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Prisoners' Free Speech Rights: The Right to Receive Publications

Alan H. Gluck
Washington University School of Law

NOTES

PRISONERS' FREE SPEECH RIGHTS: THE RIGHT TO RECEIVE PUBLICATIONS

I. INTRODUCTION

Federal courts have recently intervened in prison affairs to test the constitutionality of regulations that restrict prisoners' receipt of publications.[1] Due to the lack of Supreme Court guidance, the lower federal courts have taken inconsistent approaches. Many courts have unnecessarily banned publications and thus, perhaps unwittingly, may have retarded inmates' rehabilitation and contributed to the high rates of recidivism. Furthermore, much needless litigation has ensued and will continue until the Court develops a uniform standard for analysis of first amendment free speech rights in the prison context.

This Note considers the appropriate standard for determining whether a ban on prisoners' receipt of publications is constitutional. It first discusses the right to free speech guaranteed by the first amendment and the confusion wrought by the right's emerging role in prison affairs. It then analyzes the standard articulated by the Supreme Court in *Procunier v. Martinez*[2] to test the constitutionality of restrictions on inmates' personal correspondence with those outside the prison community. After a discussion of the standard enunciated in *Pell v. Procunier*[3], in which inmates' visitation rights were at issue, this Note demonstrates how lower federal courts extended but misapplied the *Martinez* test to limit prisoners' receipt of publications. Finally, it reviews the Court's recent decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.*[4]

1. *See, e.g.*, Carpenter v. South Dakota, 536 F.2d 759 (8th Cir. 1976); Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976); Morgan v. LaVallee, 526 F.2d 221 (2d Cir. 1975); Gaugh v. Schmidt, 498 F.2d 10 (7th Cir. 1974) (per curiam); Hopkins v. Collins, 411 F. Supp. 831 (D. Md. 1976), *aff'd in pertinent part*, 548 F.2d 503 (4th Cir. 1977) (per curiam); Cofone v. Manson, 409 F. Supp. 1033 (D. Conn. 1976); Paka v. Manson, 387 F. Supp. 111 (D. Conn. 1974); The Luparar v. Stoneman, 382 F. Supp. 495 (D. Vt. 1974), *appeal dismissed mem.*, 517 F.2d 1395 (2d Cir. 1975); Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974), *aff'd mem.*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); McCleary v. Kelly, 376 F. Supp. 1186 (M.D. Pa. 1974); Gray v. Creamer, 376 F. Supp. 675 (W.D. Pa. 1974); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974).

2. 416 U.S. 396 (1974).

3. 417 U.S. 817 (1974).

4. 97 S. Ct. 2532 (1977).

regarding prisoners' receipt of bulk mail. It concludes that *Jones* is an aberration, and that courts should apply the *Martinez* standard when prisoners' receipt of publications is at issue.

II. FIRST AMENDMENT FREE SPEECH ANALYSIS

A. *Ad Hoc Balancing*

The first amendment,[5] made applicable to the states by the fourteenth,[6] protects free speech.[7] It also protects the correlative right to receive information and ideas.[8] The right to free speech, however, is not absolute;[9] societal interests such as public order and national security qualify the right.[10]

Courts have confronted the complex problem of developing an interpretation of the first amendment that properly balances the competing interests.[11] The Supreme Court first adopted a standard that permitted the

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5. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."

6. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 10 (1964); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925). U.S. CONST. amend. XIV, § 1 provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

7. For a comprehensive discussion of the right to free speech, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) [hereinafter cited as FREEDOM OF EXPRESSION]; Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) [hereinafter cited as *Toward a General Theory*] (subsequently published as T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966)).

8. Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); Martin v. City of Struthers, 319 U.S. 141, 143 (1943). For a discussion of the right to know, see Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

9. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 49 (1961) ("[W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes' . . . ."); American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950) ("We have never held that such freedoms [first amendment rights] are absolute."); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 5 (1965) ("[T]he absolute view has not prevailed within the Court. A majority of the Justices from time to time have recognized some contexts in which government has power to curb speech as such."). *But see, e.g.*, Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) ("The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence.").

10. *See, e.g.*, United States v. Robel, 389 U.S. 258, 267 (1967) ("[W]hile the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests."). In *Robel*, the important governmental interest was national defense. *See Toward a General Theory, supra* note 7, at 907.

11. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Gitlow v. New York, 268 U.S. 652 (1925).

government to limit free speech when its exercise might deleteriously affect the public welfare.[12] The belief that this test allowed too great a restriction on free speech led to the adoption of the "clear and present danger" test,[13] which required an imminent threat to legitimate governmental interests before free speech could be infringed.[14]

Since the 1950 decision in *American Communications Association v. Douds*,[15] the Court has frequently engaged in ad hoc balancing[16] to

12. *See* Gitlow v. New York, 268 U.S. 652, 667 (1925) ("That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."). This doctrine has been labeled the "bad tendency" test. *See Toward a General Theory, supra* note 7, at 909.

13. Justice Holmes articulated the "clear and present danger" test in Schenck v. United States, 249 U.S. 47 (1919). He stated: "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." *Id.* at 52. In Whitney v. California, 274 U.S. 357 (1927), Justice Brandeis elaborated on Justice Holmes' formulation of the test: "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled." *Id.* at 373 (Brandeis, J., concurring).

> [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Id. at 377.

For a discussion of this test, see Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970); McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1203-12 (1959).

14. Whitney v. California, 274 U.S. 357, 373, 377 (1927) (Brandeis, J., concurring).

15. 339 U.S. 382 (1950).

16. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961) ("Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve."); Konigsberg v. State Bar, 366 U.S. 36, 51 (1961) ("Whenever, in such a context, these constitutional protections [the first amendment's protection of free speech as made applicable to the states by the fourteenth] are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved."); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("Decision in this case must finally turn, therefore, on whether the cities . . . have demonstrated so cogent an interest in obtaining and making public the membership lists . . . as to justify the substantial abridgment of associational freedom which such disclosures will effect."). In *Douds* itself the Court stated:

> In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congres-

decide whether the government's interest in prohibiting the expression outweighs the individual's right to free speech.[17] To limit first amendment freedoms, the government must establish a compelling interest in regulating the activity in question[18] and adopt means that do not unnecessarily infringe free speech.[19]

Courts have articulated various standards incorporating the "compelling state interest" and "least restrictive means" requirements.[20] For example, in *United States v. O'Brien*,[21] the Court enunciated a two-prong test whereby a governmental regulation prohibiting symbolic speech is justified if it furthers an important governmental interest unrelated to the suppression of free expression, and if the incidental restriction on free speech is essential to further that interest.[22]

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sional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership.

339 U.S. at 400.

17. 339 U.S. at 400.

18. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

19. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 41 (1976) (per curiam); Schneider v. Smith, 390 U.S. 17, 24 (1968) ("[A]n Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed . . . ."); NAACP v. Button, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). The Court in Shelton v. Tucker, 364 U.S. 479 (1960), stated:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Id. at 488 (footnotes omitted). *See generally* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-93 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

20. *See, e.g.*, cases cited notes 18-19 *supra; cf.* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("[T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.") (first amendment right to freedom of religion was at issue).

21. 391 U.S. 367 (1968). O'Brien was convicted for burning his draft card to symbolize his opposition to the Vietnam War. He contended that Congress had enacted the law to suppress free expression and that it was therefore unconstitutional. The Supreme Court stated that although conduct was involved, the first amendment's protection of free speech applied; however, the presence of communicative intent did not immunize the burning of the draft card from governmental regulation.

B. *Public Forum Doctrine*

The Supreme Court initially rejected the notion that citizens had a constitutional right to use governmental property as a public forum.[23] In *Hague v. CIO*,[24] however, Justice Roberts stated that citizens had historically used streets and parks to assemble and speak and that the state could not interfere with this activity.[25] Although *Hague* was a plurality opinion,[26] Justice Roberts' reasoning was later adopted by courts that reviewed restrictions on citizens' exercise of first amendment speech rights in parks and streets.[27]

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23. Davis v. Massachusetts, 167 U.S. 43 (1897), *aff'g* Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895), which was articulated by Oliver Wendell Holmes. The Supreme Court quoted with approval the following statement by Holmes: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." 167 U.S. at 47 (quoting 162 Mass. at 511, 39 N.E. at 113). The Supreme Court also stated: "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contained the lesser." 167 U.S. at 48.

For a discussion of the public forum doctrine, see Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

24. 307 U.S. 496 (1939).

25. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

26. It is unclear how many justices agreed with Justice Roberts' statement. In his dissent in Saia v. New York, 334 U.S. 558, 568 n.1 (1948), Justice Jackson said that only one, or at most two, justices agreed with Roberts' analysis. Although he did not specify how many justices supported Roberts' approach, Kalven, *supra* note 23, at 14, stated that it was most likely more than two. Whatever the number, it is clear that the members of the Court disagreed on how to analyze the exercise of free speech rights in streets and public parks.

27. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293 (1951); Jamison v. Texas, 318 U.S. 413, 415-16 (1943); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); FREEDOM OF EXPRESSION, *supra* note 7, at 301; Stone, *supra* note 23, at 239.

Whether other public or quasi-public[28] places were public forums remained unresolved until *Brown v. Louisiana*.[29] By protecting the silent protest of five blacks who had entered a public library to express their objections to its segregation policy, the *Brown* plurality extended the public forum doctrine.[30] Because the protest did not disrupt "library activities,"[31] the plurality believed it could not be prohibited[32] even though protests had not traditionally been held in libraries.[33]

Subsequently, the extended public forum doctrine gained popularity.[34]

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28. This Note adopts Emerson's usage of "quasi-public" to denote privately owned places that are "used in such a way as in effect to be dedicated to public use; or the government may have such a relationship to the property or the owner as to stamp the property with governmental attributes." FREEDOM OF EXPRESSION, *supra* note 7, at 307.

29. 383 U.S. 131 (1966). As Stone, *supra* note 23, at 246 n.54, suggests, *Brown*, not Edwards v. South Carolina, 372 U.S. 229 (1963), is the watershed case. Because *Edwards* involved a protest on the South Carolina State House grounds, which were traditionally used as a public forum, it could easily be analogized to cases in which protests were conducted on public streets and in parks, and could be brought within the parameters of the *Hague* doctrine. *See* Adderley v. Florida, 385 U.S. 39, 41 (1966) ("Traditionally, state capitol grounds are open to the public.").

30. Chief Justice Warren and Justice Douglas joined Justice Fortas who stated:

> We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. . . . [This right] certainly include[s] the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be . . . .

383 U.S. at 141-42.

31. *Id.* at 142.

32. *Id.*

33. *See* Stone, *supra* note 23, at 247. After describing Fortas' analysis, he stated: "[T]he important first step had been taken toward acceptance of the view that the right to a public forum could extend, in at least some instances, even to publicly owned property that manifestly was not historically dedicated to the exercise of First Amendment rights." Apparently, whether the activity interfered with a place's normal usage was the prime concern.

34. In Adderley v. Florida, 385 U.S. 39 (1966), the Court upheld the conviction of students who had peacefully protested on jail grounds. Significantly, though, four justices dissented (Chief Justice Warren, Justice Brennan, Justice Douglas, and Justice Fortas). The following excerpt from the dissent explains in greater detail than *Brown* the tenets of the extended public forum doctrine:

> There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put. . . . But this is quite different from saying that all public places are off limits to people with

The Court, in *Flower v. United States*,[35] held that the military could not prevent Flower from peacefully distributing leaflets: although he was on a military base, he was in an area open to the public and the military had no "special interest" in prohibiting the dissemination of leaflets there.[36] The Court clearly expanded the public forum doctrine as articulated in *Hague*. Military bases have traditionally not been associated with the unimpeded exercise of free speech rights.[37] Nevertheless, the Court thought the restriction unjustifiable.[38]

In *Grayned v. City of Rockford*,[39] the Court articulated its test for determining when governmental authorities may infringe first amendment speech rights of persons on public property:[40] "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[41]

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grievances. . . . And it is farther yet from saying that the "custodian" of the public property in his discretion can decide when public places shall be used for the communication of ideas, especially the constitutional right to assemble and petition for redress of grievances. . . . For to place such discretion in any public official, be he the "custodian" of the public property or the local police commissioner . . . is to place those who assert their First Amendment rights at his mercy. It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government. Such power is out of step with all our decisions prior to today where we have insisted that before a First Amendment right may be curtailed under the guise of a criminal law, any evil that may be collateral to the exercise of the right, must be isolated and defined in a "narrowly drawn" statute . . . lest the power to control excess of conduct be used to suppress the constitutional right itself.

Id. at 54-55 (citations omitted).

35. 407 U.S. 197 (1972) (per curiam).

36. *Id.* at 198.

37. In Greer v. Spock, 424 U.S. 828, 838 (1976), the Court said: "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." *See* FREEDOM OF EXPRESSION, *supra* note 7, at 58 ("Access to military installations for purposes of exercising the right of free speech is also subject to different rules than is access to non-military public places.").

38. 407 U.S. at 198 ("The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street.").

39. 408 U.S. 104 (1972).

40. Grayned had been convicted under a municipal ordinance prohibiting "noisy or diversionary activity that disrupts or is about to disrupt normal school activities." *Id.* at 111. The Court, believing the ordinance was a reasonable time, place, and manner regulation, upheld the conviction. *Id.* at 121.

41. *Id.* at 116. These words are from the following paragraph in which the Court further articulated the appropriate public forum analysis:

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library . . . making a speech in the

In *Greer v. Spock*,[42] however, the Court shifted from this mode of analysis.[43] It upheld the constitutionality of Army base regulations that

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reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

Id. at 116-17 (footnotes and citations omitted).

42. 424 U.S. 828 (1976). For a discussion of *Greer*, see Zillman & Imwinkelried, *The Legacy of* Greer v. Spock: *The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 GEO. L.J. 773 (1977).

43. The Court had earlier rejected the *Grayned* approach in Hudgens v. NLRB, 424 U.S. 507 (1976), which involved a quasi-public place. Because an understanding of quasi-public forum cases may prove helpful when analyzing *Greer*, an overview follows. In Marsh v. Alabama, 326 U.S. 501 (1946), the Court overturned the conviction of Jehovah's Witnesses for distributing religious literature on the streets of a company-owned town on the ground that the town did not "function differently from any other town." *Id.* at 508. In Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), the Court relied on *Marsh* to hold that the first amendment protects peaceful picketing at a shopping center to protest the practices of a business in the center.

> All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Id. at 319-20 (footnotes and citations omitted). The Court thus extended the public forum doctrine.

In Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), however, the Court retreated. It upheld the conviction of protestors who had distributed at a shopping center leaflets that criticized United States' Vietnam policy. *Lloyd* did not explicitly overrule *Logan Valley*, but many commentators believed these two cases were irreconcilable. *See, e.g.*, Note, *Labor Picketing On Private Property and the Vexation of* Logan Valley: *The Nixon Court Responds in* Hudgens v. NLRB, 6 CAP. U.L. REV. 235, 253 n.82 (1976); Note, *Private Business Districts and the First Amendment: From* Marsh *to* Tanner, 7 URB. L. ANN. 199, 211-12 (1974); Comment, Hudgens v. NLRB—*A Final Definition of the Public Forum?*, 13 WAKE FOREST L. REV. 139, 144 (1977).

In *Hudgens*, the Court held that a labor union member did not have a first amendment right to picket at a shopping center against the policies of a company operating retail stores there. In reaching this result, the Court stated that *Lloyd* had demonstrated an intention to limit the use of the public forum doctrine, at least when the forum was quasi-public. Whether this approach would extend to purely public places remained to be seen. Quasi-public places could easily be distinguished because of property rights granted to individuals by the fifth amendment of the Constitution. U.S. CONST. amend. V provides: "[N]or shall [any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Indeed, lower federal courts seized upon the distinction to avoid the use of quasi-public forum cases as precedent for situations in which the place was public. *See, e.g.*, Spock v. David, 469 F.2d 1047, 1054-55 (3d Cir. 1972), *rev'd sub nom.* Greer v. Spock, 424 U.S. 828 (1976); CCCO-Western Region v. Fellows, 359 F. Supp. 644, 651 (N.D. Cal. 1972). Stone, *supra* note 23, at 236 n.9, said his article would not consider quasi-public places. This may

prohibited political speeches and rallies and conditioned the distribution of publications upon the base commander's approval.[44] The Court distinguished *Flower* on the ground that the military commander there had abandoned " 'any claim [of] special interests in who walks, talks, or distributes leaflets on the avenue.' "[45] In addition, the armed forces had to be ready to fight wars if necessary.[46] Because of this special function, military commanders have traditionally had the power to bar civilians from the base.[47] Military bases were thus distinguishable from streets and parks because they have not been used as places "for free public assembly and communication of thoughts by private citizens."[48] Accordingly, no first amendment right to engage in the prohibited activities existed.[49]

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indicate a belief that private ownership required an approach different from that taken when public property was involved.

44. These regulations were those of Fort Dix.

> Ft. Dix Reg. 210-26 (1968) . . . provides that "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation." . . . Fort Dix Reg. 210-27 (1970) provides that "[t]he distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings issued, published or otherwise prepared by any person, persons, agency or agencies . . . is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters."

Greer v. Spock, 424 U.S. at 831.

Dr. Spock and other candidates for political office, desiring to make political speeches and distribute campaign literature, sought a preliminary injunction in federal district court prohibiting Ft. Dix military authorities from enforcing these regulations. They were joined by four others who challenged the ban on distribution of literature without prior approval. Spock v. David, 349 F. Supp. 179 (D.N.J.), *rev'd*, 469 F.2d 1047 (3d. Cir. 1972), *rev'd sub nom.* Greer v. Spock, 424 U.S. 828 (1976). The court denied plaintiff's request for injunctive relief. 349 F. Supp. at 182. On appeal, the Third Circuit reversed as to the political candidates, ordering military authorities to refrain from interfering with the candidates' campaign speeches and the distribution of campaign literature on their behalf until the upcoming election. 469 F.2d at 1056. The court of appeals upheld the denial of injunctive relief as to the other petitioners. *Id.*

45. 424 U.S. at 835 (quoting Flower v. United States, 407 U.S. at 198). In *Flower*, it was significant that the first amendment activity engaged in (peacefully distributing pamphlets) was on a street open to the public. The part of the military base in *Greer* where the petitioners sought to make speeches and distribute pamphlets, however, was no less open despite the Court's assertion to the contrary. *See* Greer v. Spock, 424 U.S. at 850-51 (Brennan, J., dissenting); Spock v. David, 469 F.2d at 1054.

46. 424 U.S. at 837-38.

47. *Id.*

48. *Id.*

49. *Id.* The Court evidently thought it unnecessary to balance the competing interests. It did not inquire whether the military had a compelling interest in excluding

Justice Powell agreed with the judgment but aptly criticized its reasoning.[50] He noted that first amendment speech rights, although not absolute, may be restricted only when essential to further a compelling governmental interest.[51] Thus, although a place's primary purpose is unrelated to a public forum, a person may have a right to use the premises as such.[52] Similarly, even if some disruption results, infringing first amendment rights may not be permissible[53] unless there exists "some basic incompatibility" between the nature of the place and the first amendment activity.[54] He rejected sub silentio the argument that the availability of first amendment rights depended on a place's historical usage.[55]

III. PRISONERS' RIGHTS

A. *Hands-off Doctrine*

Courts once viewed prisoners as slaves of the state[56] who should suffer

these people or whether, assuming arguendo it had this interest, the means used were unduly broad. An inquiry into a place's historical usage seemed to suffice.

50. *Id.* at 842-49 (Powell, J., concurring).

51. *Id.* at 842.

52. *Id.* at 843.

53. *Id.*

54. *Id.*

55. Rather than relying on *Hague*, Justice Powell cited *Grayned* and *Tinker* to establish the analytical framework he thought the majority should have used. *Id.* at 842-43. He seemed to agree with one commentator who stated: "Places are not in themselves necessarily anomalous for *all* expression; the key factor is the amount of disruption generated by a particular mode of expression exercised in a given setting." Note, *supra* note 23, at 138 (emphasis in original).

56. Meachum v. Fano, 427 U.S. 215, 231 (1976) (Stevens, J., dissenting): "At one time, the prevailing view was that the deprivation [of liberty following conviction] was essentially total. The penitentiary inmate was considered 'the slave of the State.'" Stevens noted that the thirteenth amendment gave "some support" to that viewpoint. *Id.* U.S. CONST. amend. XIII, § 1 provides: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." (emphasis added). Lower federal courts have also recognized that prisoners had been considered slaves of the state. *See, e.g.*, Sostre v. Preiser, 519 F. 2d 763, 764 (2d Cir. 1975); Bonner v. Coughlin, 517 F.2d 1311, 1316 (7th Cir. 1975); Jackson v. Goodwin, 400 F.2d 529, 532 (5th Cir. 1968).

In Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871), the court said:

> [O]ne of the most effectual means of promoting the common benefit and ensuring the protection and security of the people, is the certain punishment and prevention of crime. It is essential to the safety of society, that those who violate its criminal laws should suffer punishment. A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is

for the crimes they had committed.[57] Because inmates could have been put to death but for the state's humanity,[58] they were entitled only to that which the state chose to accord them.[59] Thus, they forfeited the rights they had possessed as freemen.[60]

In 1944, however, the Sixth Circuit stated: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[61] Nonetheless, the notion that inmates had rights was in an embryonic stage. Most courts considered prison administration beyond judicial scrutiny even when a deprivation of constitutional rights was alleged.[62] Under the "hands-off" doctrine,[63] the judiciary deferred to prison officials' judgment.[64] The principle of

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subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He 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. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man.

The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land. While in this state of penal servitude, they must be subject to the regulations of the institution of which they are inmates, and the laws of the State to whom their service is due in expiation of their crimes.

Id. at 795-96.

57. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 795-96 (1871).

58. *Id.*

59. *Id.*

60. *Id.*

61. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam), *cert. denied*, 325 U.S. 887 (1945).

62. *See, e.g.*, Eaton v. Bibb, 217 F.2d 446 (7th Cir. 1954), *cert. denied*, 350 U.S. 915 (1955); Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953); Henson v. Welch, 199 F.2d 367 (4th Cir. 1952) (per curiam); Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); Williams v. Steele, 194 F.2d 32 (8th Cir.), *cert. denied*, 344 U.S. 822 (1952); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948).

63. This term originated in Fritch, Civil Rights of Federal Prison Inmates 31 (1961) (unpublished document prepared for the Federal Bureau of Prisons).

64. *See, e.g.*, cases cited note 62 *supra*. For a discussion of the hands-off doctrine, see FOX, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S. 162, 162-66 (1972); Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181-85 (1970); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 987-92 (1962) [hereinafter cited as *The Developing Law*]; Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 515-26 (1963) [hereinafter cited as *Beyond the Ken*].

separation of powers and the possibility that prison discipline would deteriorate militated against intervention.[65] Federalism and notions of comity also supported non-intervention when state prisoners filed petitions in federal court.[66]

Despite the "hands-off" doctrine, courts increasingly have recognized their duty to uphold the Constitution in prison and have gradually carved out exceptions to this doctrine.[67] As early as 1941, in *Ex parte Hull*,[68] prisoners were accorded a due process *right* of access to court.[69] Although Hull attacked the validity of his conviction and not the conditions of his confinement,[70] this suit and its progeny[71] weakened the "hands-off" doctrine. Once prisoners were assured a forum, they could challenge prison administrators' actions that infringed other constitutional rights.[72]

65. *See, e.g.*, Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) ("The prison system is under the administration of the Attorney General . . . and not of the district courts. The court has no power to interfere with the conduct of the prison or its discipline."); Golub v. Krimsky, 185 F. Supp. 783, 784 (S.D.N.Y. 1960) (The court refused to allow inmates to sue the prison warden for failure to provide adequate medical care. It said: "We incline to the proposition that to allow such actions would be prejudicial to the proper maintenance of discipline."). Although rarely articulated, an underlying rationale for the judiciary's hesitancy to intervene in prison affairs was its lack of expertise. Courts thought prison authorities were more qualified to handle internal prison matters because these officials were exposed daily to the practical problems of prison administration. *See* Fox, *supra* note 64, at 163; Goldfarb & Singer, *supra* note 64, at 181.

66. *See, e.g.*, United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105, 107 (7th Cir. 1953): "[Petitioner] is an inmate of a State penitentiary, by reason of a conviction of a State offense. The warden is not a federal official. Federal courts will rarely intervene to interfere with the conduct of State officials carrying out their duties under State laws."

67. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966).

68. 312 U.S. 546 (1941).

69. *Id.* at 549. ("[T]he state and its officers may not abridge or impair petitioner's *right* to apply to a federal court for a writ of habeas corpus.") (emphasis added). Prison officials had prevented Hull from filing a habeas petition in the Supreme Court under a prison regulation that accorded prison authorities discretion in determining whether an inmate could file such petitions.

70. *Id.* at 550.

71. *E.g.*, Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

72. For a brief discussion of the importance of the access to court cases, see Goldfarb & Singer, *supra* note 64, at 183; *The Developing Law, supra* note 64, at 987-88. The Court has recently expanded prisoners' right of access to court. *See* Bounds v. Smith, 430 U.S. 817 (1977): "We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828.

In the 1960s, courts began to intervene when prison officials impeded inmates' free exercise of religion[73] or discriminated on the basis of race.[74] Perhaps they thought it irrational to ignore inmates' claims that prison authorities had violated their constitutional rights when the judiciary had begun to inquire into allegedly unconstitutional conduct of law enforcement officials.[75] Shortly thereafter, some courts invalidated prison regulations that restricted inmates' freedom of speech.[76] Others, however, continued to defer to prison officials' decisions limiting this right, by articulating one or more of the rationales for the "hands-off" doctrine.[77]

B. *Tension Betwen "Hands-Off" and First Amendment Speech Rights*

This tension between the "hands-off" doctrine and the need to protect prisoners' free speech rights, led the lower federal courts to adopt

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Bounds also provides a review of other recent Supreme Court decisions that have attempted to "insure that inmate access to the courts is adequate, effective, and meaningful." *Id.* at 822.

73. *See, e.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961). For a general discussion of freedom of religion in prison, see Brown, *Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review*, 32 GEO. WASH. L. REV. 1124 (1964); Frankino, *Manacles and the Messenger: A Short Study in Religious Freedom in the Prison Community*, 14 CATH. U.L. REV. 30 (1965); Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488 (1962); Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights—Obstacles to a Hearing on the Merits*, 20 RUTGERS L. REV. 528 (1966); Comment, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812 (1977).

74. *See, e.g.*, Jackson v. Goodwin, 400 F.2d 529 (5th Cir. 1968); Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968) (per curiam); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (per curiam).

75. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961). Goldfarb & Singer, *supra* note 64, at 183-84, set forth this rationale.

76. *See, e.g.*, Nolan v. Fitzpatrick, 451 F. 2d 545 (1st Cir. 1971); Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971); Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

77. *See, e.g.*, Krupnick v. Crouse, 366 F.2d 851 (10th Cir. 1966); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) (except when prison mail regulations discriminate on the basis of race or religion); Pope v. Daggett, 350 F.2d 296 (10th Cir. 1965); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964).

confusing and disparate approaches when testing the constitutionality of prison mail regulations.[78] The conflicting approaches taken in the *Morales* trilogy are illustrative.[79] The district court enjoined prison officials from prohibiting correspondence between inmates and outsiders because the officials had failed to establish a "compelling state interest."[80] The court of appeals reversed, holding that the appropriate test was whether an official's action "bears a rational relationship to or is reasonably necessary for the advancement of a justifiable purpose."[81] On rehearing en banc, the court of appeals used a stricter standard to reverse once again; the proper test was whether the "restriction is related both reasonably and necessarily to the advancement of a justifiable purpose of imprisonment."[82]

C. *Procunier v. Martinez*

In 1974, the Supreme Court finally addressed the issue of free speech rights in the prison environment. In *Procunier v. Martinez*,[83] the Court considered the constitutionality of prison mail regulations banning inmate correspondence that "unduly complain[ed], magnified grievances, express[ed] inflammatory political, racial, religious or other views," or contained matter deemed "defamatory" or "otherwise inappropriate."[84]

78. *Compare* Jackson v. Goodwin, 400 F.2d 529, 541 (5th Cir. 1968) (state must show substantial and controlling interest), *with* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) (hands-off approach), *and* Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 905 (S.D.N.Y. 1970) (there must be showing of clear and present danger), *and* Carothers v. Follette, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970) (regulation must be related both reasonably and necessarily to some justifiable purpose of imprisonment). For a good discussion of prison mail regulations, see Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87 (1971).

79. *See* Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973), *rev'd en banc*, 494 F.2d 85 (7th Cir. 1974).

80. 340 F. Supp. at 555.

81. 489 F.2d at 1343.

82. 494 F.2d at 87.

83. 416 U.S. 396 (1974).

84. *Martinez* footnoted to the pertinent regulations as follows:

Director's Rule 1201 provided:

"INMATE BEHAVIOR: Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence."

It is undisputed that the phrases 'unduly complain' and 'magnify grievances' were applied to personal correspondence.

Director's Rule 1205 provided:

"The following is contraband:

• • • • •

Prison authorities claimed that it was within their discretion to proscribe "defamatory" or "otherwise inappropriate" statements.[85] In defending the ban on statements that "unduly complain" or "magnify grievances," prison officials contended their actions furthered such governmental interests as the deterrence of flash riots and the advancement of prisoner rehabilitation.[86] Furthermore, they argued that the proscription on the expression of "inflammatory political, racial, religious, or other views" was necessary to ensure the internal security of the prison.[87]

Although *Martinez* invalidated these prison mail regulations,[88] the majority failed to confront the troublesome issue of prisoners' rights; rather, it based its decision on the right of outsiders to communicate with inmates.[89] In addition, the Court expressly declined to address the issue

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"d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation."

Rule 1205 also provides that writings "not defined as contraband under this rule, but which, if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline, may be placed in the inmate's property, to which he shall have access under supervision."

Id. at 399 nn. 2 & 3. Two inmates in a California state prison had initiated a class action suit on behalf of themselves and all other inmates under the jurisdiction of the California Department of Corrections challenging the constitutionality of prison mail regulations promulgated by the Director of Corrections. A three-judge district court held these regulations infringed inmates' first amendment free speech rights. Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973) (per curiam), *aff'd on other grounds*, 416 U.S. 396 (1974). For a general discussion of *Martinez*, see Note, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. U.L. REV. 352 (1975); 79 DICK. L. REV. 352 (1975); 6 SETON HALL L. REV. 167 (1974).

85. 416 U.S. at 415-16.

86. *Id.* at 416.

87. *Id.*

88. *Id.* at 415.

89. In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners.

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech.

of mass mailings[90] and did not mention publications that were mailed piecemeal.

By basing its decision on the rights of nonprisoners, the majority failed to ensure that protection of prisoners' free speech interests would be more than haphazard and inconsistent. Yet, as Justice Marshall noted in concurrence, an inmate has a right, not a mere privilege, to protection of his first amendment freedoms.[91] A person does not lose all his rights when he becomes a prisoner;[92] rather, he retains all the rights of outsiders except those he must relinquish because of the prison environment and its objectives.[93] Thus, prisoners should be accorded free speech rights unless there is a compelling governmental interest militating against the exercise of this right, and the government, in limiting this right, uses means that are not "unnecessarily restrictive of personal freedoms."[94]

In addition, the failure to hold that inmates have free speech rights may lead lower courts to defer to prison authorities in other cases involving claims of prisoners' rights. This could result in frequent abuse and unnecessary deprivation of prisoners' rights in other areas.[95] Yet, arbi-

Id. at 408. *Martinez* clearly held that the first amendment protected the correspondence even if the outsider were the intended recipient of the communication. *Id.* at 408-09.

90. *Id.* at 408 n.11.

91. *Id.* at 423.

92. *Id.* at 422.

93. *Id.* at 422-23.

94. *Id.* at 423.

95. Prison conditions are often so deplorable that judges feel compelled to order sweeping changes in prison operation. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). For case studies of the abuse prisoners undergo, see Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 795-812 (1969).

The area of free speech has been no exception. *See, e.g.*, Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961) (prison administrator prevented inmate from obtaining legal materials from relatives or friends); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948) (prison authorities confiscated the first lesson sheet in a correspondence course which they had encouraged the inmate to take); Kelly v. Dowd, 140 F.2d 81 (7th Cir.), *cert. denied*, 321 U.S. 783 (1944) (prison authorities prevented inmate from securing Bible study aids circulated by a religious group); Fussa v. Taylor, 168 F. Supp. 302 (M.D. Pa. 1958) (prison official prevented inmate from corresponding with his common law wife because official believed their relationship was not constructive). Fox, *supra* note 64, at 176 n.134 listed publications that had been banned by New York State prisons as reported by the N.Y. Times, Dec. 12, 1971, § 7, at 47:

> "The Jefferson Bible," The Blackstone Law Course, Psychology Today, National Geographic, newsletters of the Mattachine and Fortune Societies, Koestler's "The Ghost Machine," Gay's "The Enlightenment," Ferkiss' "Technological Man," Kaslow's "The Changeless Order," Carlson's "Modern Biology," Mat-

trary deprivations of prisoners' rights have a critical impact on the rehabilitative process.[96] Unnecessary restrictions increase prisoners' suspicions about authority figures[97] and lower inmates' self-respect.[98] The prison environment is especially dehumanizing, and any unnecessary restraint upon an inmate's freedom of speech will be more deleterious to his self-image than if the same restriction were placed upon a free citizen.[99] Because unnecessary limitations on prisoners' rights will make inmates' adjustment more difficult when they re-enter society,[100] increased crime and high recidivism rates probably will ensue.[101]

Although the Court found the regulations unnecessarily restrictive, it may have based its decision on the rights of outsiders and limited the holding to direct personal correspondence because it was not ready to commit itself on the quantum of first amendment speech rights an inmate retains.[102] The Court may also have wanted to leave a means of retreat if

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son's "Being, Becoming and Behavior," Levitas' "Culture and Consciousness," Erikson's "Youth and Crisis," Levi-Strauss' "The Savage Mind," Von Bertalanffy's "Robots, Men and Minds," Moorehead's "The Fatal Impact," Friedman's "To Deny Our Nothingness," Jung's "Man and His Symbols," McLuhan's "Understanding Media," Lunger's "Mind: An Essay on Human Feeling," Bettelheim's "The Empty Fortress," Lewis's "La Vida," Silberman's "Crisis in Black and White," Edwards' "The Rage of India," Sinclair's "The Cry for Justice," and Zaidenberg's "The Emotional Self."

96. *See* H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 359 (3d ed. 1959); UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967); Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 671 (1966); Hirschkop & Millemann, *supra* note 95, at 824; Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841, 864 (1971).

97. *See* Note, *supra* note 96, at 864.

98. *See* Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

99. *Id.*

100. *See* note 96 *supra* and accompanying text.

101. *See* note 96 *supra* and accompanying text.

102. This seems likely because the Court declined to address these issues although it expressed a desire to establish a uniform standard of review for prison mail regulations:

> This array of disparate approaches and the absence of any generally accepted standard for testing the constitutionality of prisoner mail censorship regulations disserve both the competing interests at stake. On the one hand, the First Amendment interests implicated by censorship of inmate correspondence are given only haphazard and inconsistent protection. On the other, the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them and invites repetitive, piecemeal litigation on behalf of inmates. The result has been unnecessarily to perpetuate the involvement of the federal courts in affairs of prison administration. Our task is to formulate a standard of review for prisoner mail censorship that will be responsive to these concerns.

416 U.S. at 407.

it became disenchanted with the decision's effect on the prison system or with the lower courts' interpretation of the case.

Despite the majority's failure to ground the decision on prisoners' rights, *Martinez* protects the inmates' interest in nearly every instance in which direct personal correspondence is at issue. An outsider will be involved except on the rare occasion when a prisoner wishes to communicate with an inmate in another penal institution.[103]

Although the Court did not address prisoners' rights or mass mailings, it contributed greatly to the analysis of free speech rights in the prison context. It recognized the need to develop a standard designed for the unique problems posed by the prison environment.[104] To create such a standard the Court relied heavily upon the *O'Brien* test.[105] The *Martinez* standard left the first prong of the *O'Brien* test substantially intact, but added that in the prison environment the important governmental interests were the rehabilitation of inmates and the security and internal order in prison.[106] The second prong of the *Martinez* test differed, however,

103. When interprison communication between inmates is at issue, lower federal courts have upheld restrictions even when there was no showing that the restriction was necessary. *See, e.g.*, Peterson v. Davis, 415 F. Supp. 198 (E.D. Va. 1976); Mitchell v. Carlson, 404 F. Supp. 1220 (D. Kan. 1975); Lawrence v. Davis, 401 F. Supp. 1203 (W.D. Va. 1975).

104. 416 U.S. at 412.

105. *See* notes 21-22 *supra* and accompanying text. *Martinez* also relied on Healy v. James, 408 U.S. 169 (1972), and Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). In *Healy*, a college president refused to recognize a local chapter of the Students for a Democratic Society as a campus organization. Denial of recognition meant the organization could not use campus facilities for meetings or the campus bulletin board. The Court held the president could justifiably refuse to recognize the organization if there were evidence to support the conclusion that it "posed a substantive threat of material disruption" but the first amendment right could not be limited if the fear of disruptive activities was unsubstantiated. 408 U.S. at 189.

In *Tinker*, school officials prevented students from wearing black armbands to protest the Vietnam war. The Supreme Court held that this conduct was closely related to "pure speech" and therefore the school officials had the burden of showing that the wearing of the armbands would substantially interfere with the governmental interest in maintaining discipline in the school. The Court carefully examined the requirements of orderly school administration to ensure that the officials impinged on the students' free speech rights no more than necessary "in light of the special characteristics of the . . . environment." 393 U.S. at 506.

106. Applying the teachings of our prior decisions to the instant context, we hold that censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwel-

from its counterpart in *O'Brien*. It mandated that the means used be "generally necessary" to the furtherance of security, order, and rehabilitation.[107]

The Court's recognition of the importance of the rehabilitative process in prison reform[108] and its implicit rejection of retribution represents a progressive attitude toward prison affairs.[109] *Martinez* intended that rehabilitation be balanced *against* the necessity for prison security and order.[110] Specifically, the Court recognized that personal correspondence furthers, rather than impedes rehabilitation.[111]

The importance of the assertion that deprivations of outsiders' rights must be "generally necessary,"[112] rather than essential, cannot be under-

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come opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation.

416 U.S. at 413.

107. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.

Id. at 413-14.

108. *Id.* at 412-13. *See* AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTION STANDARDS 10 (3d ed. 1966): "Penologists in the United States today are generally agreed that the prison serves most effectively for the protection of society against crime when its major emphasis is on rehabilitation. They accept this as a fact that no longer needs to be debated." For a discussion of the importance of prisoner rehabilitation to society at large, see Goldfarb & Singer, *supra* note 64 at 208-15; Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 473-74 (1971).

109. Rehabilitation and retribution are mutually exclusive goals. To rehabilitate, a program of individualized treatment should be instituted to afford the prisoner the opportunity to further his education and develop his vocational talents. This is necessary for the inmate's adjustment to society upon release. If retribution were a goal, however, prisoners would never receive this treatment. Because the basis of this theory is that a prisoner should pay for his crime, the expenditure of funds and effort on the part of prison administrators necessary for treatment could not be justified. For a discussion of retribution, see *Beyond the Ken, supra* note 64, at 516-18.

110. 416 U.S. at 412-13.

111. *Id.* at 412.

112. *Id.* at 414.

stated.[113] This "generally necessary" language represents the Supreme Court's recognition that it had to balance significant competing interests. Prison officials must retain a modicum of discretion to function effectively.[114] On the other hand, the Court recognized its duty to protect non-prisoners' free speech rights.[115]

D. *Pell v. Procunier*

The Supreme Court decided *Pell v. Procunier*[116] shortly after *Martinez*[117] but took a different approach.[118] Inmates and journalists challenged a prison regulation[119] that banned face-to-face interviews between members of the press and prisoners with whom they had specifically requested an interview.[120] The inmates asserted the regulation violated their right to free speech,[121] whereas the newsmen claimed it infringed the freedom of the press.[122] The Court rejected both contentions and upheld the regulation.[123]

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113. The Court did not explicitly reject "essential" as the governing standard. Indeed, it was cited with approval. Nevertheless, the subsequent discussion of the latitude prison officials should be accorded seems to indicate that the Court would permit prison officials to act when it was generally necessary and not essential.

114. 416 U.S. at 414 ("Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty.").

115. *Id.* at 408.

116. 417 U.S. 817 (1974).

117. The Court decided *Martinez* on April 29, 1974, and *Pell* on June 24, 1974. The Court handed down Saxbe v. Washington Post Co., 417 U.S. 843 (1974), the same day as *Pell*. In *Saxbe*, the Washington Post challenged the visitation policy of the Federal Bureau of Prisons that banned face-to-face interviews between inmates and newsmen. The Court, however, upheld the regulations. For a discussion of *Saxbe*, see 60 CORNELL L. REV. 446 (1975).

118. For a discussion of *Pell*, see *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 165 (1974); Note, *The Public's Right to Know*: Pell v. Procunier *and* Saxbe v. Washington Post Co., 2 HASTINGS CONST. L.Q. 829 (1975); Note, *supra* note 84; Comment, *The Right of the Press to Gather Information After* Branzburg *and* Pell, 124 U. PA. L. REV. 166 (1975); Comment, *Bans on Interviews of Prisoners: Prisoner and Press Rights After* Pell *and* Saxbe, 9 U.S.F. L. REV. 718 (1975); 43 U. CIN. L. REV. 913 (1974).

119. California Department of Corrections Manual § 415.071 provides: "Press and other media interviews with specific individual inmates will not be permitted." Pell v. Procunier, 417 U.S. at 819.

120. In Hillery v. Procunier, 364 F. Supp. 196 (N.D. Cal. 1973), *rev'd in part sub nom.* Pell v. Procunier, 417 U.S. 817 (1974), a three-judge district court held that the regulation was a violation of inmates' first amendment rights but not of journalists' rights.

121. 417 U.S. at 820-21.

122. *Id.* at 821. Specifically, they contend their right to gather news was violated. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

123. 417 U.S. at 835.

Justice Stewart, writing for the majority, conceded that face-to-face interviews were inherently different from other modes of expression.[124] Nevertheless, he believed an inquiry into the alternative means of communication was relevant.[125] The availability of alternative means of expression would not ordinarily justify a limitation on first amendment speech rights, but, because the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise," it was an important consideration in the prison context.[126] Visits with family, friends, lawyers, and clergymen, as well as virtually unlimited correspondence, sufficiently protected the inmates' interest in communication.[127]

The Court noted that "the pattern of [a place's] normal activities dictates" whether regulations are permissible[128] and, because there are many dangerous people in prisons, security is a primary concern.[129] Yet concern for security did not warrant a blanket prohibition of prisoners' free speech rights.[130] Because a determination of what best promotes security, order, and rehabilitation is "peculiarly within the province and professional expertise of correction officials,"[131] the Court invested them with broad discretion.[132] Rather than require officials to bear the burden of proof, officials could use their discretion unless there was "substantial evidence in the record" to show that their response to the potential threat to prison security was exaggerated.[133] The Court failed to consider whether a less restrictive alternative was available.

Although outsiders' rights were also infringed, the *Pell* majority upheld the regulation because the press, as well as the general public, could "observe prison conditions" even without face-to-face interviews with specifically designated inmates by touring the correctional facilities.[134] Members of the press also had "general access to all parts of the

124. *Id.* at 823.
125. *Id.* at 824.
126. *Id.* at 825-26.
127. *Id.* at 824-25. The friends had to be "long-standing." *Id.* at 825 n.4.
128. *Id.* at 826.
129. *Id.* at 826-27.
130. *Id.* at 827.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 830.

institutions.''[135] The Court observed that reporters had no greater right to information than the general public.[136]

Justice Douglas' cogent dissent conceded that certain limitations on prisoners' first amendment rights may be essential to maintain security and order.[137] He emphasized, however, that the restrictions must be precisely drawn to avoid unnecessary infringement of a fundamental right.[138] Furthermore, an unduly restrictive regulation cannot be justified by establishing that there are other available means of communication.[139] He concluded that the absolute ban on newsmen interviews with inmates whom they had specifically requested to interview was unnecessary to preserve prison security and order. Therefore, the regulation was unjustifiable even though an inmate could correspond with newsmen, and family, friends, attorneys, and clergymen could visit with prisoners.[140]

In *Pell*, the Court did not employ a traditional first amendment analysis. Inmates had recently made an escape attempt that resulted in five deaths,[141] and prison authorities attributed it in part to the prison policy that allowed newsmen to conduct face-to-face interviews with inmates.[142] Thus, the Court may justifiably have been wary of limiting prison officials' discretion in matters of prison security and order. Nonetheless, it seems anomalous to reject the *Martinez* analysis so soon after it was decided. Although visitation rights may pose a greater threat to prison security than does personal correspondence,[143] there is no need to alter

135. *Id.* They could also interview inmates whom the prison authorities randomly chose.

136. *Id.* at 833-34 (quoting Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972)).The Court recently heard argument in a case involving the media's right of access to prisons vis-à-vis that of the general public. KQED, Inc. v. Houchins, 546 F.2d 284 (9th Cir. 1976), *cert. granted*, 431 U.S. 928 (1977).

137. *Id.* at 837-38.

138. *Id.*

139. *Id.*

140. *Id.*

141. On August 21, 1971, three prison officials and two inmates died during an escape attempt at San Quentin, the jail in which the inmate petitioners were confined. Hillery v. Procunier, 364 F. Supp. 196, 198 (N.D. Cal. 1973), *rev'd in part sub nom.* Pell v. Procunier, 417 U.S. 817 (1974).

142. Pell v. Procunier, 417 U.S. at 831; Hillery v. Procunier, 364 F. Supp. at 198. Consequently, they promulgated the regulations in question. 417 U.S. at 831; 364 F. Supp. at 198.

143. In *Procunier v. Martinez* . . . we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communication by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the

the analytical framework. Because the balancing test employed in *Martinez* will be "applied in light of the special characteristics of the . . . environment,"[144] officials will be able to react to actual threats to security and order. *Martinez* stated that these concerns were important[145] and afforded prison officials more leeway than other governmental officers by creating the "generally necessary" test.[146]

Although prison administration is difficult[147] and prison officials have expertise,[148] shifting the burden of proof from the officials to the inmate or nonprisoner whose right is allegedly infringed is unnecessary. The complexities of prison administration do not justify analyzing the visitation policy in light of alternative means of communications rather than by determining whether the ban is "generally necessary" for the maintenance of prison security and order. Administration of schools, for example, is complex and requires expertise, yet courts apply the traditional balancing test.[149] Since judges may rely on expert testimony when their background in a particular field is inadequate, courts should not abdicate their duty to protect constitutional rights solely because they lack expertise in an area. Indeed, the primary responsibility of a federal judge is to uphold the Constitution,[150] and without judicial intervention, fundamental freedoms would be inadequately protected.[151]

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corrections system itself, require that some limitation be placed on such visitations.

Pell v. Procunier, 417 U.S. at 826. *See* notes 167-69 *infra* and accompanying text.

144. 416 U.S. at 409-10 (quoting Tinker v. Des Moines School Dist., 393 U.S. at 506).

145. 416 U.S. at 412.

146. *See* notes 112-15 *supra* and accompanying text.

147. *See, e.g.*, Procunier v. Martinez, 416 U.S. at 404-05: "The Herculean obstacles to effective discharge of [a prison administrator's] duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable . . . ."

148. *See, e.g.*, Carothers v. Follette, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970): "We further recognize that the administrators of the state prison unquestionably possess vast experience, which we do not, upon which to base their regulations and practice in the handling of prisoners consigned to their custody."

149. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

150. *See, e.g.*, Zwickler v. Koota, 389 U.S. 241, 248 (1967); Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976).

> The cornerstone of our American legal system rests on recognition of the Constitution as the supreme law of the land, and the paramount duty of the federal judiciary is to uphold that law. Thus, when a state fails to meet constitutionally mandated requirements, it is the solemn duty of the courts to assure compliance with the Constitution.

Id. at 914-15.

151. *See* note 95 *supra* and accompanying text.

Because courts perform the sentencing function, they have an additional reason for intervening in prison affairs. In determining appropriate sentences, judges consider the needs of both society and the convicted defendant. Accordingly, they should be able to ensure that the inmate's treatment is consistent with the purpose of the sentence.[152]

In addition, prison administrators cannot properly balance the inmate's free speech interests against the need for security and order.[153] Because their primary concern is the maintenance of order, as long as there is no turbulence, public criticism will be minimal, and their jobs will be secure.[154] More generally, administrators have developed an area of expertise which may produce a parochial viewpoint.[155] Judges, on the other hand, have a broader perspective:[156] they seek to protect the "enduring values of . . . society."[157] Moreover, because federal judges have life tenure,[158] they can do what they think is just with little concern for its popularity.[159]

Similarly, the *Pell* Court's argument that state prisons are under the aegis of state governments and therefore the federal judiciary should not intervene is unpersuasive when constitutional rights are at issue.[160] Although federalism and principles of comity limit the federal courts'

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152. *See* Fox, *supra* note 64, at 164; Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 387 (1977).

153. *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. 2532, 2546 (1977) (Marshall, J., dissenting).

154. *Id.*

155. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 327 (1965); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 523 (1970).

156. L. JAFFE, *supra* note 155, at 327; Monaghan, *supra* note 155, at 523.

157. Monaghan, *supra* note 155, at 523-24 (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 25-26 (1961)); *see* L. JAFFE, *supa* note 155, at 327.

158. U.S. CONST. art. III, § 1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."

159. On the other hand, members of the executive and legislative branches, as well as state judges, must weigh the political ramifications of their actions.

160. *See* Procunier v. Martinez, 416 U.S. at 405-06: "But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." (citing Johnson v. Avery, 393 U.S. 483, 486 (1969)).

involvement in state affairs,[161] they should not hesitate to intervene when constitutional rights are infringed.[162]

Finally, the Supreme Court's refusal to extend the *Martinez* standard to interview requests added to the existing confusion surrounding free speech rights in the prison environment. Federal judges had to decide whether to apply *Martinez* or *Pell* when prisoners' receipt of publications was at issue, without direction from the Court.

E. *Lower Federal Courts' Handling of Publications Issue*

Outsiders, as well as prisoners, may have a greater interest in personal correspondence than in visitation rights with newsmen or publication rights. There is certainly a greater interest when the correspondence is between family members.[163] Courts could have seized upon this to distinguish *Martinez* and apply the *Pell* standard when the right to publications was at issue, but instead most relied on the *Martinez* test.[164]

These courts may have recognized that publications present less of a security risk than personal correspondence because, in contrast to the personal message in correspondence, publications are available to the general public.[165] Regulations governing incoming publications should therefore be less stringent than those for personal correspondence;[166]

161. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

162. *See* note 160 *supra* and accompanying text.

163. *See* Joint Committee on the Legal Status of Prisoners, *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, 14 AM. CRIM. L. REV. 377, 505 (1977) [hereinafter cited as *Legal Status of Prisoners*]: "Perhaps there is no more important rehabilitative charge in prison than not to unduly disrupt the familial relationship, which offers the main support to the prisoner both during incarceration and after release."

164. *See, e.g.*, Carpenter v. South Dakota, 536 F.2d 759 (8th Cir. 1976); Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976); Morgan v. LaVallee, 526 F.2d 221 (2d Cir. 1975); Gaugh v. Schmidt, 498 F.2d 10 (7th Cir. 1974) (per curiam); Hopkins v. Collins, 411 F. Supp. 831 (D. Md. 1976), *aff'd in pertinent part*, 548 F.2d 503 (4th Cir. 1977) (per curiam); Cofone v. Manson, 409 F. Supp. 1033 (D. Conn. 1976); The Luparar v. Stoneman, 382 F. Supp. 495 (D. Vt. 1974), *appeal dismissed mem.*, 517 F.2d 1395 (2d Cir. 1975); Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974), *aff'd mem.*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); McCleary v. Kelly, 376 F. Supp. 1186 (M.D. Pa. 1974); Gray v. Creamer, 376 F. Supp. 675 (W.D. Pa. 1974); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974). *Contra*, Paka v. Manson, 387 F. Supp. 111 (D. Conn. 1974).

165. Cofone v. Manson, 409 F. Supp. 1033, 1039 (D. Conn. 1976).

166. The United States Bureau of Prisons apparently agreed; it imposed less stringent regulations upon incoming publications than upon personal correspondence.

> Policy Statement 7300.1A . . . specifies that personal correspondence of inmates in federal prisons, whether incoming or outgoing, may be rejected for inclusion of the following kinds of material:
>
> (1) Any material which might violate postal regulations, *i.e.*, threats, blackmail, contraband or which indicate plots of escape.
>
> (2) Discussions of criminal activities.

thus, the vast discretionary power that *Pell* vested in prison authorities would be unwarranted.

Visits, on the other hand, pose a greater threat to prison security and order than either personal correspondence or publications[167] because the means of communication is so intimate.[168] Moreover, an inmate could

(3) No inmate may be permitted to direct his business while he is in confinement. This does not go to the point of prohibiting correspondence necessary to enable the inmate to protect the property and funds that were legitimately his at the time he was committed to the institution. Thus, an inmate could correspond about refinancing a mortgage on his home or sign insurance papers, but he could not operate a mortgage or insurance business while in the institution.

(4) Letters containing codes or other obvious attempts to circumvent these regulations will be subject to rejection.

(5) Insofar as possible, all letters should be written in English, but every effort should be made to accommodate those inmates who are unable to write in English or whose correspondents would be unable to understand a letter written in English. The criminal sophistication of the inmate, the relationship of the inmate and the correspondent are factors to be considered in deciding whether correspondence in a foreign language should be permitted.

Procunier v. Martinez, 416 U.S. at 414 n.14 (quoting Policy Statement 7300.1A of the Federal Bureau of Prisons). Policy Statement 7300.42B(4), which controls incoming publications, is as follows:

a. Publications, including books, must come directly from the publisher. Executive officers of the following institutions may authorize exceptions to this rule: Morgantown, Englewood, Pleasanton, Ashland, Seagoville, Allenwood, Eglin, Montgomery, Safford and the Lompoc Camp.

b. Unless a publication will be detrimental to the security, good order and discipline of the institution, it will not be barred from admittance to the institution.

c. Prior approval will not be necessary for an inmate to subscribe to a publication. However, if upon examination of three issues, not necessarily successive, it is determined that a publication is unacceptable, it may be prohibited from the institution on the basis of paragraph 4b above. It is expected, however, that a further review of such publication should be initiated six months subsequent to the date the publication was originally or previously barred.

d. Caution will be exercised before declaring a publication unacceptable because of its religious, philosophical, social or sexual views. As indicated in 4b, above, the decision not to forward a publication to an inmate under this Policy Statement must be based on a showing that doing so will clearly compromise the security, discipline and good order of the institution.

e. Where a publication is unacceptable under this Policy Statement, the head of the institution shall make a complete record of the reasons for finding the publication unacceptable. The head of the institution will notify the publisher by letter (1) that a particular publication is unacceptable and will not be delivered to the inmate addressee, (2) the reason the publication is being rejected, and (3) that he may obtain an independent review of the rejection by writing to the Regional Director within fifteen (15) days of the letter. The inmate addressee will be advised of the rejection by a copy of the letter to the publisher.

f. A reasonable limit shall be placed on the number of publications an individual may retain in quarters.

Cofone v. Manson, 409 F. Supp. at 1039 n.14 (quoting Policy Statement 7300.42B(4) of the Federal Bureau of Prisons).

167. *See* Pell v. Procunier, 417 U.S. at 826.

168. *Pell* did not articulate why visits in general are dangerous to prison security and

become a prison celebrity because of visits from the press and wield power among fellow inmates.[169] Thus, although the *Martinez* standard is sufficiently flexible to encompass both situations, it is arguable that prison officials need more discretion to limit visits than is permitted under *Martinez*.

Although the lower federal courts have invoked *Martinez*,[170] most have failed to apply it properly.[171] They unnecessarily restricted non-prisoners' rights to send publications as well as prisoners' rights to receive them. In *Gray v. Creamer*[172] and *McCleary v. Kelly*,[173] two Pennsylvania district courts scrutinized regulations promulgated by the Pennsylvania Bureau of Correction.[174] Although both courts invoked

order. *Legal Status of Prisoners, supra* note 163, at 503, says the obvious reason is that the visitor may sneak in contraband.

169. Pell v. Procunier, 417 U.S. at 831-32; Seale v. Manson, 326 F. Supp. 1375, 1383 (D. Conn. 1971).

170. *See* note 164 *supra* and accompanying text.

171. *See, e.g.*, Carpenter v. South Dakota, 536 F.2d 759 (8th Cir. 1976); Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974), *aff'd mem.* 520 F.2d 941, (5th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); McCleary v. Kelly, 376 F. Supp. 1186 (M.D. Pa. 1974); Gray v. Creamer, 376 F. Supp. 675 (W.D. Pa. 1974).

172. 376 F. Supp. 675 (W.D. Pa. 1974).

173. 376 F. Supp. 1186 (M.D. Pa. 1974).

174. The Pennsylvania Bureau of Correction's regulations governing incoming publications provided:

I. PURPOSE
It is the policy of the Bureau of Correction to give wide latitude to residents in selecting publications and subscribing to periodicals in order that educational, cultural, informational, religious, legal and philosophical needs of individuals will be satisfied. It is the purpose of this directive to establish procedures regarding incoming publications which shall be applicable to all institutions in the Bureau of Correction.

II. SCOPE
The procedures outlined in this directive shall cover the purchase and/or receipt of all outside publications including legal publications, fiction and non-fiction books, paper backs, correspondence courses, training manuals, reference materials, magazines, newspapers, religious tracts and pamphlets.

III. GENERAL PROCEDURES
A. All publications shall be mailed directly from the original source, publisher, magazine distributor, department store or book store with the exception of small letter-size religious tracts and pamphlets which may be received in regular correspondence from family, friends or religious advisor.
B. An institutional staff committee of treatment and custodial representatives appointed by the Superintendent shall be responsible for clearing resident requests for outside publications and for reviewing publications received.
C. All decisions with respect to the approval or disapproval of outside publications shall be based on the criteria of Paragraph IV. below.

Martinez,[175] they upheld regulations that clearly conflicted with the *Martinez* policy and standard.

The policy statement in the Pennsylvania Bureau of Correction's Regulations indicated that prisoners were allowed to receive publications that would fulfill their "educational, cultural, informational, religious, legal, and philosophical" needs.[176] The Bureau evidently envisioned itself benevolently granting inmates the privilege of exposure to and communication with the outside world and, by implication, thought outsiders had no first amendment free speech rights in the prison context. As *Martinez* pointed out, however, the sending of publications by nonprisoners is a right, not a mere privilege.[177]

The Pennsylvania regulations at issue in *Gray* and *McCleary* were not "generally necessary"[178] to the advancement of security, order, or rehabilitation.[179] For example, the Bureau of Correction unnecessarily

D. Residents shall have the right to appeal to the Superintendent any staff committee decision disapproving a publication.
E. Should the Superintendent concur with the staff committee's disapproval, a resident may appeal to the Commissioner of Correction who shall evaluate the publication in conjunction with the Office of the Attorney General. The findings shall be communicated to all institutions.

IV. CRITERIA
A. Requests for and receipt of publications shall be disapproved when the publications contain the following:
1. Information regarding the manufacture of explosives, incendiaries, weapons or escape devices.
2. Instructions regarding the ingredients and/or manufacture of poisons or drugs.
3. Clearly inflammatory writings advocating violence, insurrection or guerrilla warfare against the government or any of its institutions.
4. Judicially defined obscenity.
B. No legitimate publication shall be prohibited solely on the basis that such publication is critical of penal institutions in general, of a particular institution, of a particular institutional staff member, or an official of the Bureau of Correction or of a correctional or penological practice in this or in any other jurisdiction.
C. The above criteria should not be interpreted so broadly as to affect recognized textbooks in chemistry, physics or the social sciences.

Gray v. Creamer, 376 F. Supp. at 682-83 app.

175. McCleary v. Kelly, 376 F. Supp. 1186, 1190-92 (M.D. Pa. 1974); Gray v. Creamer, 376 F. Supp. 675, 677-78 (W.D. Pa. 1974).

176. *See* note 174 *supra*.

177. 416 U.S. at 408.

178. *Id.* at 414 ("[A]ny regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.").

179. *Id.* at 413 (Here, *Martinez* articulated security, order, and rehabilitation as the three substantial governmental interests in the prison context.).

prohibited family or friends from mailing publications to a prisoner.[180] Although family or friends might attempt to smuggle contraband within the pages of a publication or within a hollowed book, officials could maintain security by inspecting incoming publications.[181] Prison authorities should not abrogate first amendment rights merely to further administrative convenience.[182]

The regulations adopted by the Bureau of Correction failed to comply with *Martinez* in yet another way. They stipulated that although "recognized textbooks" might fall within the classification of publications subject to prohibition, prison authorities could not ban them.[183] This exemption of "recognized textbooks" demonstrates that the Bureau's primary concern was with the merit of the publication and not with the work's probable impact upon the inmates and their environment. Under the Pennsylvania regulations the nonprisoner's right to send publications hinged upon the subjective and personal opinion of prison authorities about the work's moral and educational value. *Martinez*, however, by stating that security, order, or rehabilitation must be furthered to justify a restraint on first amendment free speech rights, focused upon the publication's probable effect within the prison.[184] *Martinez* sought to eliminate the subjective and arbitrary infringements of first amendment rights which the Pennsylvania regulations sanctioned.[185]

The *Gray* Court stated that the Bureau of Correction's Regulations comported with *Martinez* because the prison administration did not "*seek* to unnecessarily hamper freedom of expression" when promulgating the regulations.[186] Thus, if prison authorities unintentionally infringed outsider's first amendment rights, the regulations would be valid. *Martinez*, however, rejected prison authorities' intent as a criterion for

180. *See* note 174 *supra*.

181. Rhem v. Malcolm, 371 F. Supp. 594, 634 (S.D.N.Y. 1974), *finding aff'd*, 507 F.2d 333 (2d Cir. 1974).

182. *Id. Martinez* implicitly rejected administrative convenience as a justification for deprivation of first amendment rights by not citing it as one of the three legitimate governmental interests in the prison context. In other settings, the Court has held that administrative convenience does not justify infringing a fundamental right. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (equal protection claim); Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (due process claim).

183. *See* note 174 *supra*.

184. *Martinez* clearly rejected prison officials' personal opinions regarding a publication's quality as a criteron for limiting first amendment rights. 416 U.S. at 415.

185. *Id.* at 407.

186. 376 F. Supp. at 678 (emphasis added).

judging the legitimacy of their conduct.[187] Accepting prison officials' "good faith" as a justification for their actions would dilute *Martinez*[188] and lead to frequent abuse of outsiders' and inmates' fundamental rights.[189]

Courts have also applied *Martinez* when testing the constitutionality of regulations that ban sexually explicit publications.[190] In *Frazier v. Donelon*,[191] prison officials rejected sexually explicit publications on the ground that they tended to disrupt prison order.[192] They added that these publications "constitute valuable contraband within the prison culture and consequently possession of these items frequently becomes a source of inmate competition and agitation."[193]

The *Donelon* court upheld the ban on sexually explicit publications, determining that a prisoner's right to such publications bordered on frivolity.[194] If the court had given the publications the presumption of acceptability mandated by *Martinez*,[195] it may have reached a different result. Indeed, the official justification for the ban—that such publications constituted valuable contraband which would cause agitation within the prison—is arguably a compelling reason for permitting prisoners to

187. *Martinez* mandated that courts review the constitutionality of a prison official's action on the basis of its *effect* on security, order, and rehabilitation. 416 U.S. at 413.

188. It is much easier to demonstrate that someone violated another's rights than to show that the infringement was intentional. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (suit brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1970 & Supp. V 1975)):

> Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because * * * [w]hatever our law was once, * * * we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Id. at 1185. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) states: "The function of proof of motivation in cases where it is relevant will be to create a burden of legitimate defense which otherwise would not be owing." *Id* at 1208.

189. *See* note 95 *supra* and accompanying text.

190. *See, e.g.*, Carpenter v. South Dakota, 536 F.2d 759 (8th Cir. 1976); Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976); Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974), *aff'd mem.*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976).

191. 381 F. Supp. 911 (E.D. La. 1974), *aff'd mem.*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976).

192. 381 F. Supp. at 916.

193. *Id.*

194. *Id.* at 919.

195. Because *Martinez* established there was a right to correspond, the burden of proof would be on the party seeking to limit this right.

obtain sexually explicit publications. If such publications were readily available, the alleged competition and agitation would cease.[196]

The prison officials' naked assertion that the publications would interfere with prison order[197] was insufficient to justify banning these publications. Although the *Martinez* test may not require proof beyond a reasonable doubt that the prohibition of sexually explicit publications would further security, order, or rehabilitation,[198] it properly requires more than a mere assertion.[199] There is tremendous sexual tension in prison,[200] but it does not follow a fortiorari that sexually explicit publications aggravate this tension.[201] Homosexual rape is a major problem in prisons,[202] but authorities have determined that rape is an expression of aggression rather than a function of sexual deprivation.[203] It is therefore possible that sexually explicit publications, rather than leading to sexual deviance, could provide a much needed outlet for inmates' pent-up frustrations.[204]

Although many courts have invoked and misapplied *Martinez*,[205] at

196. This Note assumes the validity of the prison officials' statement that the competition and agitation was a consequence of the publications being contraband. 381 F. Supp. at 916.

197. *Id.*

198. Procunier v. Martinez, 416 U.S. 396, 414 (1974).

199. *Id.* at 415-16.

200. *See, e.g.*, D. CLEMMER, THE PRISON COMMUNITY 257-73 (1958); G. SYKES, THE SOCIETY OF CAPTIVES 70-72 (1958); Hirschkop & Millemann, *supra* note 95, at 814-15; Note, *supra* note 96, at 858-59.

201. For a discussion of the effects of sexually explicit publications, see P. GEBHARD, J. GAGNON, W. POMEROY, & C. CHRISTENSON, SEX OFFENDERS 670 (1965) ("[R]ather large proportions of the men reported little or no sexual arousal from pornography."); THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970), *quoted in* L. SUNDERLAND, OBSCENITY: THE COURT, THE CONGRESS AND THE PRESIDENT'S COMMISSION 74 (1974): " '[E]xtensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or non-sexual deviancy or severe emotional disturbances . . . .' "; Cairnes, Paul, & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1035-36 (1962).

202. *See* note 200 *supra*.

203. S. BROWNMILLER, AGAINST OUR WILL 267 (1975); A. MEDEA & K. THOMPSON, AGAINST RAPE 32 (1974); Griffin, *Rape: The All-American Crime*, RAMPARTS 26, 35 (Sept. 1971).

204. *See* Cairnes, Paul, & Wishner, *supra* note 201, at 1036 ("[I]t may be that with some of these people, obscenity operates as a safety valve for release of feelings.").

205. *See* Carpenter v. South Dakota, 536 F.2d 759 (8th Cir. 1976); Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974), *aff'd mem.*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*,

least one has properly applied it. In *Cofone v. Manson*,[206] the federal district court in Connecticut invalidated regulations that permitted prison officials to reject publications if they " 'advocate disruption within institutions or in the community; have demonstrably caused disruption within the institutions or in the community; . . . [or] obstruct rehabilitative objectives.' "[207]

The regulations allowed prison officials to ban publications even though they did not threaten the security or order of the prison. Indeed, the use of the word "disruption" as a criterion for banning publications could conceivably lead to the infringement of inmates' and outsiders' rights because their activity merely displeased officials.[208] The draftsmen of the regulations also failed to realize that first amendment guarantees must be "applied in light of the special characteristics of the . . . environment."[209] Officials may justifiably ban a publication that poses an actual threat to the security and order of the prison, but if the threat is to the security and order of the outside community, there must be a "clear and present danger" that criminal activity will occur.[210] The *Cofone* court found the regulation permitting prison officials to reject a publication that "obstructed rehabilitative objectives" the least palatable.[211] This catch-all provision in effect granted the officials discretion to reject any publication.

F. *Jones v. North Carolina Prisoners' Labor Union, Inc.*

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[212] the Supreme Court failed to follow the *Cofone* approach. A three-judge district court addressed the issue of whether prison officials could prevent a union from mailing literature to inmates in bulk.[213] Noting that other

424 U.S. 923 (1976); McCleary v. Kelly, 376 F. Supp. 1186 (M.D. Pa. 1974); Gray v. Creamer, 376 F. Supp. 675 (W.D. Pa. 1974).

206. 409 F. Supp. 1033 (D. Conn. 1976).

207. *Id.* at 1040 (quoting Connecticut Department of Correction, Administrative Directive, *Review of Reading Materials*, ch. 3.7, § 4).

208. *Id.*

209. Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

210. Cofone v. Manson, 409 F. Supp. at 1040 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

211. *Id.* at 1041.

212. 97 S. Ct. 2532 (1977).

213. North Carolina Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937 (E.D.N.C. 1976), *rev'd*, 97 S. Ct. 2532 (1977). The district court and Supreme Court also discussed prisoners' first amendment associational rights.

groups were accorded these privileges,[214] and finding no evidence that the union threatened the institution's security or order,[215] the court held that equal protection principles mandated that officials allow the union to send its literature in bulk to selected inmates.[216]

The Supreme Court reversed, employing a mode of analysis that may prove to be a great setback for prisoners' and nonprisoners' first amendment rights. While laying the groundwork for the majority, Justice Rehnquist set the tone of the opinion. He stated that prison officials should be accorded "wide-ranging deference" because of lack of judicial expertise in the complicated area of prison administration.[217] He cited federalism and notions of comity as additional reasons for deferring to prison authorities.[218]

As evidence of the adverse effect the union would have on the prison environment, he quoted statements of prominent Department of Correction officials.[219] Although the Court acknowledged the district court's finding that there was " 'not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions,' "[220] it noted that the district court failed to demonstrate that the prison officials' fears were "groundless."[221]

The Court did not require the prison officials to show that the union was dangerous to security. Rather, it relied on *Pell* to establish that inmates or outsiders must demonstrate that the officials' beliefs were unreasonable.[222] Indeed, the Court upheld the officials' action because "they have not been conclusively shown to be wrong."[223] The Court also explained why the regulations were reasonable. Only bulk mailings were involved and thus first amendment speech rights of both prisoners and outsiders were "barely implicated."[224] The union could send publications piecemeal to each prisoner[225] and, although union solicitation and

214. *Id.* at 944.
215. *Id.* at 945.
216. *Id.* The Court did not specify whether its determination was based on strict scrutiny or mere rationality.
217. 97 S. Ct. at 2538.
218. *Id.*
219. *Id.* at 2539.
220. *Id.* at 2539 n.5 (quoting 409 F. Supp. at 944).
221. *Id.*
222. *Id.* at 2539.
223. *Id.* at 2542.
224. *Id.* at 2540.
225. *Id.* at 2541 n.8.

organization were prohibited, inmates could lodge complaints through the inmate grievance procedure.[226]

The Court concluded with a discussion of the role of the public forum doctrine in prison affairs.[227] To establish that a prison was not a public forum, the Court analogized to a military base and quoted *Greer v. Spock*.[228] Prison officials thus need only show that their actions were reasonable.[229] As additional support for the application of the reasonableness standard, the Court improperly relied on *Martinez*.[230] Specifically, the Court stated that it would be inappropriate to require officials to show that the union was dangerous in light of the deference courts should accord to officials' judgment.[231]

Justice Marshall correctly noted in dissent that the Court should have employed the traditional balancing analysis.[232] After applying this analysis and determining that the bulk mail prohibition should have been invalidated,[233] he discussed the dangerous implications of the majority's decision.[234] Subjecting prison officials' actions to a mere rationality test would eventually transform prisoners' constitutional rights into privileges.[235] He added, however, that this decision was an "aberration" resulting from "the very phrase 'prisoner union' [which] is threatening to those holding traditional conceptions of the nature of penal institutions."[236]

Jones signals a significant retreat for prisoners' and nonprisoners' constitutional rights. Rather than apply traditional first amendment analysis, the Court used the *Pell* test.[237] This may indicate an intention to limit *Martinez* and apply the *Pell* test for first amendment analysis in the prison context.

Assuming arguendo that the Court's analysis in *Pell* was appropriate, it should not be extended to *Jones*. Whereas *Pell* considered visitation rights, *Jones* ruled on the right to send and receive publications in bulk.

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226. *Id.* at 2540 n.6.
227. *Id.* at 2542-44.
228. *Id.* at 2542-43 (quoting 424 U.S. at 838 n.10).
229. *Id.* at 2543.
230. *Id.*
231. *Id.*
232. *Id.* at 2545-46.
233. *Id.* at 2547-48.
234. *Id.* at 2549.
235. *Id.*
236. *Id.*
237. *Id.* at 2539.

Because visits pose a greater risk to prison security and order than publications,[238] *Martinez* should be extended to receipt of publications analysis even though the Court did not apply it to visitation rights.

Although *Jones* frequently cited *Martinez*,[239] it did not mention the *Martinez* standard. Moreover, the Court changed the tone of *Martinez* by quoting phrases from it out of context.[240] *Martinez* invested prison officals with discretion, but, when constitutional rights were infringed, it required a showing of necessity to curtail these freedoms.[241] It recognized the need to enforce the Constitution even in the prison context.[242]

More importantly, *Jones* introduced the public forum doctrine to prison affairs. It was unnecessary to do so, however, because the Court's extension of *Pell* disposed of the case. Perhaps the Court introduced this doctrine to create precedent for applying it when prison authorities' actions could not be justified even under *Pell*.

The desire to eliminate time-consuming and frivolous litigation may be another reason for introducing the public forum doctrine.[243] Under *Greer*

238. *See* notes 167-69 *supra* and accompanying text.

239. 97 S. Ct. at 2538, 2540 & n.6, 2541 n.8, 2542, 2543.

240. *Jones* quoted the following passage from Procunier v. Martinez, 416 U.S. at 405:

> [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. at 2538 (footnote omitted). *Martinez*, however, added an important caveat which *Jones* failed to acknowledge: "But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." 416 U.S. at 405-06.

241. 416 U.S. at 405-06.

242. *Jones* and *Pell* may have paid lip-service to the idea that outsiders' and prisoners' constitutional rights warrant protection in the prison environment but the standards articulated in these two cases indicate that the protection actually afforded these rights would be minimal.

243. The federal judiciary is overburdened and the Court has expressed concern about the overload's deleterious effects on the judicial system. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 522-23 (1977) (Burger, C.J., dissenting). Prisoner complaints contribute substantially to this problem. *See, e.g.*, Justice, *Prisoners' Litigation in the Federal Courts*, 51 TEX. L. REV. 707 (1973):

> Commentators say that the staggering number of [prisoner] petitions filed has created an intolerable burden on the courts. As if numbers alone were not enough to discourage even the most indefatigable federalist, nearly every petition is

v. Spock,[244] if a place were not historically a public forum or if it had a primary purpose unrelated to this function, the inquiry into whether it could serve as a public forum would end.[245] The Court could summarily dismiss first amendment prisoner complaints on these grounds.[246] The need to resolve the *Martinez-Pell* conflict or to balance the competing interests of the prisoner and administration would be eliminated.

The argument that the Court had the aforementioned intentions is strengthened by its disregard of precedent in employing the public forum doctrine. Public forum analysis is appropriate only when the right to assemble, demonstrate, or distribute pamphlets is at issue;[247] it has not been applied to the receipt of mail, whether it be direct personal correspondence or publications.[248] The *Jones* majority was apparently straining to introduce this mode of analysis to first amendment speech rights in the prison context. By so doing, the Court may have greatly reduced the first amendment speech rights of inmates and outsiders because in a public forum analysis there is no requirement that the means used be "generally necessary." Once it is determined that the place is not a public forum, restrictions need only be reasonable.[249]

Although *Jones* may not be a retreat to the "hands-off" doctrine, it does subject prison officials' actions to a much less rigorous review than that used in *Martinez*. *Jones* may, however, be an aberration.[250] The belief that prison labor unions are wholly inconsistent with the prison

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inartfully drawn, requiring the judge to expend more than an ordinary effort to understand the basis of the claim. Moreover, valid claims are few and far between.

Id. at 708.

Judge Wyzanski suggests that control of the docket can best be achieved by deciding cases in such a manner that there is clear precedent. *See* Wyzanski, *An Activist Judge: Mea Maxima Culpa. Apologia Pro Vita Mea.*, 7 GA. L. REV. 202, 210-12 (1973).

244. 424 U.S. 828 (1976).

245. *See* notes 43-49 *supra* and accompanying text.

246. Prisons have not historically served as public forums and the goals of prison administration are unrelated to use of the prison as such a forum. *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. at 2543.

247. *See* sources cited note 23 *supra*.

248. *See* sources cited note 23 *supra*.

249. Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. 2532, 2543 (1977) ("Since a prison is most emphatically not a 'public forum,' these reasonable beliefs of appellants are sufficient.").

250. *Id.* at 2549 (Marshall, J., dissenting).

environment may have influenced the Court.[251] Also, as in *Martinez*, the *Jones* Court limited its holding. By ruling only on bulk mail, the Court left room for retreat; it could easily distinguish *Jones* from most cases involving prisoners' first amendment speech rights. When bulk mail was at issue, the Court could limit *Jones* to its facts—it could state that the notion of a prison labor union was so abhorrent that it controlled the decision. Clearly, *Jones* did not end the confusion surrounding prisoners' first amendment free speech rights; rather, it demonstrates how perplexed the Court is by the complex task of balancing first amendment free speech rights against the tenets of penology.

IV. CONCLUSION

The Supreme Court should repudiate *Jones*. It not only unduly restricts free speech rights in the prison environment, but adds a third mode of analysis to the already confused state of the law. The Court must develop an analytical framework to guide lower federal courts when prisoners' first amendment speech rights are at issue. Until the Court articulates a uniform standard that adequately protects inmates' first amendment free speech rights, rehabilitation rates will not rise, recidivism will remain a major problem, and lower federal courts will face much needless litigation. The adoption of the *Martinez* test as applied in *Cofone* would not only end unnecessary litigation but would also adequately protect the interests of prison officials, inmates, and the general public. Thus, the Supreme Court should explicitly adopt this approach at the earliest opportunity, and hold that prisoners have first amendment free speech rights—including the right to receive publications.

Alan H. Gluck

251. I therefore believe that the tension between today's decision and our prior cases ultimately will be resolved not by the demise of the earlier cases, but by the recognition that the decision today is an aberration, a manifestation of the extent to which the very phrase "prisoner union" is threatening to those holding traditional conceptions of the nature of penal institutions.

Id.

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