the “hands-off” doctrine,\textsuperscript{21} a form of judicial self-restraint which appears to be based upon the premise that

\textsuperscript{17} The letter contained phrases such as the following: “The prison system in New York State stinks . . . . The people in charge are not qualified . . . . Half the employees did not get out of high school . . . . This gang of political appointees . . . . Hankey-panky with U.S. mail . . . . Anything to obstruct legal work.” 314 F. Supp. at 1021.

\textsuperscript{18} “The court held this to be an “unjustifiable overreaction.” 314 F. Supp. at 1026.


\textsuperscript{20} Consider, for example, the actions of one warden, who, following the publication of a manuscript describing his prison written by five inmates and smuggled to the press, conditioned the visiting rights of all inmates upon their submitting to “skin searches.” Mitford, \textit{supra} note 15.


\textsuperscript{23} Brown v. Wainwright, 419 F.2d 1308 (5th Cir. 1969). \textit{See also} Diehl v. Wainwright, 419 F.2d 1309 (5th Cir. 1969); Bethes v. Crouse, 417 F.2d 504 (10th Cir. 1969); Childs v. Pigelow, 221 F.2d 478, 489 (4th Cir. 1953), \textit{cert. denied}, 356 U.S. 932 (1954); Banning v. Looney, 213 F.2d 771 (10th Cir.), \textit{cert. denied}, 348 U.S. 859 (1954); Nunner v. Miller, 165 F.2d 986 (9th Cir. 1948).

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courts should decline jurisdiction over prison matters in deference to administrative expertise, as well as upon the assumption that inmates simply do not possess the constitutional rights enjoyed by free citizens.

Neither of these premises underlying the "hands-off" doctrine justifies continued abstention from subjecting prison mail regulations to constitutional scrutiny. In general, the principle of deference to administrative expertise loses much of its force when the constitutionality of the administrative action itself is at issue. In the specific case of prison administration, the Supreme Court has held, in Cooper v. Pate, that an inmate's allegation "that the restrictions placed upon his activities are in violation of his constitutional rights" states a cause of action under the Civil Rights Act which must be heard on its merits.

25. This premise was made quite explicit in Sawyer v. Sigler, 445 F.2d 818 (8th Cir. 1971), when the Court of Appeals for the Eighth Circuit gently admonished a district court for having been overly receptive to prisoners' claims. The Court stated in dictum: "We wish to emphasize our frequently expressed view that the federal courts should not be unduly hospitable forums for the complaints of . . . convicts; it is not the function of the courts to run the prisons . . .; much must be left to the discretion and good faith of prison administrators." Id. at 819.

26. See, e.g., Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). One commentator has recently suggested that the historical context of the Bill of Rights and the language of the Thirteenth Amendment support the view that prisoners are slaves of the state. Comment, Prisoner Correspondence: An Appraisal of the Judicial Refusal to Abolish Banishment as a Form of Punishment, 62 J. C. & P. S. 40, 51-54 (1971). It seems doubtful, however, that any state would today claim to own the bodies of its prisoners.


29. 392 F.2d 165, 167 (7th Cir. 1968), rev'd per curiam, 393 U.S. 546 (1969). Cooper, a Black Muslim, alleged violations of First and Fourteenth Amendment rights arising from the actions of prison administrators in interfering with his communications with his minister, prohibiting religious services, and preventing his purchase of various Muslim publications. The court of appeals invoked the "hands-off" doctrine and refused to consider the merits of the claim.


31. 378 U.S. at 546. Since the decision in Cooper, lower courts have been more disposed to entertain constitutional claims of prisoners. See cases cited, infra notes 34-37, 41-44.
Nevertheless, even when courts do not summarily dismiss the First Amendment complaints of prisoners as outside their jurisdiction, the scope of their review is frequently limited by the pervasive assumption that prisoners possess no “right” to use the mails, and, hence, prison mail regulations cannot contravene the First Amendment. Yet, after Cooper, the influential opinion in Coffin v. Reichard, and numerous other lower court cases holding the due process, equal protection, cruel and unusual punishment, and free exercise clauses fully applicable to the prison environment, it should be clear that conviction and incarceration do not strip a man of all constitutional rights. Since the premise that the state may do as it wishes with its prisoners can no longer be justified, it should not serve to insulate the prison system.

32. See, e.g., Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965); [T]he fact that prison authorities have refused to allow mailing of some particular letter or letters or to some particular person or persons does not of itself afford basis for a prisoner to try to get into the federal courts. See also Berrigan v. Norton, No. 71-1383 (2d Cir. Nov. 26, 1971); Bethea v. Crouse, 417 F.2d 504, 506 (10th Cir. 1969); Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), aff’d per curiam, 390 U.S. 553 (1968); Labat v. McKeithen, 243 F. Supp. 662 (E.D. La. 1965), aff’d, 361 F.2d 757 (5th Cir. 1966).

33. 143 F.2d 443 (6th Cir. 1944) (per curiam), cert. denied, 325 U.S. 887 (1945). Although Coffin involved a claim of cruel and unusual punishment in violation of the Eighth Amendment, the court’s analysis that “[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication taken from him by the law,” id. at 445, has had a wider application.

34. See, e.g., cases cited, Turner, supra note 3, at 478-79 nn.30, 35, 38; note 70 infra.


For discussions of the Eighth Amendment, see Decency and Fairness, supra note 21, at 848-64; Prisoner Correspondence, supra note 25, at 49-51; Note, The Role of the Eighth Amendment in Prison Reform, 38 U. Chi. L. Rev. 647 (1971); Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 70 Harv. L. Rev. 635 (1966).

37. See, e.g., Northern v. Nelson, No. 26,357 (9th Cir. Sept. 22, 1971) (confiscation of newspaper Muhammad Speaks violates Civil Rights Act); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Barnett v. Rodgers, 410 F.2d 993 (D.C. Cir. 1969); Long v. Parker, 390 F.2d 816 (3rd Cir. 1968); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961).

38. Had the Supreme Court in Cooper adopted the position that incarceration strips a prisoner of all constitutional rights, it hardly would have ordered the court of appeals to reconsider the prisoner’s claim on its merits. See also In re Harrell, 2 Cal.3d 675, 702, 470 F.2d 640, 658, 87 Cal. Rptr. 594, 592 (1970), cert. denied, 401 U.S. 914 (1971) (“In this state we have long since abandoned the medieval concept of strict civil death’ . . . .”).

39. This premise surfaced in its boldest terms in Labat v. McKeithen, 243 F. Supp. 662 (E.D. La. 1965), aff’d, 361 F.2d 757 (5th Cir. 1966). In upholding a warden’s decision to terminate the correspondence between a Black prisoner on death row and a white woman in Sweden, the court reasoned that since the state has the right to deprive a man of his life, it could also “deprive him of other privileges along the way to final reckoning” so long as it did so non-discriminatorily. Id. at 666. See also note 25 supra.
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from the demands of the free expression clause.\textsuperscript{40} Instead, the courts should face the fundamental question of what the First Amendment should mean as applied to prison life.\textsuperscript{41}

III. Applying the First Amendment

Those courts that have regarded prison mail censorship as a genuine First Amendment problem have employed a bewildering variety of tests by which to evaluate the constitutionality of the regulations. Some courts seek "clear and present dangers,"\textsuperscript{42} others demand "com-

40. Professor Emerson has offered at least four interrelated reasons for the priority of First Amendment rights. First, the right of free expression is essential to an individual's self-realization, to the development of his "character and potentialities as a human being." Emerson, \textit{Toward a General Theory of the First Amendment}, 72 \textit{Yale L.J.} 877, 879 (1963). Suppression constitutes an affront to the dignity of the individual. Second, free expression is invaluable to a society devoted to the attainment of truth. \textit{Id.} at 881. In Learned Hand's words: [The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritarian selection. To many this is, and always will be folly; but we have staked upon it our all. United States v. \textit{Associated Press}, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945). Third, free expression provides "for participation in decision-making through a process of open discussion which is available to all members of the community." \textit{Toward a General Theory, supra}, at 882. \textit{See also} De Jonge v. Oregon, 299 U.S. 353, 365 (1937); A. \textit{MIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE} (1960). Finally, freedom of speech promotes the rational compromise essential to a viable democracy; it is "a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." \textit{Toward a General Theory, supra}, at 884. \textit{See also} Bagehot, \textit{The Metaphysical Basis of Toleration}, in \textit{2 WORKS OF WALTER BAGEHOT} 339, 357 (Morgan ed. 1981) ("Persecution in intellectual countries produces a superficial conformity, but also underneath an intense, incessant, implacable doubt"). For further enumerations of the functions of the First Amendment, see T. EMERSON, \textit{THE SYSTEM OF FREEDOM OF EXPRESSION} (1970) [hereinafter cited as EMERSON, \textit{THE SYSTEM}]; Emerson, \textit{Freedom of Association and Freedom of Expression}, 74 \textit{Yale L.J.} 1 (1964).

These principles underlying the First Amendment apply, in varying degrees, to freedom of expression in prisons and, with particular force, to communications between prisoners and the general population. Human dignity and self-realization mean as much, if not more, to the imprisoned as they do to other members of society. Information and perspectives supplied by the prison population cannot be curtailed without endangering the attainment of truth and the "open discussion" vital to democratic decision-making. Suppression of prisoners' views can only impede the realization of an adaptable, yet stable society.

Accordingly, other commentators have argued that the First Amendment is generally applicable to prisons. \textit{See, e.g., The Right of Expression in Prison, supra} note 5. Lower court cases applying the freedom of expression clause to prison mail regulations include Nolan v. Fitzpatrick, 40 U.S.L.W. 2291 (1st Cir. Nov. 4, 1971); Brown v. Peyton, 437 F.2d 1228, 1230 (4th Cir. 1971); Le Vier v. Woodson, 443 F.2d 360 (10th Cir. 1971); Jackson v. Godwin, 409 F.2d 529 (6th Cir. 1968); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

41. This conclusion is entirely consistent with Mr. Justice Murphy's oft-quoted dictum in \textit{Price v. Johnson}, 334 U.S. 266, 285 (1948), that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." A proper First Amendment analysis cannot be divorced from "the considerations underlying our penal system.

42. \textit{E.g., Long v. Parker}, 390 F.2d 816, 822 (3rd Cir. 1968). Petitioners were Black Muslim inmates not permitted to receive and read publications of their religious sect,
PELLING INTERESTS, and still others pursue "LESS DRAMATIC MEANS." In this section it will be shown that two traditional First Amendment doctrines—LESS DRAMATIC MEANS and PRIOR RESTRAINTS—are particularly suitable for ascertaining the constitutionality of prison mail regulations, and these doctrines will be used to define a set of regulations which adequately effectuate legitimate administrative objectives without infringing the First Amendment rights of prisoners.

A. LESS DRAMATIC MEANS

The less dramatic means test generally has been utilized by the Supreme Court in cases where government regulation impinges indirectly on the First Amendment freedoms of expression and association. When the government is pursuing substantial, legitimate interests unrelated to the content of the expression, the Court may well ask whether the objectives are attainable in some way that is less restrictive of individual liberties.

Including *Muhammad Speaks*, on the grounds that they were "highly inflammatory." In this, the first application by an appellate court of a traditional First Amendment test to a prison, the court held:

To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution.


34. *E.g.*, *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970). The court voided a warden's refusal to allow inmates to subscribe to a newsletter on prison reform published by ex-convicts. It held that in order to censor incoming materials, the state must show a "compelling 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."

35. *E.g.*, *Jackson v. Godwin*, 400 F.2d 529, 532, 542 (5th Cir. 1968). Petitioner claimed he had been denied permission to subscribe to "national Negro magazines." Though prison officials maintained that they had been granted statutory authority to control the admission of reading material so as to preserve the institution's order and discipline, the court held that administrators must employ the least restrictive alternative means if they attempt to preserve order and discipline by censoring the contents of incoming publications, and enjoined prison administrators from interfering with petitioner's subscription to, and receipt of, the magazines he requested.


38. *EVEN though the government purpose be legitimate and substantial, that purpose
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Prison mail regulations fit nicely into this framework. Some of the government interests underlying the regulations—in general terms, restraint and rehabilitation—are obviously “important or substantial” and, at the same time, “unrelated to the suppression of free expression.” Nevertheless, as presently formulated, nearly all such regulations “broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”

In applying the less drastic means test to prison mail regulation, it is essential to identify with precision the government interests which are said to justify the controls. The interest in physical restraint underlies those regulations which, administrators contend, are implemented to detect escape plans, to intercept incoming weapons, drugs, or other contraband and to confiscate obscene or “inflammatory” literature. Likewise, the interest in prisoner rehabilitation is said to lie at the core of those regulations which are designed to isolate an inmate from undesirable outside influences.

cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

In this respect, the less drastic means test is marginal balancing; that is, the state's interest in the added effectiveness of the chosen means is balanced against the individual's interest in the use of less drastic ones. Less Drastic Means, supra note 45, at 469-70.

48. The inclusion of retribution or deterrence as legitimate state interests would not alter the analysis, for if society thinks that a prisoner's life should be made more unpleasant, there are many ways to reach that end without stifling his First Amendment rights. Lengthening work hours, for example, would probably not violate the Eighth Amendment, but would add to the burden of prison life. Hence, under the less drastic means test, these two putative state interests cannot justify any prison mail regulations. Nolan v. Fitzpatrick, 40 U.S.L.W. 2291, 2292 (1st Cir. Nov. 4, 1971); cf. The Right of Expression in Prison, supra note 5, at 413.


50. Id.

51. The identification is difficult, since defendant wardens and court opinions usually present these justifications in the most general terms. See, e.g., Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966), cert. denied, 385 U.S. 903 (1967); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Jacob, supra note 5, at 231. But see Palmigiano v. Travisono, 317 F. Supp. 776, 783 (D.R.I. 1970).


53. At the Federal Correctional Institution in Danbury, Connecticut, for instance, there is a blanket prohibition on correspondence with former associates in crime for this reason. However, if the associate is a member of the inmate's family or a co-defendant in a criminal proceeding, provision is made for limited communication. Interview with William E. Key, Chief Classification and Parole Officer, Federal Correctional Institution, Danbury, Connecticut, March 19, 1971 (on file with the Yale Law Journal). See also note 7 supra.

Other interests have been suggested occasionally. Prison authorities have sometimes pointed to prevention of confidence schemes and conspiracies between inmates and free persons, as well as to avoidance of the mailing of obscene or threatening letters to free persons. See, e.g., Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). In Berrigan
The substantiality of the government interests set forth could, of course, be disputed, but they have usually been accepted as legitimate by the courts, and for the limited purpose of applying the less drastic means test, these interests can be assumed substantial enough to warrant some infringement on First Amendment freedoms. With this assumption the less drastic means approach affords administrators the maximum constitutionally sustainable power of censorship.

Prohibition. The most drastic means of regulating prisoner correspondence would be to forbid the use of the mails altogether. Although few regulations are as Procrustean, two common forms of regulation which deny inmates the opportunity to use the mail are limiting the number of letters an inmate may send in a given period of time or the number of correspondents he may have, and forbidding correspondence with certain classes of persons.

Each of these modes of regulation operates too harshly to meet the requirements of the less drastic means test. First, artificial constraints on the number of eligible recipients bear no relation whatever to the general goals of restraint and rehabilitation, and limitations on the frequency of mailings are connected to the ultimate state interests v. Norton, 322 F. Supp. 46 (D. Conn.), aff'd, No. 71-1383 (2d Cir. Nov. 26, 1971), the government claimed that release of the priests' radical views voiced in their confiscated sermon would place them in danger of retaliation from conservative inmates. Government interests such as these, however, have been rejected by most courts as being, at best, weakly correlated with the twin goals of restraint and rehabilitation. See, e.g., Palmigiano v. Travisono, supra; Talley v. Stephens, 247 F. Supp. 683, 690 n.4 (E.D. Ark. 1965), But cf. Carothers v. Follette, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970). For a more extensive survey of government interests in this area, see Prisoner Correspondence, supra note 26. For discussions of the interests pertaining to unconvicted detainees, see Scale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971); Palmigiano v. Travisono, supra.

56. For example, although courts readily accept prison authorities' contention that the need to prevent escapes justifies inspection of an inmate's outgoing mail for the presence of escape plans, e.g., Sostre v. McG innis, 442 F.2d 178 (2d Cir. 1971) (en banc), it is impossible to determine whether, or how many, inmates would use the mails to plan escapes if the authorities did not inspect their mail. State interests, such as this one, are subjected to a more rigorous scrutiny at pp. 108-10 infra.


58. Prison officials apparently regard this approach as well within their power. Connecticut Department of Corrections, Directive 2.18 (1970), advises state institutions to grant correspondence privileges, but emphasizes that "the courts have ruled that [they] are a privilege, not a right." Even so, Connecticut officials have limited their policies to allowing only three letters per week.

59. But inmates in solitary confinement are usually denied correspondence rights available to other prisoners. See, e.g., Cruz v. Beto, 445 F.2d 801, 802 (5th Cir. 1971) (per curiam); cf. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). In addition, administrators are sometimes empowered to curtail much of individual inmates' mail on the basis of standards that should be held void for vagueness. See, e.g., Turner, supra note 5, at 485 n.80.

60. See, e.g., Texas Department of Corrections, supra note 8 (three letters per week).

61. See, e.g., Texas Department of Corrections, supra note 8 (restricting correspondence to "members of the family unless the inmate has good reason to select others"); Green Haven Special Letter Form, supra note 13 (banning correspondence with newspaper personnel).
only indirectly, if at all, through the rubric of administrative convenience. Since, however, it has been shown that elimination of these restrictions would result in only a negligible increase in correspondence, even the administrative ease argument cannot justify the limitations. The less drastic alternative is simply a system of regulations without number and frequency controls.

Second, rules preventing an inmate from corresponding with certain classes of people, such as members of the media, are too drastic. They typically include reliable individuals with whom correspondence would jeopardize no state interest whatever. Furthermore, any given letter, even one to or from a person with whom communication demonstrably endangers government interests, may contain, at least in part, perfectly harmless material. Thus inspection and selective deletion of portions of a letter are always less drastic means for effectuating government interests than are flat prohibitions on sending or receiving mail.

**Inspection.** The fact that inspection and deletion is always a less restrictive alternative than outright prohibition does not imply that inspection of all inmate mail is warranted. On the contrary, inspection of correspondence, in itself, constitutes a substantial infringement of freedom of expression, and none of the rationales propounded

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62. It has been suggested that administrative convenience cannot be used to justify curtailing a constitutional right. See, e.g., Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387, 1406 (1970); cf. Emerson, The System, supra note 40, at 340. However, reasonable regulations as to the time, place, and manner of prisoner access to the mails, implemented for the sake of administrative ease, should be constitutionally acceptable. Cf. note 121 infra. A general definition of "reasonableness" in this context is rather hard to come by, but courts have struck down particular per se rules as to time, place and manner of other First Amendment activities for being unduly harsh. See, e.g., LeFlore v. Robinson, 434 F.2d 933 (5th Cir. 1970); Mosley v. Police Dep't, 432 F.2d 1256 (7th Cir. 1970), cert. granted, 40 U.S.L.W. 9159 (Oct. 12, 1971).


64. Outright mail prohibitions thus suffer from the same affliction which the Supreme Court found so prevalent in the anti-Communist legislation of the '40s and '50s. In cases such as Scales v. United States, 367 U.S. 203 (1961) (conspiracy prosecution), United States v. Robel, 389 U.S. 238 (1967) (employment in defense installation), and Ellbrandt v. Russell, 384 U.S. 11 (1966) (public employee loyalty oath), the Court forbade penalizing or denying privileges to all members of organizations thought to be subversive in favor of regulation directed at "only 'active' members having also a guilty knowledge and intent," 367 U.S. at 228. See generally Comment, Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel, 57 Calif. L. Rev. 240 (1969). Like legislation which "sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership," 389 U.S. at 232, blanket prohibitions on correspondence without attention to the character of the correspondents are constitutionally unpalatable. Cf. note 81 infra.


66. By reading his letters, prison authorities are able to identify an inmate as the author or recipient of ideas of which they disapprove, and punishment is frequently imposed for the written expression of those ideas. See pp. 89-90 and cases cited, note 19 supra; Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); Meola v. Fitzpatrick, 322 F. Supp.
for mail regulation can support universal inspection.67

This conclusion can best be reached by analyzing the relationships between inmate correspondence with specific classes of recipients and the governmental interests of restraint and rehabilitation. Inspection of mail involving courts, attorneys or public officials68 not only undermines the rights guaranteed by the free speech and petition clauses of the First Amendment,69 but also violates the Fifth Amendment due process right of access to the courts,70 and negates the Sixth Amendment right to counsel.71 Under the less drastic means test, neither of the accepted government interests can support inspection of this type of mail. Judges, attorneys and many public officials are members of the bar. All hold positions of public trust and are subject to public scrutiny. The likelihood that judicial or executive officers will traffic in contraband, illegally plot with prisoners or impede their rehabilitation is so slim that any regulation which encompasses inspection of prisoner correspondence with these groups is manifestly overbroad.72

878 (D. Mass. 1971). Consequently, the problem of "identification and fear of reprisal," Talley v. California, 362 U.S. 60, 65 (1960), is far greater than it was in those cases where the Supreme Court held that the state may not compel members of groups engaged in the dissemination of ideas to be identified publicly, see Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958). In addition, the fact that inspection, even without expurgation, is sufficient to raise a First Amendment problem should follow a fortiori from Talley v. California, supra, where the Court invalidated as void on its face a municipal ordinance which required handbills to display the names of their printer and author.73

68. Of course, the protections outlined in the text for mail with courts, attorneys and public officials apply only when those persons are corresponding or being written to in their official or professional capacities.

69. See, e.g., Sostre v. McGinnis, 442 F.2d 178, 200 (2d Cir. 1971) (en banc). No visiting legislator or occasional investigation can discover or portray as well as the inmate himself the impact of the day-to-day operations of a correctional institution. Cf. United States ex rel. Thompson v. Fay, 197 F. Supp. 855 (S.D.N.Y. 1961) (inmate not permitted to communicate with committee studying problems of indigent inmates). See also Prisoner Correspondence, supra note 23, at 45.

70. This interference does not result from the simple inspection of court papers, which after all are public documents, but rather from the high incidence of punishment still meted out to inmates for the contents of mail sent to courts and attorneys and deemed objectionable by prison administrators. See cases cited, supra note 10 and infra note 72. The courts have long recognized that prisoners depend upon them for vindication of their rights and have made it clear that "the Constitution protects with special solicitude, a prisoner's access to the courts." See, e.g., Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941). For an early discussion of the right of prisoners to seek access to the courts, see Constitutional Rights of Prisoners, supra note 5.

71. Both invasion of the right of privacy of counsel (see, e.g., Krull v. United States, 240 F.2d 122, 127 (5th Cir.), cert. denied, 353 U.S. 915 (1957); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952)) and interrogation and punishment of inmates based on the content of communication with counsel (see, e.g., Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc)) eviscerate the Sixth Amendment's guarantee. See also note 76 infra.

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While visions of unscrupulous attorneys assisting prisoners in criminal enterprises may be slightly less fanciful, the likely extent of such impropriety is so slight that it has been held that "[t]here is no logical nexus between censorship of attorney-inmate mail and penal administration." In short, because prisoners can be confined and rehabilitated quite as well, if not better, with mail regulations which do not entail routine inspection of communications with courts, attorneys, and public officials, inspection of such mail cannot be sustained under the less drastic means test.

With respect to all other groups, however, the outcome of the less drastic means test is very different. Although peculiar problems are presented by inspection of correspondence with the media, business associates, friends and family, the presumption that members of


73. The circumstances surrounding the death of George Jackson at San Quentin raise this possibility. See N.Y. Times, Oct. 10, 1971, at 92, cols. 3-8. See also Lee v. Tahash, 332 F.2d 970 (8th Cir. 1968).

74. Prison officials also argue that some correspondents could impersonate attorneys or use an attorney's stationery while carrying on illicit business with a prisoner. Turner, supra note 5, at 479. However, since prison administrators can easily determine whether or not a person is a member of the bar, id. at 480, this rationale does not survive the less drastic means test.


76. In exceptional circumstances, where authorities have probable cause to believe inspection of a particular letter or package in this category would lead to the discovery of criminal activity, inspection, pursuant to a search warrant, would be permissible. See pp. 105 infra.

77. Communication with the media is important in assuring informed public debate and discussion. See p. 104 infra. Furthermore, from the perspective of the incarcerated, the press has traditionally been one mechanism whereby redress of grievances is sought, and in some cases, the right to publicize grievances through the media may coalesce with the right to petition judicial and executive officials. See, e.g., McDonough v. Director of Patuxent Institution, 429 F.2d 1189 (4th Cir. 1970) (prisoner must be permitted to write Playboy magazine in effort to raise funds for his legal defense, but letters must not be critical of prison administrators).

78. Despite the "commercial speech" doctrine, see Valentine v. Chrestensen, 316 U.S. 52 (1942); Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 59 Geo. Wash. L. Rev. 429 (1971), the First Amendment protections apply to correspondence with former business associates in that the extent to which a letter is "commercial" may be in dispute. Furthermore, insofar as they are not structural incidents of confinement, regulations which prohibit inmates from directing legitimate business activity, see note 15 supra, are suspect under Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944) (per curiam), cert. denied, 325 U.S. 887 (1945). For commentary on and applications of the Coffin doctrine, see, e.g., Singer, Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment, 39 U. Chi. L. Rev. 650 (1970); The Right of Expression in Prison, supra note 5.

79. Family and friends may be the persons most likely to assist prisoners in escapes,
these groups are trustworthy and would not supply information detrimental to rehabilitation is far weaker than it is with courts, attorneys, and public officials. Giving maximum credence to the fears of prison officials concerning the use of the mail for transmission of escape plans, weapons, obscenity and the like, inspection and a carefully circumscribed amount of censorship of mail not involving attorneys and judicial and executive officers should be sustained under the less drastic means test.\(^8\)

**Censorship.** Since mail inspection is justifiable only in terms of specific government interests related to restraint and rehabilitation, censorship of the contents of correspondence must be tailored precisely to those same interests. There is, of course, no First Amendment objection to the removal of physical contraband such as weapons and narcotics from mail for which inspection is permissible,\(^2\) but when prison authorities are concerned with removing words, it becomes necessary to determine what writings are not protected speech.\(^8\)

to supply contraband, etc., and correspondence with certain friends may be thought to threaten a prisoner's rehabilitation. This group is therefore distinguishable from judges, attorneys and public officials, at least for the purpose of upholding inspection under the less drastic means test. But see note 81 infra.

\(^80\). See p. 102 infra.

\(^81\). It can be argued, however, that inspection of all mail to or from members of these groups is also overbroad. The overbreadth principle, derived from the cases enumerated at note 64 supra, was carried furthest in United States v. Robel, 389 U.S. 258 (1967), where the Court, eschewing the suggestion that it balance the interests involved, held that all members of "Communist-action" groups could not be barred from working in non-sensitive defense installations since there was available the less drastic means of investigating the reliability of individual applicants.

Prison administrators are in the same position as defense employers. Inspection of all correspondence with the media, business associates, family and friends without attention to the character of the individual correspondent is much like the legislation invalidated in Robel for "sweep[ing] indiscriminately across all types of association . . . without regard to the quality and degree of membership." 389 U.S. at 262. If Robel were to govern, prison administrators would be allowed to inspect only correspondence with specific individuals shown to be "security risks."

On the other hand, for sensitive positions the Robel opinion does not conclusively establish that a security investigation program would be required; blanket prohibitions might be sustained for those positions. It may be that prison conditions are best analogized to sensitive defense industries, and that Robel does not invalidate universal inspection of correspondence with media, business associates, family and friends. Although this is the result that has been indicated in the text, it should be clear that this represents the weakest application of the less drastic means test. While inspection of mail with only these groups is certainly less drastic than inspection of mail with all groups, it is hardly the least restrictive alternative.

\(^82\). Indeed, use of the mails to send such materials to inmates may constitute a criminal offense. See, e.g., N.J. Rev. Stat. § 2A:104-12 (1951).

\(^83\). Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). It might be argued that correctional institutions should have the power to read, though not to delete, inmate correspondence as an aid in "the disclosing of problems at home and at the institution which may be upsetting or troublesome to the inmate," American Correctional Association, A Manual of Correctional Standards 546 (3d ed. 1966); however, since the knowledge that their mail may be read may make inmates wary of placing intimate thoughts in letters and thereby intensify their sense of isolation and alienation, see note 95 infra, the net rehabilitative value of this form of mail inspection is problematical.
Under current doctrine, First Amendment protections do not extend to writings that (1) are part of a criminal scheme whose object is not the expression of ideas,84 (2) are found to be obscene,85 (3) are classified as "commercial,"86 or (4) are determined to be an "incitement" to illegal action.87 Of course, in ascertaining which material in a prisoner's mail fits within these unprotected categories, prison administrators should be held to those standards and procedures developed by the Supreme Court in other areas. Obscenity should be defined according to the principles promulgated in Roth v. United States88 and its progeny.89 Incitement should also be defined strictly, by careful contextual inquiry into the actual likelihood of "imminent lawless action," as in the line of cases culminating in Brandenburg v. Ohio.90

In addition, even if this mode of regulation were of unquestionable rehabilitative value, the practice should be rejected under the less drastic means test, for "[i]t has been shown that any problems which might be presented . . . will come to staff attention, generally by the inmate himself in a request to see the Chaplain, counselor, or institutional parole officer." AMERICAN CORRECTIONAL ASSOCIATION, supra, at 546-47.

84. For cases suggesting that speech which is part of some larger criminal activity whose object and effect is not solely the promulgation of ideas is not protected, see, e.g., United States v. O'Brien, 391 U.S. 367 (1968); Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) ("teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like . . . should be beyond the pale . . . ."); United States v. Spock, 416 F.2d 165, 171-73 (1st Cir. 1969).
86. See note 78 supra.
89. The substantive standards for obscenity are described in EMERSON, THE SYSTEM, supra note 40, at 468-93, and their relationship to the prison environment is examined in JACOB, supra note 5, at 240.
[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
See also Bond v. Floyd, 385 U.S. 116 (1968); Linde, "Clear and Present Danger" Re-examined: Dissonance in the Brandenburg Concordato, 22 STAN. L. REV. 1163, 1165 (1970); Strong, Fifty Years of 'Clear and Present Danger': From Schenck to Brandenburg—and Beyond, 1969 Sup. Ct. Rev. 41. In determining that a particular writing would incite a prisoner to obstruct prison operations, prison authorities may take into account their knowledge of inmate attitudes, but must establish that their judgment is based on more than "mere apprehension," cf. Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969), and "ex cathedra pronouncements," cf. Butts v. Dallas Independent School Bd., 436 F.2d 725 (5th Cir. 1971). Although this test may, on many occasions, be difficult to apply, see EMERSON, THE SYSTEM, supra note 40, at 76, it should surely prevent censorship of such writings as the rules of conduct of the Black Panther Party, the oath of allegiance of the Republic of New Africa, and quotations from Mao Tze Tung—all of which have been labeled "inflammatory racist literature" by some prison authorities. See Sostre v. McGinnis, 442 F.2d 178, 187 (2d Cir. 1971) (en banc). In fact, the degree to which prison officials are inclined to attribute an "inflammatory" effect to generally militant literature is indicated in a recent New York Times article which reported:

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In all cases, prison authorities should adhere to the procedural safeguards—including the assurance of a prompt, adversary judicial proceeding instituted by the censor—outlined in *Freedman v. Maryland*.

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Prison officials are particularly irate about a recent state law that allows inmates to receive any publications accepted by the Post Office. Some of the more popular publications . . . contain the violent rhetoric of the Black Panthers and other groups.

"We're under pressure by the civil liberties people to let anything in," said Mr. Park [Associate Warden, San Quentin Correctional Institution]. "All of this disregards the fact that we're dealing with very unstable, very hostile people. We have people who read it and take it literally, and go out and try to kill people."


Although the incitement standard would permit limited censorship of incoming material, it has no application to outgoing letters or manuscripts. Prison administrators are in no position to judge whether or not a prisoner's writings might incite to crime if read at some future time in some unknown place, and the needs of prison discipline and security cannot be stretched to reach this form of communication. See Nolan v. Fitzpatrick, 40 U.S.L.W. 2291, 2292 (1st Cir. Nov. 4, 1971); McCray v. State, 40 U.S.L.W. 2307, 2309 (Md. Cir. Ct. Nov. 11, 1971). But see *Berrigan v. Norton* No. 71-1983, at 706 n.5 (2d Cir. Nov. 26, 1971).

Several federal courts, especially in cases involving religious literature, have taken firm if short steps toward the adoption of an incitement standard. As one court of appeals emphasized:

Mere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their proscription.


1. 380 U.S. 51 (1965). Although the *Freedman* requirements are technically part of the doctrine of prior restraints, discussed more fully at pp. 105-07 infra, they are pertinent to determining how a system of censorship—found to be permissible under the relatively weak less drastic means test—should be administered. In *Freedman* the Court invalidated a motion picture censorship statute for its failure to provide adequate procedural safeguards in the determination of obscenity. In *Blount v. Rizzi*, 400 U.S. 411 (1970), a unanimous Court held the same procedural requirements applicable to mail censorship by the Post Office Department. The *Blount* Court, reiterating *Freedman*, specified:

[T]o avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require "prompt judicial review"—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination.


To comply with the *Freedman* standards prison censors who detect what they suspect to be obscenity, incitement, or evidence of criminal conspiracy should seek a judicial determination of the First Amendment status of the mail within "a specified brief period," and the reviewing court should then act promptly. The period of administrative deliberation should not exceed, at the very most, two weeks, and the final determination by the trial court, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968), should be made in no more than sixty additional days. See United States v. Thirty-seven Photographs, 403 U.S. 924 (1971) (imposing these time limits on customs seizures of alleged
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As they now stand, however, prison mail regulations typically allow administrators to censor writings which are well within the bounds of protected speech. Under the ill-defined rubric of "rehabilitation," administrators may delete material at will, and, under the subject-matter rules which tend to limit inmates' correspondence to social matters, officials prohibit prisoners from discussing numerous subjects.

If prison authorities were truly capable of determining that a specific item in an inmate's mail were detrimental to his rehabilitation, then perhaps the less drastic means test would permit the item to be excised. At present, though, knowledge of inmate psychology and the impact of mail regulation on the correctional process does not permit such judgments. Indeed, it is possible that mail censorship impedes rehabilitation and heightens inmate unrest. At best, this manner

obscenity); cf. N.Y. Times, Nov. 27, 1971, at 18, cols. 3-5 (city ed.) (allegation by inmates of Rahway State Prison of purposeful three to four week delays in mail delivery). Furthermore, as the Freedman Court emphasized, the judicial proceedings must be adversary. Cf. Carroll v. President and Comm'r's of Princess Anne, 399 U.S. 175 (1969).
92. See p. 89 supra.
93. Id. Cf. Numer v. Miller, 165 F.2d 986 (9th Cir. 1948).
94. See Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); notes 139-43 infra. It might be suggested that some information would obviously impede inmate rehabilitation. For example, it might not seem prudent to allow an inmate convicted of bombing public buildings to study materials on the technology and construction of explosive devices, yet rehabilitation must relate to fundamental attitudes, not merely skills. If a correctional program is effective, the inmate will seek noncriminal endeavors; if it is not, withholding technical information during his incarceration will not inhibit his acquiring further criminal skills upon his release. Arguably, a more difficult question is posed by literature extolling the virtues of particular crimes. Perhaps an incarcerated sexual deviant should not be permitted to read material favorably describing sex crimes. Arguments such as these, however, rest upon the implicit factual assumption that there is a correlation between the type of reading matter an inmate is exposed to and his later conduct—an assumption which has no empirical basis. Cf. Stanley v. Georgia, 394 U.S. 557, at 566-67 (1969).
95. See, e.g., H. Barnes & N. Teeters, NEW HORIZONS IN CRIMINOLOGY 492 (3rd ed. 1959), quoted in Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971) (en banc) and in Palmigiano v. Travisono, 317 F. Supp. 776, 786 (D.R.I. 1970): Letter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation. As the Second Circuit pointed out, when inmates "become wary of placing intimate thoughts or criticisms of the prison in letters," their sense of isolation is intensified, and they feel an "artificial increase of alienation from society." Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971) (en banc), quoting Singer, supra note 5. See also Barrett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969); Hirschkop & Millemann, supra note 5, at 825.
96. One of the demands of inmates who were involved in the tragedy at the Attica Correctional Facility this year was to "end all censorship of newspapers, magazines, letters and other publications coming from the publishers." N.Y. Times, Oct. 4, 1971, at 44, cols. 4-5; likewise, grievances as to the handling of mail at Rahway State Prison were a factor in the rioting at that institution. See N.Y. Times, Nov. 27, 1971, at 18, col. 3 (city ed.). See also G. Sykes, THE SOCIETY OF CAPTIVES 8 (1938) (viewing prison riots as "highly dramatic efforts to communicate with the outside world, efforts in which confined criminals pass over the heads of their captors to appeal to a new audience"); Landman v. Peyton, 379 F.2d 135, 141 (4th Cir. 1966), cert. denied, 388 U.S. 920 (1967).
of "psychiatric censorship" should be viewed as a theoretical possibility rather than an acceptable justification for present censorship.

Likewise, forbidding inmates from so much as mentioning entire subjects cannot be upheld under the less drastic means test. Subject-matter restrictions constitute a severe infringement on a prisoner's right to express himself; moreover, to compel inmates to "limit their letters to matters of personal interest to friends and relatives" and to forbid any mention of "other inmates or institutional personnel," is to deprive the public of what has come to be called its "right to hear." Investing authorities with the power to censor statements in a prisoner's letter, especially one to the press, on the ground that they may be libelous, untrue, irrelevant, or repetitious permits criticism of prison practices to be withheld from the public by the very persons who are criticized. Having no connection with the interests in physical restraint and prisoner rehabilitation, censorship of anything other than plans of criminal activity, obscenity, or incitement in correspondence with the press, business associates, family and friends should not be tolerated.

97. Texas Department of Corrections, supra note 8. The rule also forbids "institutional gossip or rumors."


104. The incitement ground for censorship applies only to incoming mail. See note 90 supra.

105. But see note 78 supra.

106. Since the less drastic means test curtails imposition of penalties or denial of privileges in response to protected First Amendment conduct, see note 84 supra, sanctioning inmates for correspondence which is protected under the standards outlined above is equally impermissible. Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

In addition, special procedural safeguards may be imperative when what is arguably First Amendment conduct is punished. See note 91 supra. For a general discussion of due process requirements essential to prison disciplinary proceedings, see, e.g., Clutchette v. Procunier, 329 F. Supp. 787 (D. Cal. 1971); Comment, Federal Court Intervention in
B. Prior Restraints

The ultimate outcome of the application of the less drastic means test is, as just elaborated, a system of censorship that gives officials as much power as may be deemed consistent with the state interests in restraint and rehabilitation. However, it should also be recognized that prison mail regulations operate as prior restraints, and, therefore, bear "a heavy presumption against [their] constitutional validity." In this section, then, the narrowed system of mail censorship found to survive application of the less drastic means test will be inspected in the light of the more demanding prior restraint doctrine, and a set of constitutionally satisfactory regulations will be delineated.

Speaking very generally, the modern doctrine of prior restraints—first enunciated in Near v. Minnesota—means that government restrictions cannot be imposed upon speech or other kinds of expression in advance of publication. The Near Court itself, however, indicated that this doctrine is not absolute, and in rare instances the Court has sustained prior restraints. After the highly fractured opinion in New York Times Co. v. United States, the most accurate


107. The first case explicitly recognizing that prison mail regulations are prior restraints is Nolan v. Fitzpatrick, 40 U.S.L.W. 2291 (1st Cir. Nov. 4, 1971); however, although Judge Coffin wrote that "[t]he First Amendment prohibition against prior restraints applies with even more than its usual force here," id. at 2107, the prison's rule forbidding prisoners to write to the press was struck down on the basis of less drastic means principles.


110. The doctrine does not touch on the question of what, if any subsequent punishment can be administered for engaging in expression. See Emerson, The System, supra note 40, at 504.

111. The Near Court's exceptions to the general rule against prior restraints were: (1) in wartime certain dangerous speech might be curtailed; (2) obscene publications might be subject to previous restraint; and (3) the security of community life might be protected against incitements to acts of violence and the overthrow by force of orderly government. 283 U.S. at 716. For a discussion of the problems raised by these exceptions, see Emerson, The Doctrine of Prior Restraint, 20 LAW & CONTEMP. PROB. 418 (1955).

112. See pp. 106-07 infra.

113. 403 U.S. 713 (1971).
statement of the principle would seem to be that prior restraints on expression are presumptively unconstitutional. As such, prison mail regulations should be unconstitutional unless they fall within an established exception to the doctrine or unless there is a compelling reason to fashion a new exception for the type of censorship practiced in prisons.

1. Established Exceptions

First, although dicta in Near appear to exempt obscenity from the rule on prior restraints, subsequent cases reveal that no flat exception has been created. At no time has the Supreme Court ever upheld prior submission of written material to a censoring body.

114. The Court held that the New York Times and the Washington Post should not be enjoined from publishing the contents of a classified study popularly known as The Pentagon Papers. Except for the three paragraph per curiam opinion of the Court, none of the ten opinions written by the Justices attracted more than three adherents. The reasoning in the per curiam opinion started from the general premise that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," so that in the specific case, "[t]he Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" The opinion then noted that the lower courts "held that the Government had not met that burden" and terminated its inquiry tersely, commenting "[w]e agree." See 403 U.S. at 714.

115. The underlying basis of the prior restraint doctrine is entirely applicable to censorship in the prison community. In the prison, as in the general society: A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment; it is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

Emerson, The System, supra note 40, at 506.

116. See note 111 supra.

117. See generally Emerson, The System, supra note 40, at 506-12.


Similarly, in Kingsley Books v. Brown, 354 U.S. 436 (1959), the only Supreme Court case which has upheld a prior restraint on written material, the Court was careful not to exempt from the rule against prior restraints any system which involves the requirement of prior submission of written material to a censoring body. 354 U.S. at 441, 442. See also Freedman v. Maryland, supra, at 60; Emerson, The System, supra note 40, at 508.

Finally, in United States v. Thirty-seven Photographs, 403 U.S. 924 (1971), the Court, in dictum, upheld the validity of inspection at customs of books purchased abroad; but even if customs searches are conceived of as a prior submission process, that result was rationalized by treating customs searches as sui generis.

Therefore, the possibility that inmate mail—incoming or outgoing—might contain obscenity does not place prison mail inspection, even if it were limited to uncovering obscenity, in any established exception to the prior restraint doctrine.

Second, prior restraints designed to encourage expression by avoiding conflicts among persons competing for the use of the same physically limited communications facilities have been allowed. The Supreme Court has upheld government licensing of radio and television\(^\text{110}\) and municipal permit systems for public assemblies,\(^\text{120}\) but neither of these prior restraints is apposite to prison mail censorship.\(^\text{121}\)

Finally, although the dicta in *Near v. Minnesota* seem to remove incitement to acts of violence and disorder from the scope of the prior restraint principle,\(^\text{122}\) the continuing validity of this exception is, to say the least, an ambiguous proposition. The Supreme Court has vacillated and lower courts are divided,\(^\text{123}\) but commentators tend to agree that suppression imposed to prevent the threat of disorder from materializing should not constitute an exception to the prior restraint doctrine.\(^\text{124}\) The incitement standard is difficult enough to apply after the fact,\(^\text{125}\) but to use it in an effort to predict whether a prisoner, upon receipt of a publication in his mail, will rebel against prison discipline would make for a hopelessly speculative rule of law.\(^\text{126}\)

to distribute leaflets on army base held not to violate prior restraint doctrine); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971) (requirement of prior approval for distribution of newspapers on high school grounds held not to violate prior restraint doctrine if proper procedural safeguards incorporated).


121. The licensing power of the Federal Communications Commission, designed to protect "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences," Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), lends no support to the censorship power of prison authorities, which operates to restrict rather than augment communications to and from the public. Nor does the use of the mails pose the problem of limited physical facilities for communication. Cf. Emerson, *The System*, *supra* note 40, at 661.

Likewise, the fact that an exception to the general rule against prior restraints may exist to permit municipalities to institute reasonable controls over the time, place and manner of public assemblies has no bearing on the constitutionality of reading and censoring prisoner mail, though it does support the proposition that prison officials can impose reasonable regulations on the time, place and manner of mail delivery and pickup. Cf. note 62 *supra*.

122. See note 111 *supra*.

123. See generally Emerson, *The System*, *supra* note 40, at 343.


2. Establishing New Exceptions

Although prison mail regulations fall within none of the established exceptions to the general principle that prior restraints on expression are forbidden by the First Amendment, it might well be argued that the prison is a unique institution, with unusual needs and problems, requiring the creation of special exceptions. Three factors seem to differentiate the use of the mails where prisoners are involved from the manner in which they are normally utilized.

First, drugs, explosives and devices such as weapons and implements of escape that are especially dangerous in the prison context, are more likely to be present in mail sent to inmates. The First Amendment prior restraint doctrine, however, in no way bars the interception of physical contraband. Guns, narcotics, metal files, and the like are not protected speech,\footnote{127} and the problem of opening mail to locate these items is a Fourth Amendment one.\footnote{128} Courts almost always uphold warrantless searches of inmate mail as reasonable under the Fourth Amendment,\footnote{129} and, as long as adequate safeguards are introduced to ensure that no mail is read\footnote{130} in the course of the search,\footnote{131} removal

\footnote{127} See notes 82, 83 supra.

\footnote{128} Searches and seizures of publications must adhere to special procedural safeguards. For an analysis of this interplay between the First and Fourth Amendments, see Note, Prior Adversary Hearings on the Question of Obscenity, 70 COLUM. L. REV. 1403, 1413-21 (1970).

\footnote{129} See cases cited, supra note 6. An analysis of the Fourth Amendment issue is beyond the scope of this Note, but it should be observed that where prisoners have signed a consent form permitting inspection of their mail, see pp. 87-88 supra, this should not constitute a waiver of Fourth Amendment rights in view of the coercive conditions under which such consent is obtained. Palmigiano v. Travisono, 217 F. Supp. 776, 792 (D.R.I. 1970). Furthermore, Post Office regulations governing warrantless searches of mail have little bearing on prison mail inspection practices. Under current Post Office regulations first-class mail may not be opened without a search warrant. 39 U.S.C. §§ 4057-58 (1964). That postal inspectors are authorized to open second, third and fourth class mail without a warrant for purposes pertaining to the operation of the postal system cannot be construed as authorizing warrantless inspections by other persons, such as prison censors, for other reasons. For materials on the validity of the Post Office regulations, see 1 T. Emerson, D. Haber & N. Dorson, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 693-96 (3rd ed. 1967).

\footnote{130} The invalidity of reading, even without subsequent censorship, is indicated at notes 66, 83, and 101 supra. In some instances, opening correspondence will inevitably entail some reading. For example, if an inmate is sent a copy of a magazine, it will be all but impossible for an inspector to avoid noticing the title as he leafs through for contraband. To avoid the chilling effect this might have on communication with inmates, physical tests for contraband that do not necessitate actual opening of mail should be used, see note 131 infra, or, as a minimum precaution, prison authorities should be barred from recording the titles of publications sent to an inmate.

\footnote{131} One study of contraband searches revealed that letters opened during the course of routine searches of incoming mail were read thoroughly. See B. Brown, Rules of Communication by Pretrial Detainees at the Connecticut Correctional Institute at Niantic (1971) (unpublished paper on file at the Yale Law Journal). One way to overcome this problem would be to require that the inmate address see or some neutral party be present when prison officials open and inspect packages for contraband; or, physical tests for the presence of contraband that do not entail opening and inspecting packages might be
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of physical contraband does not conflict with the prior restraint doctrine.\textsuperscript{132}

Second, mail to and from prisoners differs from mail in general in that escape plans may be present in prison mail. The statistical frequency with which this would occur if the policy of universal inspection of correspondence with family, friends, business associates, and the media were abandoned is impossible to predict,\textsuperscript{123} but the fact that escape plans are now uncovered in mail which inmates know to be inspected\textsuperscript{134} suggests that the problem is a real one.

Nevertheless, it is easy to place too much emphasis on mail inspection as a means of thwarting escapes. Eliminating routine administrative inspection of letters would hardly leave the state powerless: escape from a penitentiary is itself a criminal offense in most jurisdictions,\textsuperscript{135} and persons outside the prison who would use the mails to aid inmates in planning, attempting, or executing escapes would be subject to prosecution as conspirators.\textsuperscript{136} For years penologists have employed. Cf. Marsh v. Moore, 325 F. Supp. 392 (D. Mass. 1971) (enjoining prison officials from "intercepting, delaying, reading, opening letters or other correspondence" between an inmate and his attorney, but permitting prison authorities "to examine correspondence with a fluoroscope or a metal-detecting device"); Peoples v. Wainwright, 325 F. Supp. 402 (M.D. Fla. 1971) (permitting inmate/attorney mail to be submitted "to whatever tests may be appropriate for security purposes without opening the envelopes").

132. If the search is to extend beyond locating and removing physical contraband, a warrant describing what is to be read should be obtained beforehand.

133. One court of appeals has expressed a certain amount of skepticism for what it called "the dubious assumption" that newsmen would participate in escape attempts. Nolan v. Fitzpatrick, 40 U.S.L.W. 2291, 2299 (1st Cir. Nov. 4, 1971). In making any estimate of the impact of eliminating routine inspection of prisoner letters on the incidence of escapes, two factors should be kept in mind: the difficulty of actually escaping from the prison, and the difficulty of effecting a successful escape once outside the walls. The system proposed above would prevent inmates from using the mails to obtain weapons, files, ropes or other implements which might be needed to escape from secure institutions. But only a dozen (approximately three per cent) of the 347 escapes from federal institutions during the fiscal year 1970 were from maximum security institutions. Key Interview, \textit{supra} note 55. As for prisoners confined in minimum security institutions near population centers, prisoner correspondence is unlikely to have a substantial impact on escapes, since it is relatively simple for an escapee to reach quickly a place where recapture will be difficult. Thus the category of inmates whose likelihood of escape is most affected by free correspondence with possible confederates is those inmates confined in minimum security institutions far from population centers—for these potential escapees, a rendezvous with confederates once outside the walls is important. Regrettably, there is no good information breaking down minimum security institutions by proximity to population centers. It should be noted, however, that while some correctional systems, like the federal one, utilize a multi-tiered grouping of prisons and attempt to use "security risk" criteria in assigning prisoners to facilities, others, like New York, have almost nothing but maximum security prisons. See \textit{N.Y. Times}, Oct. 24, 1971 § 4, at 9, col. 1.

134. Key Interview, \textit{supra} note 55.


urged the adoption of reforms that have entailed some risk of additional escapes.\textsuperscript{137} Thus, the fear that more escape plans might find their way through prison mails should not remove regulation of inmate mail from the reach of the prior restraint doctrine. Where prison officials do not secure a search warrant to inspect letters for evidence of criminality, reading or censoring such letters should be barred.

Finally, prison mail is distinguishable from other correspondence in that communications with prisoners may have adverse effects on the ultimate rehabilitation of inmates. As many commentators have noted, perhaps the most telling indication of the failure of our penal system is the high rate of recidivism associated with it.\textsuperscript{138} If definitive evidence were to show that prohibition, inspection or censorship of inmate mail were essential components of an effective rehabilitative process, it is conceivable that their presumptive unconstitutionality as prior restraints would be overcome. At present, however, no "hard" data is available\textsuperscript{139} and it is doubtful that prison personnel can identify what information would or would not retard rehabilitation.\textsuperscript{140} If anything, the conclusion reached by the California Supreme Court\textsuperscript{141} as well as by numerous commentators,\textsuperscript{142} that "a strictly controlled intellectual diet"\textsuperscript{143} may itself discourage prisoner rehabilitation, may

\textsuperscript{137} Thus, low security institutions have become more prevalent despite the higher incidence of escapes from such facilities. \textit{See note 133 supra.} Prison experts are virtually unanimous in recommending that prison facilities be constructed in or near large cities even though the risk of escape might be heightened somewhat as a result. \textit{See N.Y. Times, Oct. 25, 1971, at 29, col. 1.} Reforms directed toward increasing inmate participation in outside activities, such as work-release programs, are also generally regarded as desirable by experts, although they, too, might add to the escape rate. \textit{See, e.g., Bureau of Prisons, U.S. Dept of Justice, New Roles for Jails: Guidelines for Planning 5-6 (1969); N.Y. Times, supra.}

\textsuperscript{138} \textit{See R. Hood & R. Sparks, Key Issues in Criminology 171-92 (1970). But see D. Glaser, The Effectiveness of a Prison and Parole System 15 (abridged ed. 1969).} Imprisonment and parole, as procedures for dealing with felons, are far from complete failures, although they are far from "sure cures." Apparently, no more than a third of the men released from prison are convicted of further felonies, even where half or more have some further difficulty with the law.

\textsuperscript{139} \textit{See Hood & Sparks, supra note 138, at 193-234; Glaser, supra note 138.}

\textsuperscript{140} \textit{See Hood & Sparks, supra note 138, at 215-34; Glaser, supra note 138, at 4.}

\textsuperscript{141} \textit{See In re Harrell, 2 Cal.3d 675, 703-04, 470 P.2d 640, 645, 87 Cal. Rptr. 504, 509 (1970), cert. denied, 401 U.S. 914 (1971).}

\textsuperscript{142} \textit{See notes 95-96 supra. See also Turner, supra note 5, at 487 n.97:} Indeed, unrestricted communication with the outside world and maintaining close family contact through free correspondence would seem to have obvious rehabilitative value.

\textit{Cf. authorities cited in Sostre v. McGinnis, 442 F.2d 178, 191 n.14 (2d Cir. 1971) (en banc).} In striking down as inconsistent with a state statute prison regulations banning materials deemed by officials to be not "conducive to rehabilitation" because they tended to incite crime, the court observed:

It may well be that even persons who have committed antisocial acts warranting their imprisonment may derive greater rehabilitative benefits from a relatively free access to the thoughts of all mankind as reflected in the published word than they would derive from a strictly controlled intellectual diet. \textit{In re Harrell, 2 Cal.3d 675, 703-04, 470 P.2d 640, 645, 87 Cal. Rptr. 504, 509 (1970), cert. denied, 401 U.S. 914 (1971).}
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be the correct one. Certainly, current understanding of the correctional process does not warrant fashioning an exception based on “rehabilitation” to the general rule that prior restraints are unconstitutional.

The First Amendment doctrines of less drastic means and prior restraints establish the constitutional necessity of a more refined system of prison mail regulation than the structure of restrictions, prohibitions, inspections, and deletions now prevalent at most prisons. No limitations should be imposed on the basis of the identity of the recipients or the frequency of the correspondence. Unless authorities first establish that they have probable cause to believe that a search will lead to the discovery of physical contraband or criminal activity, correspondence with courts, attorneys and public officials should not be opened, inspected or censored. To enable officials to intercept physical contraband, incoming mail from friends, family, business associates and the media may constitutionally be opened without a warrant. But strict safeguards should be implemented to prevent administrative reading of such incoming mail, and all such outgoing correspondence should be free from routine inspection and censorship.