CONSTITUTIONAL LAW—INMATES' RIGHT TO CORRESPOND—*McDonough v. Director of Patuxent*, 429 F.2d 1189 (4th Cir. 1970).

William L. McDonough, plaintiff, was convicted of assault and battery in 1959, and sentenced to two years imprisonment by the Circuit Court for Baltimore County.[1] Subsequently, he was found to be a "defective delinquent"[2] and was committed to Patuxent Institution for an indeterminate period.[3] Prior to a second redetermination hearing,[4] plaintiff contacted several psychiatrists in the fall of 1967 for the purpose of securing private psychiatric evaluations and testimony.[5] Dr. Thomas Szasz indicated interest in plaintiff's case, advised him that his fee would be $500 per day, and requested authorization to publish plaintiff's earlier letters in *Playboy Magazine* to mitigate expenses through solicitation of funds from its readers.[6] The Director of Patuxent would not permit plaintiff to mail the authorization and prohibited any further correspondence with Dr. Szasz or *Playboy*.[7]

Plaintiff instituted suit for the removal of this restriction under The Civil Rights Act,[8] contending "that the purpose of the correspon-

1 McDonough v. Director of Patuxent, 429 F.2d 1189, 1191 (4th Cir. 1970).

2 MD. ANN. CODE art. 31B, § 5 (1957):

> For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

3 429 F.2d at 1191.

4 MD. ANN. CODE art. 31B, § 10(a) (1957) provides in part:

> After any person shall have been committed under § 9(b) as a defective delinquent, shall have been confined for two years after such commitment, . . . such person . . . may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined.

5 429 F.2d at 1191.

6 *Id.*

7 *Id.*

8 42 U.S.C. § 1983 (1964) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Stringer v. Dilger, 313 F.2d 536, 540 (10th Cir. 1963), describes the statutory prerequisites to liability under 42 U.S.C. § 1983:

> (1) [T]hat the defendant act "under color of" state or local law, and (2) that the plaintiff be subjected to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

dence was to seek psychiatric, financial and legal assistance" for his upcoming redetermination hearing.[9] During the course of this action, the Director of Patuxent amended the correspondence prohibition to exclude only letters containing an authorization for the publication of plaintiff's correspondence "for which . . . institutional approval has not been granted . . . ."[10] The district judge dismissed the suit,[11] but his action was reversed by the court of appeals, which stated:

> If . . . the purpose of his correspondence . . . was to obtain psychiatric, financial and legal assistance for his redetermination hearing, he alleged a good cause of action . . . . [I]f . . . the purpose of the correspondence was to effect publication of a critique of the defective delinquency law and its implementation at Patuxent with deleterious effect upon institutional control and discipline, treatment programs and other inmates, the administration of the institution would not be powerless in its discretion to suppress it.[12]

Historically, society's desire for retaliation against the convicted criminal furnished the rationale for our system of imprisonment.[13] Through the influence of nineteenth-century humanitarian concepts, however, penal philosophy gradually embraced corrective treatment, reform and rehabilitation as desirable ends to be achieved during incarceration.[14] Moreover, society's interest in the prevention of crime provided reason enough for the furtherance of prison's rehabilitative function; practically all of those imprisoned would one day return to free society, changed for the better or for the worse by their experience of confinement.[15] Yet, the notion of punishment still pervades today's correctional objectives,[16] and uneasily coexists with goals of treatment and rehabilitation.[17]

The origin of present-day barriers surrounding prison communication can be traced to earlier penal practices of restraint, such as the maintenance of enforced silence among the inmates at all times.[18] And even though the doctrine "that a prison is a world by itself, whose in-

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9 429 F.2d at 1190.

10 *Id.* at 1191.

11 *Id.* at 1190.

12 *Id.* at 1193.

13 H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 582 (1946); Leopold, *What Is Wrong With The Prison System?*, 45 NEB. L. REV. 33, 35-38 (1966).

14 Vogelman, *Prison Restrictions-Prisoner Rights*, 59 J. CRIM. L., C.&P.S. 386 (1968).

15 E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 441 (3d ed. 1939).

16 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 2 (1967) (hereinafter cited as 1967 REPORT).

17 *Id.* at 4.

18 *See* H. BARNES & N. TEETERS, *supra* note 13, at 521; 1967 REPORT, *supra* note 16, at 3.

habitants are not supposed to know anything of what is passing without its orbit"[19] is defunct, its vestiges remain, notably in the form of censorship of prisoners' mail.

Penal administrators in federal and most state correctional systems have been delegated authority to regulate inmate conduct, including correspondence, by Congress and the state legislatures respectively.[20] In the remaining states, prison directors apparently formulate and enforce conduct rules through implied authority.[21] Traditionally, through what has been termed the "hands-off" doctrine, courts have considered themselves powerless to interfere with the rules and regulations promulgated by prison administrations, leaving the determination of inmates' rights to prison officials' discretion.[22] As the Supreme Court stated in *Price v. Johnston*:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.[23]

Consequently, while judicial intervention to secure the rights of those imprisoned was "limited to the extreme situation," the independence of penal authorities was preserved.[24]

Recently, courts have begun to recognize that imprisonment does not demand the automatic surrender of one's constitutional rights, and have become more willing to assume jurisdiction of these inmate controversies.[25] Under the "retained rights" theory espoused in *Coffin v.*

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19 F. WINES, PUNISHMENT AND REFORMATION 152 (1895), *quoted in* H. BARNES & N. TEETERS, *supra* note 13, at 585.

20 Jacob, *Prison Discipline And Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 227 n.1, 235 (1970). *See, e.g.*, 18 U.S.C. §§ 4001, 4042 (1964, Supp. IV, 1969); CONN. GEN. STAT. ANN. § 18-81 (Supp. 1970); N.Y. CORREC. LAW § 46 (McKinney 1968); UTAH CODE ANN. § 64-9-2 (Supp. 1968).

21 Jacob, *supra* note 20, at 235.

22 Vogelman, *supra* note 14, at 386; Jacob, *supra* note 20, at 228. *See, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954) (courts have no power to supervise prison administration or to interfere with ordinary prison regulations); Garcia v. Steele, 193 F.2d 276 (8th Cir. 1951) (courts have no supervisory jurisdiction over the conduct of penal institutions); Commonwealth v. Banmiller, 194 Pa. Super. 566, 168 A.2d 793 (1961) (it is not the court's function to superintend the treatment and discipline of prisoners).

23 334 U.S. 266, 285 (1948).

24 Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986-87 (1962). Many recent cases adhere to this traditional view of the court's role. *See, e.g.*, Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970); Haggerty v. Wainwright, 427 F.2d 1137 (5th Cir. 1970); Argentine v. McGinnis, 311 F. Supp. 134 (S.D.N.Y. 1969); State v. Rydzewski, 112 N.J. Super. 517, 271 A.2d 907 (App. Div. 1970).

25 Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 669-70 (1966).

Reichard,[26] "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[27] The only express restriction, generally, limits the inmates' freedom of movement, and the question is: "[W]hat other deprivations can be implied?"[28] According to *Coffin*, only those restrictions of prisoners' constitutional rights which can be justified as necessary for the purpose or function of imprisonment may be imposed.[29] On this basis, then, the exercise of discretion by prison administrations is more subject to judicial scrutiny. Their decisions regarding restriction of inmates' correspondence may be reviewed, and a denial of freedom of expression may be redressed.

As in *McDonough*, the right of an inmate to correspond with the court and his attorney has generally been recognized.[30] Other correspondence is frequently governed by very restrictive rules.[31] Usually, the content of letters to family, friends, or other approved correspondents is limited to personal matters,[32] and comment about the institution or its personnel is prohibited.[33] The case of Robert Stroud, the famed Birdman of Alcatraz, furnishes a well-known example of prison mail censorship, in which the court upheld the authority of the warden to suppress Stroud's correspondence to secure publication of material

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

27 *Id.* at 445. *See also* Note, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671 (1967).

28 Note, *The Right of Expression In Prison*, 40 S. CAL. L. REV. 407, 410 (1967).

29 *Id.* at 408.

30 Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951) (warden's refusal to permit prisoner to file appeal papers in court was a violation of the equal protection clause of the fourteenth amendment); Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966) (prisoners retain the right of access to courts while incarcerated); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970) (right of prisoner to apply to the state court for relief cannot be unreasonably restricted); United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965) (prison regulations cannot preclude inmates from communication with the courts); *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970) (prisoners have the right to correspond confidentially with attorneys and public officials). However, prisoners' letters to attorneys and courts have been censored and stopped by prison officials, and their decisions have been upheld by courts in some instances. Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A.J. 1051, 1054 n.25 (1970). Also it has been observed that the practice of limiting prisoners' paper supplies to only a few sheets a week might infringe upon this right: "The preparation of a single habeas corpus petition, for instance, could exhaust a prisoner's paper supply for months." Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 822 (1969).

31 Leopold, *supra* note 13, at 49. Provisions are usually made for an "approved mailing list consisting of the names of persons with whom a prisoner may correspond." Vogelman, *supra* note 14, at 387.

32 Jacob, *supra* note 20, at 239.

33 Leopold, *supra* note 13, at 50.

on ornithology.[34] Prisoners' letters to governmental agencies, Supreme Court Justices, and even the Pope have been censored and stopped.[35] And, as in *McDonough*, curtailment of inmate correspondence with a national magazine raises a serious question concerning the limits of freedom of expression in prison.

Restrictions placed upon inmate freedom of expression are, like any other governmental restrictions, subject to the restraints of the due process clause of the fourteenth amendment,[36] which prohibits "unreasonable, arbitrary, or capricious" state or federal regulation.[37] The exercise of governmental power must be "reasonable in relation to its subject and . . . adopted in the interests of the community . . . ."[38] However, the due process standard does not require that the best or "least drastic" means of regulation be utilized.[39] Consequently, it would appear that reasonable prison censorship of inmate mail, when uniformly applied, does not violate this conventional due process standard. And, courts reviewing inmate correspondence controversies have generally applied the "due process standard of reasonableness . . . irrespective of what rights have allegedly been violated," and "prisoners' first amendment freedoms have not enjoyed a preferred status."[40] Yet, the Supreme Court has characterized first amendment guarantees as preferred freedoms[41] and "fundamental personal rights and liberties."[42] The

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34 Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951).

35 Singer, *supra* note 30, at 1054 & nn.27-29.

36 Civil Rights Cases, 109 U.S. 3 (1883) (the fourteenth amendment prohibits "State action of every kind," which impairs life, liberty, or property without due process of law).

37 Nebbia v. New York, 291 U.S. 502, 525 (1934) (governmental regulation of prices violates due process if found to be arbitrary, discriminatory, or demonstrably irrelevant to legislative purposes). *See also* Heiner v. Donnan, 285 U.S. 312 (1932) (a statute creating a conclusive presumption that gifts made within two years of donor's death are made in contemplation of death found to be arbitrary and in violation of due process); People v. McClean, 167 Misc. 40, 3 N.Y.S.2d 314 (Middletown City Ct. 1938) (the inclusion of the phrase "New York World's Fair 1939" on all state license plates held not to be in violation of due process, as only essential and not whimsical rights are protected); Note, 53 IOWA L. REV. 671, *supra* note 27, at 672-73.

38 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (minimum wage law for women found not to be an arbitrary discrimination, and not violative of due process).

39 Note, 53 IOWA L. REV. 671, *supra* note 27, at 672. *See also* Nebbia v. New York, 291 U.S. at 537, which states that due process is satisfied when laws have a "reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory."

40 Note, 53 IOWA L. REV. 671, *supra* note 27, at 674 & nn.33-37. Courts differ on the question of whether the "clear and present danger" doctrine extends to prisons. Singer, *supra* note 30, at 1052 n.16.

41 Jones v. Opelika, 316 U.S. 584, 608 (1942) (dissenting opinion) (city ordinance requiring licensing for the selling of pamphlets on the street does not infringe upon free speech or free press).

42 Schneider v. State, 308 U.S. 147, 161 (1939) (an ordinance prohibiting distribution

Court has stressed "the importance of preventing the restriction of enjoyment of these liberties"[43] in the absence of a "clear and present danger"[44] or a "*compelling* governmental interest."[45] This more stringent constitutional standard for first amendment guarantees, as applied to prisoners' correspondence rights, would seem to invalidate a regulation if a reasonable alternative, involving less deprivation of the prisoners' freedom of speech, is available.[46]

The administration of Patuxent Institution maintained that the publication of plaintiff's letters "might have an adverse effect upon institutional control and discipline, the treatment programs available therein, and, in general, upon the population committed to Patuxent."[47] While *McDonough* upheld plaintiff's right of publication if the purpose was to obtain psychiatric, financial, and legal assistance, remanding the case for resolution of the issue of fact, they also upheld the defendant institution's right to suppress correspondence effecting publication of the letters if their content constituted a "critique of the defective delinquency law and its implementation at Patuxent with deleterious effect upon institutional control and discipline, treatment programs and other inmates."[48] Other courts have similarly justified censorship for the sake of the "orderly administration,"[49] compatibility with "good prison administration,"[50] and, in general, for the preservation of authority within the prison.[51] Penal administrators' basic mo-

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of literature on public streets, for the purpose of maintaining clean streets, violates constitutionally protected right of free speech and free press).

43 *Id.*

44 Dennis v. United States, 341 U.S. 494, 513 (1951) (advocacy of the forceful overthrow of the government not protected by the first amendment). *Accord,* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (students wearing armbands in school to express objection to the Vietnam war are entitled to the protection of free speech); West Virginia Board of Educ. v. Barnette, 319 U.S. 624 (1943) (compelling school children to salute the flag and pledge allegiance to it violates the first and fourteenth amendments).

45 Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (statutory provision establishing residence requirement for welfare assistance impinges upon constitutional right to travel, and is unconstitutional in the absence of a compelling governmental interest). *See also* United States v. O'Brien, 391 U.S. 367 (1968) (restrictions on first amendment freedoms justified only if the restriction is no greater than is essential to the furtherance of a substantial governmental interest); Shelton v. Tucker, 364 U.S. 479 (1960) (restrictions for the furtherance of a governmental purpose should achieve that end by the least drastic means available); Cantwell v. Connecticut, 310 U.S. 296 (1940) (regulations, while achieving a permissible end, must not unduly infringe upon protected freedoms).

46 *See* Note, 53 IOWA L. REV. 671, *supra* note 27, at 674.

47 429 F.2d at 1192.

48 *Id.* at 1193.

49 *In re* Smigelski's Petition, 185 F. Supp. 283, 286 (D.N.J. 1960).

50 Labat v. McKeithen, 243 F. Supp. 662, 664 (E.D. La. 1965).

51 Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506, 508-09 (1963).

tives for mail censorship seem to be their fear of escape planning through unrestricted correspondence and their sensitivity toward criticism.[52] It has been suggested that since the prisoners' escape rate in the federal prison system, which employs one of the most lenient mail censorship systems, has been calculated at less than one percent, it would not be unreasonable to require prison officials to obtain court sanction, based on evidence of a possible escape plot, before mail censorship is permitted.[53] Affirmatively, publication of inmates' letters or manuscripts can provide penal administrators with a barometer of prisoners' attitudes, progress, and problems, enhancing the prospects of rehabilitation as well as disclosing potential disciplinary risks.[54] Greater inmate freedom of expression can afford society an opportunity to acquaint itself with inmate life and penal practices,[55] thus providing the public with a more enlightened basis for evaluation.

While the orderly management of a prison presents peculiar and difficult problems of discipline, justification for interference with first amendment freedoms cannot be found in the assumption that free speech is inimical to that discipline. Less drastic alternatives should be devised for the prevention of inmate contraband, while every effort should be made to insure the place of freedom of expression in the constitutional hierarchy. Prisoner correspondence restrictions, particularly those relating to mass media as in *McDonough*, would seem to be remnants of the retributive penal theory which held "that the punishment of a convict is incomplete, so long as his mind is not conquered."[56] Society's goal of crime prevention through resocialization of the inmate would seem to be foiled by isolation practices that foster social sever-

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52 Jacob, *supra* note 20, at 239. The sensitivity of prison officials is well illustrated by their refusal, in one case, to allow an inmate to continue an English correspondence course. It was learned that he desired to improve his writing for the purpose of authoring a book describing prison brutality. Numer v. Miller, 165 F.2d 986 (9th Cir. 1948). In the present case, an excerpt of a letter published in *Playboy* in February, 1969, written by William McDonough, apparently after relaxation of the correspondence ban, gives an indication of prison criticism:

> The guards beat, harass and degrade the inmates until some lose their humanity entirely and sink into doglike submission . . . . Blackjacks are used in the beatings and steel bracelets are employed as handcuffs.

PLAYBOY, Feb. 1969, at 57.

See also Hirschkop & Millemann, *supra* note 30, at 824, which states:

> Knowledge of prison problems is withheld from the public, solely on the discretionary authority of the officials who are often the perpetrators of the acts of which the prisoners seek to complain.

53 Singer, *supra* note 30, at 1055.

54 Note, 40 S. CAL. L. REV. 407, *supra* note 28, at 410.

55 *Id.* at 409.

56 F. WINES, *supra* note 19, at 152.

ance and hostility toward the community.[57] And as reasonable alternatives often remain untried, the censorship of mail which prevents an inmate from placing the facts of his case before the public, or prevents him from informing the public about conditions within the prison, thus appears violative of the first amendment. Developments suggest, however, that the vast power of the warden over prisoners' first amendment rights, once secretly exercised in the name of "administrative discretion," is waning as courts become more willing to balance the interests of internal prison administration against freedom of expression.[58] Hopefully, recognition of constitutional rights will result, for, as Justice Frankfurter stated:

> The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality.[59]

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[57] *See* H. BARNES & N. TEETERS, *supra* note 13, at 598-99; Leopold, *supra* note 13, at 43; Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270, 1271 (1969).

[58] For example, the United States District Court of Rhode Island in Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970), recently held that censorship of prisoners' mail in order to suppress any criticism of the institution violated inmates' first amendment rights. While recognizing the need to maintain prison security by eliminating traffic in weapons, drugs and other contraband, the court maintained:

> [I]n taking steps to prevent the introduction of such items into the prison, even though the purpose or end in view is legitimate, prison officials must use means which are legitimate and which provide the least restrictive of the alternative methods of accomplishing the desired end.

Id. at 788.

[59] Dennis v. United States, 341 U.S. 494, 520-21 (1951) (concurring opinion).