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CONSTITUTIONALITY OF REGULATIONS RESTRICTING PRISONER CORRESPONDENCE WITH THE MEDIA

INTRODUCTION

In *Procunier v. Martinez*,¹ the Supreme Court determined that censorship² of direct personal mail of prisoners restricts the first amendment right to free speech³ of both prisoners and their correspondents.⁴ It held that censorship of prisoner mail, in the form of opening, reading or confiscation, is justified only if it furthers one of three substantial government interests concerning prisons: security, order or rehabilitation of inmates.⁵ In addition, the censorship must be no greater than is necessary to effectuate the governmental interest involved.⁶

In response to the Court's directive in *Martinez*, state prison authorities have promulgated regulations providing for a variety of treatments of prisoner mail, depending on the governmental interests implicated.⁷ The specific treatment to be given any piece of prisoner correspondence depends on its classification in prison regulations as either general or

1. 416 U.S. 396 (1974).

2. The essence of censorship is "interference with . . . intended communication." Taylor v. Sterrett, 532 F.2d 462, 469 (5th Cir. 1976) (quoting *Martinez*, 416 U.S. at 408-09); see, e.g., Admin. Regulations, No. 750, § IV C (State of Nevada Dep't of Prisons, Aug. 8, 1984) ("Censorship refers to . . . 1. Reading of mail except that which is seen during inspection; 2. Deleting portions of a letter; 3. Returning the letter either in its entirety or in part to the sender; and 4. Removing printing or pictures or rendering any portion of the contents unintelligible."); Policy Statement, Manual of Policies and Procedures, No. 02-00-105, § 1a, Offender Correspondence (Indiana Dep't of Corrections, Jan. 1, 1984) ("censorship: any action taken by departmental staff which results in the restricting, deletion or withholding of an item of correspondence or a publication, or a part of an item of correspondence or publication"); see also *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984) (finding it functionally impossible to separate inspection from censorship).

3. U.S. Const. amend. I.

4. See *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305-07 (1965)); *accord Saxbe v. Washington Post Co.*, 417 U.S. 843, 864-65 (1974) (Powell, J., dissenting) (citing *Martinez*, 416 U.S. at 408); *Vester v. Rogers*, 795 F.2d 1179, 1181 (4th Cir. 1986) (citing *Martinez*, 416 U.S. at 409), *cert. denied*, 107 S. Ct. 3189 (1987); *Hamilton v. Saxbe*, 428 F. Supp. 1101, 1111 (N.D. Ga. 1976), *aff'd*, 551 F.2d 1056 (1977).

5. See *Martinez*, 416 U.S. at 412-13.

6. See *id.* at 413.

7. See, e.g., Policy Statement, Manual of Policies and Procedures, 02-00-105, Offender Correspondence (Indiana Dep't of Corrections, Dec. 16, 1983) (department's mail system designed to maintain prisoner's outside connections to ease reassimilation upon release, while at the same time protecting the safety of the general public, the order and security of the prison, and safety of the inmates); Wash. Admin. Code § 137-48-010 (1983) (correspondence regulations serve to maintain "the safety, security, and discipline of adult correctional facilities"); Admin. Regulations, No. 750 (State of Nevada Dep't of Prisons, Aug. 8, 1984) ("Correspondence between inmates and persons outside the Department is encouraged for the purpose of maintaining family ties and other positive contacts in the community. Any restrictions placed on inmate correspondence must be for the protection of the security of the institution and to prevent injury. . . .")

privileged correspondence.⁸ Prison officials may open, read, and even confiscate general correspondence, such as a prisoner's letters to or from family members or friends, without violation of the first amendment rights of the prisoner or his correspondents.⁹ In contrast, the Constitution protects free speech contained in "privileged" correspondence between an inmate and those directly involved with, or responsible for, his incarceration,¹⁰ such as attorneys,¹¹ governmental agencies,¹² and courts.¹³ Mail to or from these privileged correspondents cannot be censored.¹⁴

Inmate correspondence with the news media¹⁵ does not fit easily

8. See *Washington v. James*, 782 F.2d 1134, 1139 (2d Cir. 1986); *Meadows v. Hopkins*, 713 F.2d 206, 208-09 (6th Cir. 1983); *Feeley v. Sampson*, 570 F.2d 364, 367 (1st Cir. 1978); *Smith v. Shimp*, 562 F.2d 423, 424 (7th Cir. 1977); see, e.g., Manual of Policies and Procedures, No. 02-00-105, Offender Correspondence §§ 7 and 8 (Indiana Dep't of Corrections, Jan. 1, 1984) (providing for differing treatment of general and confidential or privileged correspondence); Admin. Regulations, No. 750, § V D (State of Nevada Dep't of Prisons, Aug. 8, 1984) (requiring presence of inmate during inspection of privileged correspondence, while no such requirement exists for inspection of general correspondence); Wash. Admin. Code § 137-48-030 (1983) (general mail may be inspected at any time, but mail pertaining to legal matters may be inspected only in the presence of the inmate and shall not be read without a search warrant).

9. See *Meadows v. Hopkins*, 713 F.2d 206, 208 n.3, 211 (6th Cir. 1983) (reading incoming and outgoing general correspondence, and censoring prohibited statements therein, does not violate the constitutional rights involved); *Jones v. Diamond*, 594 F.2d 997, 1014-15 (5th Cir. 1979) (upholding censorship of both incoming and outgoing general correspondence as constitutionally permissible); *Feeley v. Sampson*, 570 F.2d 364, 374 (1st Cir. 1978) (finding prison officials constitutionally may monitor inmate general correspondence); *Smith v. Shimp*, 562 F.2d 423, 424-26 (7th Cir. 1977) (spot-checking and reading all incoming and outgoing nonprivileged mail does not violate constitutional rights); see also prison regulations cited *supra* note 8.

10. See *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977) ("correspondence from attorneys-at-law, courts, government officials . . . is privileged mail, and scrutiny of it by prison officials is restricted under the First and Sixth Amendments"); *Stover v. Carlson*, 413 F. Supp. 718, 723 (D. Conn. 1976) ("the channels of communications to and from those agencies with important and immediate responsibility for the fact of an inmate's incarceration remain entirely free of prison staff surveillance, except for the minimum intrusion of opening in the inmate's presence to check for contraband without reading contents"); Comment, *A Giant Step Backwards: The Supreme Court Speaks Out On Prisoners' First Amendment Rights*, 70 Nw. U. L. Rev. 352, 354 (1975) ("inmate correspondence with courts, public officials, and lawyers has received preferential treatment").

11. See *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977).

12. See *Taylor v. Sterrett*, 532 F.2d 462, 473-74 (5th Cir. 1976) (parole and probation departments); *Stover v. Carlson*, 413 F. Supp. 718, 723 (D. Conn. 1976) (Justice Department and state and local prosecuting authorities).

13. See *Laaman*, 437 F. Supp. at 322.

14. See cases cited *supra* note 10; see, e.g., Admin. Regulations, No. 750, §§ V F1(d) and V D2(b) (State of Nevada Dep't of Prisons, Aug. 8, 1984); Policy Statement, Manual of Policies and Procedures, No. 02-00-105, Offender Correspondence (Indiana Dep't of Corrections, Dec. 16, 1983).

15. The Federal Bureau of Prisons defines media as:

Persons who are substantially employed in the business of gathering or reporting news for (a) a newspaper qualifying as a general circulation newspaper in the community to which it publishes, (b) news magazines having a substantially

within either the general or privileged category.¹⁶ Although the media is not directly responsible for the prisoner's incarceration, they may provide an alternative means of communications with those who are. The answer depends upon interpretation of the Supreme Court's decisions in *Procunier v. Martinez*¹⁷ and *Pell v. Procunier*.¹⁸ In *Pell*, the Court held that personal contact with members of the media could be restricted¹⁹ because written correspondence afforded prisoners an alternative means of communication ("alternative means test")²⁰ with these correspondents. Some courts hold that media mail is privileged and, as such, should not be subject to censorship regulations under the *Martinez* test.²¹ One court finding prisoner correspondence with the media to be nonprivileged,²² however, asserts that the alternative means test of *Pell* allows media mail to be censored.²³

This Note advocates that inmate correspondence with members of the media should be classified as privileged in order to protect the first amendment rights of both prisoners and their correspondents. Part I of this Note discusses general restrictions on the free speech of prisoners and the classification of inmate mail. Part II addresses the conflict concerning the classification of prisoner correspondence with the media as privileged, concludes that a proper reading of Supreme Court guidelines in this area should result in a finding that media mail is privileged, and warns of the possible chilling effect of a finding to the contrary on both prisoners and their correspondents.

national circulation being sold by newsstands to the general public and by mail circulation, (c) national or international news services (d) radio and television news programs of stations holding Federal Communication Commission Licenses.

U.S. Dep't. of Justice, Bureau of Prisons, Policy Statement No. 1220.6/7300.96, Inmate Correspondence Interviews With Representatives of the Press and News Media, § 4(a)(1), June 10, 1974 (quoted in *Taylor v. Sterrett*, 532 F.2d 462, 481 n.28 (5th Cir. 1976)).

16. Compare *Guajardo v. Estelle*, 580 F.2d 748, 759 (5th Cir. 1978) (holding media mail privileged) with *Gaines v. Lane*, 790 F.2d 1299, 1306-07 (7th Cir. 1986) (holding media mail not privileged). Prison regulations also differ in their treatment of media mail. Compare Policy Directive, No. PD-BCF-63.03 (Mich. Dep't of Corrections, March 19, 1985) (treating media mail as privileged correspondence) with Policies and Procedures, No. 16.1 (State of Maine Dep't of Corrections, May 30, 1986) (excluding media mail from privileged category).

17. 416 U.S. 396 (1974).

18. 417 U.S. 817 (1974).

19. See *id.* at 827-28.

20. See *id.*; *infra* notes 109-22 and accompanying text.

21. See *Taylor v. Sterrett*, 532 F.2d 462, 481-82 (5th Cir. 1976); *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984).

22. See *Gaines v. Lane*, 790 F.2d 1299, 1307 (7th Cir. 1986).

23. See *Gaines*, 790 F.2d at 1306-07 (without discussing the alternative means available, the Seventh Circuit stated that the inmates have other avenues for communicating with the general public).

I. RESTRICTIONS ON PRISONER RIGHT TO CORRESPOND

Prior to *Procunier v. Martinez*,²⁴ the judiciary avoided involvement in prison administration issues,²⁵ citing reasons that included separation of powers,²⁶ the benches' inability to deal with prison administrative problems,²⁷ the difficulty of prison administration,²⁸ prison officials' expertise in this area,²⁹ federalism,³⁰ and the notion that such officials should be afforded deference.³¹ As a result, prior to 1974, lower courts generally utilized a variety of approaches to the problem of censorship of prisoner mail,³² most relying on rationales involving "prisoner's rights."³³ For example, one prohibited censorship of mail between an inmate and the court based on the inmate's right of access to the courts,³⁴ while another forbade censorship of mail between an inmate and his attorney based upon the inmate's right to counsel.³⁵

In 1974, the Supreme Court applied the first amendment freedom of speech clause to a prisoner mail issue for the first time in *Procunier v. Martinez*.³⁶ Under the *Martinez* test, prisons may place a restriction on

24. 416 U.S. 396 (1974).

25. See *Feeley v. Sampson*, 570 F.2d 364, 371 (1st Cir. 1978); *Main Road v. Aytch*, 522 F.2d 1080, 1085-86 (3d Cir. 1975); *Cole v. Snow*, 586 F. Supp. 655, 660 (D. Mass. 1984), *aff'd in part, vacated and remanded in part on other grounds*, 771 F.2d 556 (1st Cir. 1985).

26. See *Martinez*, 416 U.S. at 405; *Goff v. Nix*, 803 F.2d 358, 362 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 115 (1987); *Meadows v. Hopkins*, 713 F.2d 206, 209-10 (6th Cir. 1983); *Feeley*, 570 F.2d at 371; *Wooden v. Norris*, 637 F. Supp. 543, 555 (M.D. Tenn. 1986).

27. See *Martinez*, 416 U.S. at 405; *Main Road*, 522 F.2d at 1085.

28. See *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); *Bumgarner v. Bloodworth*, 768 F.2d 297, 300-01 (8th Cir. 1985).

29. See *Pell v. Procunier*, 417 U.S. 817, 827 (1974); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1018 (2d Cir. 1985).

30. See *Martinez*, 416 U.S. at 405; *Main Road*, 522 F.2d at 1085; *Hall v. Maryland*, 433 F. Supp. 756, 778-79 (D. Md. 1977), *affirmed in part, rev'd and remanded in part on other grounds sub nom. Carter v. Mandel*, 573 F.2d 172 (4th Cir. 1978).

31. See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam).

32. Some courts deferred to prison officials when confronted with constitutional challenges to censorship of prisoner mail. See, e.g., *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964). Another required that censorship of inmate mail be supported by a rational and constitutionally accepted concept of a prison system. See *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (en banc) (censorship of mail between an inmate and his attorney does not satisfy this standard), *cert. denied*, 405 U.S. 978 (1972). Others have required a "compelling state interest" to justify censorship of inmate mail. See, e.g., *Jackson v. Godwin*, 400 F.2d 529, 530, 541-42 (5th Cir. 1968) (denying prisoner the right to receive newspapers and magazines is not justified by a compelling state interest); *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901, 905 (S.D.N.Y. 1970) (prison restriction on prisoners' right to receive newsletter not supported by a compelling state interest).

33. See *Procunier v. Martinez*, 416 U.S. 396, 408 (1974).

34. See *Coleman v. Peyton*, 362 F.2d 905, 906-07 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966).

35. See *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (en banc), *cert. denied*, 405 U.S. 978 (1972).

36. 416 U.S. 396 (1974).

prisoner mail if it furthers the governmental interests of security, order, or rehabilitation³⁷ and is no greater than necessary to effectuate that legitimate governmental interest.³⁸

In developing this two-part analysis, the Court emphasized the first amendment interests of persons corresponding with prisoners and did not distinguish between authors and recipients of inmate correspondence.³⁹ The *Martinez* Court also noted that prison officials must be given some latitude in this area in order to administer their duties properly.⁴⁰ Thus, under *Martinez*, prison officials need not show that harm is certain to follow if a certain piece of inmate mail is left uncensored.⁴¹ Safeguards such as notification of censorship to intended recipients of censored mail, along with an opportunity to object,⁴² however, must be in place to control the discretion exercised by prison officials over censorship of prisoner mail.⁴³

In the years following the *Martinez* decision, courts have justified a variety of prisoner mail restrictions based on the existence of at least one of the three governmental interests enumerated by the *Martinez* Court.⁴⁴ For example, some have found that prisoner correspondence implicates security interests because it provides the opportunity for infiltration into the prison of contraband⁴⁵ and communications, such as escape plans, likely to threaten institutional security.⁴⁶ Others have cited the interest in maintaining prison order to justify censorship, reasoning that the mails could be used to stir up prison violence,⁴⁷ create institutional ten-

37. *See id.* at 413-14.

38. *See id.*

39. *See id.* at 408-09 (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305-07 (1965)).

40. *See id.* at 414; *see also* *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. . . .").

41. *See Martinez*, 416 U.S. at 414.

42. *See id.*; *Ramos v. Lamm*, 639 F.2d 559, 581 (10th Cir. 1980) (citing *Martinez*, 416 U.S. at 418-19), *cert. denied*, 450 U.S. 1041 (1981); *Taylor v. Sterrett*, 532 F.2d 462, 466 (5th Cir. 1976) (discussing *Martinez*).

43. *See Martinez*, 416 U.S. at 417-18; *Pittman v. Hutto*, 448 F. Supp. 61, 62 (E.D. Va. 1978), *aff'd*, 594 F.2d 407 (4th Cir. 1979).

44. *See, e.g.*, *Meadows v. Hopkins*, 713 F.2d 206, 210-11 (6th Cir. 1983); *Feeley v. Sampson*, 570 F.2d 364, 374 (1st Cir. 1978); *Smith v. Shimp*, 562 F.2d 423, 426-27 (7th Cir. 1977).

45. *See Wolff v. McDonnell*, 418 U.S. 539, 574-77 (1974); *Parrish v. Johnson*, 800 F.2d 600, 603 (6th Cir. 1986); *see also* *Guajardo v. Estelle*, 568 F. Supp. 1354, 1361 (S.D. Tex. 1983) (citing Texas Department of Corrections' definition of contraband as "physical items 'that present a substantial danger to the safety or security of staff, inmates, or the institution'").

46. *See Safley v. Turner*, 777 F.2d 1307, 1312 (8th Cir. 1985) (escape plans), *aff'd in part, rev'd in part on other grounds*, 107 S. Ct. 2254 (1987); *Heimerle v. Attorney Gen.*, 575 F. Supp. 1175, 1178 (S.D.N.Y. 1983) (escape and riot plans), *rev'd on other grounds*, 753 F.2d 10 (2d Cir. 1985).

47. *See Safley*, 777 F.2d at 1312 (riots); *Cavey v. Levine*, 435 F. Supp. 475, 482-83 (D.

sion,⁴⁸ and thwart the enforcement of discipline.⁴⁹ Last, courts have pointed to the threat against prison rehabilitative efforts evident in unrestricted mail to "person[s] whom the prison officials believe [would] deter rehabilitation."⁵⁰ Because prisoner correspondence implicates the three governmental interests enumerated by the *Martinez* Court,⁵¹ little constitutional protection is available to most prisoner mail.⁵²

Two categories of prisoner mail have developed, however, as courts and prison officials have faced the issue of censorship: general or non-privileged correspondence,⁵³ and privileged correspondence.⁵⁴ General correspondence, such as prisoner mail to and from family, friends or clergy,⁵⁵ may be opened, read and even confiscated by prison officials without violating the first amendment rights of prisoners or their correspondents.⁵⁶

Privileged correspondence requires different treatment; when inmate mail is handled by prison officials, the prisoner's constitutional right of access to courts,⁵⁷ which includes the prisoner's right to effective assistance of counsel⁵⁸ and to petition the government for redress of grievances,⁵⁹ must receive special protection.⁶⁰ Consequently, correspondence

Md. 1977) (citing *Mims v. Shapp*, 399 F. Supp. 818 (W.D. Pa. 1975), *vacated on other grounds*, 541 F.2d 415 (3d Cir. 1976)), *aff'd*, 580 F.2d 1047 (4th Cir. 1978).

48. See *Vester v. Rogers*, 795 F.2d 1179, 1183 (4th Cir. 1986) (limiting correspondence between inmates in different penal institutions "as a means of reducing institutional tensions"), *cert. denied*, 107 S. Ct. 3189 (1987).

49. See *Martinez v. Oswald*, 425 F. Supp. 112, 115 (W.D.N.Y. 1977) ("[E]xtensive press attention to an inmate may result in his becoming a 'public figure' within the prison society with a disproportionate degree of notoriety and influence among his fellow inmates. Because of this notoriety and influence, these inmates may become the source of disciplinary problems.") (citing *Pell v. Procunier*, 417 U.S. 817, 831-32 (1974)).

50. *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970) (justifying restrictions on correspondence with persons outside the prison).

51. See *Procunier v. Martinez*, 416 U.S. 396, 412-13 (1974); see also *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) (correspondence may be a vehicle for contraband); *Feeley v. Sampson*, 570 F.2d 364, 374 (1st Cir. 1978) (escape plans may be formulated through the mails); *Smith v. Shimp*, 562 F.2d 423, 426 (7th Cir. 1977) (same).

52. See *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977).

53. See, e.g., *Policies and Procedures*, No. 16.2, § II A (State of Maine Dep't of Corrections, May 7, 1984) ("General correspondence is mail between an inmate and someone other than those approved for privileged correspondence.").

54. See, e.g., *Policies and Procedures*, No. 16.1, § 3 (State of Maine Dep't of Corrections, May 30, 1986) ("Privileged Correspondence: Written communication from an inmate to elected officials, attorneys, persons within the judicial system, and government officials.").

55. See *supra* note 53.

56. See *supra* note 9 and accompanying text.

57. See *Ex parte Hull*, 312 U.S. 546, 549 (1941); *Washington v. James*, 782 F.2d 1134, 1138 (2d Cir. 1986); *Taylor v. Sterrett*, 532 F.2d 462, 473 (5th Cir. 1976); *McDonough v. Director of Patuxent*, 429 F.2d 1189, 1192 (4th Cir. 1970) (citing *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966)).

58. See *Taylor v. Sterrett*, 532 F.2d 462, 473 (5th Cir. 1976); *McDonough v. Director of Patuxent*, 429 F.2d 1189, 1192 (4th Cir. 1970).

59. See *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

60. See *Taylor*, 532 F.2d at 473-74; *Pearson v. King*, No. 81-1878, (D. Mass. June 18,

with those persons or agencies directly involved with these prisoner rights may not be read by prison officials.⁶¹ Government agencies given privileged correspondent status are those "with important and immediate responsibility for the fact of an inmate's incarceration,"⁶² and include the Justice Department,⁶³ state or local prosecuting authorities,⁶⁴ and probation or parole officers.⁶⁵

The concept of privileged mail derives from Supreme Court reasoning in *Ex parte Hull*, decided in 1941.⁶⁶ In *Hull*, the Court held that because prison officials may not impair or abridge a prisoner's right of access to courts,⁶⁷ prisoners retain the right to uninhibited written correspondence with the courts.⁶⁸ Prisoners may use this right to seek redress for violations of their constitutional rights.⁶⁹ The availability of unimpeded written correspondence with these privileged sources⁷⁰ is essential to ensure fair judicial proceedings.⁷¹ It also provides a means by which unconstitutional prison conditions may be exposed.⁷²

When mail is sent by a prisoner to a privileged correspondent, prison officials may only ascertain whether such mail is correctly addressed,⁷³ because the opening of outgoing inmate mail to these persons or agencies is not in furtherance of the substantial government interests involved in prisons.⁷⁴ "[M]ail [addressed to privileged sources which contains] con-

1982) (LEXIS, Genfed library, Dist file); *Stover v. Carlson*, 413 F. Supp. 718, 722 (D. Conn. 1976); see also *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977) (establishing that prison officials may open privileged incoming mail and inspect it for contraband only in the inmate's presence; outgoing mail to privileged sources may not be opened).

61. See *Wolff v. McDonnell*, 418 U.S. 539, 574-77 (1974); *Pearson v. King*, No. 81-1878, (D. Mass. June 18, 1982) (LEXIS, Genfed library, Dist file); *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977).

62. *Stover v. Carlson*, 413 F. Supp. 718, 723 (D. Conn. 1976).

63. See *id.*

64. See *Taylor*, 532 F.2d at 475; *Stover*, 413 F. Supp. at 723.

65. See *Meadows v. Hopkins*, 713 F.2d 206, 208-09 (6th Cir. 1983); *Taylor*, 532 F.2d at 475.

66. 312 U.S. 546 (1941); see *Taylor*, 532 F.2d 462, 470-71 (5th Cir. 1976).

In *Hull*, the Supreme Court invalidated a prison regulation allowing prison officials to inspect legal documents addressed to the courts to determine whether they were properly drafted. See *Hull*, 312 U.S. at 549. The Court ruled that this procedure abridged the inmate's right of access to the courts. See *id.*

67. See *Hull*, 312 U.S. at 549.

68. See *id.*

69. *Procurier v. Martinez*, 416 U.S. 396, 419 (1974).

70. See *supra* notes 57-61 and accompanying text.

71. See *Taylor v. Sterrett*, 532 F.2d 462, 475 (5th Cir. 1976).

72. See *id.* at 471 (" 'letters addressed to courts, public officials, or an attorney when a prisoner challenges the . . . conditions of his incarceration' are '[s]ui generis in both logic and the case law' ") (quoting *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (en banc), cert. denied, 405 U.S. 978 (1972)). The right of access to the courts is necessary to contest the constitutionality of prison conditions. See *id.* at 472-73.

73. See *id.* at 480.

74. See *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982); *Taylor*, 532 F.2d at 473-74.

traband or information about illegal activities will be treated by the recipients in a manner that cannot cause harm.'"⁷⁵ Thus, inmates are permitted to seal outgoing mail to privileged correspondents before it is sent to the prison mail clerk.⁷⁶ Only a warrant based upon probable cause to believe the correspondence contains evidence of illegal activity⁷⁷ would permit prison officials to open such outgoing mail.⁷⁸

Incoming mail from privileged sources may not be read by prison officials, but may be opened and inspected for contraband in the presence of the inmate when external screening procedures are insufficient to detect contraband.⁷⁹ The prisoner presence requirement prevents prison staff from reading the privileged correspondence while ensuring prison security.⁸⁰

75. *Davidson*, 694 F.2d at 53 (quoting *Taylor*, 532 F.2d at 474).

76. See *Meadows v. Hopkins*, 713 F.2d 206, 209 (6th Cir. 1983) (citing Bureau of Prisons Regulation, 28 C.F.R. § 540.2(c) (1981), which permits inmates to seal outgoing "special mail"); see also *Jones v. Diamond*, 594 F.2d 997, 1014 (5th Cir. 1979) ("[o]utgoing mail to . . . licensed attorneys, courts, and court officials must be sent unopened"), *cert. dismissed*, 453 U.S. 950 (1981); *Smith v. Shimp*, 562 F.2d 423, 424 (7th Cir. 1977) ("Jail personnel also spot-check the contents of all outgoing mail except 'privileged correspondence,' which may be sealed by the detainee prior to submission for mailing.").

77. See, e.g., *Meadows v. Hopkins*, 713 F.2d 206, 211 (6th Cir. 1983) (evidence of illegal activity through inmate mail includes threats and matters prohibited by law); *Smith v. Shimp*, 562 F.2d 423, 424 (7th Cir. 1977) (same); *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984) (escape plans or plans to harm someone); *Heimerle v. Attorney Gen.*, 575 F. Supp. 1175, 1178 (S.D.N.Y. 1983) (threats and matters prohibited by law may possibly be transmitted through inmate mail), *rev'd on other grounds*, 753 F.2d 10 (2d Cir. 1985); *Cavey v. Levine*, 435 F. Supp. 475, 483 (D. Md. 1977) (threats to, and abuse of, former victims), *aff'd sub nom. Cavey v. Williams*, 580 F.2d 1047 (4th Cir. 1978).

78. See *Guajardo v. Estelle*, 580 F.2d 748, 759 (5th Cir. 1978) ("If [prison] officials have reason to believe that a particular prisoner or [privileged source] is using the mail to violate the law or threaten security, they may, upon a showing of probable cause, obtain a search warrant to read and open the mail."); *Burton v. Foltz*, 599 F. Supp. 114, 117 (E.D. Mich. 1984) ("[I]f department personnel suspect some [privileged source] is aiding a resident in some illegal plan, they may hold the letter and obtain a search warrant."); *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977) (rules on treatment of inmate mail are "subject to the Fourth Amendment, whereby, if the authorities satisfy its requirements, privileged mail may be searched and seized").

79. See *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974); *Procurier v. Martinez*, 416 U.S. 396, 424-25 (1974) (Marshall, J., concurring); *Meadows v. Hopkins*, 713 F.2d 206, 209 (6th Cir. 1983); *Jensen v. Klecker*, 648 F.2d 1179, 1182 (8th Cir. 1981); see also *Taylor v. Sterrett*, 532 F.2d 462, 480-81 (5th Cir. 1976) ("It is essential that prison officials have the discretion to open and inspect envelopes from any source when they feel that external screening is insufficient to detect contraband."); Wash. Admin. Code § 137-48-030 (1983) (mail touching on legal matters shall be inspected only in the presence of the inmate and shall not be read without a search warrant); Admin. Regulations, No. 750 (State of Nevada Dep't of Prisons, Aug. 8, 1984) (requiring presence of inmate during inspection of privileged correspondence).

External screening includes physical tests such as manipulation and fluoroscoping letters. See *Procurier v. Martinez*, 416 U.S. 396, 424-25 (1974) (Marshall, J., concurring); *Marsh v. Moore*, 325 F. Supp. 392, 395 (D. Mass. 1971).

80. See *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974); *Harrod v. Halford*, 773 F.2d 234, 235 (8th Cir. 1985) (citing *Wolff v. McDonnell*), *cert. denied*, 476 U.S. 1143 (1986);

II. MEDIA MAIL SHOULD BE PRIVILEGED

Upon incarceration, prisoners totally forfeit some constitutional rights, such as the right to associate, deemed inconsistent with the purposes of the correctional system.⁸¹ Prisoners, however, always retain certain "fundamental" rights,⁸² although these may be curtailed to address legitimate penological needs.⁸³ These rights include the freedom of speech under the first amendment.⁸⁴ Thus, it is not disputed that prison inmates have the freedom under the first amendment to correspond with members of the media by mail.⁸⁵ In fact, prisoners' freedom and ability to write letters is noted as an indispensable form of communication,⁸⁶ as their telephone and visitation contact with those outside the confines of the institution are drastically curtailed.⁸⁷ First amendment jurisprudence, however, dictates that reasonable restrictions on the time, place and manner of the exercise of free speech are permissible, even in a free society, if they further legitimate governmental interests.⁸⁸ A balancing

Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976); Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir.), *cert. denied*, 418 U.S. 910 (1974).

81. See Pell v. Procunier, 417 U.S. 817, 822 (1974) (citing Price v. Johnston, 334 U.S. 266, 285 (1948)). For example, prison officials may properly restrict a prisoner's right of association and right to communicate by refusing to allow the prisoner to leave the institution temporarily to exercise these rights. See *id.* at 823.

82. See, e.g., Estelle v. Gamble, 429 U.S. 97, 102 (1976) (eighth amendment protection from cruel and unusual punishment is retained by the incarcerated); Meachum v. Fano, 427 U.S. 215, 225 (1976) (due process); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (due process and equal protection); Cruz v. Beto, 405 U.S. 319, 322 (1972) (freedom of religion); Johnson v. Avery, 393 U.S. 483, 485 (1969) (access to the courts); Lee v. Washington, 390 U.S. 333 (1968) (equal protection of laws).

83. See Procunier v. Martinez, 416 U.S. 396, 413-14 (1974).

84. Pell v. Procunier, 417 U.S. 817, 822 (1974) ("a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"); accord Safley v. Turner, 777 F.2d 1307, 1311 (8th Cir. 1985), *modified on other grounds*, 107 S. Ct. 2254 (1987); Smith v. Shimp, 562 F.2d 423, 425 (7th Cir. 1977). See generally, Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87 (1971).

85. See Nolan v. Fitzpatrick, 451 F.2d 545, 547 (1st Cir. 1971) (prisoners retain "the right to send letters to the press concerning prison matters").

86. See Martinez, 416 U.S. at 426 (Marshall, J., concurring) ("The mails provide one of the few ties inmates retain to their communities or families—ties essential to the success of their later return to the outside world."); Taylor v. Sterrett, 532 F.2d 462, 481 (5th Cir. 1976) ("correspondence is a principal method available to prisoners to communicate with private and public individuals or entities"); Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971) (en banc) ("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 more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation.") (quoting Palmigiano v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) quoting Note, *The Right of Expression in Prison*, 40 S. Cal. L. Rev. 418 (1967)), *cert. denied*, 405 U.S. 978 (1972).

87. See, e.g., Pell v. Procunier, 417 U.S. 817, 823-25 (1974) (visits curtailed); Wooden v. Norris, 637 F. Supp. 543, 558 (M.D. Tenn. 1986) (restrictions on telephone use); Robinson v. Palmer, 619 F. Supp. 344, 348 (D.D.C. 1985) (restrictions on visitation).

88. See Pell, 417 U.S. at 826; *cf.*, Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (upholding an anti-noise ordinance as a reasonable time, place and manner restriction); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (acknowledging that the state has

of these interests indicates that to avoid constitutional violations, written correspondence between inmates and the media be classified as privileged mail.

Disagreement exists over the proper classification of prisoner correspondence with the media for purposes of first amendment protection from censorship. Is prisoner correspondence with the media to be privileged,⁸⁹ or is such mail to be general correspondence that may be opened and read by prison officials?⁹⁰ The answer depends upon the application of *Pell* and *Martinez*.⁹¹

A. *Martinez Test Mandates Privileged Status For Media Mail*

Those who advocate protection of media mail to and from prisoners view the problem from the perspective of the correspondent,⁹² following the Supreme Court's approach to general correspondence in *Procunier v. Martinez*.⁹³ Accordingly, the censorship of media mail abridges the free speech rights of media correspondents,⁹⁴ and this type of correspondence should therefore be privileged.⁹⁵

When confronting censorship of prisoner correspondence with the media, courts should apply the Supreme Court's governmental-interest test set forth in *Procunier v. Martinez*⁹⁶ because it focuses on the interference with the nonprisoner correspondent's right of free speech.⁹⁷ According to the *Martinez* test, governmental interference with free speech of media correspondents must be confined to the least intrusive methods necessary

the right to regulate and impose nondiscriminatory, reasonable time, place and manner restrictions on the use of city streets); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941) (upholding a state law requiring a licence to parade based on analysis of time, place and manner considerations).

89. See *Guajardo v. Estelle*, 580 F.2d 748, 759 (5th Cir. 1978); *Taylor v. Sterrett*, 532 F.2d 462, 480-82 (5th Cir. 1976); *Burton v. Foltz*, 599 F. Supp. 114, 116-17 (E.D. Mich. 1984).

90. See *Gaines v. Lane*, 790 F.2d 1299, 1306-07 (7th Cir. 1986).

91. Compare *Taylor*, 532 F.2d at 480-81 (applying Supreme Court's tests in *Procunier v. Martinez*, 416 U.S. 396 (1974), from the standpoint of the inmates' first amendment interests) with *Gaines*, 790 F.2d at 1307 (applying the alternative means test of *Pell v. Procunier*, 417 U.S. 817 (1974), and holding that media mail need not be given special status since inmates have alternative means of communication with the public).

92. See *Burton v. Foltz*, 599 F. Supp. 114, 116-17 (E.D. Mich. 1984).

93. 416 U.S. 396, 407-09 (1974).

94. See, e.g., *Guajardo v. Estelle*, 580 F.2d 748, 753-54 (5th Cir. 1978) (analyzing the Texas Department of Corrections correspondence rules based upon "the limited situations in which prison regulations could have the effect of inhibiting the first amendment rights of persons wishing to correspond with inmates"); *Burton*, 599 F. Supp. at 116 ("The inspection of mail from residents to the media infringes on both the rights of residents and the press because it raises the possibility of censorship.").

95. See *Burton*, 599 F. Supp. at 117.

96. 416 U.S. 396, 413 (1974); *supra* notes 36-38 and accompanying text.

97. See *Burton*, 599 F. Supp. at 116 ("The inspection of mail from [prison] residents to the media infringes on both the rights of residents and the press because it raises the possibility of censorship.") (citing *Martinez*, 416 U.S. at 408).

to protect legitimate government interests,⁹⁸ established in light of the special characteristics of the prison environment,⁹⁹ including high tension, confinement and aggressive feelings.¹⁰⁰

The least restrictive means requirement of *Martinez* requires that *outgoing* media mail be protected from censorship. The risk that inmates might be sending contraband to media representatives presents at best a minimal concern to prison officials.¹⁰¹ Furthermore, a media correspondent is unlikely to become involved in escape plans or similar threats to prison security.¹⁰² Inmates therefore should be permitted to seal outgoing letters to the media. If, however, prison officials determine that a particular inmate presents a higher security risk, that inmate can be required to have his outgoing mail inspected in his presence, but not read, before it is sealed.¹⁰³ Therefore, permitting prison officials to read outgoing media mail exceeds the bounds of what is necessary to further these interests.¹⁰⁴

Treatment of *incoming* media correspondence as privileged likewise satisfies the *Martinez* test. Opening and inspecting the correspondence

98. See *supra* notes 37-38 and accompanying text.

99. See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 864 (1974) (Powell, J., dissenting) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)); *Pell v. Procunier*, 417 U.S. 817, 837 (1974) (Douglas, J., dissenting); *Procunier v. Martinez*, 416 U.S. 396, 424 (1974) (Marshall, J., concurring); see also *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) ("Prisons, it is obvious, differ in numerous respects from free society. They . . . are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance."); *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974) (a prison is a "closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so"); cf. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969) (applying First Amendment rights "in light of the special characteristics of the school environment").

100. See *Wolff*, 418 U.S. at 562 (tension, frustration, resentment and despair characterize prison atmosphere); *Nolan v. Fitzpatrick*, 451 F.2d 545, 548 (1st Cir. 1971) (aggressive feelings and grudges); *Jackson v. Ward*, 458 F. Supp. 546, 557 (W.D.N.Y. 1978) (penal confinement is restrictive).

101. See *Martinez*, 416 U.S. at 424 (Marshall, J., concurring) (state's concern that contraband may be smuggled into prison through the mail does not justify reading outgoing mail); *Smith v. Shimp*, 562 F.2d 423, 427 (7th Cir. 1977) (conceding that "contraband leaving the jail poses no substantial threat to [jail] security"); *Nolan v. Fitzpatrick*, 451 F.2d 545, 549 (1st Cir. 1971) ("the communication which allegedly creates the danger to security does so only when it returns to the prison"); *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984) ("Contraband is certainly a serious problem in a correctional setting, but the main problem is to keep it from *entering*, rather than leaving, the correctional facility.") (emphasis in original).

102. See *supra* note 108 and accompanying text.

103. See *Burton*, 599 F. Supp. at 116 (rule requiring that media mail be sent unsealed not applicable to all residents in segregation).

104. Other procedural precautions, such as verification procedures, may be necessary to assure that the prisoner's correspondent actually is a member of the media. Cf. *Wolff v. McDonnell*, 418 U.S. 539, 576-77 (1974) (finding a regulation requiring an attorney to identify himself to prison authorities prior to corresponding with an inmate, thereby permitting officials the opportunity to ascertain whether the correspondent is actually an attorney, would not restrict any constitutional rights).

for contraband in the prisoner's presence (to guarantee that the mail will not be read) only when external screening proves insufficient—the treatment given to privileged mail—offers the least restrictive means of handling *incoming* mail.¹⁰⁵ In the case of prisoner correspondence with the media, such restrictions do not compromise prison security or order.¹⁰⁶ Contraband will be detected through inspection,¹⁰⁷ and it is unlikely that incoming mail from media sources would contain any written material that would jeopardize the security of the prison if left uncensored.¹⁰⁸

The alternative means test¹⁰⁹ set forth in *Pell v. Procunier*,¹¹⁰ the case in which the Supreme Court first faced the question of prisoner contact with the media,¹¹¹ has been interpreted to deny first amendment protection of media mail.¹¹² *Pell* holds that a prison regulation restricting non-written personal contact between certain inmates and members of the media did not violate the first amendment rights of the inmates because the inmates had access to the press through written correspondence.¹¹³ The decision sets forth a test under which a prisoner's alternative means of communication constitutes a factor to be considered in the balancing of his first amendment rights against the governmental interests in prison security, order and rehabilitation that underlie restrictions on prisoners' communication.¹¹⁴

The alternative means recognized by the *Pell* Court was the availability of written correspondence with the press.¹¹⁵ Because a prisoner could write to members of the media, the regulation restricting his personal contact with them did not abridge his freedom of speech under the first amendment.¹¹⁶ Moreover, the Court in *Pell* limited the use of the alter-

105. See *supra* notes 79-80 and accompanying text.

106. See *infra* notes 107-08 and accompanying text.

107. See *Procunier v. Martinez*, 416 U.S. 396, 424-25 (1974) (Marshall, J., concurring); *Taylor v. Sterrett*, 532 F.2d 462, 477 (5th Cir. 1976); see also *supra* note 80 and accompanying text (incoming mail may be opened in presence of inmate).

108. See *Nolan v. Fitzpatrick*, 451 F.2d 545, 549 (1st Cir. 1971) ("the danger that newsmen will participate in escape attempts or assist in transferring contraband from one prisoner to another, is based upon the dubious assumption that newsmen would be willing to cooperate in such projects"); *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984) ("Media representatives, should they desire drugs for some reason, would hardly look to residents in segregation as a source. . . . Also, it is highly unlikely members of the media would aid residents in segregation in an escape plan or in a plan to injure or kill some individual.").

109. See *supra* notes 22-23 and accompanying text.

110. 417 U.S. 817 (1974).

111. See *id.* at 819. *Pell* considered the constitutionality of a prison restriction prohibiting media interviews with specific individual inmates. See *id.*

112. See *Gaines v. Lane*, 790 F.2d 1299, 1307 (7th Cir. 1986).

113. See *id.* at 827-28.

114. See *id.* at 824, 826. According to the Court, "[s]o long as reasonable and effective means of communication" between inmates and the media remain open, "prison officials must be accorded latitude" in restricting personal contact with these visitors. *Id.* at 826 (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

115. See *id.* at 824.

116. See *id.* at 827 & n.5.

native means test to review of claims by the incarcerated, because the relationship between the state and prison inmates is "more intimate than that of a State and a private citizen."¹¹⁷ Thus the availability of alternatives would not justify restrictions on first amendment rights of unincarcerated citizens, the issue analogously dealt with in *Martinez*.¹¹⁸

The Court of Appeals for the Seventh Circuit classified media mail as general correspondence in *Gaines v. Lane*.¹¹⁹ In doing so, the court applied the *Pell* test and found no abridgement of first amendment rights by prison regulations that censor such mail,¹²⁰ so long as alternative means of communication with the general public are available.¹²¹ This court emphasized that the gravity of enforcing prison security justifies policies to open and read incoming and outgoing media mail.¹²²

In concluding that media mail should not be privileged,¹²³ the Seventh Circuit incorrectly approached the problem of prisoner-media correspondence. The *Pell* case must be distinguished from *Gaines* because in *Pell* the Court used the availability of written correspondence to uphold a regulation that restricted visitations by members of the media,¹²⁴ clearly potentially more disruptive than the restriction of correspondence justified in *Gaines*.¹²⁵ The *Gaines* decision makes no mention of the first amendment rights of the media correspondents,¹²⁶ and effectively ignores the Supreme Court's analysis in *Procunier v. Martinez*.¹²⁷

Courts applying the *Pell* test must find an alternative form of communication to written media correspondence in order to allow censorship of such correspondence without constitutional violation.¹²⁸ The Seventh Circuit recognizes prisoners' access to direct correspondence with the executive, legislative, and judicial branches of government as an alternative to media correspondence as a means of seeking redress of their griev-

117. *Id.* at 825-26 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)).

118. *See id.* at 825.

119. 790 F.2d 1299 (7th Cir. 1986).

120. *See id.* at 1306-07.

121. *See id.* An alternative means of communication between inmates and the general public found in *Pell* was visitation with family members, the clergy, friends, and attorneys. *See Pell v. Procunier*, 417 U.S. 817, 824-25 (1974).

122. *See Gaines v. Lane*, 790 F.2d 1299, 1304-07 (7th Cir. 1986).

123. *See id.* at 1306-07.

124. *See Pell v. Procunier*, 417 U.S. 817, 827-28 (1974).

125. *See Taylor v. Sterrett*, 532 F.2d 462, 480 (5th Cir. 1976). *Taylor* states:

A more important difference between *Pell* and this case is that here we are dealing with correspondence rather than with press interviews. A press interview conducted in a prison with a specific inmate is an extraordinary mode of communication. Correspondence with . . . the press is, to the contrary, a singularly common means of communication.

Id.

126. *See Gaines v. Lane*, 790 F.2d 1299, 1306 n.6 (7th Cir. 1986).

127. *See id.* at 1303-07 (discussing *Martinez* but never applying the two-part analysis to justify censorship of prisoner/media mail).

128. *See Pell v. Procunier*, 417 U.S. 817, 824-25 (1974); *see e.g., Gaines*, 790 F.2d at 1307.

ances.¹²⁹ But the existence of this alternative does not address the fact that the prison regulation restricting media mail abridges first amendment rights of the media correspondents.¹³⁰ Even assuming that the alternative means is an effective one, the effect of prison mail regulations on the constitutional rights of the media correspondents still must be confronted.

B. *The Press is a Special Category of Correspondents*

The framers of the Constitution bestowed upon the press an unparalleled role as a vital source of public information.¹³¹ The function of reporting on the activities of government gave rise to the media's special constitutional status,¹³² based on the notion that "[o]nly a free and unrestrained press can effectively expose deception in government."¹³³

Unrestrained reporting on government activity includes reporting on the conditions and activities taking place in state penal institutions.¹³⁴ By informing the public about prison issues, the press educates society on

129. See *Gaines*, 790 F.2d at 1307.

130. See *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); see also *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984) ("In *Martinez* the Supreme Court described the standard by which regulations limiting the use of the mail under the circumstances here described [inspection of inmate mail sent to the media] should be judged").

131. See U.S. Const. amend. I; see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 8-9 (1978) (plurality opinion) (stating that "the role of the media is important; acting as the 'eyes and ears' of the public"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) ("in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of these operations"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) ("An informed public depends on accurate and effective reporting by the news media."); *Time Inc. v. Hill*, 385 U.S. 374, 401 (1967) (the founders guaranteed "the press a favored spot in our free society"); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.").

132. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

133. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); see also *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.").

134. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality opinion) (while holding that media access was not mandated by the first amendment, the Court conceded that the media fills the role of providing information concerning conditions in penal facilities); *KQED, Inc. v. Houchins*, 546 F.2d 284, 285, 296 (9th Cir. 1976) (Hufstedler, J., concurring) ("The newsmen's function is to gather, to collate, and to transmit to a wide public audience all of the information which the public is entitled to know about prison conditions."), *rev'd on other grounds*, 438 U.S. 1 (1978); *Seattle-Tacoma Newspaper Guild, Local No. 82 v. Parker*, 480 F.2d 1062, 1066 (9th Cir. 1973) ("The importance of the media in providing public information about the conduct of [prisons] is undisputed.").

a matter of public concern.¹³⁵ Accurate disclosure of prison practices fosters public awareness crucial to any reform or upgrading of the correctional system.¹³⁶ The press' special constitutional status ensures that this function is fulfilled.¹³⁷

Unrestrained reporting, however, does not imply that the media is completely free from governmental limitation.¹³⁸ The news media has no constitutional entitlement to information from which the general public is excluded, such as the minutes of a prison administration meeting.¹³⁹ Yet because the media's need for access to information is distinguishable from that of the remainder of society,¹⁴⁰ governmental restriction on its operation cannot be severe.¹⁴¹ There are less restrictive means of regulating news media access to prisoners than censorship of their correspondence.¹⁴² Thus, it is improper and unwise to allow prisoner correspondence with members of the media to be censored as general correspondence.

C. *Chilling Effect by Censorship of Media Mail*

Because prison issues are important matters of public interest on

135. See *Houchins*, 438 U.S. at 8 ("conditions in jails and prisons are clearly matters 'of great public importance'") (quoting *Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974)).

The Supreme Court in *Houchins* stated that "[p]enal facilities are public institutions which require large amounts of public funds, and their mission is crucial in our criminal justice system. Each person placed in prison becomes, in effect, a ward of the state for whom society assumes broad responsibility." *Id.*; see also *Seattle-Tacoma Newspaper Guild, Local No. 82 v. Parker*, 480 F.2d 1062, 1066 (9th Cir. 1973) ("Decisions recognizing 'the paramount public interest in a free flow of information to the people concerning public officials, their servants,' are equally applicable in the realm of prison administration.") (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)); *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971) ("the conditions of our prisons is an important matter of public policy").

136. *Cf. Houchins*, 438 U.S. at 8 (media "can be a powerful and constructive force, contributing to remedial action in the conduct of public business"); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (referring to trial publicity, the Court stated: "The press does not simply publish information . . . but guards against the miscarriage of justice. . . ."); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials"); *Seattle-Tacoma Newspaper Guild, Local No. 82 v. Parker*, 480 F.2d 1062, 1066 (9th Cir. 1973) ("it has often been through the zealous efforts of the news media that failures in a particular institution have been exposed").

137. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.").

138. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (plurality opinion) ("like all other components of our society media representatives are subject to limits").

139. See, e.g., *KQED, Inc. v. Houchins*, 546 F.2d 284, 296 (9th Cir. 1976) (Hufstedler, J., concurring specially), *rev'd on other grounds*, 438 U.S. 1 (1978).

140. See *id.* at 286 ("The access needs of the news media and the public differ. Media access, on reasonable notice, may be desirable in the wake of a newsworthy event. . . .").

141. See *Bridges v. California*, 314 U.S. 252, 265 (1941) ("the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society").

142. See *supra* notes 105-08 and accompanying text.

which prisoners are uniquely qualified to report,¹⁴³ prisoners should not be discouraged from speaking out on prison conditions and the conduct of prison officials. The failure to include inmate-media correspondence in the protected category of privileged mail, however, may produce such a "chilling effect"¹⁴⁴ on the freedom of speech enjoyed by both inmates and their media correspondents.¹⁴⁵

Aware that nonprivileged mail is inspected and read outside their presence, prisoners may fear reprisal if they criticize prison officials in their writings to the media.¹⁴⁶ As a result, they may temper or limit their criticisms.¹⁴⁷ This inhibits the free flow of information that underlies the freedom of speech of both prisoners and their correspondents.¹⁴⁸ Moreover, the valuable information concerning prison conditions that can be obtained from inmate letters to the press will be suppressed.¹⁴⁹

Protection of inmate-media mail, in contrast, will ensure that inmate grievances will be conveyed to the public freely and accurately.¹⁵⁰ The public will receive the information necessary to monitor prison condi-

143. See *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971); *O'Connell v. Southworth*, 422 F. Supp. 182, 186 (D.R.I. 1976) (citing *Nolan*, 451 F.2d at 547); *Burnham v. Oswald*, 342 F. Supp. 880, 885 (W.D.N.Y. 1972) (same).

144. See *Procunier v. Martinez*, 416 U.S. 396, 423 (1974) (Marshall, J., concurring) ("A prisoner's free and open expression will surely be restrained by the knowledge that his every word may be read by his jailors and that his message could well find its way into a disciplinary file, be the object of ridicule, or even lead to reprisals.").

145. See *id.*, 416 U.S. at 423-27 ("A similar pall may be cast over the free expression of the inmates' correspondents."); *Taylor v. Sterrett*, 532 F.2d 462, 469 (5th Cir. 1976) (recognizing that the restriction at issue in *Martinez* denied the prisoner's correspondent effective communication by chilling that communication); *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984) ("The inspection of mail from residents to the media infringes on both the rights of residents and the press because it raises the possibility of censorship."); *Heimerle v. Attorney Gen.*, 575 F. Supp. 1175, 1177 (S.D.N.Y. 1983) ("even the reading of mail implicates First Amendment interests because it exerts a potentially chilling effect upon the freedom of expression of the inmates and their correspondents"), *rev'd on other grounds*, 753 F.2d 10 (2d Cir. 1985).

146. See *Taylor v. Sterrett*, 532 F.2d 462, 476 (5th Cir. 1976); *Travis v. Lockhart*, No. 84-309 (E.D. Ark. Apr. 18, 1985) (LEXIS, Genfed library, Dist file) (quoting *Martinez*, 416 U.S. at 424), *aff'd*, 787 F.2d 409 (8th Cir. 1986) (per curiam); *Burton v. Foltz*, 599 F. Supp. 114, 117 (E.D. Mich. 1984); see also, *Cavey v. Levine*, 435 F. Supp. 475, 481 (D. Md. 1977) (disciplinary proceedings brought against inmate for sending correspondence violated the first amendment rights of both the inmate and his correspondent), *aff'd sub nom. Cavey v. Williams*, 580 F.2d 1047 (4th Cir. 1978).

The Supreme Court has recognized generally that the threat of sanctions can chill constitutional rights. See *Procunier v. Martinez*, 416 U.S. 396, 423 (1974) (Marshall, J., concurring); *Mills v. Alabama*, 384 U.S. 214, 222 (1966) (Douglas, J., concurring); *Domrowski v. Pfister*, 380 U.S. 479, 486 (1965); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

147. See *Travis v. Lockhart*, No. 84-309 (E.D. Ark. Apr. 18, 1985) (LEXIS, Genfed library, Dist file) (the prison's reading media mail results in suppression of criticism of prisons and prison officials), *aff'd*, 787 F.2d 409 (8th Cir. 1986) (per curiam).

148. See *supra* note 145 and accompanying text.

149. See *supra* note 146 and accompanying text.

150. See *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) ("[T]he ability to open the mail in the presence of inmates . . . in no way constitute[s] censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence

tions, and the free flow of expression under the first amendment will not be impeded.

CONCLUSION

It is well settled that security, order and rehabilitation represent legitimate governmental interests that limit constitutional freedoms in a prison setting. At the same time, inmates, as well as their nonprisoner correspondents, retain constitutional rights that must be protected from unnecessary interference. In order to balance these competing interests, the Supreme Court developed the governmental-interest and least-restrictive-means tests in *Procunier v. Martinez*.¹⁵¹

When the governmental restriction appears in the form of regulation of prisoner correspondence with members of the media, the least restrictive means to further the government's interest in prisons without abridging the first amendment rights of these nonprisoner correspondents is to treat such mail as privileged correspondence. Because the possible contents of media correspondence are not likely to be used to cause harm, this approach does not put prison security, order, or rehabilitation at risk. Moreover, as a special class of correspondents, the press must be afforded an opportunity to report on prison activities, as such activities constitute a matter of public concern. Finally, censorship of inmate-media mail may produce a "chilling effect" on both prisoners and their correspondents, resulting in the suppression of information that necessarily must flow freely in order for the debate over institutional conditions to remain in the public arena.

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insures that prison officials will not read the mail."); *Taylor v. Sterrett*, 532 F.2d 462, 475 (5th Cir. 1976) (citing *Wolff*, 418 U.S. at 577 (1974)).

151. 416 U.S. 396 (1974); see *supra* notes 36-38 and accompanying text.

