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The Prisoner and the First Amendment: Freedom Behind Bars?

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THE PRISONER AND THE FIRST AMENDMENT: FREEDOM BEHIND BARS?

He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.¹

Abhorrent as these words now seem, they were actually spoken by a court approximately one hundred years ago. Within the last century, however, the development of prisoners' rights law reflects an evolution—though not radical—undergone by society in its attitude toward the incarcerated.

The first amendment to the United States Constitution² has traditionally enveloped the "preferred" freedoms³ of all individuals. Whether or not first amendment rights survive incarceration in various sets of circumstances is a question which has been asked of many courts over a period of several years.

When discussing the "imprisoned," it is necessary to be aware of a dichotomy inherently existent in that term. Every incarcerated individual is not necessarily confined because he has been deemed guilty of some act which society has decided does not conform to an acceptable behavioral pattern; often a person is imprisoned simply because he could not afford bail and, therefore, in order to assure his appearance at trial, this unconvicted individual is forced to assume the same mode of existence as one who has been adjudged guilty of a crime. As in many other problem areas in our societal structure, the economically oppressed finds the wall of discrimination confining him to an existence which he often does not deserve and for which he has no means of re-

². "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
dress if he is ultimately found "not guilty" of the crime for which he was originally charged.

Thus, a discussion of whether or not—and, if so, to what degree—the first amendment protects activities of the prisoner must necessarily distinguish between the convicted and the unconvicted prisoner.

It is interesting to note the wide variations of tests which various courts have applied in their attempts to decide if a particular prisoner in a certain set of circumstances should prevail in his quest for the right of survival of some first amendment freedom. No less illuminating is the rationale some courts have used in order to shift the burden of making decisions to the prison administrative channels. Various state legislatures and prison administrative systems have recently made efforts to effect changes in the operation and maintenance of the prison structure.

**Recent Legislative and Administrative Efforts Concerning Prisoners' Rights in the First Amendment Area**

On August 23, 1972, the members of the Association of State Correctional Administrators met in Pittsburgh, Pennsylvania, and at that meeting adopted a set of Policy Guidelines to be utilized in the prison system. The Guidelines for access to media and mail are especially relevant to a discussion of prisoners' first amendment freedoms. Considering the extensive litigation in these two areas, they perhaps constitute the most controversial subjects of prisoner rights at the present time.

The Guidelines for mail initially state:

Correspondence with members of an inmate's family, close friends, associates, and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and in the community.4

After espousing this benevolent point of view, however, the Guidelines then go on to set out several limitations on the prisoners' correspondence.

The Guidelines divide mail into two categories: (1) mail to and from a specified class of persons and organizations5 and (2) general

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5. The following individuals should be included in the specified class of persons and organizations: (1) judges of federal, state and local courts; (2) officials of the confining authority; and (3) members of the paroling authority. Id.
correspondence. Mail to persons in the specified class should not be opened; mail from these persons may be opened only for inspection of contraband. However, all general correspondence, both incoming and outgoing, is subject to inspection. "The criteria for approval of persons for general correspondence should be limited to the purposes of confinement and security of the institution." 

Another correspondence area concerns what type of publications the inmates should be allowed to receive via the mails. The Guidelines indicate that any publication may be restricted if it constitutes a danger of a breach of prison discipline or security, or substantial interference with the maintenance of order at the institution.

In general, the Guidelines state that the media should have access to correctional operations, except where such access would interfere with the orderly administration of the prison. The Guidelines for media access indicate that inmates should be allowed to correspond with media representatives in the same manner as with anyone else on the general correspondence list. Restrictions on this mail may only be imposed if the correspondence "endangers the security of the institution or impedes the orderly operation of the institution."

Thus, under the guise of maintaining the "security" or "orderly operation" of the institution, the prison officials have the power to eliminate any general correspondence or media access they desire; only correspondence with persons in the "specified class" seems to be an absolute  

6. The Guidelines set out who should be approved as potential members of the prisoner's general correspondence list: "In general, all close relatives should be approved, anyone having legitimate business with the inmate may be approved, correspondence should not be limited solely on the basis of sex, existence of a criminal record should not, in and of itself, constitute a barrier to correspondence, and juveniles under the age of 18 years should have permission from parents before correspondence is allowed. Other correspondents may be permitted at the discretion of the institutional head."  

7. Id.  

8. Id.  

9. Id.  

10. The full text states: "PUBLICATIONS: Institutions should allow inmates access to publications to the greatest degree consistent with institutional goals, internal discipline and security. Publications should be received by inmates only from the publisher or distributor. In addition, institutions may subscribe to publications in sufficient quantity to give coverage in the institution and to provide for the diverse interests of the inmate population. No publication should be prohibited solely on the basis of its appeal to a particular ethnic, racial or religious audience. As a general rule, however, institutions may restrict receipt of publications that constitute a danger of breach of prison discipline or security, or some other substantial interference with the orderly administration of the institutions."  


12. Id.  

13. Id.  

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right. Under scrutiny, the Guidelines appear far from adequate as a safeguard of the prisoners' first amendment rights.

Some legislation has also attempted to outline the rights of the prisoner. However, the following study of the legislative efforts made in some states reveals that the legislation suffers from the same infirmities as the administrative Guidelines, i.e., the legislation is stated in such broad terms that much discretion is still vested in the prison authorities.

Under the new Illinois Unified Code of Corrections, for the ostensible reasons of security, safety or morale of the institution, the prison administration can limit to whatever extent it deems necessary the prisoners' rights to the use of the mails. Due to the lack of specificity in the Illinois Code, the mail provision proves inadequate as a meaningful regulation. The vagueness of the Code prevents a useful application in a particular set of circumstances.

The State of New York, in its Department of Correction Code, indicates that, except for correspondence designated as "special correspondence," all incoming and outgoing correspondence may be read by jail personnel "to protect the safety and security of the facility and the welfare and best interests of the prisoners." The Second Circuit recently held that these mail regulations were constitutional. The court felt that since the new regulations permit censorship (by non-mailing) only in the case of a "clear and present danger" to the security of the facility, this delineation balances the conflicting interests appropriately. However, it seems that the "chilling effect" presented by the officials'
reading of all incoming and outgoing mail (except for the "special correspondence") presents a substantial constitutional question. As in the Illinois Code, the New York legislation has not eliminated the wide discretion vested in prison officials to limit rights in order to insure the security of the penal institution.

**POLICY OF JUDICIAL INTERVENTION WHEN FIRST AMENDMENT RIGHTS OF PRISONERS ARE SCRUTINIZED**

The previous examination of some legislative and administrative efforts in the area of first amendment rights of the incarcerated reveals that, by no means, have these efforts obviated the need for court intervention in the future if the constitutional rights of the imprisoned are to be secured. The prisoner seeking relief for an alleged deprivation of his first amendment rights must, before the merits of his case will be reached, contend with the judicial laissez faire attitude regarding litigation of prisoner rights. This problem is not as crucial for the prisoner as it once was since recent litigation indicates a somewhat more benevolent judicial attitude toward the imprisoned and their rights.

Courts have used various rationales in an effort to refrain from interfering in the prisoner rights area. One court said that although a prisoner may not approve of prison rules, under ordinary circumstances his disapproval is not a basis for seeking relief in a federal court even though the prisoner alleges that the limitations placed upon him can be equated to a violation of his constitutional rights.\(^2\) The Sixth Circuit indicated that prison authorities have the right to adopt reasonable restrictions on the conduct of prison inmates and courts should not interfere unless there is actual constitutional deprivation.\(^2\) The "hands off" policy in matters of prison administration has been exhibited by the Tenth Circuit's statement that the basic responsibility for the control and management of penal institutions lies with the responsible administrative agency; judicial review is not necessary unless the institution is managed in such a manner as to amount to caprice or clear abuse by the prison officials.\(^2\) Thus, it has been held that prison authorities are permitted wide discretion in matters of internal prison administration, and reasonable action within the ambit of this discretion does not constitute an infringement of a prisoner's constitutional rights.\(^2\)

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\(^2\) United States v. Ragen, 213 F.2d 294, 295 (7th Cir. 1954).
\(^2\) Vida v. Cage, 385 F.2d 408 (6th Cir. 1967).
\(^2\) E.g., Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969); Paniagua v. Moseley, 451 F.2d 228, 230 (10th Cir. 1971).
\(^2\) Smith v. Schneckloth, 414 F.2d 680, 681 (9th Cir. 1969).
In 1969 the decision in Brown v. Wainwright\textsuperscript{24} indicates how far a court will go in maintaining its "hands off" policy. Brown was an action by a state prisoner brought under the Civil Rights Act, i.e., 42 U.S.C. § 1983 (hereinafter referred to as "Section 1983"),\textsuperscript{25} in which a request was made to enjoin prison mail censors from removing postage stamps from the prisoner's outgoing mail. The Fifth Circuit, in affirming the lower court's dismissal of the action, held that the claim did not rise to the level of a federal claim, and, if considered only as a property theft problem, no basis was indicated for the prisoner to maintain a civil rights action!\textsuperscript{26}

Prior to the United States Supreme Court's announcement of its new standard in Cruz v. Beto\textsuperscript{27} it had been stated that courts will not interfere in prison administration absent an abuse of the wide discretion permitted prison officials to maintain order and discipline\textsuperscript{28} or absent an extreme case.\textsuperscript{29} The Second Circuit expressed an even stricter standard, stating that the federal courts should not interfere with internal state prison administration except in the most extreme cases which involve a shocking deprivation of fundamental rights.\textsuperscript{30}

On the positive side for the complaining prisoner, however, even the Fifth Circuit, which previously had said that there should not be judicial interference absent an abuse of the wide discretion permitted prison authorities,\textsuperscript{31} has also held that "interference with federally guaranteed rights may not be insulated on the basis that everything which occurs within prison walls is protected as prison administration."\textsuperscript{32}

The United States Supreme Court in Cruz v. Beto\textsuperscript{33} has recently announced the standard on judicial intervention in prisoner rights cases. Cruz involved a class action under Section 1983 by prison inmates who alleged deprivation of their constitutional rights. Their complaint alleged violations of first amendment rights to freedom of religion, to court access, and to stay informed on the status of local and national

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  \item \textsuperscript{24} 419 F.2d 1308 (5th Cir. 1969).
  \item \textsuperscript{25} 42 U.S.C. § 1983 (1964) is as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
  \item \textsuperscript{26} Brown v. Wainwright, 419 F.2d 1308 (5th Cir. 1969).
  \item \textsuperscript{27} 405 U.S. 319 (1972).
  \item \textsuperscript{28} Royal v. Clark, 447 F.2d 501, 501-02 (5th Cir. 1971).
  \item \textsuperscript{29} Baldwin v. Smith, 446 F.2d 1043, 1044 (2d Cir. 1971).
  \item \textsuperscript{30} Rhodes v. Sigler, 448 F.2d 1237, 1238 (8th Cir. 1971).
  \item \textsuperscript{31} Royal v. Clark, 447 F.2d 501, 501-02 (5th Cir. 1971).
  \item \textsuperscript{32} Rocha v. Beto, 449 F.2d 741, 742 (5th Cir. 1971).
  \item \textsuperscript{33} 405 U.S. 319 (1972).
\end{itemize}
affairs by being denied access to radio, television, newspapers and magazines during the times they were disciplined by solitary confinement. The Fifth Circuit affirmed the district court's dismissal of the complaint without discussing the issues involved.

In a *per curiam* decision the United States Supreme Court vacated the judgment and remanded the cause for a hearing and appropriate findings. In response to the district court's denial of relief on the ground that the area should be left to the prison administration's discretion, the Court said: "Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners."\(^4\)

The *Cruz* decision will perhaps somewhat mitigate the chaos\(^3\) in which the courts apparently have found themselves when trying to decide whether to interfere in prisoner-initiated complaints. Whatever problems face the courts in the future, it appears that the *Cruz* rationale will at least make it easier for the judiciary, once it determines a constitutional right is possibly being infringed, to determine that its intervention is warranted. It would seem that the exercise of court jurisdiction need no longer be "sparing" or only in an "extreme" case or one involving a "shocking deprivation" of basic rights, but rather, if the prisoner's complaint indicates the deprivation of a constitutional right, the court should hear the case.

**Tests Generally Applicable in First Amendment Litigation**

In the past several years whenever the courts have been faced with the question of whether or not an individual's first amendment rights have been violated, a judicial resolution of this situation has involved the application of some sort of test, *e.g.*, "clear and present danger," balancing, etc.\(^6\) A cursory study of the application of these first amendment tests when the non-prisoner is the complainant can perhaps

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34. *Id.* at 321.

35. A capsulized version of this "chaos" can perhaps best be illustrated by the court's statement in Sawyer v. Sigler, 445 F.2d 818, 819 (8th Cir. 1971): "... [W]e wish to emphasize our frequently expressed view that the federal courts, whether in habeas corpus or in section 1983 contexts, should not be unduly hospitable forums for the complaints of either State or federal convicts; it is not the function of the courts to run the prisons, or to undertake to supervise the day-to-day treatment and disciplining of individual inmates; much must be left to the discretion and good faith of prison administrators. That is not to say, of course, that the federal courts should not exercise their jurisdiction in proper cases, but the exercise of it should be sparing."

36. For an extensive discussion of the history of the "clear and present danger" test and its offspring, see Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 Sup. Ct. Rev. 41.
shed some light on what type of reasoning the courts will—or should—utilize when the incarcerated is seeking his constitutional rights.

The test which the courts generally in the past have deemed appropriate is the “clear and present danger” test. This test found its genesis in Schenck v. United States. In Schenck the Court said:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

However, approximately thirty years later, when the Supreme Court attempted to resolve the question presented by Dennis v. United States, the “clear and present danger” test was distorted in such a manner that its application in the first amendment area virtually had lost its vitality. It was the Court’s attempt in Dennis to decide what the “clear and present danger” test actually meant that ultimately resulted in its demise. In that case the Court decided that protection from overthrow of the government by force is a substantial enough interest to justify a restriction on speech. In essence, the “clear and present danger” test was rejected in favor of some sort of balancing technique; however, instead of indicating that it was balancing, the Court merely imported a different meaning to the “clear and present danger” rationale.

Thus, the balancing techniques came into vogue, clearly spelling the death of any strict construction—if, indeed, any construction at all—of the “clear and present danger” test. The balancing tests proved to be anathema to any litigant propounding first amendment deprivations since under the scheme of balancing, any governmental interest could be deemed “substantial enough” to warrant the restriction of an individual’s constitutional rights in a given situation. As in Dennis, no

38. 249 U.S. 47, 52 (1919).
40. Id. at 509.
41. The Court used the words: “Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. . . . Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent.” Id.
42. For a good discussion of the various types of balancing tests, see Strong, Fifty Years of “Clear and Present Danger”: From Schenck to Brandenburg—and Beyond, 1969 SUP. CT. REV. 41.
actual danger had to be present—just a substantial governmental interest.

In Brandenburg v. Ohio\textsuperscript{43} the Supreme Court seized upon an opportunity to develop a test defining the present concept of what type of examination an alleged first amendment right has to pass in order to survive judicial scrutiny. In striking down Ohio's Criminal Syndicalism Act,\textsuperscript{44} the Court said that this statute purporting "to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action" falls within the condemnation of both the first and fourteenth amendments.\textsuperscript{45}

It appears that the Brandenburg test would permit a state to forbid advocacy of the use of force or of law violation only where such advocacy is directed to, and is likely to, incite or produce imminent lawless action.\textsuperscript{46} The Court recently used this test in Cohen v. California where it stated that an "undifferentiated fear or apprehension of disturbance" is not enough to overcome an individual's right to freedom of expression.\textsuperscript{47} Thus, the Brandenburg "imminent lawless action" test is much more protective of first amendment interests than the distorted "clear and present danger" test of Dennis, and it is probably what Justices Holmes and Brandeis had meant to be the interpretation of their original test.

Apparently, the courts at the present time are willing to render to a complaining non-prisoner the full range of his first amendment rights, subject only to the "imminent lawless action" restriction. However, what does the Brandenburg test hold for the plaintiff who is imprisoned, either in a convicted or unconvicted status? Will the very setting of confinement have an influence on whether or not the courts will determine if the "imminent lawless action" test is applicable?

Before examining the substantive tests the courts apply in the prisoner rights area, it seems proper to consider the procedural aspects of initiating litigation when the protection of the Constitution is sought.

\textsuperscript{43} 395 U.S. 444 (1969).
\textsuperscript{44} Ohio Rev. Code Ann. § 2923.13 (1954). The Act punished persons who (1) advocated or taught the duty, necessity, or propriety of violence as a means of accomplishing reform; (2) published or circulated or displayed any publication containing such advocacy; (3) justified the commission of violent acts with the intent to advocate the propriety of the doctrines of criminal syndicalism; or (4) voluntarily assembled with a group which had the purpose to advocate the doctrines of criminal syndicalism. \textit{Id.} at 448.
\textsuperscript{45} 395 U.S. 449.
\textsuperscript{46} \textit{Id.} at 447.
PROCEDURAL ASPECTS OF BRINGING PRISONER FIRST AMENDMENT ACTIONS

When a prisoner believes that his first amendment rights are infringed in the prison environment, he has the choice of two common methods of proceeding in the federal court: (1) federal habeas corpus; or (2) Section 1983. State prisoners who apply for federal habeas corpus relief must demonstrate that they have exhausted state judicial remedies. It has been implied that a court will look at a Section 1983 action and, under some circumstances, it may treat such action as a petition for habeas corpus.

It is generally preferable for the prisoner to proceed via a Section 1983 action rather than by a petition for habeas corpus. Unlike a habeas corpus petition, a Section 1983 action does not require exhaustion of state legal or equitable remedies before its commencement. Jurisdiction is granted to the federal district courts in Section 1983 cases by 28 U.S.C. § 1343 which does not require diversity of citizenship or an allegation of a jurisdictional amount.

The Tenth Circuit outlined the purpose of Section 1983; and the court's delineation of the aims of Section 1983 seems to illustrate properly the rationale behind, and the need for, that Section:

. . . 42 U.S.C. § 1983 provides a remedy for persons who are deprived of any rights secured by the Constitution, under color of any state or territorial statute, ordinances, regulations, custom or usage. The purpose of this section is to override certain kinds of

49. The United States Supreme Court will review Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972), cert. granted sub nom. Oswald v. Rodriguez 407 U.S. 919 (1972), and the question presented is whether the prisoner should be allowed the option of challenging the condition of his confinement by means of a Section 1983 action despite the purported existence of an appropriate remedy by means of habeas corpus.
50. 28 U.S.C. § 2254(b) and (c) (Supp. III, 1965-67).
54. 28 U.S.C. § 1343 (1964), in pertinent part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."
Section 1983 protects rights secured by the Constitution and statutes of the United States. Persons who are confined in state prisons are within the protection of Section 1983. Similar to federal habeas corpus, a Section 1983 complaint must indicate specific conduct by state officials which violates some right of the complainant before a claim for relief is properly stated.

Although a Section 1983 action does not require exhaustion of state remedies, it does demand of the complainant that he seek to obtain relief through the proper administrative channels before approaching the courts for a remedy. It is the duty of the district court to determine whether the inmate has actually exhausted his administrative remedies.

Although a petition is presented to the court as a habeas corpus action, it may be read by the judiciary to plead a cause of action under Section 1983. In Wilwording v. Swenson the United States Supreme Court stated that state prisoners are not held to any stricter standard of exhaustion than other civil rights complainants.

GENERAL COURT ATTITUDE TOWARDS THE IMPRISONED

Various judicial attitudes have been expressed toward the prisoner and his rights. One attitude, as expressed in Price v. Johnston, indicated that lawful incarceration necessitates the withdrawal or limitation of many rights, a retraction purportedly justified by the considerations underlying the penal system. However, it has been said that a prisoner does not lose all of his rights. Coffin v. Reichard evidenced another attitude when it indicated that a prisoner is said to retain all the rights which an ordinary citizen enjoys except those which are taken

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59. E.g., Gittlemacker v. Prasse, 428 F.2d 1, 3 (3rd Cir. 1970).
60. E.g., Paden v. United States, 430 F.2d 882, 883 (5th Cir. 1970); Rocha v. Beto, 449 F.2d 741, 742 (5th Cir. 1971).
61. Tarlton v. United States, 429 F.2d 1297, 1298 (5th Cir. 1970).
63. Id.
64. 334 U.S. 266, 285 (1948).
from him by law, either expressly or by necessary implication.\textsuperscript{66} The court in \textit{Coffin} went on to say that the courts will be diligent in finding a way to protect the substantial rights of an individual.\textsuperscript{67}

Apparently, the First Circuit felt that prison inmates may hold some constitutional rights in diluted form.\textsuperscript{68} The Fifth Circuit's rationale for this dilution is the attitude that inherent administrative problems necessitate the withdrawal of many of the prisoner's rights and privileges.\textsuperscript{69} Unfortunately, so long as incarceration as a punitive form exists, the Third Circuit felt that the objective of imprisonment is to circumscribe some of the activities which are characteristic of an open societal setting.\textsuperscript{70}

Thus, when a prisoner petitions a court for a redress of his grievances, once the court decides to hear the case, the prisoner will probably be confronted with the judicial attitude that, in essence, his rights may be limited because he is confined. An examination of various decisions will reflect why this attitude exists and also the tests used in determining whether the limitation on the prisoner's rights is justified.

\textbf{THE PRISONER AND THE FIRST AMENDMENT}

Although it is clear that an individual, upon incarceration, may be subjected to the limitation of some of his rights, it is also apparent that a prisoner does not forfeit his first amendment rights upon entrance into the prison.\textsuperscript{71} Courts have a propensity to scrutinize administrative action involving a deprivation of the "preferred" freedoms encompassed by the first amendment.\textsuperscript{72} The court in \textit{Jackson v. Godwin} indicated that stringent standards are to be applied to governmental restrictions, "and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights."\textsuperscript{73}

It has been said that there are state interests which justify repression or restriction of first amendment rights beyond those interests which could possibly justify limitations upon citizens who are not incarcerated.\textsuperscript{74} \textit{Brown v. Peyton} went on to set out some state interests. It indicated that prison officials have the duty to protect the public at large,

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  \item \textsuperscript{66} 143 F.2d 443, 445 (6th Cir. 1944), \textit{cert. denied}, 325 U.S. 887 (1945).
  \item \textsuperscript{67} \textit{Id.}
  \item \textsuperscript{68} Nolan v. Scafati, 430 F.2d 548, 551 (1st Cir. 1970).
  \item \textsuperscript{69} Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968).
  \item \textsuperscript{70} Gittlemacker v. Prasse, 428 F.2d 1, 3-4 (3rd Cir. 1970).
  \item \textsuperscript{71} \textit{E.g.}, Brown v. Peyton, 437 F.2d 1228, 1230 (4th Cir. 1971).
  \item \textsuperscript{72} \textit{E.g.}, Walker v. Blackwell, 411 F.2d 23, 24 (5th Cir. 1969).
  \item \textsuperscript{73} 400 F.2d 529, 541 (5th Cir. 1968).
  \item \textsuperscript{74} Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971).
\end{itemize}
\end{footnotesize}
prison employees, and also other inmates, who are almost totally dependent on the prison for their well-being. Prison authorities may legitimately restrict freedoms in an attempt to further the interest in prisoner rehabilitation. Many restrictions on first amendment rights have supposedly been justifiable as part of the punitive regimen of a prison; for example, confinement itself limits communication with the outside world but is permissible in order to punish and deter crime; additional restrictions may be imposed as a means of punishing misbehavior of the inmate inside the prison. Also, the state is interested in reducing the burden and expense of administration. The state may place reasonable limits on the number of publications received by each prisoner in an attempt to limit the onus of examining incoming materials. However, the Brown court emphasized that these state interests do not eliminate the necessity for a state to prove that they exist in a particular set of circumstances.\(^7\)

Is the Brown approach of determining whether a first amendment right may be limited by the existence of a state interest adequate in the prison situation? Where a first amendment interest is involved, it seems that the Brown finding of state interests may not be appropriate because it seems to put too much emphasis on the punitive aspects of the prison situation and not enough on the rehabilitative element.

A brief discussion of some of the developments in the law concerning certain first amendment rights is indicative of what some courts apparently feel is the proper method of determining prisoner rights.

*Mail Correspondence, Court Access, Redress of Grievances*

Although it has been said that "... the use of the mails is almost as much a part of free speech as the right to use our tongues, ... "\(^6\) a judicial determination has also been made that a prisoner has no right to unlimited freedom in the receipt and transmission of mail.\(^7\) Correspondence sent to public officials in an attempt to seek a redress of alleged grievances is protected under the first amendment clause which protects the right to petition for redress of grievances.\(^8\) In *California Motor Transp. Co. v. Trucking Unlimited*, the United States Supreme Court recently said, "Certainly the right to petition extends to all de-

\(^{75}\) Id.
\(^{77}\) Adams v. Ellis, 197 F.2d 483, 485 (5th Cir. 1952).
partments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. 79

Where the inmate's complaint states a deprivation of his right to access to the courts by a refusal to mail a letter, censorship of same, etc., the courts have no problem in finding a constitutional deprivation. A state prison inmate has a right of access to the courts 80 and prison officials cannot deny court access to prisoners in their charge 81 since the Constitution forbids this denial to the incarcerated. 82

In an action by a state prisoner seeking relief for claimed violations of his constitutional rights by prison authorities, the prisoner charged that he had been denied access to the courts by the officials' refusal to mail his letter to the Massachusetts Civil Liberties Union seeking advice and assistance on his due process claims. 83 The First Circuit felt that an inmate's right of access to the court involved a corollary right to obtain assistance in preparing the prisoner's communication with the court. Given that right, the court held that, absent a countervailing interest not evident in the case, the state could not prevent the inmate from seeking legal assistance from bona fide attorneys working in the Civil Liberties Union. 84 This decision, however, contains the implication that if a "countervailing interest" could be found, the prisoner would be denied relief, thus prompting the conclusion that the prisoner's right to court access and a redress of his grievances is not absolute and apparently is subject to a balancing test.

Once it is determined that the correspondence between the prisoner and his attorney, the courts, or state officials is not strictly in regard to the legality of the prisoner's conviction or the conditions of his incarceration, the Tenth Circuit recently seemed to have a difficult time in finding the correspondence to be constitutionally protected. 85 Evans v. Moseley involved allegations by a state prisoner that his constitutional rights were being denied. One of the issues involved was whether the prisoner Evans had a constitutional right to write an attorney. Evans, attempting to establish a chapter of the Black United Front, wrote a letter to an attorney who himself was apparently a Black United Front member seeking the attorney's assistance in organizing the chapter. In

80. E.g., Ex parte Hull, 312 U.S. 546, 549 (1941).
81. E.g., Haines v. Castle, 226 F.2d 591, 593 (7th Cir. 1955), cert. denied, 350 U.S. 1014 (1956).
82. E.g., Jenks v. Henys, 378 F.2d 334, 335 (9th Cir. 1967).
84. Id. at 551.
85. Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972).
holding that Evans did not possess a right to have the letter mailed, the
court explained that although a prisoner does have a right to corre-
spond with his attorney, or the courts, or appropriate state officials, re-
garding the legality of his conviction or the condition of his incarcera-
tion, this right does not include the right to correspond with his attorney
on any subject. Since Evans' correspondence was about another mat-
ter, and also a matter concerning an organization which the prison offi-
cials did not want, this correspondence was not constitutionally pro-
tected.86

Thus, the Evans court, denying that the prisoner had a constitutional
right to have his letter mailed to the attorney, felt that the controversy
was governed by the general rule that the regulation of mail from a pe-
nal institution is essentially an administrative matter for the prison offi-
cials and, therefore, not subject to judicial review except under the
most unusual circumstances.87 What is unusual about Evans is that
the court did not feel it was necessary to discuss in any depth the con-
stitutional implications. The court merely referred to LeVier v. Wood-
son,88 wherein was recognized a narrow exception to the general rule
that the regulation of mail is essentially an administrative matter. The
narrow exception in LeVier was that the prisoner had a right to corre-
spond with his attorney, or the courts, or appropriate state officials re-
garding the legality of his conviction or the condition of his incarcera-
tion.89 The Evans court felt this exception was not broad enough to
include the right of a prisoner to correspond with an attorney on any
subject.90

The Fourth Circuit in McDonough v. Director of Patuxent deter-
mined that if the purpose of an inmate's correspondence with a national
magazine, its legal representatives, a psychiatrist, and the prisoner's lo-
cal attorney was to receive psychiatric, financial and legal assistance, he
would be entitled to relief from a ban and restrictions on this corre-
spondence.91 However, if the purpose of the correspondence was to
effect publication of a critique of the defective delinquency law and its
implementation at the institution, the institution had the authority to
suppress the correspondence.92 The McDonough court engaged in
mere speculation and stated that such publication, being critical of the

86. Id. at 1086-87.
87. Id. at 1087.
88. 443 F.2d 360 (10th Cir. 1971).
89. Id. at 361.
90. Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972).
91. 429 F.2d 1189, 1193 (4th Cir. 1970).
92. Id.
injection, might adversely affect institutional control and discipline since word of the criticism would certainly reenter the institution and reach other inmates.93

The First Circuit's response to the McDonough situation was enunciated in Nolan v. Fitzpatrick, a prisoner action challenging the constitutionality of the prison's ban on letters by the prisoners to news media.94 The prisoners were not challenging the prison authorities' right to read all letters to the press and to inspect them for contraband or escape plans. They were also not propounding a right to correspond with the news media about matters of public policy or personal affairs which were not prison-related. The issue which they were raising was the right to send to the media letters concerning prison management, offender treatment, and personal grievances they had in the prison.95

In holding that the prisoner retains the right to send letters to the press with regard to prison matters, the First Circuit refrained from adopting the broad principle that, upon incarceration, a prisoner retains all first amendment rights.96 The court applied a balancing test in determining whether state interests unrelated to the suppression of speech justified the ban imposed on these prisoners. Under this test the state had the burden of establishing that the regulation furthered a substantial governmental interest and that the restriction on the prisoners' mail was essential to the furtherance of that state interest.97

In considering whether the state's interest in retaining prison security and good order justified the restriction on the prisoners' mail, and also whether prison restrictions under the circumstances actually constituted a "prior to a prior restraint" (since expression would be cut off even before the tension between free expression and order is present), the court declared:

The most that can reasonably be said is that, depending upon conditions in the prison when the letter or news story based on it returns to the prison, some particularly inflammatory letters may create a "clear and present danger" of violence or breach of security. In that extreme case, prison officials can cope with the situation by refusing to admit the dangerous issue of the newspaper to the prison rather than by refusing to mail the letter in the first instance. The rule against mailing is constitutionally infirm

93. Id.
94. 451 F.2d 545 (1st Cir. 1971).
95. Id. at 546.
96. Id. at 547.
97. Id. at 548. The court used the test which the United States Supreme Court utilized in United States v. O'Brien, 391 U.S. 367, 376-77, rehearing denied, 393 U.S. 900 (1968).
in that it permits officials to withhold letters from the mails on the basis of speculation as to what conditions in the prison will be when and if the letter or article derived from it returns.\(^9\)

In essence, the *Nolan* court applied a "clear and present danger" test in determining whether the prisoners' interest in corresponding survived the state's interest in furthering the security of the prison institution. *Nolan* went much further than *McDonough* in protecting the prisoners' first amendment rights by holding that it is not enough that the mail "might adversely" affect institutional control, but rather the correspondence must actually represent a "clear and present danger" of, for example, a breach of security, before a restriction on the prisoners' right is allowed.

Somewhat akin to the *Nolan* rationale, the Second Circuit in *Corby v. Conboy*,\(^9\) when faced with a prisoner's complaint of interference by prison officials with his access to the courts, denial of medical treatment and censorship of his outgoing mail, stated that, unlike correspondence with courts or counsel, a prisoner's right to mail letters to his family or friends is not absolute. The court stated that the prison officials' refusal to mail a letter must be clearly justified, for example, where communication of its contents to persons outside the prison would pose a threat to prison discipline or security or would impede efforts at inmate rehabilitation.\(^10\) The *Corby* court hinted at the use of a "clear and present danger" test in a situation of this type when it talked about a refusal to mail a letter being justified if it could be equated to a threat to prison discipline or security. However, the court determined that another justification would be a hindrance of efforts to rehabilitate the inmate, indicating that there is a reluctance to take from the prison officials their discretion to censor mail whenever it is decided that censorship may assist in the prisoner's rehabilitation.

Following the *Nolan* (and, to a degree, *Corby*) rationale, it would appear to be very difficult for any court to decide that outgoing mail is subject to censorship on the basis that it constitutes a "clear and present danger" to prison security. As *Nolan* illustrated, the "danger" would not appear until the result of the outgoing correspondence found its way back into the prison. Thus, incoming communication would be more prone to fail the "clear and present danger" test than would outgoing mail since almost any restraint on outgoing mail would consti-

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9. 451 F.2d 545, 549 (1st Cir. 1971).
99. 457 F.2d 251 (2d Cir. 1972). The Second Circuit reversed and remanded *Corby*, stating that an adequate Section 1983 claim was made out by the prisoner.
100. Id. at 254.
stitute a prior restraint on the prisoner's first amendment freedoms.

A recent First Circuit decision, *Smith v. Robbins*, was concerned with censorship by prison authorities of prisoner mail to and from courts and attorneys. The district court's order entitled the prisoner to be present when prison officials open incoming mail from the prisoner's attorney in order to inspect for contraband. On appeal, the prisoner sought to have the order modified to bar the prison officials from opening attorneys' letters at all unless they have reason to suspect that the letters contain contraband. The First Circuit rejected this argument and declared that if the prisoner is present, he has the ability to determine that the letter is not being read, and that is sufficient.

Thus, in the attorney-client correspondence area the court not only assured the prisoner that he would receive all incoming mail from his attorney, but, by allowing the prisoner to be present when the mail was opened, the court made certain that the prisoner's right would not suffer from a possible "chilling effect" created by the fear that the prison officials might read the incoming mail.

Whether this precedent in favor of prisoners' rights in the area of attorney-client mail will be universally followed is a question which is difficult to answer. When the Second Circuit was recently given the opportunity to rely on *Smith*, it expressed the desirability of the *Smith* rationale, but carefully refrained from extending its holding to encompass the entire *Smith* decision.

The issue in *Goodwin v. Oswald* was whether or not prisoner-members of the Prisoners' Labor Union should be permitted to receive a letter from their attorneys, which letter contained advice about the formation of the union and efforts to have it officially certified, and all letters from the Legal Aid Society, in accordance with the provisions enunciated in Administrative Bulletin No. 20 of the Department of Correctional Services. The regulation requires that attorney mail be opened in the prisoner's presence, presumably to insure that it is checked only for contraband and not read for content.

The Second Circuit concluded that the district court was correct in requiring the delivery of the letters and their enclosures. However, the district court judgment had gone further and required adherence to the existing departmental regulations. The regulations inhibit the "chilling

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101. For a good discussion of prior restraint, see *Near v. Minnesota*, 283 U.S. 697 (1931).
103. *Id.* at 697.
105. *Id.* at 1239, 1240.
effect" of any procedure under which the inmate is required to trust the members of the prison staff not to read an opened letter. The court expressed the desirability of the policy exhibited in the regulations (which policy is similar to the Smith v. Robbins holding) and urged adherence to that policy; however, it determined that it was not necessary to go that far and, thus, froze the regulations in this situation on the narrow issue of the Legal Aid letters involved.\textsuperscript{106}

Thus, it appears from the foregoing cases that the first amendment, at a minimum, protects correspondence to the prisoner's attorney and the courts if the mail relates to the legality of the prisoner's conviction or the conditions of his incarceration.\textsuperscript{107} The recognition of a constitutional right necessitates the courts' application of some type of first amendment test; the courts have utilized variations of the balancing, "less drastic means," and "clear and present danger" tests. If the mail is to someone other than the prisoner's attorney or the courts, the judiciary may or may not give to this correspondence the protection of the first amendment.

Apparently, no court has held that a prisoner possesses a first amendment right to \textit{all} use of the mails. However, a recent trail-blazing district court decision, Morales v. Schmidt, indicated that the freedom to use the mails is a first amendment freedom and that, in the general population, each individual's interest in corresponding by mail is considered a "fundamental" interest.\textsuperscript{108} When the government denies this freedom to convicted persons, while allowing it to the general population, the court felt that the prison must show a "compelling governmental interest in this differential in treatment."\textsuperscript{109}

\textit{Morales} represents a virtual attack on the prison system as an institution. If rules must be promulgated for institutional survival, and these rules substantially affect the individual rights of the prisoners, "the balance must be struck in favor of the individual rights of the prisoners," a theory was propounded whereby if prison system survival requires limitations of fundamental rights of the incarcerated, "it may well be that the Constitution requires that the prison be modified."\textsuperscript{110}

\textsuperscript{106} Id. at 1245.
\textsuperscript{107} Perhaps the reason for this protection is not only the existence of the first amendment; the Due Process Clauses of the fifth and fourteenth amendments and the Assistance of Counsel Clause of the sixth amendment may share in assuring this protection to the prisoner.
\textsuperscript{108} 340 F. Supp. 544, 554 (W.D. Wis. 1972). The correspondence was permitted between a prisoner and his paramour.
\textsuperscript{109} Id. at 554-55.
\textsuperscript{110} Id. at 554.
However, the Seventh Circuit, in reviewing the Morales district court opinion, felt that the “compelling governmental interest” standard was inapplicable and propounded that the appropriate test would involve deciding whether the prohibition of the communication was rationally related to the advancement of a legitimate purpose of the state such as the rehabilitation of the prisoner; the dissent seemed to indicate that a “less drastic means” standard would be proper.111

**Freedom of Religion**

There are other first amendment rights of the incarcerated which have been the subject of much litigation. Among these are those rights protected by the Free Exercise Clause of the first amendment. Interestingly enough, the courts apparently have been able to resolve the problems inherent in this type of litigation much more easily than the mail problems.

Under the Free Exercise Clause of the first amendment each individual is supposed to have the freedom to practice the religion of his choice. A question exists as to whether or not an individual retains this right once he is put behind prison walls. A fundamental determination must be made as to what constitutes a religion before any other question can be resolved.112 Included among those rights which a prisoner is said to retain is an immunity from punishment for making a reasonable attempt to exercise his religion, even a religion which may seem unusual to another.113

The United States Supreme Court in Cooper v. Pate declared that a prisoner’s complaint is valid if it alleges that, solely because of his religious beliefs, he was not permitted to purchase certain religious publications and denied other privileges which other prisoners enjoy.114 Whatever may be the view with regard to the usual problems of prison discipline, courts have determined that a charge of religious persecution falls in a special category since freedom of religion and of conscience is one of the fundamental “preferred” freedoms promised to all individuals by the Constitution.115 Religious freedom may undergo

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111. Morales v. Schmidt, Civil No. 72-1373, — F.2d — (7th Cir. 1973).
112. It appears that the courts at present are prone to construe liberally what is determined to be a religion. See Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), but see Prison ‘Religion’ Netsless Officials, N.Y. Times, September 24, 1972, at 57, col. 1, for the results of the Theriault decision.
115. E.g., Pierce v. La Vallee, 293 F.2d 233, 235 (2d Cir. 1961); Weaver v. Pate, 390 F.2d 145, 146 (7th Cir. 1968).
modification in a prison environment; however, it cannot be suppressed or ignored without adequate reason.\textsuperscript{116}

The Third Circuit in \textit{Long v. Parker}\textsuperscript{117} felt that mere antipathy caused by statements derogatory of, and offensive to, the white race would not justify the suppression of Black Muslim religious literature even in a prison situation. The court held that mere speculation that such statements could ignite racial or religious riots in the prison would not warrant their proscription. In order to justify the prohibition of religious literature, prison authorities must prove that the literature amounts to a "clear and present danger" of a breach of prison security or discipline or some other substantial interference with the order required in the institution.\textsuperscript{118}

It appears, nevertheless, that the Third Circuit, when applying the "clear and present danger" test in \textit{Knuckles v. Prasse}\textsuperscript{119} engaged in quite a bit of speculation. There the court determined that it was not mandatory that the prison officials make available Black Muslim periodicals and books requested by the prisoners since these writings could be interpreted as sanctioning the concept that whites generally and prison authorities should be defied by Black Muslim prisoners even when legal orders were made. Although the court stated that such a view is not a correct reading of Black Muslim religious doctrine, it felt that the literature could be subject to inferences exhorting such defiances if not interpreted by a trained Muslim minister. Thus, the literature could present a "clear and present danger" which would threaten prison security or discipline.\textsuperscript{120} However, the Eighth Circuit recently held that the prisoner could receive the newspaper \textit{Muhammad Speaks} as long as the literature did not have a substantially inflammatory effect on the inmates.\textsuperscript{121}

It has been said that the requirement that a state may not interpose unreasonable barriers to the free exercise of religion by the inmates does not imply that the state has a positive duty to furnish every prisoner with a clergyman or religious services of his choosing.\textsuperscript{122} How-

\begin{footnotesize}
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\item \textsuperscript{116} E.g., Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969). Prison authorities have also been permitted to refuse to inmates who had a history of being security risks and who were confined to a maximum security building permission to attend Sunday worship services in the prison chapel. Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969).
\item \textsuperscript{117} 390 F.2d 816 (3rd Cir. 1968).
\item \textsuperscript{118} Id. at 822.
\item \textsuperscript{119} 435 F.2d 1255 (3rd Cir. 1970), cert. denied, 403 U.S. 936, rehearing denied, 404 U.S. 877 (1971).
\item \textsuperscript{120} 435 F.2d at 1256.
\item \textsuperscript{121} Rowland v. Jones, 452 F.2d 1005, 1006 (8th Cir. 1971). \textit{See also} Walker v. Blackwell, 411 F.2d 23, 29 (5th Cir. 1969).
\item \textsuperscript{122} Gittlemacker v. Prasse, 428 F.2d 1, 4 (3rd Cir. 1970). The court distin-
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ever, the *Smith v. Blackledge*\(^{123}\) decision recognized that a prisoner might have a valid complaint that a prison was not as open to a minister of his choice as to other clergymen of various faiths. In *Smith* the inmate asserted that the prison did not treat the Black Muslim minister on an equal basis with white clergymen in that the state paid the white ministers while it did not pay the Black Muslim minister. Therefore, the Black Muslim minister discontinued his visits to the prison.\(^{124}\) The Fourth Circuit recognized that the complaint and other facts did present issues of fact as to whether any religious discrimination existed.\(^{125}\)

Thus, a court will determine if a prisoner is being religiously discriminated against or if he is being denied the free exercise of his religion; if such discrimination or denial exists, the state is generally required to prove that the prisoner’s exercise of his religion would constitute a “clear and present danger” if the prisoner is permitted to prevail. In contrast to the mail correspondence cases, therefore, the courts have recognized that freedom to exercise religion is a constitutional right of the imprisoned.

It seems that it is beneficial for the prison if prison authorities permit liberal rules regarding the prisoners’ religious rights. The Fourth Circuit in *Brown v. Peyton*\(^{126}\) recognized that religious beliefs are supposed to make an individual a more ethical, useful member of the societal setting. If one of the principal purposes of imprisonment is to effect the rehabilitation of the inmates, then it would seem all the more important that the prisoners be allowed to practice their religious choice.\(^{127}\) Perhaps, in this area, more than in any other, there is a need for both the courts and prison officials to tend to construe the “clear and present danger” test in a light most favorable to the prisoner before declaring that a prisoner has forfeited any of his religious rights under the first amendment.

**Press Interviews**

An emerging controversial area of prisoner rights litigation involves the issue of whether or not the prisoner—and the public—may enjoy a first amendment right to interviews between the press and the prisoner.

A federal district court in *Washington Post Co. v. Kleindienst* distinguished between providing facilities for worship and the opportunity for clergy to visit the institution and actually supplying the clergy.

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123. 451 F.2d 1201 (4th Cir. 1971).
124. *Id.* at 1202.
125. *Id.*
126. 437 F.2d 1228 (4th Cir. 1971).
127. *Id.* at 1230.
struck down a blanket ban on press interviews for federal prisoners as being unconstitutional. The court discussed the propriety of utilizing a balancing technique, weighing the governmental interests against the limitations placed on the first amendment freedoms of the involved parties. It held that, if it can be clearly established that serious administrative or disciplinary problems are created, the prohibition of the press interviews would be justified.\textsuperscript{128}

On appeal, \textit{Washington Post} was remanded to the district court for further consideration in light of the United States Supreme Court's \textit{Branzburg} decision, which decision compelled reporters to reveal information gathered by them to grand juries. However, on remand, the district court stated that reconsideration only reinforced its decision that the blanket ban on press interviews of federal inmates is unconstitutional.\textsuperscript{129}

On the other hand, a North Carolina federal district court in \textit{Smith v. Bounds} recently held that the exclusion of newsmen who desired to interview inmates from the prison personally is a matter of internal prison administration with which the court should not interfere. The court, determining that there were too many problems of security in personal interviews, felt that the prisoners have a sufficient amount of contact with the media via mail.\textsuperscript{130}

However, a New York federal district court in \textit{Burnham v. Oswald} recently held that prison inmates are to be allowed face-to-face interviews with reporters.\textsuperscript{131} It was stated that a "clear and present danger" test is applicable in such a situation, and the interview must be permitted with a consenting inmate unless it is determined that the interview poses a "clear and present danger" of breach of the security, discipline or orderly administration of the institution, or that the inmate had clearly abused his right of access to the press previously.\textsuperscript{132}

The prisoners in \textit{Burnham} argued that the failure of the prison guidelines to provide for interviews out of the hearing of the correctional personnel permits a "chilling effect" on the exercise of first amend-

\textsuperscript{128} Civil No. 467-72, 11 CRIM. L. RPTR. 2045, 2046 (D.C. D.C. 1972).
\textsuperscript{130} Civil No. 2914, 1 PRISON L. RPTR. 144 (E.D. N.C. 1972). \textit{See also Seattle-Tacoma Newspaper Guild v. Daggett}, No. 9557, 1 PRISON L. RPTR. 229 (W.D. Wash. 1972).
\textsuperscript{131} 342 F. Supp. 880 (W.D. N.Y. 1972).
\textsuperscript{132} \textit{Id.} at 887.
ment rights. However, the court felt that although the interview monitoring by the correctional personnel is permissible, the inmate interviewee may not be subjected to any sort of reprisal, retribution or retaliation because he granted the interview or because of the contents of his interview. Also, the officials are not permitted to interrupt or interfere with the conversation between the newsman and the inmate to comment on the conversation. However, the opportunity for abuse on the part of the prison officials is apparent since a subtle form of harassment could take place and yet it would not be viewed as amounting to “retribution” or “retaliation.”

Perhaps forthcoming decisions will shed some light on the direction in which the courts plan to go when faced with the press interview-inmate problem. Not only are the prisoners’ first amendment rights at stake but also the public’s right to know is involved. If the Burnham “clear and present danger” test is sanctioned, a great judicial step forward will be taken in the recognition of prisoner rights in the first amendment area. However, if the courts lean toward Smith v. Bounds, once again the judiciary will be shifting the burden, as it has done in many first amendment cases via its “hands off” policy, to the prison officials. If the courts decide to permit the limitation on press interviews, they will no doubt be opening wide the doors to extensive future litigation — litigation brought both on behalf of the prisoners and the representatives of the news media.

The Unconvicted Prisoner

Thus far this discussion has been mostly concerned with the prisoner who has been tried, found guilty and sentenced to serve a term in prison. However, not all prisoners are ever proven to be guilty. Numerous people are behind bars, awaiting trial, solely because they could not afford bail. Thus, the economically underprivileged person must begin serving time in prison simply because he is financially less fortunate than his free—and perhaps as “guilty”—wealthy counterpart.

The past few years have revealed a more progressive judicial attitude toward the unconvicted prisoner than was previously prevalent. In

133. Id. at 889.
134. “It has been estimated that 40 percent or more of the jail population is made up of unconvicted defendants. A large proportion of these, from 40 to 60 percent, will later be released without being convicted.” Morris and Hawkins, The Honest Politician’s Guide to Crime Control 113 (1970).
135. See Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968), for an indication of the attitude toward the unconvicted prisoner just a few years ago.
Freedom Behind Bars

_Palmigiano v. Travisono_\(^{136}\) unconvicted prisoners contended that the prison officials persisted in opening, reading and censoring the prisoners’ incoming and outgoing mail, including correspondence with courts, officials of the government and attorneys. They asserted that these actions of the prison officials constituted a "chilling effect" upon their right to court access, their right to petition representatives of government, and their right to effective representation by counsel.\(^{137}\)

The _Palmigiano_ court, carefully stating that its opinion related only to letters,\(^{138}\) decided that the prison officials could not open or otherwise inspect the contents of any incoming or outgoing letters between inmates and various public officials and inmates and any attorney duly licensed to practice law in Rhode Island.\(^{139}\) Letters addressed to an inmate from his approved addressee list could be inspected but not read. All other incoming mail, except that received from public officials, Rhode Island attorneys, or approved addressee list members, could be read and inspected in an effort to keep from the prison anything which threatens the safety and/or security of the prison.\(^{140}\) In regard to outgoing mail the court held that the reading of any such mail is not necessary and constitutes a violation of the inmates' first amendment rights, unless such reading is pursuant to a duly obtained search warrant, "and in the absence of the same [a duly obtained search warrant] no outgoing prisoner mail may be opened, read or inspected."\(^{141}\)

Following this trend, an Ohio federal district court in _Jones v. Witt-tenberg_ recently made a distinction between prisoners serving sentences and those who are awaiting trial.\(^{142}\) It was determined that prisoners who are serving sentences are properly subject to some limitations on communication, to the extent that this may be a desirable type of punishment. However, prisoners who are awaiting trial should not be subjected to any punishment, except to the extent necessary to keep prison order. In other words, prisoners who are unconvicted can be limited in their communications with the outside world only to the extent necessary to prevent abuse, or as a means of general enforcement of discipline. In so holding, the court announced, among other standards, the following guidelines with respect to unconvicted prisoners:

\(^{137}\) Id. at 780.
\(^{138}\) Id. at 792.
\(^{139}\) Id. at 788-89.
\(^{140}\) Id. at 790.
\(^{141}\) Id. at 791.
1. There shall be no censorship of outgoing mail.
2. There shall be no limitation on the persons to whom outgoing mail may be directed.
3. There shall be no censorship of incoming letters from the prisoner's attorney, or from any judge or elected public official.
4. Incoming parcels or letters may be inspected for contraband, but letters may not be read.
5. Proper arrangements shall be made to insure that prisoners may freely obtain writing materials and postage.
6. Indigent prisoners shall be furnished at public expense writing materials and ordinary postage for their personal use in dispatching a maximum of five (5) letters per week.  

The Jones court felt that standards 2 and 4 need not be applied to convicted prisoners and that reasonable limitations could be placed upon the number of dispatched letters.

The Jones guidelines extended the Palmigiano rights since in Palmigiano some incoming correspondence could be read but no incoming letters could be read in Jones.

A federal district court in Connecticut in Seale v. Manson recently proffered what could be an acceptable test to apply when deciding the rights of an unconvicted prisoner. After pointing out the maxim that unconvicted detainees are those "whom the law presumes innocent," the court indicated that the state's sole asserted interest is to insure the unconvicted prisoner's appearance at trial. Thus, any limitation on the fundamental rights of unconvicted prisoners must be justified in the legitimate advancement of that interest. It was held that unconvicted detainees may be treated the same as convicts only to the extent necessary to insure the security, internal order, health and discipline of the prison; considerations of rehabilitation, deterrence or punitive measures are immaterial. Unfortunately, however, the decision in Seale reflects a very conservative opinion of which rights the prisoner should be free to enjoy.

Faced with a complaint which alleged official delay, censorship and reading of an unconvicted prisoner's incoming mail from his attorney

143. Id.
144. Id.
146. Id. at 1379.
147. The court decided that "Unfettered mail and visitation privileges will seriously hamper prison security and discipline. Limiting contact with the outside community to attorneys and members of the family is not unreasonable." Id. at 1383.
and religious advisors, the Eighth Circuit indicated that a balancing test was adequate; the court felt that the asserted need for regulation in the furtherance of prison security or orderly administration must be weighed against the claimed constitutional rights and the extent to which they had been impaired.\textsuperscript{148}

It seems that, particularly in the case of the unconvicted prisoner, a court should do everything possible to insure the “presumably innocent” individual the full range of his first amendment rights. If a balancing test is deemed pertinent, the balance should almost always be struck in the prisoner’s favor, giving the incarcerated the full benefit of the “preferred” aspect of his constitutional rights; if the Seale test is utilized, a strict construction of what is necessary to insure the security and discipline of the prison should be propounded. The Morales\textsuperscript{149} district court’s “compelling governmental interest” test seems especially applicable for the unconvicted prisoner and perhaps represents the ideal posture. The unconvicted detainee, for the most part, is being economically discriminated against by the mere fact of his incarceration (since it is usually only the poor who cannot raise bail); it seems that the injustice already being perpetrated upon him should not be compounded by a limitation of his first amendment freedoms.

CONCLUSION

Obviously, the foregoing analysis was not designed to cover all aspects of the first amendment. Several decisions and attitudes were discussed in an attempt to determine which rights the prisoners do in fact retain.

It seems that, in light of the fact that the purported purpose of the prison system is rehabilitation and deterrence—not punishment—there is no reason why the incarcerated individual should not be as free as anyone else to enjoy his constitutional rights. As far as those rights given by the first amendment are concerned, the determinative test should be the same for all people, both imprisoned and free.

A good argument can be propounded for not rendering the prisoner the full benefit of the Brandenburg rationale; perhaps the prison environment is such that to restrict first amendment rights only when “lawless” action is “imminent” might be the cause of serious harm both to the prisoner and to the prison officials. However, this argument

\textsuperscript{148} Moore v. Ciccone, 459 F.2d 574, 576 (8th Cir. 1972).
fails if the Brandenburg test is perceived as somewhat analogous to what was originally meant by the "clear and present danger" test; if Brandenburg is viewed in this manner, perhaps rendering to the prisoner the full ambit of his rights, via Brandenburg, would prove feasible. A better way of phrasing it might be to say that the prisoner should be free to enjoy his rights subject to the Brandenburg test "under the circumstances of confinement.” In other words, what could be equated to a "clear and present danger" or to "imminent lawless action" outside the prison is not necessarily the same as what would prove "dangerous" or "imminently lawless" inside the prison walls. There is nothing revolutionary about enacting an objective standard and applying it subjectively to the particular circumstances involved. If a very strong argument can be devised for giving the convicted prisoner his rights subject to the Brandenburg test, certainly there is no reason for holding the unconvicted prisoner to any different standard than the one utilized for the non-prisoner.

Judge Doyle, in the Morales district court's opinion, noted that court decisions in constitutional litigation involving prisons represent an unsatisfactory method of meeting the problems posed by the existence of prisons. His attitude toward the prison institution may well predict the optimum course for the future:

Specifically, 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. Also, with respect to the comparatively few offenders who simply must be physically restrained for periods of time to prevent them from committing antisocial acts, it may well be that the society will be compelled, constitutionally, to allocate sufficient resources for physical facilities and manpower to permit this function of physical restraint to be performed in a setting which little resembles today's prisons.

MARIAN CONROY HANEY

150. Id. at 554.
151. Id.