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# Palmigiano: The Constitutionality of Prison Mail Censorship

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# Palmigiano: The Constitutionality of Prison Mail Censorship

In *Palmigiano v. Travisono*[1] the United States District Court for the District of Rhode Island examined the practice of prison mail censorship in light of the first and fourth amendment guarantees of freedom of speech and freedom from unlawful search and seizure. In a class suit, inmates of the Rhode Island Adult Correctional Institution sought an order restraining prison authorities from "delaying, opening, reading, censoring or tampering in any way with incoming or outgoing mail."[2] Rejecting prior case law,[3] the district court granted a temporary restraining order and reasoned that total censorship served "no rational deterrent, rehabilitative or prison security purpose."[4] It ruled that total censorship of outgoing mail was "unnecessary and in violation of the First Amendment rights of the parties involved,"[5] and formulated a rule of reason for incoming mail which was dictated by prison security. The court also held that either type of mail cannot be constitutionally censored if it is between pretrial inmates and their attorneys[6] or certain public officials.[7]

As the court in *Palmigiano* recognized, any discussion of prison inmates'

1. 317 F. Supp. 776 (D.R.I. 1970).
2. *Id.* at 780.
3. Prior to *Palmigiano* the settled doctrine was that "except in extreme cases the courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline." Childs v. Pegelow, 321 F.2d 487, 489 (4th Cir. 1963); *see, e.g.*, Harris v. Settle, 322 F.2d 908, 910 (8th Cir. 1963); United States *ex rel* Morris v. Radio Station WENR, 209 F.2d 105, 107 (7th Cir. 1953). Since censorship of inmate mail was not considered an "extreme case," judicial review was limited. Courts felt they possessed neither the time nor expertise to supervise the minute details of prison administration and were unwilling to review the acts of prison authorities except in circumstances of illegal detainment or cruel and unusual punishment. *See, e.g.*, Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964).
4. Palmigiano v. Travisono, 317 F. Supp. at 785.
5. *Id.* at 791.
6. *Id.* at 789.
7. The court held that prison officials were prohibited from opening or otherwise inspecting the contents of any incoming or outgoing letters between inmates and the following public officials:
   a) The President of the United States; any United States Senator or Congressman; Judges of any of the Federal Courts of the United States; including the clerks of said courts, the Attorney General of the United States and Director of the Federal Bureau of Prisons.
   b) The Governor of the State of Rhode Island, Supreme, Superior and District Court Judges of Rhode Island; Lt. Governor, Attorney General, Secretary of State, General Treasurer, and any member of the Rhode Island State Legislature or any state prison official or member of the Parole Board.

*Id.* at 788-89.

constitutional rights must begin with an analysis of the "retention of rights" doctrine. This doctrine, originally propounded in *Coffin v. Reichard*,[8] states that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law."[9] In contrast to those "judicial attitudes of the past"[10] which considered the prison inmate as a "slave of the state,"[11] *Palmigiano* recognized that prisoners do retain certain first and fourth amendment rights.

The state's interest in maintaining the security of its penal institutions was balanced against the "retention of rights" doctrine.[12] Although it acknowledged the legitimacy of the state interest, the *Palmigiano* court stressed the inmate's right to rehabilitation and the integral role that the receipt of mail plays in any effective rehabilitation program. The court felt that this right should be weighted heavily whenever it is balanced against the state interest in the security

8. 143 F.2d 443 (6th Cir. 1944).

9. *Id.* at 445.

10. Palmigiano v. Travisono, 317 F. Supp. at 785.

11. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

12. Palmigiano v. Travisono, 317 F. Supp. at 783. Prison authorities stress the importance of screening incoming correspondence to prevent the introduction of contraband into the institution. *See, e.g.*, Hatfield v. Bailleaux, 290 F.2d 632, 639 (9th Cir. 1961). Thus, incoming mail is generally examined to detect evidence of escape plots or weapons, and to exclude so called "inflammatory material" and drugs. In *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970), the court upheld a prison regulation which prevented inmates' access "to obscene materials or those which tend to incite certain activities which pose a distinct threat to prison discipline." Here, an inmate challenge the constitutionality of the marijuana law and attempted to correspond with a theology professor who had co-authored a work on the subject with Dr. Timothy Leary. *See also* Fulwood v. Clemmer, 206 F. Supp. 36 (D.D.C. 1962), where a Negro inmate, a disciple of Elijah Muhammad, was denied access to a newspaper which carried an article by his spiritual leader since it was considered "inflammatory."

Censorship has also been imposed on an inmate's business correspondence. The purpose of this was to prevent the prisoner from gaining outside resources which would be used as a lever in the corruption of prison guards. *See, e.g.*, Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965); Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951).

In *Palmigiano*, the Assistant Director for Correctional Services professed a fear that inmates would engage in confidence schemes or enter into criminal conspiracies with persons outside the prison. 317 F. Supp. at 784. He felt he had a statutory duty to censor outgoing mail in order to "protect the outside community from insulting, obscene, or threatening letters." *Id.* at 784. As a result, the censoring officer was given authority to "stop any letter that is insulting, fraudulent, threatening or not in good taste or any letter that cases the prison in an unfavorable light." *Id.* at 784. The courts have consistently upheld this type of broad delegation of censorship powers to prison authorities as being valid incidents of state interest. *See, e.g.*, McDonough v. Director of Patuxent, 429 F.2d 1189 (4th Cir. 1970), (although an inmate was allowed to publish a letter in Playboy magazine seeking financial assistance, he had no right to criticize the penal administration or the constitutionality of the law under which he was sentenced); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965), (a prison regulation which prevented outgoing mail criticism of "the law, rules, institution policy or officials" is an inherent incident in the administration of penal institutions); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964), (prison officials have a right to censor inmate correspondence to be certain of its "reasonableness and propriety").

of the institution.[13]

Although the petitioners in *Palmigiano* alleged first, fourth, sixth, ninth and fourteenth amendment violations, the court limited its discussion to the first amendment guarantees, except to note that fourth amendment abuses were also inherent in the prison censorship procedure. This article will examine the first amendment arguments advanced by the *Palmigiano* court, propose an alternative fourth amendment approach, and suggest ninth amendment considerations.

### *First Amendment Considerations*

In his examination of the constitutionality of prison mail censorship, Judge Petine writing for the three judge statutory court adhered to the two controlling doctrines of the Supreme Court—the clear and present danger test and the balancing of interests test. As originally enunciated in *Schenck v. United States*[14], the clear and present danger test states that an individual's action can be restricted only if it is clear that failure to do so would substantially harm the public welfare.[15] This test was modified in *Dennis v. United States*[16] in which the Supreme Court weighed the need for restrictions on first amendment rights against the consequences of permitting unrestrained actions. "In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[17] Applying the *Dennis* test requires that prison mail censorship be weighed against first amendment guarantees. As *Palmigiano* stated "the burden is on the prison authorities to show a compelling justification for

13. In balancing these divergent state interests, the court recognized that noted criminologists have espoused greater freedom rather than restriction of the inmate's communication with the "outside world."

> We argue for fewer restrictions on letter writing. Letter writing keeps the prisoner in contact with the outside world, helps to hold in check some of the morbidity and helplessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation.

Palmigiano v. Trevisono, 317 F. Supp. at 786. *See also* C. BARNES & J. TEETERS, NEW HORIZONS IN CRIMINOLOGY 492 (3d ed. 1959).

14. 249 U.S. 47 (1919).

15. *See* Whitney v. California, 274 U.S. 357, 374-78 (1927) (Brandeis & Holmes, JJ., concurring).

16. 341 U.S. 494 (1951).

17. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950). This quote by Chief Judge Learned Hand was adopted by the Supreme Court on appeal. Dennis v. United States, 341 U.S. 494, 510 (1950). There is some controversy as to whether the "clear and present danger" test was overruled in Brandenburg v. Ohio, 395 U.S. 444 (1969) where the Court citing *Dennis* held that,

> These later cases have fashioned the principle that the constitutional guarantee of free speech and free press do not permit a state to "forbid or proscribe (the oral) advocacy

interfering with the free exercise of those freedoms."[18] Thus, the prisoner should retain his rights unless suppression is justified by an overriding interest.[19]

Like *Palmigiano*, *Jackson v. Godwin*[20] found that prison officials had not met the heavy burden of justifying their infringement upon an individual's freedom. The *Jackson* court stated:

> [I]n the area of first amendment freedoms] we have pointed out that stringent standards are to be applied to governmental restrictions . . . and rigid scrutiny . . . must show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement . . . and absence of such compelling justification, the State restrictions are impermissible infringements of these fundamental and preferred rights.[21]

The court found that it was not enough to simply balance the state interest against first amendment protections. Rather the state was required to use the least restrictive methods possible in protecting itself. Judge Tuttle went on to say:

> Moreover, in examining the justification for state infringement in the area of [first amendment freedoms] the Supreme Court has recognized and declared the principle that the means utilized by the State, as well as the ends, must be legitimate. Even the most legitimate of legislative ends cannot justify the enforcement [sic] of

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of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

*Id.* at 447. Justices Black and Douglas concurred stating they understood that the majority opinion, by simply citing *Dennis*, "did not indicate any agreement on the Court's part with the 'clear and present danger' doctrine on which *Dennis* purports to rely." *Id.* at 450. Some circuits do not agree. *See* Norton v. Discipline Committee, 419 F.2d 479 (D.C. Cir. 1969). For a discussion of the distortion of the "clear and present danger" test by *Dennis*, *see* McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1203 (1959).

18. Palmigiano v. Travisono, 317 F. Supp. at 786.

19. Although the Courts in *Palmigiano* and in Coffin v. Reichard squarely faced the first amendment issues, they did so only to the extent that it affected the receipt of mail by the prison inmate. The infringement of these rights vis-a-vis the non-inmates who were corresponding with the prisoners was not the basis of these decisions.

20. 400 F.2d 520 (5th Cir. 1968).

21. *Id.* at 541. A Negro inmate under sentence of death charged that prison officials had deprived him of equal protection by denying him the right to receive Negro newspapers and magazines. The prison regulation under which censorship of inmate mail was excercised gave authority to the prison superintendent "to refuse mail if in his opinion such mail would be detrimental to good order and discipline." *Id.* at 531. The prison superintendent felt justified in excluding certain mail to the inmate, because it was his duty "to insure that no publications containing elements of violence or sex entered the prison." *Id.* at 531. In addition, the prison regulation limited the inmates' access to the rest of society by providing that a prisoner could subscribe to one newspaper of his choice, but that choice was restricted to newspapers published in the prisoner's home town. *Id.* at 530.

> fundamental rights if these ends may be accomplished by the use of less restrictive alternative means which result in less invasion of these fundamental rights.[22]

Curtailing a prisoner's first amendment right to receive mail may have a deleterious effect on society as a whole as well as on an individual inmate. Just as mail censorship limits the right of an inmate to receive information from the outside world, it also curtails society's right to firsthand information about prison conditions.[23]

A court must not focus solely on the first amendment rights of the prison inmate. Rather it must concern itself also with the "rights of all persons or institutions outside the prison who wish to correspond with the inmate."[24] Ideas expressed in prison correspondence represent one of the few means by which society can keep abreast of the status and conditions of prisoners and prisons. By limiting this means of expression, the courts permit prison authorities to arbitrarily control the dissemination of thought between the prison community and society as a whole. Such an arbitrary exercise of power is abhorrent to the freedoms contained in the first amendment.

The necessity of allowing inmates to communicate with the courts has previously provided an exception to the "hands-off" doctrine and resulting reluctance of courts to interfere with the administration of prisons. As *Palmigiano* acknowledged, the judiciary has been quick to intervene in the administration of a prison when called upon to safeguard access to the courts themselves.[25] Not only are prison officials restrained from restricting inmate correspondence with the courts, they are also prohibited from unreasonably delaying this mail, "since such delay would amount to an effective denial of a prisoner's right to access to the courts."[26]

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22. *Id.* at 541.

23. In Kovacs v. Cooper, 336 U.S. 77 (1949), the Supreme Court stated that free speech is guaranteed every citizen so that he may reach the mind of willing listeners, and in order to do so "there must be an opportunity to win their attention." *Id.* at 87.

24. Palmigiano v. Travisono, 317 F. Supp. at 786. It would follow that in any examination of the constitutionality of prison mail censorship, consideration also must be given to the first amendment guarantee of freedom of the press. The Supreme Court stated in *Ex Parte* Jackson, 96 U.S. 727, 733 (1877):

> Regulations cannot be enforced against the transportation of printed matter in the mail, which is open to examination, or as to interfere in any manner with the freedom of the press. Liberty of circulating is an essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.

25. It is well settled that "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." Johnson v. Avery, 393 U.S. 483, 485 (1969); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959).

26. *See, e.g.*, Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959); United States *ex rel* Vraniak v. Randolph, 161 F. Supp. 554 (E.D. Ill. 1958);Warfield v. Raymond, 195 Md. 711, 71 A.2d 870 (1950); *Ex Parte* Hull, 312 U.S. 546 (1941).

Prior to *Palmigiano*, the courts had not been eager to interfere with the censorship of correspondence between an inmate and his attorney.[27] *Palmigiano* held that inmate-attorney mail is an extension of an inmate's right of access to the courts.[28] Rather than relying on the common-law attorney-client privilege the court reasoned that since an attorney is an officer of the court, such correspondence amounts to intimate correspondence with the courts, and is thus entitled to constitutional protection.[29] The court considered the censorship of attorney-inmate mail to be "just another veil which can help hide an administration which perhaps should be a prime subject for judicial review."[30]

It is axiomatic that an inmate needs to consult with his attorney and that an unconvicted inmate, innocent until proven otherwise, possesses both the need and the right to consult freely with his legal representative. *Palmigiano* recognized the need and protected the right.

### *Fourth Amendment Considerations*

The court in *Palmigiano* focused primarily on mail censorship as it relates to the first amendment. However, it also held that the conduct of prison officials who indiscriminately opened and read prison mail "whether the same be from inmates or members of the free society" was a violation of the fourth amendment;[31] yet it recognized that "by necessity, the full sweep of the fourth

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27. One of the reasons for this is set out by Eugene N. Barkin, Legal Counsel, Federal Bureau of Prisons and Associate Professor of Law, The George Washington University:

> Unfortunately, a small minority of the members of the bar are not above reproach, but perhaps more important is that it is a simple matter for anyone to have a fictitious return address printed on envelopes and letterheads.

Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 675 (1966).

28. In reasoning thusly, the *Palmigiano* court fully agreed with Judge Keating's dissent in Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S.2d 693 *modified* 267 N.Y.S. 2d 580 (1966), where it was stated that ". . . the 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 . . . ." *Id.* at 699.

29. To censor such correspondence, *Palmigiano* held, would be "to render ineffective the guarantee of the Sixth Amendment." In so doing the court rejected the rationale of United States *ex rel* Green v. Maine, 113 F. Supp. 253 (D. Me. 1953); Vraniak v. Randolph, 161 F. Supp. 553 (E.D. Ill., 1852).

30. 317 F. Supp. at 789. The Federal Bureau of Prisons does not subject an attorney's visits with his client-inmate to auditory supervision, yet they do censor attorney correspondence. "The obvious question, therefore, is whether an escape plan or illegal business dealing can be transmitted as effectively by word of mouth as by the pen." If this is true then the practical benefits achied by the inspection of attorney-inmate correspondence are illusory.

Since uncensored visits are permitted between attorneys and inmates it follows logically that inmate-attorney correspondence should be free from censorship. In addition, any danger resulting from the rare case of an attorney assisting an inmate to avoid a legitimate prison regulation would be significantly outweighed by the constitutional right to assistance of counsel.

31. 317 F. Supp. at 791.

amendment obviously cannot apply in a prison or jail context."[32] Therefore, although the court recognized that the inmate retained his right to be free from unreasonable searches and seizures, it failed to define the scope of such protection.[33]

It is a general rule that the invasion of a constitutionally protected area without a search warrant is presumptively unreasonable.[34] First class mail is such a constitutionally protected area;[35] thus the mail may not be opened without the authority of a search warrant. When the articles searched are a form of expression, such as letters, the protection of the fourth amendment is supported by the inherent freedoms of the first amendment, and therefore, the courts have been extremely reluctant to class a search as reasonable when its ultimate goal is the suppression of free speech or thought.[36]

To qualify for fourth amendment protection a case must meet two qualifications: first, the person searched must have had an actual expectation of privacy; and second, that expectation must have been one that society is prepared to recognize as reasonable.[37] In *Palmigiano*, the prison authorities sought to negate the first qualification, of the prisoner's expectation of uncensored mail, by requiring inmates to sign an authorization of censorship.[38] This waiver, when judged by generally applicable standards is a travisty.[39] A

32. *Id.*

33. The *Palmigiano* Court held that such a fourth amendment right must be subject "to such curtailment as may be made necessary by the purpose of confinement and the requirements of security." *Id.* at 791.

34. Katz v. United States, 389 U.S. 347, 360 (1967), (Harlan, J., concurring) "The overriding function of the fourth amendment is to protect personal privacy and dignity against unwarranted intrusion by the state." Schmerber v. California, 384 U.S. 757, 767 (1966). Its adoption was a reaction to the misuse of power in searches and seizures. The assurances against its revival are so deeply embodied in the fundamental law that "it ought not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right." Byars v. United States, 273 U.S. 28, 33 (1927).

35. *Ex Parte* Jackson, 96 U.S. 727 (1878); United States v. Van Leeuwen, 414 F.2d 758 (9th Cir. 1969); For the constitutional distinction made between first class mail and other classes of mail, Oliver v. United States, 239 F.2d 818 (8th Cir. 1957). Whether such a rule is now applicable in a prison context is a matter of conjecture. In 1919, the Supreme Court held that letters written by an inmate charged with the murder of a prison guard may be intercepted by a vison warden without a warrant, conveyed to a prosecutor and later used as evidence against the inmate in a criminal trial without violating the fourth amendment. *See* Stroud v. United States, 251 U.S. 15 (1919).

36. *See* Stanford v. Texas, 379 U.S. 476 (1965); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961). The principal reason why such logic has not been applied to prixon mail is the "hands-off" policy argument.

37. Katz v. United States, 389 U.S. 347 (1967), (Harlan, J., concurring).

38. 317 F. Supp. at 781. The waiver was not mandatory, but unless it was signed the prisoner lost all mail privileges.

39. *See* Amos v. United States, 255 U.S. 313 (1921); Pekar v. United States, 315 F.2d 319 (5th Cir. 1963); McDonald v. United States, 307 F.2d 272 (10th Cir. 1962); Channel v. United

search may be conducted with consent and without a warrant only if the individual freely and intelligently gives an "unequivocal and specific consent" which is "uncontaminated by any duress or coercion, actual or implied."[40] Courts indulge in every reasonable presumption against such waiver and will not presume aquiessence in the loss of fundamental rights.[41] Prison regulations such as that in *Palmigiano* not only coerce an inmate to surrender his already limited constitutimal rights, but, if exercised in the extreme, approach administrative extortion.[42]

Since the usual justification for censoring prisoner mail is the maintenance of the security necessary to effectively administer correctional institution, it would be better to interpret the fourth amendment in light of the rationale proferred for "administrative searches." Although *Palmigiano* did not consider this approach, the similarities between an administrative search and the typical prison censorship procedure are quite evident. Both are essentially noncriminal searches, *i.e.*, the authorities' primary intention is something other than discovery of evidence for use in a criminal proceeding.[43] The object of both prison and administrative searches is the protection the public interest through maintenance of an orderly society, whether prison society or society in general. In either case, inspections are necessary and the rights of the public must be balanced against the privacy of the individual.[44] In view of this similarity it is difficult to justify any difference between the fourth amendment treatment of administrative searches and of prison searches.

An issue similar to that in *Palmigiano* was presented to the Supreme Court in *Frank v. Maryland*.[45] There, Mr. Justice Frankfurter stated:

> Appellant's resistance can only be based, not on admissible self-

States, 285 F.2d 217 (9th Cir. 1960); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Kelih, 272 F. Supp. 484 (S.D. Ill. 1951).

40. McDonald v. United States, 307 F.2d 272, 274 (10th Cir. 1960).

41. Johnson v. Zerbst, 304 U.S. 458 (1938). *See also* United States v. Vickers, 387 F.2d 703 (4th Cir. 1967); Stoner v. California, 376 U.S. 483 (1964); United States v. Page, 302 F.2d 81 (9th Cir. 1962).

42. The motive underlying the "authorization" is unclear. If the prison warden can rightfully censor the prisoner's mail, why must the inmates sign the waiver? In Johnson v. Zerbst, 304 U.S. 458 (1937) and Gorman v. United States, 380 F.2d 158 (1st Cir. 1967) the standard of "consent" was the "intentional relinquishment or abandonment of a known right."

43. Both Justice Frankfurter in Frank v. Maryland, 359 U.S. 360 (1959), (Douglas, J., dissenting) and Justice White in Camara v. Municipal Court, 387 U.S. 523 (1967) appeared reluctant to use the term "civil search" because evidence found in an administrative search could be used in a criminal charge. Such a proposition also holds true for prison mail censorship.

44. The difference between incoming and outgoing mail involves a constitutional question. Incoming mail is authored by a nonprisoner yet is subject to the same censoring procedure as outgoing mail. Although the court in *Palmigiano* made such a distinction in its restraining order, it based its decision on grounds of prison maintainance rather than on the Constitution.

45. 359 U.S. 360 (1959), (Douglas, J., dissenting).

> protection (since the search is non-criminal in nature), but on a rarely voiced denial of any official justification for seeking to enter his home. The constitutional liberty that is asserted is the absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place.[46]

In *Frank* the Court held this absolute right was subordinate to state interest, but *Camara v. Municipal Court*[47] overruled both the *Frank* reasoning and its result. When it decided *Frank* the Court felt that administrative searches were outside the protection of the fourth amendment because they lacked any prospect of criminal prosecution.[48] However, this reasoning was rejected in *Camara* when the Court held that innocent persons should enjoy the same safeguards as those suspected of criminal activity.[49]

Prior to *Camara* courts generally held that the broad restraints on constitutional rights compel inquiry into both the extent of individual suppression and the justification of social need which requires this suppression.[50] The need to search must be balanced against the invasion which the search entails.[51] *Camara* enlarged this concept:

> The final justification suggested for warrantless administrative searches is that the public interest demands such a rule; . . . . Of course in applying any reasonableness standard, including one of constitutional dimensions, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant . . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a

46. *Id.* at 366. Obviously, this issue changes considerably when the inspection is one which continues daily as it does for the prison inmates.

47. 387 U.S. 523 (1967).

48. On the difference between a "criminal" and a "civil" search, *compare* Mr. Justice Frankfurter's majority opinion *with* Mr. Justice Douglas' dissenting opinion in Frank v. Maryland, 359 U.S. 360 (1959).

49. For a more thorough discussion of the distinction between *Frank* and *Camara* and the reliance upon Entick v. Carrington, 19 Howell's State Trials, Col. 1029 (1765), *see* Comment, *Administration Searches and the Fourth Amendment*, 36 UMKC L. REV. 111, 126 (1968).

50. *See, e.g.*, Frank v. Maryland, 359 U.S. 360 (1959); Boyd v. United States, 116 U.S. 616 (1886); District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949).

51. Camara v. Municipal Court, 387 U.S. 523 (1967), (Clarke, Harlan & Stewart, JJ., dissenting).

> warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[52]

The Court concluded that it was possible for fire, health, and housing code inspection programs to achieve their goals within the confines of a warrant requirement. However, the strict standards of a general warrant were relaxed in an administrative search.[53] The prerequisites for issuance of such a warrant are satisfied upon showing that the prescribed legislative and administrative standards have been met.[54]

The reasoning in *Camara* would appear applicable to prison censorship practice. Maintenance and discipline are maintained through periodic checks of incoming mail. At the same time individual rights of personal liberty and freedom of expression are not forfeited completely and the strict standards of "probable cause" normally needed to obtain a fourth amendment search warrant are unnecessary.

In some ways this middle-of-the-road solution to the prison censorship problem is more constitutionally acceptable than the administrative guidelines set down in *Palmigiano*,[55] which placed a heavy emphasis on the state interest in incoming and outgoing mail. All outgoing mail was found to be protected by the fourth amendment and could not be the subject of a warrantless search. However, because a satisfactory state interest was shown, substantially all incoming mail was subjected to inspection.[56] This reasoning runs contrary to *Camara*'s expansion of the fourth amendment protections. In *Camara* the question was not whether the public interest justifies such a search, but whether the authority to search should require a warrant. This depends partly on whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[57]

Thus, in light of *Camara*, the real question for the *Palmigiano* court was

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52. *Id.* at 533.

53. For the possible public policy effect of issuing such warrants, *see* Justice Clarke's dissenting opinion in *Camara*. Other examples of what some call "wattered-down" warrants are found in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Davis v. Mississippi, 394 U.S. 721 (1969); and Terry v. Ohio, 392 U.S. 1 (1968).

54. This standard might be satisfied if the administrative agency has deemed periodic inspection essential. *See* Comment, *supra* note 48 at 111. The Court reasoned that probable cause to issue a warrant must exist if these standards are met.

55. Palmigiano v. Trovisono, 317 F. Supp. at 788. A middle-of-the-road approach would buy any solution which centered between the two extremes of complete censorship and no censorship.

56. *Id.* at 790. The purpose of the warrantless inspection was the detection of inflammatory and pornographic material. The exceptions were letters received from persons on the "approved mailing list." *Id.* at 791.

57. Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

not whether a valid state interest exists in censoring incoming mail, but whether obtaining a warrant would hamper the censorship procedure sufficiently to harm the state interest. Since strict adherence to ordinary probable cause requirements is unnecessary to obtain a warrant for an administrative search, the state interest, although a factor, seems no longer decisive.

The administrative search rationale would afford greater protection to the individual with whom the inmate corresponds than the censorship procedures promulgated in *Palmigiano*. In addition, periodic inspection under authority of a warrant would protect the rights of the non-inmate, while upholding the valid interests of the prison authorities.

### *Ninth Amendment Considerations*

The power to control evil does not remove all restrictions on the means employed for that purpose.[58] In *Griswold v. Connecticut*[59] the Supreme Court stated that a "governmental purpose to control or prevent activities . . . may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[60] The rationale behind this protection is simply that these liberties are so deeply rooted in the American tradition and conscience as to be considered fundamental.[61]

Although *Palmigiano* did not utilize the ninth amendment to bolster its reasoning, the argument is certainly applicable in the prison context. As with fourth amendment considerations, the right to privacy is constitutionally protected if no compelling state interest is present or if the procedure used to secure the public interest is not reasonable.[62] Used as a rule of construction to interpret the rights specified in the Constitution within the context of present day needs and values, the ninth amendment compels inquiry into the availability of alternative approaches to achieve the state interest.[63] The Supreme Court has stated: "It is now well established that the Constitution protects the right to receive information and ideas. This freedom of speech and press . . . necessarily protects the right to receive . . . information and ideas, regardless of their social worth [and] is fundamental to our free society."[64] This

58. Cross v. Harris, 135 U.S. App. D.C. 259 (1969).

59. 381 U.S. 479 (1965), (Goldberg, J., concurring).

60. *Id.* at 485. *See also* NAACP v. Alabama, 377 U.S. 288 (1964).

61. Griswold v. Connecticut, 381 U.S. 479, 493 (1965), (Goldberg, J., concurring), quoting with approval, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

62. *See* Comment, *Connecticut Contraceptive Ban v. Right of Privacy*, 34 UMKC L. REV. 95, 109 (1966).

63. Kutner, *The Neglected Ninth Amendment*, 51 MARQ. L. REV. 121, 135 (1967). *See* Stanley v. Georgia, 394 U.S. 557 (1969) which involved alleged "obscene material."

64. Stanley v. Georgia, 394 U.S. 557, 564 (1969). *See also* Lamont v. Postmaster General, 381 U.S. 301, 307, 308 (1965); Winters v. New York, 333 U.S. 507 (1948); Martin v. City of Struthers, 319 U.S. 141 (1943).

interpretation supports the prisoner's argument that not only is the writing and sending of letters constitutionally protected, but also that the right to receive mail is so fundamental as to be within the purview of the ninth amendment. As stated in *Griswold*, the "various [constitutional] guarantees create zones of privacy."[65] It is logical to assume that the right to send and receive uncensored mail falls "within the zone of privacy created by several fundamental constitutional guarantees."[66] The ninth amendment expands the freedoms inherent in the first amendment and brings them to their logical conclusion[67] harboring those "additional fundamental rights which exist alongside those fundamental rights specifically mentioned in the first eight amendments."[68] This reasoning was first espoused by Mr. Justice Brandeis, dissenting in *Olmstead v. United States:*

> [The Farmers] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be left alone, the most comprehensive of rights, and the right most valued by civilized men.[70]

This right of privacy, the claim of individuals to determine for themselves when, how, and to what extent information about them is communicated to others,[71] is more than a penumbra right "formed by emanations from those [first and fourth amendment] guarantees that help give them life and substance."[72] It is a basic right in itself, existing alongside other protected activity. Not surprisingly, this right of privacy in communication has been suggested as the underlying theme of the Bill of Rights.[73] In arguing to limit such a right, the state bears a substantial burden of justification. It must not only further a substantial governmental interest, but it must also avoid the suppression of free expression as much as possible. Furthermore, "the incidental restrictions on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[74]

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65. 381 U.S. 484.

66. *Id.* at 485.

67. The same reasoning might be used to find double protection (for the sender and receiver) against unreasonable search and seizure in the fourth amendment.

68. Griswold v. Connecticut, 381 U.S. 479 (1965), (Goldberg, J. concurring).

69. 277 U.S. 438 (1928).

70. *Id.* at 442.

71. J. WESTIN, PRIVACY AND FREEDOM (1967). This definition of privacy was used with the *Griswold* reasoning in Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970).

72. Griswold v. Connecticut, 381 U.S. 479 (1965), (Goldberg, J., concurring).

73. Note, *Griswold, The Right to be Left Alone*, 55 NW. U.L. REV. 216 (1960). *See also* Comment, *Privacy after Griswold: Constitutional or Natural Law Right?*, 60 NW. U.L. REV. 813 (1966).

74. United States v. O'Brien, 391 U.S. 367, 376 (1968), (Harlan, J., concurring). *See also* Mr. Justice Harlan's concurring opinion in *O'Brien*.

In applying the *Coffin* "retention of rights" doctrine to prison inmates, *Palmigiano* in effect utilized the rationale of the ninth amendment as it applies to society at large.

### *Conclusion*

Although the factual situation posed in *Palmigiano* would seem to limit its application solely to pretrial inmates,[75] the court's reasoning is more widely applicable since prison rules, procedures, and practices concerning mail censorship apply equally to convicted and unconvicted inmates.

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75. As in the factual context of *Palmigiano*, a large percentage of prison inmates in the United States are unconvicted but are detained for want of bail. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 25 (1968). As in *Palmigiano*, they are usually subject to the same mail censorship as their convicted brethren and for essentially the same reasons. 317 F. Supp. at 781.

In Parks v. Ciccone, 281 F. Supp. 805 (W.D.M. 1968), the court found that an unconvicted inmate had no more of a constitutional right to free access to the mails than a convicted prisoner. "This is so because considerations of security of institutional administration and of rehabilitative and medical practices are present to a large extent even though the particular inmate is an unconvicted person." *Id.* at 810. Although some regulation is necessary due to the very fact of confinement, the difference in prisoner status warrants different treatment particularly with respect to the first and fourth amendments. *See* United States *ex rel* Mitchell v. Thompson, 56 F. Supp. 683, 690 (S.D.N.Y. 1944).

In Tyler v. Ciccone, 299 F. Supp. 684 (W.D.M. 1969), the same court departed from *Parks* and held that unconvicted persons charged with crime are entitled to the rights of free speech and to do business accorded to all unconvicted citizens.

> The challenged regulation, in its requirement that permission be obtained before allowing preparation of the manuscript . . . and, in its provision for confiscation and censorship . . . deprives the unconvicted inmate of fundamental constitutional rights and cannot therefore be enforced against him.

*Id.* at 687.

The doctrine of judicial non-interference, the court ruled, was not applicable to an unconvicted inmate since the courts retain the duty to protect all innocent persons against violations of statutory and constitutional rights.

Although the court in *Tyler* recognized the threat against institutional security, the holding is based primarily on the pretrial inmate's unrestricted right to privacy and in doing so, the court negated the principle of balancing individual rights with social need. The by-product of such reasoning is the negation of the government's maintenance of discipline and state interest argument. 317 F. Supp. at 793.

The reasoning of *Tyler* could logically expand to include the censoring of incoming mail. As that procedure imposes on the rights of individuals to whom the inmate is corresponding, it violates express first, fourth and ninth amendment guarantees as applied to nonprisoners. Such reasoning gives birth to the principle that the censoring of incoming mail must be grounded on a state interest more compelling than that applying to outgoing mail. Although the justifications of censorship might be the same for both, the rights of the nonprisoner must be given greater weight than those of the prison inmate.

The *Palmigiano* court referred only briefly to this distinction. 317 F. Supp. at 785. By adopting the retention of rights doctrine enunciated in Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), the court plainly implied that its reasoning should also apply to convicted prisoners. Indeed, if the reasoning of *Palmigiano* is so narrowly construed as to exclude the convicted prisoner, another attempt at defining the constitutional rights in a prison context will be defeated.

When carried to its logical conclusion, *Palmigiano* represents a step toward free communication for the more than 300,000 prisoners in the United States. However, if *Palmigiano* is limited solely to the unconvicted inmate, it must be considered a retreat to that policy of avoidance known as the "hands-off" doctrine. In any case, courts facing this issue might well utilize the fourth amendment and consider the ninth amendment.

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