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Prisoners generally seek judicial remedies either to object to conditions of confinement—general or individual—or to secure relief from the execution of their sentences, usually on the basis of some error of law. But rights without the means of enforcement are empty; and although there is no constitutional language which explicitly states that prisoners have a right to free access to the courts, such a right has been judicially inferred from sources in the Constitution. Primarily, the right of access to the courts has been seen as included in the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution,[1] and by similar limitations on state governments by similar clauses in the respective state constitutions.

Generally speaking, however, the source of the right of access to the courts has not been much discussed. For the most part it has merely been acknowledged by the United States Supreme

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1. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961); Groom v. Hert, 405 P.2d 125 (Okla. 1965); Austin v. Hert, 405 P.2d 126 (Okla. 1965). Some cases suggest that the right of state prisoners to have access to the courts might flow from the Equal Protection Clause of the Fourteenth Amendment. Cochran v. Kansas, 316 U.S. 255 (1942), wherein the Supreme Court assented to the stipulation that if the prison officials had prevented petitioner from appealing his conviction, it would be a denial of equal protection. In 1951 *Cochran* was clarified by Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951), in which *Cochran* was cited for the proposition that a discriminatory denial of a *statutory* right of appeal was a denial of equal protection. In *Cook*, as in *Cochran*, the prevention of the appeal was alleged to have been the cause of prison officials acting pursuant to prison rules. Some recent cases have expressed the view that communications with courts via the mails in a First Amendment right, whether of free expression or to petition for redress of grievances. Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

Court: "It is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed,"[2] or simply declared by the lower federal courts: "A right of access to the courts is one of the rights a prisoner clearly retains. It is a precious right and its administrative unfettered exercise may be of incalculable importance to the protection of rights more precious."[3] These simple expressions, though probably unassailable at this time, leave a wide variety of questions unanswered. What type of "access" is required? What is denial or obstruction of access? What restrictions, while justifiable in general, must fall because they deny or obstruct access to the courts? What exceptions must be built into prison regulations to avoid collision with this right and when does administrative regulation begin to "fetter" the right of access to the courts? These and other questions will be the focus of this article.

I. PREVENTING COMMUNICATIONS WITH COURTS

The most obvious form of obstruction of the right of access to the courts is the absolute refusal of the prison officials to allow an inmate to communicate with the courts by refusing to mail his letters. This practice has been uniformly condemned[4] as a denial of access to the courts, and prisoners have been held entitled to relief if such interference can be factually established.[5] In *Cochran v. Kansas*[6] the United States Supreme Court heard a plea requesting that Kansas give the petitioner a hearing to determine if in fact his appeal from conviction had been frustrated by prison regulations. The state agreed that had the petitioner's direct appeal been blocked by administrative regulations that prevented him from filing his appeal, the petitioner would have suffered a denial of equal protection.

The Kansas Supreme Court, however, had refused to grant petitioner a hearing in order to establish the factual basis for the charge, thus precluding him from obtaining any relief from his allegedly unconstitutional treatment. The United States Supreme Court ordered the hearing.

2. Johnson v. Avery, 393 U.S. 483, 485 (1969).
3. Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1966).
4. Brabson v. Wilkins, 25 App. Div. 2d 610, 267 N.Y.S.2d 580 (Sup. Ct. 1966).
5. *But see* State *ex rel.* Jacobs v. Warden, 190 Md. 755, 59 A.2d 753 (1948).
6. 316 U.S. 255 (1942).

The burden that the inmate must carry in showing that he is entitled to relief because communication with the courts has been blocked by prison officials varies with the circumstances of each case. On the one hand are the identical Oklahoma cases of *Groom v. Hert*[7] and *Austin v. Hert*.[8] In both cases, inmates had been given a definite period of time to obtain a transcript and perfect an appeal. The petitioners claimed to have delivered the necessary application to have the transcript made at public expense to the prison post office for notarization and mailing within the allotted time. The applications were not received by the court until the day following the deadline for the completion of the perfection of the appeal—one and one-half months after their delivery to the prison post office. The applications had never been notarized. The court found that "there is some doubt regarding the procedure followed at the penitentiary in the mailing of petition for casemade [the Oklahoma term for transcript and exceptions] at public expense, that has never been refuted by the State."[9] Based upon this finding, the court ordered relief for the petitioners in the form of allowing their appeal, notwithstanding the delay. *Groom* and *Austin* would seem to indicate that once the inmate has alleged facts which show that prison officials have blocked his communications with the court and has established "some doubt regarding the procedure," then the burden of proof shifts to the officials to show that the delay and prejudice have not been caused by their actions or regulations—either because the inmate's mail has not been blocked or because any delay is attributable to the inmate.[10]

This interpretation is supported by the decision of the United States Supreme Court in *Fallen v. United States*.[11] In *Fallen*, the Court essentially held that an inmate should not be prejudiced by the failure of the court to receive a notice of appeal within the allotted time when the inmate had delivered the notice of appeal to the prison mail room within the requisite time. Significantly there was no indication that the officials had delayed the mail beyond the normal delay required in processing mail. The same result is even more strongly indicated when the delay has been

7. 405 P.2d 125 (Okla. 1965).
8. 405 P.2d 126 (Okla. 1965).
9. 405 P.2d 125, 126 (Okla. 1965); 405 P.2d 126, 127 (Okla. 1965).
10. Bolden v. Pegelow, 218 F. Supp. 152 (E.D. Va. 1963).
11. 378 U.S. 139 (1964).

caused by active interference on the part of the prison officials.[12] As stated in *Groom* and *Austin*, "[Prison officials] should [never] become active participants in the denial of the right to appeal, and thus implements in denial of due process."[13]

The prison officials of course have an opportunity to refute the allegations of delay or interference. Perhaps the most effective means of refutation would be to demonstrate that the inmate had previously filed numerous petitions or motions and has heretofore had unfettered access to the courts. Numerous cases use the reasoning that since the inmate has corresponded freely with the court hearing his petition and/or others, his claim of denial of access to the courts is unsubstantiated.[14] Other circumstances supporting the prison officials' response to allegations of interference with court-directed mail have been that routine records of the prisoner's mailings failed to disclose letters directed to courts, and a sworn declaration of the petitioner's warden of a policy of "free communication between inmates and the appellate courts."[15]

Reasoning that since an inmate has had access to the courts in the past, he has not been denied in the instant case to access to the courts, however, is a doctrine which, although still vital, is a remnant of the old "hands off" days. The reasoning is valid when the inmate's allegations are general and conclusionary, but lacks validity when the allegations speak to a specific instance of interference.[16] The interference may be the result of an isolated response to a particular complaint, and a hearing should not be precluded solely because obstruction has never happened before and is against stated prison policy.

The only remedy for the obstruction of an inmate's mail so far discussed is that the inmate shall not be prejudiced by any delay caused by such interference. It should be noted, however, that blocking an inmate's access to the court is also a deprivation

12. Dodge v. Bennett, 335 F.2d 657 (1st Cir. 1964).

13. 405 P.2d 125, 126 (Okla. 1965); 405 P.2d 126, 127 (Okla. 1965).

14. Walker v. Pate, 356 F.2d 502 (7th Cir. 1966), *cert. denied*, 384 U.S. 966 (1966); Draper v. Rhay, 315 F.2d 193 (9th Cir. 1963); Prewitt v. Arizona, 315 F. Supp. 793 (D. Ariz. 1968), *aff'd*, 418 F.2d 572 (9th Cir. 1969); Hodges v. Field, 320 F. Supp. 775 (C.D. Cal. 1968), *aff'd*, 435 F.2d 1309 (9th Cir. 1970); Austin v. Harris, 226 F. Supp. 304 (W.D. Mo. 1964); People v. Wells, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (Ct. App. 1968); Brabson v. Wilkins, 25 App. Div. 2d 610, 267 N.Y.S.2d 580 (Sup. Ct. 1966).

15. People v. Wells, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (Ct. App. 1968).

16. *See* Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963).

of a civil right remediable under the Civil Rights Act in the form of damages[17] [if such can be established] and/or injunctive relief which may result in the reformulation of mailing procedures.[18]

Oftentimes, however, the inmate's complaint that his access to the courts has been obstructed is based not on direct refusals to mail material, but rather on prison regulations which impose such conditions on the preparation and mailing of legal papers that the right to free access to the courts is effectively precluded. These regulations generally take three forms: mail regulations, regulations of inmate legal assistance, and regulations limiting the possession of legal materials. But, the shifting attitude of the courts away from the "hands off" doctrine has been evident, and the unassailability of these regulations is no longer definite.

II. REGULATING THE MAIL

A. *Mail Directed to Courts*

Despite the early lead offered by *Ex parte Hull*[19] that mail regulations which obstructed a prisoner's access to the courts should be declared invalid, the courts for the most part continued to adhere to the "hands off" doctrine. In 1948 the Supreme Court of Maryland, although cautioning prison officials not to prevent freedom of communication with the courts, held that the prisoner's complaints concerning interference with his mail should be directed to the prison authorities and not to the courts.[20] Ten

17. Spires v. Bottorff, 317 F.2d 27 (7th Cir. 1963), *cert. denied*, 379 U.S. 938 (1964). The defendant in this case was the Judge of the county court, who allegedly, in concert with the plaintiff's warden, had prevented plaintiff from filing *corum nobis* petition in Indiana's Clark County Court. The plaintiff sued the Judge (the warden having left years ago) for damages. The district court dismissed the complaint, but the court of appeals reversed, holding that a claim under the Civil Rights Act had been stated. Judgment was eventually rendered for the defendant on the basis of judicial immunity (not available to prison officials generally) and the failure of the plaintiff to show damages. Spires v. Bottorff, 223 F. Supp. 441 (N.D. Ind. 1963), *aff'd*, 332 F.2d 179 (7th Cir. 1964), *cert. denied*, 379 U.S. 938 (1964), *reh. denied*, 379 U.S. 985 (1965). Such a result should not be comforting to prison officials.

18. Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *modified on other grounds sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

19. 312 U.S. 546 (1941). The regulation required that legal papers be screened by the institutional welfare board and the legal advisor to the parole board for sufficiency prior to mailing.

20. State *ex rel.* Jacobs v. Warden, 190 Md. 755, 59 A.2d 753 (1948).

years later, a shift appeared. In *People v. Howard*[21] and *Spires v. Dowd*[22] the courts no longer directed the petitioners to the prison officials for relief. They entertained the claims and in each case ordered relief for the petitioners. In *Howard* the inmate had complained that the prison officials had refused to mail his handwritten notice of appeal and had advised him that notices of appeal were required to be typewritten, pursuant to prison rules. Although the appellant submitted the notice for typing, it was returned with the notation that it could not be typed. He later delivered another handwritten notice to the inmate clerk. The court finally received a handwritten notice of appeal one day late. The *Howard* court ruled that delays which were not the fault of a prisoner could not be used to deny his statutory right of appeal. Although the decision rested upon earlier cases,[23] the importance of this case was that the Attorney General had made a concerted attempt to have these earlier cases overturned, and argued in essence that the prisoner should have to comply with the time requirement imposed by law within the framework of the prison regulations. In response the court held:

> However reasonable it may be to adopt a rule that notices of appeal must be typed [although the rules of court did not so require] or a rule that no mail will be processed from Friday after 4:30 P.M. until Monday, such rules cannot be used to cut down the defendants very limited time in which to appeal.[24]

The court then held the appeal to have been constructively filed in time and considered the appeal on its merits.

In *Spires v. Dowd* the petitioner alleged that his warden had issued a written order prohibiting him from writing to the judge or clerk of the county court of Clark County, Indiana, where the petitioner had been convicted. This order was issued after the judge had objected to the warden, concerning a stream of letters, inquiries and pleadings from the petitioner. The petitioner alleged further that this order prevented him from pursuing a collateral attack upon his conviction through the writ of error *corum nobis*. The court held the warden was not justified in refusing to

21. 166 Cal. App. 2d 638, 334 P.2d 105 (Ct. App. 1958).

22. 271 F.2d 659 (7th Cir. 1959).

23. People v. Griffin, 162 Cal. App. 2d 112, 328 P.2d 502 (Ct. App. 1958); People v. Tenny, 162 Cal. App. 2d 458, 328 P.2d 254 (Ct. App. 1958); and People v. Slobodian, 30 Cal. 2d 362, 181 P.2d 868 (1947).

24. 166 Cal. App. 2d 638, 334 P.2d at 109.

allow the petitioner to mail any legal document addressed to the clerk of the proper state court.[25]

Also, in *People v. Hairston*[26] the court held that a prisoner who alleged that his notice of appeal was refused mailing because it lacked postage stamps had stated a claim for relief thus entitling him to a hearing on the matter. Four years later, the same court held that a prison regulation that afforded the appellant one free letter per week and as many as three additional stamped letters per week, but which did not allow the appellant to mail, in addition to his free letter, his notice of appeal because he had no stamps, "could vitally jeopardize the rights of indigent inmates and thereby deprive them of a valuable constitutional right."[27] Furthermore, "any state rule which would prevent remedy or redress in a proper case must be subordinated to the United States Constitution."[28]

In none of these cases, however, did the court make any general order with regard to administrative regulations. The courts confined the relief granted to the specific appellant, noting at the outset of their opinions that the administration of the affairs of penal institutions are in the hands of the authorities charged by law to carry out the proper regulatory processes, and thus effectively disclaimed any power of the courts to promulgate rules.

The latest expressions of the attitude preserving prison regulations concerning the physical handling of mail while granting individual relief upon a proper showing that access to the courts has been denied have been in *Hodge v. Field*[29] and *Argentine v. McGinnis*.[30] Both cases dismissed complaints for failure to allege facts upon which a finding of a denial of access to the courts could be based, and gratuitiously noted that generally prison authorities can exercise control over a prisoner's mailing privileges as a matter of internal prison affairs.

Although courts were beginning to take pains in seeing that an individual inmate's access to the courts was not obstructed by regulations governing the handling of the mails, they were at the

25. The court did note, however, that sending material directly to a judge was improper. Presumably then, the warden could continue to prohibit mail directed to an individual judge. 271 F.2d at 661. *But see*, Glenn v. Wilkerson, 309 F. Supp. 411 (W.D. Mo. 1970).

26. 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).

27. People v. Comacho, 46 Misc. 2d 705, 260 N.Y.S.2d 723, 730 (Sup. Ct. 1965).

28. *Id.*

29. 320 F. Supp. 775 (C.D. Cal. 1968), *aff'd*, 435 F.2d 1309 (9th Cir. 1970).

30. 311 F. Supp. 134 (S.D.N.Y. 1969).

same time unsympathetic to requests of inmates to obtain special or affirmative treatment of certain mailings. Initially in *Hill v. United States*[31] the proposition was that prison officials were under no affirmative duty to effectuate the filing of appeals. Hill had argued that he was under apprehension of reprisal if he filed an appeal and that the prison officials had effectively blocked his access to the courts by failing in their duty to remove this apprehension by aiding his preparation of an appeal. The court noted that since this apprehension was never communicated to the prison officials, they could not be charged with exerting pressure on the prisoner, nor did they have the burden of easing his fears. In support of this general position, in *Schack v. Wainwright*[32] the court of appeals affirmed the denial of relief by a district court in which the appellant asked for an injunction to obtain the right to have his mail relating to legal proceedings sent "postage prepaid by certified mail—return receipt requested." It was undisputed that the prison officials would post court-directed correspondence in the normal way, and gave assurances thereof to the appellant. The court of appeals gave no opinion of its own, but merely quoted from the ruling of the district court that the control of mails was a necessary adjunct to penal incarceration, and "only if rules and regulations prohibit and unduly hinder a prisoner's efforts to secure relief from illegal detention or treatment would a federal court be justified in looking into aspects of prison administration relating to the use of the mails."[33] It was found that the petitioner was not prohibited or unduly hindered. Thus the attitude expressed in *Schack* was that prison regulation of the mail was the norm, and a petitioner must show that these rules have prejudiced him. The authorities were under no duty—notwithstanding the burden of the petitioner's right to have free access to the courts—to explain the necessity or reasonability of such rules. Instead, if anything, they had only to respond to the petitioner's allegations with a showing that the petitioner had not been prohibited or unduly hindered by the rules. Thus, the prison officials were also relieved of taking any affirmative steps to facilitate a petitioner's access to the courts without having to show that such steps would inconvenience their operations. This position is contrary to the affirmative duty recognized

31. 268 F.2d 213 (6th Cir. 1959).
32. 391 F.2d 608 (5th Cir. 1968), *cert. denied*, 390 U.S. 1007 (1968).
33. *Id.* at 608.

by most judges to assist indigent inmates in getting their claims for relief properly before the court.[34]

Although this "as-little-laying-on of hands-as-necessary" doctrine that began in the late fifties continued to enjoy favor with some courts, a new approach was signaled in *Coleman v. Peyton*.[35] In a petition for a writ of habeas corpus, Coleman sought, among other things, relief from interference with his mail by the prison officials. The court denied relief generally under the authority of *McCloskey v. Maryland*,[36] and also found that there had been no substantial or intentional hindrance of the prisoner's access to the courts within the rules previously in force. Therefore, upon the statement of the authorities that disavowed any such purpose, no relief was ordered. However, the court did not stop at that point, although under the bulk of then current authority it could have ceased. Instead, the court launched into a far-reaching dictum regarding the general handling of inmates' mail to and from the courts:

> The right [of access to the courts] and its exercise are adequately secured in the future, we think only if delivery to a prisoner of incoming matter from a court having jurisdiction to hear his complaints and the mailing of his communications to such a court are delayed no longer than the necessities of sorting require. Further delay for other purposes, such as censorship, seems both inappropriate and unnecessary. If a Virginia prisoner should attempt to use a Virginia court or one of the United States as a letter drop for the conduct of an unauthorized or objectionable correspondence, the court can be expected to report the matter promptly and to refuse to suffer such a perversion of its offices. Censoring takes time, and a letter at the bottom of a pile does not receive the immediate or sometimes the prompt attention of the censor. Precensorship sorting followed by the immediate dispatch of communications addressed to the courts is both becoming and essential to the avoidance of unnecessary delay.[37]

At about the same time, the New York judiciary was pondering

34. *See, e.g.*, Boykin v. Huff, 121 F.2d 865 (D.C. Cir. 1941).

35. 362 F.2d 905 (4th Cir. 1966).

36. 337 F.2d 72 (4th Cir. 1964) (enunciating the power of prison officials to regulate the mail of inmates).

37. Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1966).

the case of *Brabson v. Wilkins*,[38] in which the petitioner sought relief from censorship. In *Brabson I*, the Supreme Court Special Term [the trial court] entered the following order with respect to censorship of mail addressed to courts: "Ordered that the respondent be directed and instructed to cease and desist from intercepting, obstructing, or otherwise delaying any communications addressed to any court." From the court's opinion it is clear that the order was intended to preclude censorship of such mail. Both parties appealed the decision, and in *Brabson II* the Appellate Division of the Supreme Court modified the order to the effect that it appeared to grant prison authorities the power to censor mail addressed to a court. The New York Court of Appeals affirmed the order in *Brabson II*, but undercut the interpretation of the order which would allow censorship of court-directed mail. In speaking of the differences between the orders of the lower courts, the court of appeals noted that the *Brabson II* order left the *Brabson I* order "unchanged as to 'any court'." Commenting on the reasonableness of the *Brabson II* order the court stated, "The prisoner may write to a court about anything . . . ." Although three of the seven judges dissented, their dissenting position was that the *Brabson I* order should be reinstated, but they evidenced no concern regarding censorship of mail to the courts. Given the tenor of their opinion, such lack of concern indicates that they were clearly in agreement with the majority in the "no censorship" approach in the area of court-directed mail.

This "no censorship of court-directed mail" approach lay dormant for the next few years, but in *Sostre v. Rockefeller*,[39] *Carothers v. Follette*,[40] and *Palmigiano v. Travisano*[41] it was restated and applied. In *Sostre* the court adopted the minority opinion in *Brabson III* as the law constitutionally required in the area of legal communications. In *Carothers* the court relied heavily upon *Sostre v. Rockefeller* in ordering the prison officials not to read any correspondence addressed by the inmate to any court [although *Sostre v. McGinnis*[42] later only enjoined prison officials

38. 256 N.Y.S.2d 693 (Sup. Ct. 1965) (hereinafter cited as *Brabson I*), *modified*, 267 N.Y.S.2d 580 (App. Div. 1966) (hereinafter cited as *Brabson II*), *aff'd*, 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967) (hereinafter cited as *Brabson III*).

39. 312 F. Supp. 863 (S.D.N.Y. 1970), *modified on other grounds sub nom.*, 442 F.2d 178 (2d Cir. 1971).

40. 314 F. Supp. 1015 (S.D.N.Y. 1970).

41. 317 F. Supp. 776 (D.R.I. 1970).

42. 442 F.2d 178 (2d Cir. 1971).

from deleting material from such letters]. In *Palmigiano* the court issued a temporary injunction pending hearing by a three-judge federal district court prohibiting the prison officials from opening or otherwise inspecting mail to or from any judges or clerks of court.

In these cases, the courts were presented with established law affirming the power of prison officials to regulate and censor prison mail. Why, then, were they so easily persuaded that this authority was obsolete? One can glean from a reading of the opinions the fact that the prison officials were unable to convince the judges of the necessity of a rule which inhibited the right of access to the courts:

> The record before this court, though pregnant, with utterances of fear in the testimony of the prison officials offers nothing in this regard by way of credible evidence.[43]

From Judge Keating's dissent in *Brabson III* comes this prophetic language:

> Exactly how the exercise of this right will undermine prison discipline is not made clear . . . . No valid reason, other than the shibboleth of prison discipline, has been advanced for the denial of this right in the case before us. I believe that courts should look behind inappropriate slogans so often offered up as excuses for ignoring or abridging the constitutional rights of our citizens.[44]

Thus it would appear that the rules governing communications to the courts must rest upon the necessity of the rule to dispel a reasonable apprehension of disruption based upon fact and not upon opinion and theory.[45] In short, prison officials must be prepared to justify on the grounds of *need* a mail regulation which restricts a prisoner's right to communicate with the courts. What then might such needs be? The test is likely to be whether or not the interest served by the regulation is a compelling one, permitting the circumspection of a fundamental right. Thus many arguments which have served well before will not be available. For example in *Spires v. Dowd*[46] the court held that while blocking mail to a court was impermissible, sending mail to an

43. Palmigiano v. Travisono, 317 F. Supp. 776, 785 (D.R.I. 1970).
44. 19 N.Y.2d 433, 439, 280 N.Y.S.2d at 565, 227 N.E.2d at 386.
45. *Cf.* Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).
46. 271 F.2d 659 (7th Cir. 1959).

individual judge was improper and could be restrained on the grounds that the mail to the judge was of an offensively repetitive nature. Similarly, in *Barber v. Page*[47] the court held that a prisoner was not entitled to send a letter to an individual Justice of the United States Supreme Court. The obvious purpose of such restrictions is to insulate judges from annoying, repetitive, and oftentimes offensive mail where no legal relief is available or even requested. But is providing such insulation to judges a valid state interest? If so, is this interest a compelling one which allows the restriction on the fundamental right of an inmate's access to the court? And even if it is a compelling reason, is the restriction the least restrictive means necessary to accomplish the purpose for which it is intended?

The more recent cases indicate that the insulation of judges from inconvenient mail serves no valid state function, let alone a compelling state interest.[48] In any event, it seems that even if a compelling state interest could be found, a blanket proscription on mail to individual judges, as in *Spires* and *Barber*, would be more than the minimum necessary to insulate judgs from offensive mail, and would affect large numbers of inmates who are sending mail to judges seeking relief. Such a regulation would fail, since less restrictive alternatives would be available (e.g., reaction against an individual inmate based upon a complaint) to serve the interest, if it exists.

Thus the trend seems to be that mail between inmate and court or judge must not be intercepted or censored. Inspection of court mail has not been an issue as yet, but recall the language of *Coleman v. Peyton*:

> Precensorship sorting followed by the immediate dispatch of communications addressed to the courts is both becoming and essential to the avoidance of delay.[49]

This statement would seem to leave little room for the assertion of a power to inspect, although it is not explicit. If asserted, the power to inspect mail *from* courts will have to be strongly bol-

47. 239 F. Supp. 265 (E.D. Okla. 1965), *rev'd*, 355 F.2d 171 (10th Cir. 1966).

48. Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966), *cert. denied*, 385 U.S. 905 (1966); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Carothers v. Follette, 314 F. Supp. 1015 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Glenn v. Wilkerson, 309 F. Supp. 411 (W.D. Mo. 197); Brabson v. Wilkins, 19 N.Y.2d 433, 227 N.E.2d 383, 230 N.Y.S.2d 561 (1967).

49. 362 F.2d at 907.

stered by a factual foundation concerning the breaches of security or discipline that probably will result if inspections are not allowed. It would almost be necessary to impute to a large portion of the judiciary the role of co-conspirators, accomplices or smugglers of contraband, or to demonstrate a common neglect on the part of the judiciary in withholding judicial stationary from such individuals. On the other hand, however, *Sostre v. McGinnis* did hold that "prison officials may open and read all [including that with courts] incoming and outgoing correspondence to and from prisoners."[50]

B. Mail Directed to Public Officials

Courts, however, are not the only agencies to which an inmate might wish to correspond in search of relief from his conviction or the conditions of confinement. Notably, public officials in the executive or legislative branches of government and legal defense and civil rights organizations might be the targets of pleas for assistance by an inmate. Such correspondence has been the subject of litigation in the past and the law is presently in a state of swift change and development.

The right to correspond with public officials was first asserted in *McClosky v. Maryland*[51] and *Lee v. Tahash*.[52] In both cases, bizarre features obscured the constitutional issues and no resolution beyond the application of the "hands off" doctrine was had. However, the *Brabson v. Wilkins*[53] series of cases provided a reasoned consideration of the issue. In *Brabson I* the trial court lumped mail to public officials together with mail to courts and attorneys, and restrained prison officials from interfering with any of it. The intermediate appellate division modified the order in *Brabson II* with respect to mail to public officials as follows:

> That [prison officials are] hereby directed to cease and desist from intercepting and withholding . . . any communications addressed to any executive official of the Federal or State Government concerning his complaints about unlawful treatment by prison authorities . . . subject to the right of the prison au-

50. 442 F.2d at 201.

51. 337 F.2d 72 (4th Cir. 1964).

52. 352 F.2d 970 (8th Cir. 1965).

53. 256 N.Y.S.2d 693 (Sup. Ct. 1965), *modified*, 267 N.Y.S.2d 580 (App. Div. 1966), *aff'd*, 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967).

thorities to censor such communications and strike therefrom any material not relating to the foregoing.[54] 11

As so modified, this order was approved by the New York Court of Appeals in *Brabson III*, and as such it established the limited right of prisoners to correspond with public officials for limited purposes, with the reservation of power to the prison officials to monitor the mail to see that the correspondence stayed within the proper zone. However, these limitations were the subject of strong dissent; Judge Keating argued that he could perceive of no distinction between mail to the courts (which could not be interfered with at all) and mail to public officials that would justify or support the restrictions on the latter correspondence.

The concept of a common quality between letters addressed to and from courts and public officials has become the foundation of the new wave of cases which have treated this issue.[55] Both types of letters serve a common purpose—*i.e.* to secure a lawful remedy for an alleged grievance. Whether the power to grant relief flows from judicial or administrative sources should make no difference in the inmate's right to apply for such relief in an unrestrained fashion.

Under the formula or parity between mail to courts and public officials, the withholding of a letter to a public officer requesting specific information concerning an inmate's case (as opposed to specific relief) would also be immune from interference.[56] The purpose of the letter relating to the terms of confinement would qualify it for special treatment. It could not be restrained, although it could be read to see that it was not an attempt to abuse the right. However, a new advance may have been signaled by *Conklin v. Hancock*,[57] in which the court prohibited the censorship of letters addressed to public officials, although they could be read for purposes of discovering whether or not such letters were being improperly used in an attempt to conspire to escape. On the other hand, the court ruled that letters *from* public officials could not even be opened by prison officials.

In the future, however, the courts are likely to rule in favor of unrestrained correspondence between inmates and courts and

54. 267 N.Y.S.2d at 582.

55. Levier v. Woodson, 443 F.2d 360 (10th Cir. 1971); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

56. *Cf.* Pope v. Daggett, 350 F.2d 296 (10th Cir. 1965).

57. 334 F. Supp. 1119 (D.N.H. 1971).

public officials. It would be difficult to imagine courts or public officials conspiring with an inmate to undertake some breach of prison discipline or smuggle contraband. Thus the danger to these state interests from unrestricted correspondence rights (unopened letters) with public officials is hard to conceive. Justifying the intrusion of censorship or even reading of this mail will be almost impossible as a general rule. The intrusion is a grave one, as previously discussed, and in balancing these considerations, the courts will likely take a position along the lines of the dictum of *Coleman v. Peyton* that no restraints at all will be allowed on inmate mail to and from courts and public officials, in the absence of a showing of abuse by individual inmates. Even then, any justifiable restraints will have to be imposed only upon the offenders, and not on the prison population generally.

C. *Mail Directed to Attorneys*

Oftentimes, however, inmates do not communicate directly with courts or other officials, but rather utilize or seek to utilize counsel in presenting their argument. When attempts to communicate with counsel through the mails are hindered and obstructed, inmates are likely to complain, and depending on the nature and extent of the interference, the courts have been willing to listen. In an early case, *Green v. Maine*,[58] the court was concerned over an allegation that the defendant had been held incommunicado during the pre-trial stage. Although the inmate failed to sustain this allegation, the court hinted that such an action would be a violation of the defendant's right to counsel.

The right to counsel, however, only provides a foundation for communications to an attorney of record during, or in preparation for, litigation. Unless the inmate is involved in a critical stage of a criminal proceeding, the right to counsel does not alone provide a basis for a right to communicate generally with attorneys. The right to counsel, however, is not the only source of a prisoner's right to communicate generally with lawyers. Instead, this right has been held to be part of the Fourteenth Amendment's due process right of access to the courts. In *Bailleaux v. Holmes*[59] the court succinctly stated:

58. 113 F. Supp. 253 (D. Me. 1953).

59. 177 F. Supp. 361 (D. Ore. 1959); *rev'd on other grounds sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961).

> However, the right to inspect [mail] should not be used to delay communications to attorneys . . . since such delay could amount to an effective denial of a prisoner's right to *access to the courts*.[60]

This statement has been the rule ever since.[61]

Once the right to communicate generally with attorneys has been identified as derivative of the right of access to the court; much of what has been said concerning the propriety of limitations on the right of access to the courts is applicable to the right to communicate with attorneys. There have been some distinctions drawn, however, which usually concern the scope of the prison's authority to censor and inspect mail directed to or from attorneys.

1. Interception and Censorship

The early approach of the courts was to approve virtually any interference and censorship of an inmate's mail:

> The censoring of mail is a prison rule. The court will not interfere with such rules which are so necessary in the orderly conduct of an institution. [It cannot] be considered a denial of due process.[62]

More recently, there has been some weakening of the "hands off" approach. This was first signaled by *Bailleaux v. Holmes*,[63] discussed previously, and reinforced by *In re Ferguson*,[64] which after citing *Bailleaux v. Holmes* went on to hold:

> [It is] an abuse of discretion for prison regulations to be utilized so as to deny an inmate the opportunity to procure with reasonable promptness or to communicate within a reasonably

60. *Id.* at 364 [Emphasis added].

61. *See, e.g.*, McCloskey v. Maryland, 337 F.2d 75 (4th Cir. 1964), *cert. denied*, 380 U.S. 952 (1965); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Carothers v. Follette, 314 F. Supp. 1015 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *modified on other grounds sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); *In re* Allison, 66 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961); and Brabson v. Wilkins, 256 N.Y.S.2d 693 (Sup. Ct. 1965), *modified on other grounds*, 267 N.Y.S.2d 580 (App. Div. 1966), *aff'd*, 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967).

62. United States *ex rel.* Vraniak v. Randolph, 161 F. Supp. 553, 559-60 (E.D. Ill. 1958), *aff'd*, 261 F.2d 234 (7th Cir. 1958). *See also* Green v. Maine, 113 F. Supp. 253 (D. Me. 1953).

63. 177 F. Supp. 361 (D. Ore. 1959), *rev'd*, 290 F.2d 632 (9th Cir. 1961).

64. 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961).

> prompt manner, a member of the Bar on matters pertaining to alleged violations of the prisoners' rights . . . .[65]

The position of the courts had shifted from that of "hands off" to that of a limited interference to determine if the regulations actually operated to obstruct an inmate's attempts to communicate with the attorney of record or with members of the legal profession to assist in presenting his claims.

This view was reaffirmed in *McClosky v. Maryland*:[66]

> Of course, prison officials should not interfere with (the inmate's) access to the courts, or with a reasonable correspondence designed to secure for himself legal assistance for the purpose of testing the validity of his conviction or the constitutionality of punitive treatment which he may claim to be cruel and unreasonable. . . . We only hold that he has no constitutional right to seek legal assistance in aid of propagandizing endeavors.[67]

Compare the language of *In re Ferguson*:[68]

> [I]t is manifest that the right of a prisoner to petition a court for redress of alleged illegal restraints on his liberty is unreasonably eroded if the prison authorities may be allowed to deny a prisoner the opportunity of procuring counsel, so that his petition for writ of habeas corpus or other mode of redress always must be presented in propria persona. It must also be conceded that when a prisoner is writing to an attorney in an attempt to secure legal representation, he must be allowed to set forth factual matters even though derogatory or critical of the prison authorities, since he must persuade the attorney receiving the letter that the writer's rights as a prisoner truly have been violated, so as to interest that attorney in the prisoner's alleged case against the prison authorities.[69]

While this language might seem to indicate that the prison officials were to be restrained from censoring the content of prisoner mail to attorneys, such was not the ruling. The case only prohibited the censoring of material which was critical of prison offi-

65. *Id.* at 761, 361 P.2d at 425.

66. 337 F.2d 72 (4th Cir. 1964).

67. *Id.* at 74-75. The petition was denied on the grounds that the inmate was mainly seeking to propagandize his anti-Semitism and his claim of seeking legal assistance was unfounded.

68. 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961).

69. *Id.* at 761, 361 P.2d at 425.

cials. A similar ruling was the final result of the *Brabson v. Wilkins*[70] series discussed previously. *Brabson I* ordered prison officials not to censor mail to attorneys. This order was modified in *Brabson II* and affirmed in *Brabson III* to prohibit interception of:

> . . . any communications addressed to his attorney concerning the legality of his detention and treatment received while incarcerated, . . . *subject to the right of the prison authorities to censor such communications and strike therefrom any material not relating to the foregoing.*[71]

Under this rule, as in *Ferguson*, material critical of prison officials could not be censored, because inmates' criticisms could well form the basis for a challenge to the "legality of his confinement [in isolation for example] and treatment received while incarcerated."

On the other hand, material which was not related to or seeking legal relief could still be censored. Thus in *In re Gregg*[72] the court held that the censorship of a letter to an attorney which contained "grisley halftruths and fabrications" was proper. This case, however, was decided under the "hands off" rule, and the prison official's statement that the letter contained these objectionable passages was accepted without proof. Under the *Ferguson-Brabson* rule, the burden on the officials would be greater to show that the censored material was unrelated to legal relief.

A clearer indication of what may or may not be censored under the *Ferguson-Brabson* rules comes from *Rhinehart v. Rhay*.[73] The inmate had attempted to send letters to his attorney which the court found to contain references to anticipated habeas corpus proceedings, reported cases dealing with sodomy, reports of the inmates' observations of " 'boundless' acts of 'oral sodomy,' " and expressions of his opinions that sodomy and other comparable acts should be made legal between consenting adults. The court found that "taken as a whole . . . the letters could reasonably be suspected to reveal a pathological fixation with the subject of sodomy," and held that the withholding of these letters

70. 256 N.Y.S.2d 643 (Sup. Ct. 1965), *modified*, 267 N.Y.S.2d 580 (App. Div. 1966), *aff'd*, 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967).

71. 267 N.Y.S.2d at 582.

72. 143 Mont. 533, 392 P.2d 87 (1964).

73. 314 F. Supp. 81 (W.D. Wash. 1970).

from the mails did not infringe the inmate's rights to correspond with counsel. Another element of this case which was important to the court was the expressed desire of the inmate for the attorney to save his letters for future "nationwide" publication. It should be noted that in *Rhinehart*, unlike *Gregg*, the prison authorities submitted the letters to the court.

While the *Ferguson-Brabson* rule is probably the most reliable statement of the generally applicable rule on the subject as indicated not only by court rulings but by institutional responses thereto,[74] the rule sets the stage for the question of who decides whether the material is related to legal relief and thus entitled to unrestricted transmission. If the inmate in *Rhinehart* was describing acts of sodomy performed upon him against his will in the hope that an action could be brought to secure some relief from such abuse, or charging officials with negligence or complicity in the practice, it would seem that such a letter could not be censored under *Ferguson-Brabson*. However, such a letter might be erroneously or maliciously restrained under the authority of *Rhinehart*. The opportunity for abuse of the discretion to censor attorney mail under *Ferguson-Brabson* is clear. The danger was articulated by Judge Keating in his dissent in *Brabson III*:

> I believe that these limitations (on the inmate's communications with counsel) as well as the authority given the warden unnecessarily interfere with and endanger this prisoner's right to communicate with his attorney . . . . The appellate division . . . overlooked the fact that judges and courts are not the only persons or agencies capable of granting relief to prisoners complaining about the illegality of their treatment or detention. For this reason I see no basis for distinguishing between letters to courts [and] the prisoner's attorney . . . . In . . . these cases only the recipients of the letters should be permitted to determine whether the contents warrant their intervention and not the very person whose jurisdiction and conduct are being questioned.[75]

In answer to the prison officials' argument that unrestricted communication would allow inmates to carry on unauthorized activities through their attorneys, the court noted that such com-

74. *See, e.g.*, United States v. Stahl, 393 F.2d 101 (7th Cir. 1968), *cert. denied*, 393 U.S. 879 (1968); Konigsberg v. Ciccone, 285 F. Supp. 585 (W.D. Mo. 1968), *cert. denied*, 397 U.S. 963 (1970); Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968).

75. 19 N.Y.2d at 438, 227 N.E.2d at 385, 280 N.Y.S.2d at 564.

munication was available through attorney visitation without any apparent undermining of prison discipline, and furthermore that:

> . . . [T]he right of a prisoner to unexpurgated communications with his attorney is so significant that it outweights the danger of frustration of prison rules regarding outside activities in the rare case where an attorney—an officer of the court—would assist a prisoner in avoiding legitimate prison regulations . . . . No valid reason, other than the shibboleth of prison discipline, has been advanced for the denial of this right in the case before us. I believe that courts should look before ignoring or abridging the constitutional rights of our citizens.[76]

Although Judge Keating represented the minority view in *Brabson III*, recently other courts have utilized his approach in ordering new restraints on prison officials. In the first of these cases, correctional authorities were apparently caught unaware and were able to offer no persuasive reason for restraining inmate mail to attorneys. Thus in *Sostre v. Rockefeller*[77] and *Carothers v. Follette*[78] the courts ruled that prison officials could not censor prisoner mail to or from attorneys since it served no valid state interest and severely affected the inmates' right to access to the court through counsel. In *Palmigiano v. Travisano*,[79] the court went so far as to enjoin temporarily even the opening, reading, and inspection of mail from attorneys, since the correctional authorities were unable to carry the factual burden of establishing the danger to the security and discipline that might result from such free transmittal.

In short, the trend is to treat inmate correspondence with attorneys in the same manner as correspondence with courts and to enjoin censorship by prison officials of inmate-attorney mail. *Sostre v. McGinnis* reversed *Sostre v. Rockefeller* on this point and explicitly held that prison authorities were to be forbidden from deleting material from, withholding, or refusing to mail a communication between an inmate and his attorney unless they could demonstrate that the inmate had clearly abused his right of access. Such abuses would include the transmittal of contraband, laying plans for some unlawful scheme, or attempting to use the right to correspond with an attorney as a pretext for

76. *Id.* at 439-40, 227 N.E.2d at 386, 280 N.Y.S.2d at 565-66.
77. 312 F. Supp. 863 (S.D.N.Y. 1970).
78. 314 F. Supp. 1014 (S.D.N.Y. 1970).
79. 314 F. Supp. 776 (D.R.I. 1970).

corresponding about some "restricted matter"—although no indication of what a "restricted matter" might be was given. In so holding, *Sostre v. McGinnis* explicitly sanctioned the opening and reading of inmate mail to and from attorneys. This approach has been followed in *Tyree v. Fitzpatrick*[80] and *Collena v. Schoonfield.*[81]

Sostre v. McGinnis is not a return to the *Brabson-Ferguson* approach, however, since under *Sostre* the prison officials may not delete anything (in their opinion) unrelated to the inmate's legal business, as they could under *Brabson-Ferguson*; they can delete only material concerning "restricted matters" if the inmate abuses the right of access by attempting to circumvent the ordinary correspondence rules. The decision of what is relevant to the inmate's legal business has thus been removed from the hands of the prison officials and placed in the hands of the attorney, where it properly belongs.

An indication of the limitations placed by *Sostre v. McGinnis* on prison officials may be found in *Godwin v. Oswald.*[82] In *Godwin*, the court enjoined the withholding by prison officials of mail directed to inmate members of a putative Prison Labor Union, from the attorney representing the putative union. The authorities had interpreted the letter as a call for illegal action and felt that the very existence of a Prison Labor Union posed a threat to the security of the institution. The court ruled contrarily observing that while the letter was perhaps a little optimistic concerning the possible success of the venture, it was sufficiently cautionary in tone to be more in the nature of legal advice than an incitement to breach security. Particularly persuasive to the court was the advice to the "membership" of the union to abide by all institution rules and regulations pending the recognition of the union by the state. The letter, having thus been characterized as legal advice, could not be withheld from the inmates under the *Sostre* rationale since no abuse of the right of access could be demonstrated. Consequently the court held that the authorities had erroneously withheld the letter from the inmates.

On the other hand, not all courts are accepting the "go slow" approach of *Sostre v. McGinnis*. In *Moore v. Ciccone*[83] the court

80. 325 F. Supp. 554 (D. Mass. 1971).
81. 344 F. Supp. 257 (D. Md. 1972).
82. 462 F.2d 1237 (2d Cir. 1972).
83. 459 F.2d 574 (8th Cir. 1972).

held that prison regulations governing censorship and inspection of inmate-attorney mail raised questions of constitutional magnitude which required an evidentiary hearing to be held as to whether the regulations were an unconstitutional restraint on the prisoner's right of access to the courts. More importantly, four of the eight members of the court would have gone further and prohibited the opening of mail between attorney and inmate client. In *McDonnell v. Wolff*,[84] the court did just that. These cases seem to indicate that there is no justification for the prison authorities to *censor* mail between inmates and their attorneys. If, despite the *Sostre* line of cases, no justification exists for censoring inmate-attorney mail, then the focus must shift to whether authorities may *inspect* such correspondence and if so, how. A number of cases have already proceeded to this analytical stage.

2. Inspection

The burden to justify inspection for contraband may be easier, since the necessary inspection can be accomplished with a minimal infringement on the right to correspond with attorneys. Thus in *Marsh v. Moore*[85] the court enjoined censorship and opening of inmate-attorney mail since inspection for contraband could be accomplished with a fluoroscope, metal detecting device, or by manual manipulation. Similarly in *Peoples v. Wainwright*[86] prison officials were restrained from opening or reading inmate-attorney mail, but were allowed to subject such mail to outward inspection for contraband.[87] The courts also restrained the inmates and their attorneys from sending non-legal communications and restrained the attorneys from acting as conduits for non-litigational material which they might receive.

In *Smith v. Robbins*[88] correctional authorities, having agreed not to read mail between an inmate and his attorney, asked to retain the unrestricted power to open attorney mail to inspect it for contraband. The court ruled that such an opening would infringe the inmate's right, guaranteed under the Sixth Amendment, to communicate privately with counsel. The court found

84. 342 F. Supp. 616 (D. Neb. 1972).

85. 325 F. Supp. 392 (D. Mass. 1971). *See also* McDonnell v. Wolff, 342 F. Supp. 616 (D. Neb. 1971).

86. 325 F. Supp. 402 (D. Fla. 1971).

87. *See also* Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971).

88. 328 F. Supp. 1962 (D. Me. 1971), *aff'd* 454 F.2d 696 (1st Cir. 1972).

that the unrestricted power to open mail could be abused, in that the mail could then easily be read without the knowledge of the inmate; and that the potential for such abuse would unconstitutionally restrain an inmate from being candid with his attorney and vice versa. The remedy, the court ruled, was for the prison officials to open and inspect the mail only in the presence of the inmate, thus demonstrating to him that his correspondence with his attorney would not be read.[89]

A somewhat less restrictive position on the issue of opening for inspection was taken by the court in *Rhem v. McGrath*.[90] The prison officials had already been restrained from reading inmate-attorney mail but wished to open incoming mail to inspect for contraband. The court recognized the potential for abuse and the primacy of the privacy of the attorney-client relationship guaranteed by the Sixth and Fourteenth Amendments. The court ruled that mail from attorneys in cases in which the prison officials were named parties could not be opened for inspection, but modified this holding by further ruling that this injunction was not to restrain such inspection where other means of assuring confidential consultations between inmates and attorneys were available. Specifically mentioned as an alternative means of assuring privacy were private face-to-face meetings between inmates and their attorneys.

Sostre v. McGinnis and its approach to censorship is subject to the criticism leveled at the *Brabson-Ferguson* rule by Judge Keating in his dissent in *Brabson III*. Unless the prison authorities can establish individual abuses by inmates and attorneys, a blanket rule permitting the opening and reading of inmate-attorney mail is constitutionally suspect. The danger of the subversion of prison discipline is slight. Because prison security vis-a-vis contraband can be protected by less intrusive means, as indicated by *Marsh, Peoples, Rhem* and *Smith*, which weigh against the state interest, the right of communication with counsel would be greatly intruded upon by reading inmate-attorney mail. Additionally, such a power may be greatly abused as demonstrated in *Cox v. Crouse*[91] and *McClelland v. State*.[92] In both *Cox* and *McClelland* the warden, after reading letters between an

89. *See also* Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972) (concurring opinion).
90. 326 F. Supp. 681 (S.D.N.Y. 1971).
91. 376 F.2d 824 (10th Cir. 1967).
92. 4 Md. App. 18, 240 A.2d 769 (1968).

inmate and his attorney, forwarded the contents thereof to the representative of the state opposing the inmate during pending litigation. In both cases, the courts disapproved the practice, but no relief was granted to the inmates for this infringement of their rights, since they were unable to establish that their cases had been prejudiced thereby. The trend of the cases, notwithstanding *Sostre v. McGinnis*, is likely to continue in the direction of enjoining the opening for any purpose of an inmate's mail to and from attorneys. The attempted balance struck by the court in *Rhem v. McGrath* is not likely to alter this trend, since it is not likely to provide a workable solution from an attorney's perspective. The time-consuming nature of visitation vis-a-vis a confidential note or letter is more likely to result in further attacks on the system rather than a reduction of them. And even should the system prove workable in New York City, distance and transportation problems in other parts of the country are likely to result in a *Rhem*-type system creating an unconstitutional burden on the right of private consultation.

The courts may be willing to go as far with inmate-attorney mail as they have with court-directed mail, however, prison officials should have an easier burden justifying some restrictions on mail to and from attorneys. But even these regulations are likely to be much more narrow than those which are currently approved. For example, the reading of an inmate's mail to and from his attorney is a grave intrusion of the attorney-client relationship, especially pending or during litigation with the state. The dangers to be avoided from a prison administrative viewpoint are smuggling of contraband and communications concerning "restricted matters". The first of these dangers could be largely avoided by the procedure adopted in *Marsh v. Moore* and *Peoples v. Wainwright, i.e.,* external manual, fluoroscopic, or chemical analysis of letters. In addition, in case of ongoing litigation, the attorney may be restrained from acting as a conduit of improper information. Where a court does not have jurisdiction of the parties, or when an inmate is seeking legal assistance, prison officials might be able to assert more control over the flow of mail (*e.g.*, opening of incoming mail), although a showing of specific abuse by an inmate or a particular attorney might be necessary to support such control.

With respect to all these classes of correspondents—attorneys, court officials and public officials—the objection is often raised by prison officials that official stationery might be

stolen and used by inmates to circumvent the normal correspondence restrictions. The court in *Peoples v. Wainwright*[93] ruled that such a danger could be obviated by the corresponding attorney inserting a sealed letter to the inmate in an envelope with a cover letter to the prison officials, identifying the prisoner for whom the enclosure was intended, and signed by the attorney. This procedure could be adopted as well by courts and public officials. A cover letter need not always be necessary if the outside of the sealed letter to the inmate were signed by his correspondent, whose signature could be compared if necessary to one on a signature card. Initial incoming correspondence would be verified by phone if the individual were not familiar with this procedure, and initial outgoing correspondence could be accompanied by instructions on compliance.

Since most of the aforementioned cases have dealt with mail between an attorney and his client, the question might arise as to whether the powers of correctional officials would be any different with respect to mail to or from attorneys who do not officially represent the inmate in question. Perhaps there would be more justification for the power to open and reach such correspondence, as the addressee is not yet an established feature of the inmate's associations, and thus more caution may be in order. However, *Palmigiano v. Travisano*[94] suggested that there is no difference by ruling that no correspondence between the inmate and his attorney or *any other attorney duly licensed to practice law* may be opened or inspected.

Another distinguishing factor may be the classification of the inmate. A severe classification may serve to justify certain restrictions of rights of inmates that could not be justified for the general prison population.[95] On the other hand, the more severe the classification of a prisoner, the more important his right of access to the court may become, thus making unrestricted flow of correspondence with counsel all the more important.[96]

D. Mail Directed to Service Organizations

An inmate sometimes seeks to correspond with individuals

93. 325 F. Supp. 402 (M.D. Fla. 1971).

94. 317 F. Supp. 776 (D.R.I. 1970).

95. *See* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961); *Accord*, McKinney v. DeBord, 324 F. Supp. 928 (E.D. Cal. 1970).

96. *See*, Coleman v. Peyton, 302 F.2d 905 (4th Cir. 1966).

and groups in attempts to interest them in his plight and secure their assistance in instituting court proceedings. Such letters are often treated as ordinary correspondence by prison officials. The early cases supported such treatment.[97] However, a weakening of this support appeared in *McCloskey v. Maryland* in which the court stated:

> An effort to correspond in reasonable terms with a limited number of national organizations . . . in aid of [securing legal assistance] . . . would produce a different question.[98]

In two recent cases, *Nolan v. Scafati*[99] and *Burns v. Swenson*,[100] the result alluded to in *McCloskey* was declared. In *Nolan*, the court of appeals unambiguously held that it was tantamount to a denial of access to the courts for prison officials to refuse to mail a letter to the Massachusetts affiliate of the American Civil Liberties Union:

> *Johnson v. Avery*[101] clearly stands for the general proposition that an inmate's right of access to the courts involves a corollary right to obtain some assistance in preparing his communication with the court. Given that corollary we fail to see how a state, at least in the absence of some countervailing state interest not here appearing [the letter was rejected because it contained "lies"], can prevent an inmate from seeking legal assistance from bona fide organizations such as the American Civil Liberties Union.[102]

In *Burns* the district court held that refusing "a prisoner the right to correspond with a responsible organization which might afford him legal assistance is so closely associated with a denial of access to the court that the blanket restrictions on such correspondence must be held unlawful."[103] On appeal, the prison authorities attempted to have this order stricken, but the court was not persuaded entirely. The court did modify, however, the broad decision of the district court by adding that correspondence with the ACLU may be subjected to "reasonable regulation consistent

97. Ortega v. Ragan, 216 F.2d 561 (7th Cir. 1954); Austin v. Harris, 226 F. Supp. 304 (W.D. Mo. 1964).

98. 337 F.2d at 74-75.

99. 430 F.2d 548 (1st Cir. 1970).

100. 300 F. Supp. 759 (W.D. Mo. 1969), *modified*, 430 F.2d 771 (8th Cir. 1970).

101. 393 U.S. 483 (1969).

102. 430 F.2d at 551.

103. 300 F. Supp. at 762.

with legitimate policies of internal prison administration and security, so long as such regulations do not deny Burns access to the ACLU, and through it to the courts."[104] The court also noted that in an unreported opinion[105] a judge of the district court had held that the allegation of an inmate that he had been hampered in his request for aid from the ACLU did not, without more, state any claim of violation of a federally protected right.

The court of appeals in *Burns* gave no indication of what a "reasonable regulation" might be, nor what constituted a legitimate policy of internal prison administration and security. Thus upon reflection, the *Nolan-Burns* approach to the regulation of mail to and from groups in a position to give legal assistance to inmates is the approximate equivalent of the *Ferguson-Brabson* rule with respect to mail to attorneys: *i.e.,* correspondence may not be shut off, but it may be subjected to regulation such as inspection and limited censoring.

Correspondence in search of "legal assistance" may encompass more than that addressed only to securing an attorney's services. In *McDonough v. Director of Patuxant*[106] the inmate of a facility for defective delinquents in Maryland sought to correspond with a psychiatrist and *Playboy* magazine to authorize its publication of certain letters designed to generate financial assistance to mount a broad challenge to the constitutionality of the defective delinquent law, the treatment and facilities at the institution, and the legality of his confinement. The director of the institution refused to mail the letter and also prohibited the giving of a power of attorney to the inmate's local attorney. The inmate challenged this action as denial of access to the courts, alleging that the prohibited mailings were necessary to secure an adequate hearing on the issues he wished to litigate. The court held that insofar as the inmate's correspondence was intended to obtain expert testimony and legal and financial assistance for his litigation, he could not be restrained. Insofar as the purpose of the correspondence was to publish a critique of the defective delinquency law and its implementation at Patuxant with a deleterious effect upon institutional control and discipline, treatment programs and other inmates, the prison administrators would not

104. 430 F.2d at 777.

105. Hand v. Wilkinson, Cir. No. 1568 (S.D. Mo. March 25, 1970, *cited at,* 430 F.2d at 777, n.5.

106. 429 F.2d 1189 (4th Cir. 1970).

be powerless in their discretion to suppress the letters—a result in accord with the *Nolan-Burns* approach. Consequently, the emerging rule appears to be that of recognizing a right on the part of an inmate to correspond with virtually anyone he considers might assist him with his alleged plight. Additional restrictions would require a conclusive, positive, factual showing of abuse or substantial danger to the penal interests of discipline or security that would flow from the relaxation of the restrictions or the use of a less restrictive alternative regulation.

III. REGULATING INMATE ASSISTANCE

Writ-writers and other forms of inmate assistance have long existed in the prison society. Regulations restricting these activities by inmates are also common experience. Until about four years ago, however, these regulations were untested in the courts. About 1967, a rush of cases challenging restrictions on inmate assistance were decided. The initial response of the courts was mixed, but the bulk of them upheld prison regulations against claims that they effectively denied inmates access to the courts.[107] Notable exceptions to this trend were *Johnson v. Avery*,[108] *Arey v. Peyton*,[109] and *Coonts v. Wainwright*.[110]

In 1969, however, the United States Supreme Court in *Johnson v. Avery*,[111] settled the issue of the constitutionality of blanket prohibitions on inmate assistance. The Court stressed that such prohibitions placed an unequal burden on indigent and illiterate prisoners in asserting their rights. This "equal protection" approach to the right of inmate assistance would apply no matter what relief the inmate sought, or for that matter, where he sought it. The Supreme Court stated, however, that inmate assistance could be barred by correctional authorities if meaningful alternatives were available to the inmate and if the restraints placed upon inmate assistance were reasonable—such as limitations on the time and place for assistance and penalties for the passage of compensation. Although not explicitly passing judg-

107. *See, e.g.*, Johnson v. Avery, 382 F.2d 353 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969); Owens v. Russell, 277 F. Supp. 390 (M.D. Pa. 1967), *cert. denied*, 393 U.S. 1003 (1969); People v. Wells, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (Ct. App. 1968).

108. 252 F. Supp. 783 (M.D. Tenn. 1966), *rev'd*, 382 F.2d 353 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969).

109. 378 F.2d 930 (4th Cir. 1967).

110. 282 F. Supp. 893 (M.D. Fla. 1968), *aff'd*, 409 F.2d 1337 (5th Cir. 1969).

111. 393 U.S. 483 (1969).

ment with respect to any particular alternative program for assistance, the Court acknowledged that three models currently existed: paid public defenders, law student clinics,[112] and voluntary assistance by the members of the local bar association. By contrast, the mere provision of a notary service and a permissive attitude toward correspondence with local attorneys were held insufficient.[113]

Since *Johnson v. Avery*, blanket prohibitions against inmate assistance have been struck down regularly upon its authority.[114] Some cases, while not disputing the authority of *Johnson v. Avery*, have distinguished it or found that the relief requested lay outside its mandate. Two cases which dramatically represent the Pandora's Box which *Johnson v. Avery* has opened with respect to what constitutes a sufficient alternative to inmate assistance are *Ayers v. Ciccone*[115] and *Clements v. Ciccone*.[116] Both emanate from the same district court, with different judges presiding.

In *Ayers* Judge Becker held that assistance by social workers in preparation of legal materials was insufficient because of delays and failure to respond to requests for assistance by inmates; and furthermore that a program of legal assistance by senior law students was insufficient because of the distance involved between the penal facility and the law school. On the other hand, in *Clements*, Judge Hunter ruled that assistance given by social workers was qualitatively at least as adequate as that given by other inmates, and thus refused to grant relief to the petitioner.[117] He did not treat the question of the quantitative ability of the social worker program to give adequate requested assistance in preparing legal materials. Thus whether a particular program of

112. *See* United States v. Simpson, 436 F.2d 162 (D.C. Cir. 1970). The court opined that the use of supervised law students would provide the best alternative program for legal assistance. *See also* Foggy v. Eyman, 107 Ariz. 532, 490 P.2d 4 (1971).

113. Johnson v. Avery, 393 U.S. 483 (1969).

114. *See, e.g.*, Beard v. Alabama Board of Corrections, 413 F.2d 455 (5th Cir. 1969); Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969); Previtt v. Arizona, 315 F. Supp. 793 (D. Ariz. 1970), *aff'd*, 418 F.2d 572 (9th Cir. 1969); Carothers v. Follette, 314 F. Supp. 1015 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F. Supp. 867 (S.D.N.Y. 1970).

115. 303 F. Supp. 637 (W.D. Mo. 1969).

116. 285 F. Supp. 196 (W.D. Mo. 1967).

117. Additionally, Judge Hunter in *Clements* construed *Johnson v. Avery* as granting the right of inmate assistance only when the legal material in question was a petition for a federal writ of Habeas Corpus and not a motion to vacate a sentence. As discussed previously the "equal protection" foundation of *Johnson v. Avery* clearly extends the right to inmate assistance beyond the statutory foundation in the Federal Habeas Corpus Act. *See also* Coonts v. Wainwright, 282 F. Supp. 893 (M.D. Fla. 1968).

legal assistance is adequate or not depends on whether the courts look at theoretical possibilities as did Judge Hunter, or practical realities as did Judge Becker. Given the expanding interest of the courts in correctional affairs, the better rule is probably that of Judge Becker, since the import of *Johnson v. Avery* is that the inmate be able to get assistance if he needs it. The cases demonstrate, however, that judges can differ over factual issues which are seemingly the same.

Although the *Ayers* court ruled that the social worker and law school assistance programs were inadequate, it refused to strike down the prohibition against inmate assistance because corrections officials had retained the part-time services of an attorney to render preliminary legal assistance to inmates. Such programs appeared at that time to be reasonable alternatives to inmate assistance. In any event, the court clearly left open the door to challenges based upon the unavailability or inadequacy of the part-time attorney. Similarly, *Beard v. Alabama*[118] indicated that a state program making available a sufficient number of qualified attorneys (or other persons capable and willing to render voluntary legal assistance) would be necessary to justify a blanket prohibition. But in *Novak v. Beto*,[119] the fifth circuit rejected as insufficient to justify a blanket prohibition on inmate assistance a program in which two attorneys, assisted by law students, were to service 13,000 inmates. In *Williams v. United States*,[120] the fifth circuit remanded a case to a district court, holding that an eighteen month delay between a request for legal services from a law school clinical program and the time the service was rendered "is an unreasonable length of time for a prisoner to wait in order to file a petition for post-conviction relief,"[121] and thus inferred that a clinic program might not be a sufficient alternative form of legal assistance to offset the *Johnson v. Avery* right to mutual prisoner assistance.

In *United States* ex rel. *Stevenson v. Mancusi*[122] the prison officials attempted to limit inmate assistance to those who "tested" below a fifth-grade level. The theory advanced by the

118. 413 F.2d 455 (5th Cir. 1969).

119. Novak v. Beto, 320 F. Supp. 1206 (S.D. Tex. 1970), *rev'd*, 453 F.2d 661 (5th Cir. 1971).

120. 433 F.2d 958 (5th Cir. 1970).

121. *Id.* at 960.

122. 325 F. Supp. 1028 (W.D.N.Y. 1971).

prison authorities was that *Johnson v. Avery* only guaranteed the right of inmate assistance to illiterate inmates, and the fifth-grade level was the institutional line set for functional illiteracy. The court was not persuaded, however, that this scheme was not violative of the *Johnson v. Avery* standard, and stated: "Any inmate desirous of legal assistance should have an opportunity to receive it under reasonable rules."[123]

Johnson v. Avery made clear, however, that reasonable restrictions might be placed on inmate assistance. The court in *McDonnell v. Wolff*,[124] approved a prison regulation that permitted inmate assistance for other inmates only upon prior approval of the administration. While this restriction standing alone may be suspect under the terms of *Johnson v. Avery*, the court was persuaded that it was reasonable in light of an alternative procedure that operated in the prison—a designated inmate who provided assistance to other inmates on a scheduled basis. The prior restraint on unlimited inmate assistance coupled with the designated inmate assistant program, was found by the court not to unduly restrict the inmate's access to the courts. The Supreme Court of California sitting en banc in *In re Harrell*,[125] ruled that a "writ writer" need not be allowed to visit an inmate in isolation, since the effectiveness of isolation as a punishment would be severely curtailed by such visitation. Thus, although the rule might hinder legal assistance, it was a reasonable restriction under *Johnson v. Avery*. The court noted, however, that it did not consider confinement in isolation as wholly preventing inmate assistance. An inmate may continue to work on materials for an isolated inmate, and in cases where the filing of papers was necessary, a "next friend" application would be entertained by the court. Furthermore, the court "presumed" correctional officials would provide illiterate inmates in isolation with clerical assistance in preparing legal materials or in corresponding with attorneys. Although *Harrell* gave some consideration to and made some accomodation for the special problem of inmates in isolation asserting legal complaints, it is possible that these accommodations might prove insufficient. The "next friend application" remedy relies heavily on the knowledge and altruistic perseverance of other inmates for its success. Providing clerical assistance

123. *Id.* at 1033.
124. 342 F. Supp. 616 (D. Neb. 1972).
125. 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

presumes that the illiterate inmate is capable of orally verbalizing his complaint, which when transcribed will be nearly as effective as an application or petition prepared by an experienced writ-writer. None of these presumptions are particularly supported by demonstrable experience with the ethics or literacy of inmates. Thus, these "alternatives" to the writ-writer for inmates in isolation may not suffice, especially if the ground for the complaint is the imposition of isolation, the lengthy term of isolation[126] or the inmate's inability to meet filing deadlines during litigation. A better procedure would appear to be that of the designated inmate assistant utilized by the Nebraska Penal and Correctional Complex and approved by the court in *McDonnell v. Wolff*.[127] Inmates in isolation were permitted to visit with the institution's designated inmate legal assistant for up to one and three-quarters hours on a designated day, once per week. The inmate assistant is searched prior to and following admission to the isolation area. The court ruled that as long as the inmate assistant was available once per week and no inmate was required to wait more than three weeks to see the assistant, restrictions on other inmate assistance were reasonable. Of controlling importance on the court's determination that the prison procedure was reasonable was the argument that permitting any broader right of inmate assistance to the inmates in isolation would undermine the punitive aspects of isolation.

In re Harrell nonetheless remains the case which has most explored the implications of *Johnson v. Avery*. The court, commenting that the Supreme Court had not established guidelines for determining whether a restriction on inmate assistance was proper or not, proceeded to promulgate the following formula:

> We have concluded that the proper determination of this question requires that we measure the extent of restriction against the need for restriction. The following inquiries are relevant to this determination: (1) To what extent does the application of the particular rule have the actual effect of impeding or discour-

126. *Id.* The maximum term in California is thirty days, subject to extension only by affirmative order from the Director of Corrections.

127. 342 F. Supp. 616 (D. Neb. 1972). The court also approved a restriction on the right of access to inmate legal assistance of newly arrived inmates while they were undergoing orientation and testing. Newly arrived inmates were afforded the same access to designated assistants as were those in punitive isolation. As a result, the court termed the delay that might result in obtaining assistance to be minimal and thus not a meaningful denial of the right of access to the courts.

> aging mutual prisoner assistance? (2) From the standpoint of legitimate custodial objectives, how undesirable is the conduct sought to be avoided by the particular rule? (3) Are there reasonable alternative means of dealing with the undesirable conduct which do not entail so significant a restriction upon mutual prisoner assistance? When these factual questions have been answered we then must proceed to determine whether the extent of limitation is justified in light of the gravity of the undesirable conduct sought to be avoided and the availability of other measures for dealing with the conduct. If the application of the rule impedes or discourages mutual prisoner assistance to a significant degree, the burden of justification will be great. If, on the other hand, the application of the rule results in mere inconvenience to prisoners seeking legal assistance, and there is a clear institutional reason for the restriction, the rule must be sustained.[128]

This is the formula being applied by courts generally in dealing with complaints concerning infringement of prisoners' rights—*i.e.*, balancing exercise of the right against legitimate state interests; recognizing that where the right is restricted the burden is upon the state to establish the necessity of the restriction and to show that there is no less restrictive alternative to the challenged regulation which would adequately protect the state interest. Of course, this balancing takes into account the degree of the interference with the right vis-à-vis the danger sought to be avoided by the regulation.

Applying this test in the factual setting in *Harrell*, the court ruled that a regulation prohibiting one inmate from possessing the legal papers or materials of another inmate had "a severe effect upon the ability of an illiterate or uneducated prisoner to gain assistance from a more gifted one."[129] This established that the correctional officials had the burden of justifying the rule. The officials asserted that the rules were required to reduce the chances of an inmate assistant's withholding papers in order to extort money and the dangers of violent reprisals following the potential negligent loss or damage of legal papers by the inmate assistant. The court found these to be "substantial concerns [and] custodial officials must not be prevented from taking ac-

128. 2 Cal. 3d at 686, 470 P.2d at 646, 87 Cal. Rptr. at 510.

129. *Id.* at 687, 470 P.2d at 647, 87 Cal. Rptr. at 511.

tion against them."[130] However, the court concluded that direct punishment of an extortive writ-writer or an inmate who destroys or damages legal papers of another was a less restrictive alternative that would adequately preclude the asserted dangers. Thus the regulation was held to be invalid as an unreasonable restriction on a prisoner's right to mutual assistance.[131]

In addition to challenging this regulation, the petitioner also attacked regulations which prohibited him from "representing" inmates, from filing documents on behalf of other inmates, from corresponding regarding legal matters with inmates at other correctional facilities, from interviewing an inmate in isolation, from obtaining disciplinary records of inmates at the institution, and from maintaining a personal law library. But before detailing the court's response to these challenges it should be explained that the right to inmate assistance does not refer to the right of the writ-writer to operate, but rather refers to the right of the illiterate and uneducated inmate to have assistance in preparing his legal materials. The reason these cases are often brought by writ-writers and entertained by the courts is because an inmate may be incapable of asserting his rights (as is an uneduated or illiterate inmate who is unable to challenge a restriction because of his illiteracy) and therefore one who is only collaterally affected (the writ-writer) may have standing to sue, even though no right of his own is directly in issue.[131.1] Thus an extortive writ-writer, upon proper, specific facts, may be prevented from operating since he has no right to operate *per se*. Only when the writ-writer is the only inmate capable or willing to provide assistance would the question arise as to whether or not other inmates were being denied their right to inmate assistance by restraining the writ-writer from aiding them. Of course, all blanket restrictions are automatically suspect on this score.

With this in mind, the complaints of the petitioner in *In re Harrell* take on a different cast than they might otherwise. The court held that the petitioner writ-writer had no "right" to file papers for another. The inmate who cannot sign or verify papers

130. *Id.*

131. *But see* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970). The same regulation was found constitutional if interpreted to prohibit the possession of *completed* legal papers of another, thus still allowing the assisting inmate to work on them in his cell.

131.1. *Cf.* NAACP v. Alabama, 377 U.S. 288 (1964); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

has a right to have them filed by another, but it must be clear that the inmate was unable to sign or verify papers himself before this right can be asserted for him by the writ-writer. Thus, a general prohibition against filing papers for another was permissible, subject to relaxation for exceptional circumstances where a "next friend application" would be necessary to vindicate rights of the assisted inmate. Similarly, the petitioner had no right to "represent" another inmate, since the court found that *Johnson v. Avery* only contemplated assistance, not representation, and thus a regulation forbidding representation would be valid.[132] (In *McKinney v. DeBord*[133] a federal court held that an inmate assistant had no protected right to draft a check on his inmate "client's" account to pay for filing fees, even though the "client" was in solitary confinement. The court ruled that taking the completed papers to the inmate and allowing him to draft the check and file the complaint was a reasonable alternative to allowing his inmate assistant to do it.)

Turning to the demand for correspondence between writ-writers in one institution and inmate "clients" in other institutions, the *Harrell* court ruled that the prohibition of such correspondence was a reasonable restriction within the zone permitted by *Johnson v. Avery*. The restriction did not operate as a bar to inmate assistance, since such aid was available from other inmates in the same institution. Consequently, no significant effect was produced on the right to assistance of the inmates with whom the petitioner sought to correspond. The reasonable connection between the regulation and prison discipline and security was therefore sufficient to uphold it against constitutional attack.

The *Harrell* court also rejected the petitioner's argument that restrictions on the number of books allowed in his cell contravened the right of inmate assistance.[134] As noted, the restrictions placed on the writ-writer's activity and possession of materials could infringe the right of other inmates

> . . . only to the extent it is shown that the ability of other inmates seeking legal assistance is affected. Unless and until it is demonstrated that other sources of legal assistance . . . can-

132. *Accord*, McKinney v. DeBord, 324 F. Supp. 928 (E.D. Cal. 1970).
133. 324 F. Supp. 928 (E.D. Cal. 1970).
134. *Cf.* Wilgus v. Peterson, 335 F. Supp. 1385 (D. Del. 1972).
135. 2 Cal. 3d at 690, 470 P.2d at 649, 87 Cal. Rptr. at 513.

not provide assistance to disadvantaged inmates, the state of any inmate's personal library is of no significance.[135]

IV. REGULATING POSSESSION OF LEGAL MATERIALS

Regulations restricting the acquisition and possession of legal materials by inmates, or regulating the time and place of working on legal materials, have been the target of many attacks—most of which have, until recently, been unsuccessful. In sharp contrast to these cases is *Bailleaux v. Holmes*[136] which held that, although the interests of prison security and discipline must be served, these ends could not be "achieved by stifling the study of law, where such study is necessary to the effective utilization of a basic right."[137] As a result, the court enjoined the correctional authorities from prohibiting the possession of law books in the cells, from prohibiting legal research and writing in the cells, and from discriminating against legal materials by broad regulations pertaining to the purchase and possession of printed material in general.

Holmes was reversed, however, by *Hatfield v. Bailleaux*.[138] Specifically, the court of appeals held that regulations restricting the possession of legal materials were reasonable and justified by the prison policy of discouraging "jailhouse lawyers," since the rules governing the use of the prison library were adequate to dispel the allegation that the challenged regulations denied inmates access to the courts. Even had the prison library proved inadequate:

> . . . no constitutional problem would be presented. State authorities have no obligation under the federal Constitution to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held or to perform services which only a lawyer is trained to perform. . . . He has no Due Process right to spend his time in prison or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment.[139]

Although the court of appeal's decision rested upon prior

136. 177 F. Supp. 361 (D. Ore. 1969), *rev'd*, 290 F.2d 632 (9th Cir. 1969).
137. *Id.* at 363.
138. 290 F.2d 632 (9th Cir. 1961).
139. *Id.* at 640-41.

pronouncements of other courts on the subject,[140] *Hatfield v. Bailleaux* became the landmark case in this area until the advent of *Johnson v. Avery*. *Hatfield* provided the conceptual and persuasive authority for a number of cases which approved institutional regulations that *inter alia*, restricted legal research and preparation to a "writ room";[141] set a maximum limit on the number of law books an inmate could possess at one time;[142] supported the refusal of state officials to furnish law books to inmates;[143] restricted the sources of legal materials to only those approved by the prison administrators;[144] prohibited correspondence with law publishers and the possession of law books in cells; prohibited a prisoner from purchasing used law books,[145] from typing his own materials[146] and from retaining his collection of law books upon entry into the prison;[147] and allowed confiscation of an inmate's law books found in another inmate's cell.[148] Of course there were exceptions to this trend, but they were truly special cases.[149]

Among the reasons asserted by correctional officials to support the necessity of restrictions on personal law libraries, legal work in cells, and sources of books were space limitations, fire hazards, and smuggling problems. Above all, however, the most relied-upon justification for these restrictions was the necessity to discourage writ-writers from aiding other inmates in the preparation of their legal materials. Of course, since *Johnson v. Avery* this reasoning has been constitutionally deficient, and to the ex-

140. Seigal v. Ragen, 180 F.2d 785 (7th Cir. 1950); *In re* Chessman, 44 Cal. 2d 1, 279 P.2d 24 (1955); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961).

141. Edmunson v. Harris, 239 F. Supp. 359 (W.D. Mo. 1965); *Ex parte* Wilson, 235 F. Supp. 988 (E.D.S.C. 1964); Austin v. Harris, 226 F. Supp. 304 (W.D. Mo. 1964).

142. People v. Matthews, 46 Misc. 2d 1024, 261 N.Y.S.2d 654 (Sup. Ct. 1965).

143. Barber v. Page, 239 F. Supp. 265 (E.D. Pa. 1965), *rev'd*, 355 F.2d 171 (10th Cir. 1966).

144. Roberts v. Peppersack, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967); Henson v. Myers, 244 F. Supp. 826 (E.D. Pa. 1965).

145. Lockhart v. Prasse, 250 F. Supp. 529 (E.D. Pa. 1965).

146. Young v. Parker, 256 F. Supp. 1008 (M.D. Pa. 1966); *Accord*, Durham v. Blackwell, 409 F.2d 838 (5th Cir. 1969); Williams v. United States, 433 F.2d 958 (5th Cir. 1970).

147. Walker v. Pate, 356 F.2d 502 (7th Cir. 1966), *cert. denied*, 384 U.S. 966 (1966).

148. United States *ex rel.* Duronio v. Russell, 256 F. Supp. 479 (M.D. Pa. 1966). *Accord, In re* Schoengarth, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967).

149. DeWitt v. Paul, 366 F.2d 682 (9th Cir. 1966); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969); Brown v. South Carolina, 286 F. Supp. 998 (D.S.C. 1968); United States *ex rel.* Mayberry v. Prasse, 225 F. Supp. 752 (E.D. Pa. 1963).

tent that cases rely upon the need to restrain writ-writers, they are no longer the best law. To the extent, however, that they rely upon the other reasons for the restrictions, they continue to be sound.

By and large, most cases have relied upon the *Hatfield* concept that there exists no inmate right to possess legal material or to acquire a legal education. Although *Johnson v. Avery* did not directly deal with this point, it is difficult to escape the logic that if an inmate has the right to the assistance of another inmate in the preparation of legal material, he cannot be absolutely restrained from acquiring the requisite knowledge to *assist himself* in the preparation of his petitions and applications. To reason otherwise would be effectively to grant writ-writers an in-prison monopoly on legal knowledge to which inmates must resort for the effective presentation of their complaints. Some post-*Johnson v. Avery* cases have successfully avoided this issue by the "bootstrap" approach utilized in many of the access-to-the-court cases.[150] The fact that the petitioner's papers were adequately bristled with citations demonstrated conclusively to the court that the regulations prohibiting him from taking legal materials to his cell and restricting his access to the prison library had not unduly restricted his access to the courts.[151] This approach, of course, begs the question, since it does not reach the issue of the chilling effect of such regulations on inmates with less persistence who might otherwise have been unable to secure relief.

In re Harrell[152] considered the issue of prisoner access to and use of law books more fully. The posture of the case was an attack against regulations limiting personal "libraries" to sixteen hardbound books and restricting sources of books to those approved by the officers of the correctional institution. The former regulation was challenged on the grounds that it prohibited the petitioner from possessing sets of legal materials, notably the *Lawyers Edition Supreme Court Reporter* and the *Supreme Court Digest*—a total of forty-two volumes and a total likely to increase in the process of keeping the sets up to date. A request for these books had initially been approved, but was cancelled when the

150. Ralls v. Wolfe, 321 F. Supp. 867 (D. Neb. 1971); State v. Ragen, 76 Wash. 2d 331, 457 P.2d 1016 (1969).

151. *See also*, Cruz v. Beto, 329 F. Supp. 443 (S.D. Tex. 1970), *aff'd*, 445 F.2d 801 (5th Cir. 1971).

152. 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

authorities became aware of the number of books involved. However, the prison officials would permit the petitioner to have sixteen at one time, and to exchange them for others as needed through correspondence with his mother. In the alternative, the officials would permit the petitioner to donate the entire set of books to the library, where they would be even more accessible to him. The court found that the reason for the sixteen book limit was the lack of available space in the individual cells, and thus the rule was not intended to prevent an inmate from reading law. Furthermore, the willingness of the prison officials to make the books available to the petitioner within the limits of the custodial circumstances led the court to conclude that the restriction was reasonable.[153]

The regulation restricting the source of printed material (including law books) to those approved by the institution was also found reasonable in the light of the threat of smuggling. However, if non-prohibited reading matter (including law books) could not be obtained from the approved sources, the court indicated that a different question would be presented, and the regulation might fail. Thus it would appear that regulations on inmate law libraries reasonably related to the preservation of prison security and discipline will be able to withstand constitutional attack as long as (1) the reason or effect of the rule is not to prevent inmates from reading the law and (2) reasonable alternative measures are available for inmates to acquire and read legal material.

Personal "law libraries" are generally unavailable to the indigent inmate, who cannot afford expensive law reporters, digests and treatises. For him the only recourse is a writ-writer or the prison library. The *Hatfield* approach that no inmate has a right to engage in legal research, led to the courts' approval of restrictions on the use and content of prison libraries. In *Bailleaux v. Holmes*[154] the court had been confronted with a prison law library that consisted of two volumes of a legal encyclopedia, a copy of the criminal sections of the state code and some advance sheets from the state supreme court. The court inferentially ruled that the library was insufficient and would not justify the imposition of restrictions on legal study—especially since inmates were limited in theory to access to the library, and delays of up to seven-

153. *Accord*, McKinney v. DeBord, 324 F. Supp. 928 (E.D. Cal. 1970).

154. 177 F. Supp. 361 (D. Ore. 1959), *rev'd*, 290 F.2d 632 (9th Cir. 1961).

teen days had been experienced. By the time that *Hatfield* reversed this ruling, the capacity and content of the library had increased; delays of no longer than one day were experienced in its use; it contained the United States Constitution Annotated, nine volumes of a legal encyclopedia covering the areas of Evidence, Criminal Law, Constitutional Law and Witnesses; the titles of the state code dealing with writs, criminal procedure and criminal law; and the advance sheets of the state supreme court. Arrangements for prisoners in segregation to have access to legal material in their cells had been made. These circumstances were a substantial underpinning of the court's ruling that the inmates had not been denied access to the courts.

The general language of *Hatfield* gave support, however, to broader restrictions on the use of the library and a general refusal of the courts to inquire into the sufficiency of the library for legal research.[155] *Johnson v. Avery* made this approach to the problem of content and use of prison libraries for legal research suspect. This is especially true if prison regulations allow relatively affluent inmates to purchase and possess even limited legal materials. The *Johnson v. Avery* dictum that inmates have a right to legal assistance, coupled with an express dissatisfaction with a system that consistently discriminates against indigents in such an important area as access to the courts, is highly persuasive.

The *Harrell* court, in reacting to a challenge to the adequacy of a prison library for effective legal research, stated it this way:

> Several decisions of this court [as well as *Hatfield v. Bailleaux*] have indicated in positive terms that inmates in the state prison system have no legally enforceable rights to engage in legal research except insofar as much research is necessary to insure access to the courts. . . . That standard, which conceptually begs the question asked of it, has nevertheless been applied to sustain . . . [rules] forbidding mutual prisoner assistance . . . and has operated to repel constitutional attack against various regulations effectively limiting prisoner access to legal material . . . .
>
> We cannot fail to recognize, however, that . . . *Johnson v. Avery* heralds the advent of new principles governing the question of prisoner access to legal material. . . . Moreover we are

155. Haughey v. Rhay, 300 F. Supp. 490 (E.D. Wash. 1969); Henson v. Myers, 244 F. Supp. 826 (E.D. Pa. 1965); Barber v. Page, 239 F. Supp. 265 (E.D. Okla. 1965), *rev'd*, 355 F.2d 171 (10th Cir. 1966); State v. Ragen, 76 Wash. 2d 331, 457 P.2d 1016 (1969).

> cognizant that the principles of *Johnson* may, in a proper case, require a judicial assessment of the adequacy of prison libraries to permit legal research of a certain minimum degree of effectiveness. This court itself has recognized that some kind of access to legal materials is necessary to the preparation of an effective application for relief. "[A]lthough [an application] should ordinarly be predicated on a full and honest statement of the facts which the inmate believes give rise to a remedy, . . . the relevance of certain facts may not be apparent to him until he has done some legal research on the point."[156]

The Supreme Court of California is not alone in its concern over the content of prison libraries, as *Gilmore v. Lynch*[157] indicates. A three-judge district court was empaneled to hear challenges to the California Department of Corrections regulations governing the content of the prison library and mutual inmate assistance.[158] Specifically, the inmates attacked a regulation which limited the content of any prison library to:

(1) The state penal code
(2) The state welfare and institutions code
(3) The state health and safety code
(4) The state vehicle code
(5) The United States and state constitutions
(6) A law dictionary
(7) A text on state criminal procedure
(8) A subscription to a weekly digest of state cases
(9) Rules of state courts
(10) Rules of the United States Court of Appeals
(11) Rules of the United States Supreme Court.

In addition to this regulation, the director of the Department of Corrections had issued a letter stating that "all existing law books and references in inmate law libraries not consistent with this section are to be removed and destroyed."[159] The plaintiffs argued

156. 2 Cal. 3d at 695, 470 P.2d at 652-53, 87 Cal. Rptr. at 516-17.

157. 319 F. Supp. 105 (N.D. Cal. 1970) (three judge court), *aff'd sub nom.*, Younger v. Gilmore, 404 U.S. 15 (1971).

158. *Gilmore* ruled that the regulation which permitted inmate assistance but prohibited the assisting inmate from possessing legal materials pertaining to his benefactor was constitutionally valid as long as it was "interpreted to bar only storage of completed legal papers in the cell of persons to whom they do not pertain." But *In re Harrell* declared the regulation invalid as an unreasonable hindrance on the right to mutual prisoner assistance.

159. This restriction was theoretically mollified by the fact that the state library would make available to inmates copies of the state and federal reporter systems and

that these regulations denied indigent inmates and their inmate assistants the legal expertise which was necessary if access to the courts is to be in any way meaningful.

The court first ruled that the right of access to the courts

> . . . encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him. . . . [Further, under *Johnson v. Avery*] some provisions must be made to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.[160]

The state has many alternatives, but in this case, the one chosen discriminated against indigent inmates by allowing affluent inmates to possess any legal material they desired subject to space limitations and by restricting the contents of the prison library (the source of legal material for indigents). As a result the right of access to the court for indigent inmates was seriously infringed upon.

In answer to the state's contention that an extensive law library was not necessary to gain access to the courts, and thus permitting affluent inmates to purchase books did not affect the right held by indigents, the court noted:

> [T]his court takes notice that more than simple "facts" are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant and merit presentation to the Court, and which are irrelevant or confusing. When the Return is filed it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney filing a habeas petition omits a statement of points and authorities or neither does the State's attorney in responding to one. Johnson v. Avery . . . has explicitly recognized the relevance of legal expertise to

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supplements and amendments to the code. The court indicated that this supplemental source was insufficient since (1) only one copy of each volume was available to service 30,000 inmates, and (2) many volumes had been lost or stolen and had not been replaced—*e.g.*, nearly one-fourth of the United States Reports were no longer available. 319 F. Supp. at 107, n.4.

160. 319 F. Supp. at 110.

> the filing of petitions in habeas corpus [citing the *Johnson* rational for the right of mutual prisoner assistance].[161]

As to the state's argument that the interests of economy and standardization countervailed any infringement of the indigent inmate's rights, the court held that such interests have never prevailed in cases in other areas where the rights of indigents had been curtailed. Citing Judge (now Justice) Blackmun's rejection of such an argument in *Jackson v. Bishop*[162] to justify the use of the strap as a disciplinary measure the *Gilmore* court held:

> . . . the fundamental inadequacy of the restricted book list here [is not] relieved by the fact that California authorities have succeeded in "standardizing" the law libraries in all of that State's institutions.[163]

The court never reached the questions of whether or not the interests served by the regulations were compelling, or whether the infringement of the right was the minimum necessary to achieve the interest, or whether there existed less restrictive alternatives. In short, the court held that the library restriction infringed the right of access to the court enjoyed by indigent inmates, and concluded that no valid state interest was served by the regulation. Therefore, it enjoined the enforcement of the regulation.

But merely removing any restrictions on the content of the law library does not in any meaningful way alleviate the problems of gaining access to legal material for indigent inmates. The indigent inmates were still quite far from any legal resources, and the underlying problem still remained. The correctional authorities were thus ordered to formulate an affirmative program to equalize the circumstances between affluent and indigent inmates in regard to access to legal material. The court left the formulation of this program to correctional authorities, but noted that there were many alternatives from which to choose under the doctrine of *Johnson v. Avery*. In addition to these alternatives, the correctional officials could raise the level of the content of the libraries so as substantially to do away with the current advantage of the affluent inmates. No explicit guides were given to the department

161. *Id.*
162. 404 F.2d 571 (8th Cir. 1968).
163. 319 F. Supp. at 112.

if the last alternative were chosen, but by way of commenting on the deficiencies of the present libraries, the *Gilmore* court indicated its ideas of what might be necessary:

> The basic codes and references authorized for prison use under [the] regulation . . . would offer meager fare to a criminal lawyer. There are no annotated codes, no United States Reports [cases of the Supreme Court of the United States], no federal reports [cases of the Courts of Appeals and the District Courts], no . . . [state] reports. There are unannotated versions of four of [the state's] codes, but there is no copy of any part of the United States Code. There are copies of the rules of the [state] . . . and certain federal courts, but there is no edition of the Rules of the Federal District Courts, which receive a great many of the habeas corpus petitions and all of the civil rights petitions filed by . . . [state] prisoners. There is one copy of [a text on state] criminal procedure, but there are no other law books or journals such as "U.S. Law Week" [a weekly national reporter of new legal developments and recent United States Supreme Court opinions], on the list.[164]

Furthermore, in discussing the deficiencies in the state library collection available to inmates the court stated that an inmate's ability to do rudimentary legal research "is hindered, to say the least, by the lack of any lists of parallel citations in either the prison or on the State Law Library Prison List."

Of course, the purchase of all this legal material as well as the annual cost of keeping it up to date would amount to a substantial item in the budget of any department of corrections; but, it is likely to be as cheap as any suitable alternative. Given that correctional facilities are presently generally underfinanced, it may be difficult to see the acquisition of an expensive law library as a high-priority item. It may not be when viewed in that fashion. But what *Gilmore* and to some extent *In re Harrell* are announcing is that the state has an affirmative burden to provide inmates with the basic necessities of legal care, similar to the long-recognized burden to provide basic medical care, even though it *is* expensive. The law library may be the functional equivalent of a prison hospital in this analogy. This attitude is apparent from one phrase of the *Gilmore* opinion: ". . . satisfying the legal need of its [the Department of Corrections] charges."[165]

164. *Id.* at 110.
165. *Id.* at 112.

When viewed from this perspective, perhaps the expense can be justified.[166]

Of course, a sterling law library is of little use if the inmates are not given adequate time with which to utilize its contents. Following the lead of *Hatfield*, nearly all restrictions, including outright prohibitions on the use of library facilities as an incident of punishment, have been upheld by the courts.[167] Since *Johnson v. Avery*, however, a re-examination of this practice has become necessary. The beginning of such a re-examination was made in *McDonnell v. Wolff*.[168] The court there dealt with what the parties had stipulated to be an adequate law library. In issue were regulations that restricted library use to no more than six persons at a time, that restricted library hours to certain times that conflicted with other inmate educational programs, and that prohibited inmates in isolation from having direct access to library facilities. While the court found little difficulty in finding that the needs of prison security justified the six-man restriction by preventing large numbers of prisoners from congregating in one place, the other two restrictions did not fare as well.

The library schedule called for independent legal research to be done from 5:00 p.m. to 7:00 p.m. three days per week, and from 6:00 p.m. to 7:00 p.m. the remaining two days. Education classes, which were mandatory for some inmates, conflicted with these library hours and, thus, serious restrictions were placed on independent legal research by many of the inmates. The court found that the limitations bore no reasonable relation to the time needed for such research and that no compelling state interest was served by such limited library hours. As a result the court ordered the prison officials to modify the time restrictions, and suggested that a rule be adopted allowing inmates access to the law library during any "free time" periods.

The court also found the practice of banning inmates in particular sections of the institution (punitive segregation) from having access to the library to be unreasonable on its face. At the time of the decision, however, the prison authorities had already set about to modify the regulation by assigning inmate legal assistants and by creating a small legal library in the unit. Without

166. For a list of contents which, with one exception, was agreed to be sufficient, see McDonnell v. Wolff, 342 F. Supp. 616, 618, Appendix A at 629 (D. Neb. 1972).

167. *See, e.g., In re* Allison, 66 Cal. 2d 282, 425 P.2d 193, 57 Cal. Rptr. 593 (1967).

168. 342 F. Supp. 616 (D. Neb. 1972).

an inquiry into the adequacy of the unit's library facility, the court was unable to determine whether the regulation was in fact unreasonable. It would seem, however, that unless the two libraries were virtually identical, or that procedures existed for ready access through book transfers or loans, the satellite library system proposed by the prison authorities would not be a satisfactory alternative. Unless such equalizing conditions prevailed, an inmate's right of access to the courts through the medium of a *pro se* application supported by research would, in effect, seem to be curtailed depending upon the inmate's classification within the institution. As previously indicated, an inmate's classification bears little, if any, relation to his need to proceed in court. If any need exists, it may in fact be directly proportional to the severity of the classification. Unless substantial parity between inmates of differing units of a penal institution is achieved with respect to access to state supplied legal material, there would appear to be violations of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

V. REGULATING ATTORNEY VISITATION

The right of an accused to consult with his attorney in jail was early recognized in statutes[169] and judicial opinion.[170] There have been few recent decisions relating to the right of a convicted inmate to consult with an attorney, probably because most correctional facilities allow such visitation fairly liberally.[171] Those few cases which have dealt with visitation rights revolve about the incidents of the right.

In *Kahn v. LaVallee*[172] an attorney wrote to the warden of an institution stating that she wished to interview thirty-four inmates within the space of one-and-one-half days. There was no mention of a retainer and the purpose of the interviews was not indicated. The warden made arrangements for the visit, but stationed a guard in the interview room within earshot of the discussions. The attorney sought an order compelling the warden to

169. *See, e.g.*, McPhail v. Delaney, 48 Colo. 411, 110 P. 64 (1910), and Farrell v. Hood, 32 S.W.2d 480 (Tex. Cir. App. 1930) [statutes imposing quasi-criminal and criminal sanctions on jailkeepers who refused to allow attorney consultations].

170. Wilmans v. Harston, 234 S.W. 233 (Tex. Cir. App. 1921); Farrell v. Hood, 32 S.W.2d 480 (Tex. Cir. App. 1930).

171. *See, e.g.*, McClelland v. State, 4 Md. App. 18, 240 A.2d 769 (1968).

172. 12 App. Div. 2d 832, 209 N.Y.S.2d 591 (Sup. Ct. 1961).

allow inmates to confer privately with her. Shocked by the broad scope of the attorney's request, the court held that the interviews were properly subjected to scrutiny "in order to insure against any impropriety or infractions of prison rules and regulations."[173] However, the court continued,

> We are quite sure that upon a reasonable request for interviews at reasonable intervals, upon a proper showing of a retainer, a private interview would be arranged by the warden, even in connection with a post-conviction relief proceeding. While we are not now reaching or deciding herein the question of whether in a proper case the court would order a warden to allow a private interview in a post-conviction remedy case, it would seem that the same justifications for a private interview exist (although there appears to be no authority for same) as in those cases where the petitioner is an accused, and is facing trial.[174]

It is indisputable that the accused has a right to private consultation as an incident to the right to counsel.[175] However, in *United States v. White*[176] the court ruled that there was no authority for dismissing an indictment against an accused on the basis of his being compelled to consult with counsel in a crowded visiting room. Although the remedy requested was a bit drastic for the situation, the case does indicate that the facilities need not be absolutely private.[177] It would appear to be sufficient in the ordinary case that the conversations between attorney and client are not monitored by the authorities.

Konigsberg v. Ciccone[178] serves as an example in which monitoring of vocal communications between an inmate and his attorney might be upheld. The inmate was being held at the United States Medical Center for Federal Prisoners in Springfield, Missouri. He had made approximately twenty telephone calls to his

173. *Id.*, 209 N.Y.S.2d at 593.

174. *Id.*

175. *See* Annot., 23 A.L.R. 1382 (1923); Annot., 54 A.L.R. 1225 (1928).

176. 295 F. Supp. 893 (N.D. Ga. 1968).

177. *See* People v. Del Rio, 207 N.Y.S.2d 186 (N.Y. Co. Gen. Sess. 1960). The court stated with respect to an accused:

> The right of an accused to consult with his attorney is not without limitation. There is no duty on the warden . . . to provide a room beyond the need required for consultation . . . . It is only necessary that reasonable facilities be provided and that the right of privacy between the accused and his attorney be respected. *Id.* at 189.

178. 285 F. Supp. 585 (W.D. Mo. 1968).

out-of-state attorneys. During these calls, a social worker was present, observing the inmate's emotional condition during these conversations. During five of these calls the social worker was close enough to overhear one end of the conversation and on those occasions the worker entered the general content of the conversations in the inmate's record. There was no electronic surveillance of the calls. The inmate alleged that his right of private communication with counsel had been infringed. The court found that the entries in the record were of a medical nature and not intended to glean confidential information between attorney and client, thus rejecting the inmate's contention. It would appear from this case that, in limited circumstances, the rehabilitative interest might serve to justify a non-intrusive observation of visits between inmates and their attorneys. On the other hand, in *Collins v. Schoonfield*,[179] the court held that the facilities provided for inmate-attorney consultations were inadequate to preserve the protected confidentiality of the communications since guards were often within hearing distance of the attorney and his client. Since no justification was offered for such an intrusion, the court, unlike the *Konigsberg* court, found the facilities to be constitutionally deficient.

Konigsberg also held that visits by attorneys may be interrupted by demands of prison regimen such as fixed meal times. This is supportive of the general concept that the time and place of inmate consultation with attorneys may be governed by reasonable regulations as long as they do not work a hardship on the inmates or his attorney.[180] Similarly *Elie v. Henderson*[181] held that reasonable restrictions such as individual as opposed to group meetings with multiple clients, alternative sites for interviewing clients as necessitated by security needs, and requiring that a request on the part of the inmate to see an attorney be shown. The latter restruction—that an inmate's request be a condition precedent to an attorney visitation—is probably unsound as a blanket rule since, as the *Elie* court indicated:

> Access as complete as possible should be given an inmate to his attorney. Any restrictions placed thereon must be reasonable and justified under the existing circumstances.[182]

179. 344 F. Supp. 1119 (D.N.H. 1971).

180. *See* Negrich v. Harn, 379 F.2d 213 (3d Cir. 1967); People v. Del Rio, 207 N.Y.S.2d 186 (N.Y. Co. Gen. Sess. 1960).

181. 340 F. Supp. 958 (E.D. La. 1972).

182. *Id.* at 968.

In fact, *Collins v. Schoonfield*[183] held that time restrictions placed on attorney visitations, generally regarded as constitutionally permissible, were, in that case, too restrictive to allow for adequate assistance by counsel. The specific defect in the restriction was the scheduling of time for attorney visitations so that they conflicted with the hours the courts were in session. As a result attorneys with current trials were precluded from consulting with their clients in prison.

Another incident of the right to consult with counsel enjoyed by accused persons is the right to consult with agents of the attorney, or experts retained by him.[184] This right has recently been extended to convicted inmates,[185] and under the dictum of *Kahn v. La Vallee*[186] it is difficult to see under what circumstances it could be denied. In the case of an accused, a prison regulation that inmates could not be visited by convicted felons was invoked to bar a visit to an inmate by an investigator sent by the inmate's attorney. The court rejected this blanket approach to the situation:

> The rule restricting jail visits by felons does not appear to be unreasonable. But the authority of the sheriff is not so absolute as to prevail against the defendant's right to prepare his defense. The choice of an investigator lies with defense counsel. There has been no showing by the prosecution that the investigator's visits cannot be so handled as to avoid endangering security. In the absence of such a showing, the investigator must be accorded reasonable visitation privileges with [the inmate] for the purpose of preparing the defense's case. If the privilege is abused, the prosecution has the recourse of seeking a protective order from the trial court . . . .[187]

Thus the court held that although the regulation served a legitimate state interest, it could not stand since it was not the least restrictive alternative means of serving that interest. If this area is to be the subject of further litigation, the courts will probably resolve doubtful questions by recourse to the well-developed law

183. 344 F. Supp. 257 (D. Md. 1972).

184. Clifton v. Superior Court, 7 Cal. App. 3d 245, 86 Cal. Rptr. 612 (Ct' App. 1970); Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959) (en banc). *See also* People v. Del Rio, 207 N.Y.S.2d 186 (N.Y. Co. Gen. Sess. 1960).

185. Arif v. McGrath, 10 CRIM. L. RPTR. 2278 (E.D.N.Y. Dec. 9, 1971).

186. 12 App. Div. 2d 832, 209 N.Y.S.2d 591 (Sup. Ct. 1961).

187. Clifton v. Superior Court, 7 Cal. App. 245, 86 Cal. Rptr. 612 (1970).

of the right to counsel of accused persons, unless the correctional officials can establish that a substantial threat to prison discipline or security would result thereby. The right of an accused to consult with counsel includes the right to a reasonable time and place for private consultation as well as the right to consult with counsel's assistants or experts concerning the inmate's case, absent a showing of abuse.

Viewing the problem from another perspective, counsel does not necessarily have free access to consult with prisoners whom he does not represent. Although no issue can be taken to the general proposition, a threshold question may be presented when a determination is made that an attorney does, in fact, "represent" an inmate. It has not as yet been made clear at what point the attorney-inmate-client relationship begins, but a formal retainer agreement is probably not necessary to establish the relationship. For example, if an attorney should arrive at a penal institution to interview an inmate at the request of a family member, in response to a letter from an inmate, or even on his own initiative, it would be contrary to the concerns of the indigent inmate as expressed in *Johnson v. Avery* for the prison authorities to turn him away. Even if the inmate has an attorney of record, a refusal to allow a visit by different counsel may violate the inmate's right of access to the courts through counsel, if one of the grounds for post-conviction relief is incompetency of one's prior counsel. Since the inmate may wish to change counsel (as is his right within the discretion of the court) and because correctional officials are not the guardians of the ethics of the bar, they should not therefore deny admission to the "stranger" attorney on the grounds that it would be "unethical" absent a showing that the particular attorney has engaged in illegal conduct on prior occasions.

VI. CONCLUSION

The right of access to the courts, although not explicitly stated in the Constitution, in an inferable right, and one which is carefully guarded by the courts as being fundamental. The most absolute form of denying an inmate's access to the courts is the refusal by officials to mail court-directed letters. This practice has been uniformly prohibited as a denial of access to the courts. Most charges of denial of access to the courts, however, are not based on absolute refusals by institutional authorities to

mail letters, but rather on restrictive institutional regulations which preclude or hinder effective or meaningful communications with the court. In the past the court's traditional "hands off" policy treated these restrictive regulations as being within the discretionary domain of prison authorities and thus unassailable in the courts. As a result, the inmates were directed by the courts to take their complaints to prison officials. At present the courts appear to be shifting from reliance on the "hands off" doctrine and are subjecting restrictive penal regulations to closer scrutiny.

While some courts retain much of the "hands off" reasoning, a new trend is developing and its impact is being felt among the emerging rights of the confined. Although the ultimate resolution of the problems concerning inmates and their right of access to courts and counsel has not yet been achieved, certain principles are discernible. Inmate mail to courts may not be intercepted or censored as to any criticism about correction officials or facilities. In the future, inmate mail to the courts may not be subject to *any* restrictions, including censorship. As a corollary, inmate mail to public officials is to be treated in the same manner as court-directed mail. Inmate-attorney mail must not be intercepted and probably should not be censored, although it may be subjected to reasonable inspection procedures. Inmate mail to service organizations in an attempt to secure assistance in instituting court proceedings should be treated in the same manner as mail to attorneys. At the same time it should be recognized that mail which seeks "legal assistance" is being conceptually broadened by the courts to include not only assistance of counsel, but that seeking financial assistance, expert witnesses or merely information relating to the inmates case.

Despite the liberalizing trend in affording inmates an unhampered access to courts,prison officials still retain the power to punish individual abuses of mailing rights upon a factual showing that the mailing rights are being used for improper purposes. Additionally, regulations affecting the incidents of the right of access to the courts may be imposed on inmates subject to the protections of the Fourteenth Amendment. For example, reasonable regulations as to time, place and duration of legal assistance by inmates may be imposed by prison officials. Such regulations must be necessitated by a compelling state interest and must not have a substantial chilling effect on the right of indigent inmates to receive legal assistance. Reasonable regulations limiting the possession of legal material by inmates may be upheld by the

courts; in each case, such regulations are subject to equal protection guarantees. Prison officials, in any event, must take affirmative action to supply alternative methods to enable inmates to achieve meaningful access to the courts. Prison libraries must be sufficient to allow an inmate to research the points of law and procedure applicable to his case. Reasonable opportunity must be given inmates to confer conveniently with counsel or any of his lay assistants. Although definitive delineations of what restrictive regulations are reasonable probably depend on the specific facts of each case, it can be said that blanket proscriptions affecting an inmate's access to court without provision of reasonable alternatives will not be allowed.

It is almost too elemental to bear recitation, but as a corollary of the rights of inmates of access to courts, no punishment may be visited upon inmates for the assertion and utilization of those rights.[188] To allow otherwise would be to allow prison officials to do indirectly what they could not do directly—namely inhibit free access through threat of reprisal. Nor can restrictions of an inmate's freedom of access to the courts be used as punishment itself. Restriction on these rights might be justified according to the classification of the inmate, but this is becoming a doubtful procedure unless some clear factual basis of danger exists to support the distinctions. In any event, any such restrictions incidental to classification must not be of substantial impact, of long duration, unnecessary, or imposed for their disciplinary value.[189]

188. Andrade v. Hanck, 452 F.2d 1071 (5th Cir. 1971); Carothers v. Follette, 314 F. Supp. 1015 (S.D.N.Y. 1970); United States *ex rel.* Diamond v. Social Services Dept., 263 F. Supp. 971 (E.D. Pa. 1967); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1970).

189. *See, e.g.*, Arey v. Peyton, 378 F.2d 930 (4th Cir. 1967).

> [S]olitary confinement for several weeks . . . may . . . be such an oppressive and inappropriate response as to amount to undue interference with an inmate's access to the courts. *Id.* at 931.