Prisoners and the Press: The First Amendment Antidote to Civil Death after PLRA

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PRISONERS AND THE PRESS: THE FIRST AMENDMENT ANTIDOTE TO CIVIL DEATH AFTER PLRA

DENNIS TEMKO*

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I. INTRODUCTION

There is currently a split of authority among the United States Circuit courts about whether prisoners have the right to send letters to the media unopened and unread by prison officials.1 The split

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1. For cases holding a prisoner has such a right see, e.g., Guajardo v. Estelle, 580 F.2d 748, 759 (5th Cir. 1978); Taylor v. Sterrett, 532 F.2d 462, 481-82 (5th Cir. 1976); Travis v. Lockhart, 607 F. Supp. 1083, 1086 (E.D. Ark. 1985); Burton v.
regarding prisoners’ rights lies in each circuit’s classification of prisoner mail as either general or privileged. Courts that hold prisons should treat prisoner mail to the media as general mail have applied the test developed in Procunier v. Martinez. Under the Martinez test, prison officials may read outgoing general mail if the mail presents a threat to prison security. Contrary to the way general mail is treated, prison officials may generally not read privileged mail because it abridges the prisoner’s constitutional right to communicate with those who facilitate a prisoner’s access to the courts: individuals or agencies closely connected to the judicial process. In essence, prison officials may read general mail if doing so is dictated by security concerns, while prison officials may generally not read privileged mail.

The Prison Litigation Reform Act ("PLRA") has greatly impacted the way courts should examine the treatment of prisoner mail to the media as general or privileged mail. PLRA has, along with several factors, fundamentally changed the prison system. PLRA has imposed burdensome restrictions on prisoners’ ability to file lawsuits. The result is that courts often reject claims from prisoners seeking court protection from dangerous conditions and civil rights violations for failure to first exhaust their remedies through the prison’s internal grievance system. PLRA has significantly curtailed prisoners’ in

Foltz, 599 F. Supp. 114, 117 (E.D. Mich. 1984). For cases holding that no such right exists see, e.g., Gaines v. Lane, 790 F.2d 1299, 1307 (7th Cir. 1986); Smith v. Delo, 995 F.2d 827, 832 (8th Cir. 1993).

2. Id.


5. See supra note 1; Daniel M. Donovan, Jr., Constitutionality of Regulations Restricting Prisoner Correspondence with the Media, 56 FORDHAM L. REV. 1151, 1152 (1998); Wolff v. McDonnell, 418 U.S. 539, 575-77 (1974)).


8. Id.

9. Id. at 35; Darryl M. James, Reforming Prison Litigation Reform:
court redress for inhumane conditions in prisons. Because PLRA has made it more difficult for prisoners to get to court, their claims of dangerous conditions and civil rights violations now depend on the media for redress. Without access to the media, a prisoner’s constitutional right of access to the courts is a hollow shell. It will remain so in jurisdictions where mail to the press is not protected as it would be if it were sent to courts or to attorneys. A Supreme Court decision to resolve the circuit split in favor of treating prisoner mail to media as privileged would signal the Court’s recognition that media mail is critical to prisoners’ access to the courts and to broader public discourse. That recognition befits a society that values humane treatment for its most vulnerable citizens.

Section II of this Article discusses the “hands-off” attitude courts took toward prison administration problems, the gradual departure from that policy, and finally, the development of constitutional law addressing prison mail. Prisoners were not seen as people until the turn of the century, and even then, courts had mostly a “hands-off” policy towards prison administration until the Warren Court took a more active approach. But Congressional action in the form of PLRA and the circuit split on prisoner mail have created a need for the Supreme Court to step in to protect prisoners’ constitutional rights.

Next, Section III addresses the split in authority about whether a prisoner has the right to send a letter to the media unopened and unread by prison officials. The Fifth and Seventh Circuits’ treatment

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10. HUMAN RIGHTS WATCH, supra note 7, at 35.


13. See infra Section II.

14. Taylor v. Sterrett, 532 F.2d 462, 482 (5th Cir. 1976); Gaines v. Lane, 790
of media mail as either privileged or general mail will be compared, and I will conclude that the Supreme Court should adopt the reasoning of the Fifth Circuit to safeguard prisoners' constitutional rights.

Then, Section IV outlines the important role the media plays in publicizing prisoner abuse and gives examples of instances where the media has exposed prisoner abuse courts had not addressed.

Sections V and VI examine how various state prison systems in the United States and model codes treat prisoners' mail to the press, and generally, whether it is read by prison officials or not. The review reveals there are many states that allow prisoners to send unread mail to the media as either privileged or general mail, demonstrating that other states' security concerns may be greatly overstated. 15 In light of the instrumental role the media plays in guaranteeing a prisoner's right to court access and the restrictions placed upon prisoners by PLRA, the Sections conclude that the Court should treat prisoners' media mail as privileged mail. By doing so, the Court would place prisoners' media mail within the same category as mail to individuals or agencies closely connected to the judicial process, which prison officials cannot read even if they assert security concerns. 16

PLRA is the subject of Section VII. PLRA has curtailed prisoners' ability to redress grievances through the court system. 17 The impact of PLRA has entirely changed the playing field of prisoners' rights. Section VII explores the extent of the changes and argues that particularly because of the new barriers created by PLRA, the media must be permitted to serve its essential purpose in protecting prisoners' constitutional rights by having access to unopened and unread prisoner mail.

Section VIII, in addition to examples throughout the Article, then specifically describes the problem of retaliation wrought by prison officials against prisoners who report grievances. This Section demonstrates why it is paramount for the Court to resolve the circuit split in favor of giving prisoners unfettered access to the media by

F.2d 1299, 1307 (7th Cir. 1986).
17. HUMAN RIGHTS WATCH, supra note 7, at 35.
treated their media mail as privileged. By doing so, the Court ensures prisoners an alternative means to complain outside the realm of prison officials, which cannot be intercepted, even if officials cite security concerns.

Finally, Section IX concludes that the Supreme Court should adopt the reasoning of the Fifth Circuit in *Taylor v Sterrett*, and allow prisoners the right to send unopened and unread mail to the media.

II. PRISONERS' RIGHT OF ACCESS TO FEDERAL COURTS AND MAIL CENSORSHIP TEST

The historically poor treatment of prisoners in the United States persisted until the 1960s. The 1960s and 1970s saw a retreat from courts' "hands-off" approach, and in 1974, the current standard for whether a prison official may read a prisoner's mail was established.

Prisoners received exceptionally poor treatment in the mid-nineteenth century. Initially, there was a general consensus among U.S. courts that prisoners had forfeited all rights, even their humanity, at the prison door, much as if they had physically died. The state regarded prisoners as slaves. As such, they were denied access to courts and had no rights. Prison officials had unfettered discretion in their treatment of prisoners. From the mid-nineteenth century until the turn of the twentieth century, prisoners' claims were denied based upon their slave status.

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18. See supra note 1.
19. Gaines, 790 F.2d at 1305-06; Martinez, 416 U.S. at 409-11; Travis, 607 F. Supp. at 1085-86.
20. Taylor v. Sterrett, 532 F.2d 462, 482 (5th Cir. 1976).
24. Id.
Decided in 1871 in Virginia, *Ruffin v. Commonwealth*\(^{27}\) illustrates the common view of early courts regarding prisoners' rights from the mid-nineteenth century through the mid-twentieth century.\(^{28}\) Woody Ruffin, a convict, had been hired out from a penitentiary to work alongside other convicts on the Chesapeake and Ohio Railroad in Bath, Virginia.\(^{29}\) While he was working on the railroad in Bath, Ruffin attempted to escape and killed a guard, Louis Swats.\(^{30}\) A state statute declared that all criminal proceedings against convicts would occur in Richmond.\(^{31}\) A Richmond court tried, convicted, and sentenced Ruffin to death by hanging.\(^{32}\) On appeal, Ruffin argued that the Virginia Bill of Rights, contrary to the state statute, required him to be tried in Bath, where the crime occurred, rather than in Richmond.\(^{33}\) The Virginia Bill of Rights stated, "a man hath a right to a speedy trial by an impartial jury of *his* vicinage,\(^{34}\) without whose unanimous consent he cannot be found guilty."\(^{35}\)

The Virginia Court of Appeals rejected Ruffin's argument and held the penitentiary in Richmond was Ruffin's proper vicinage rather than Bath, where the crime occurred.\(^{36}\) The court reasoned that as a prisoner, Ruffin "not only forfeited his liberty, but all his personal rights[.] . . . He is for the time being the slave of the State. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man."\(^{37}\) The Virginia Bill of Rights did not apply to Ruffin because he was a prisoner. Ruffin unsuccessfully argued the Virginia Bill of Rights did apply to him because he was working at the time of

\(^{27}\) *Ruffin*, 62 Va. (21 Gratt.) at 790.


\(^{30}\) *Id.* at 792.

\(^{31}\) *Id.* at 793.

\(^{32}\) *Fliter*, supra note 28, at 51.

\(^{33}\) *Ruffin*, 62 Va. (21 Gratt.) 792-93.

\(^{34}\) *Black's Law Dictionary* 1702 (9th ed. 2009) ("The place where a crime is committed or a trial is held; the place from which jurors are to be drawn for trial; esp., the locale from which the accused is entitled to have jurors selected.").

\(^{35}\) *Ruffin*, 62 Va. (21 Gratt.) 792.

\(^{36}\) *Id.* at 798-99.

\(^{37}\) *Id.* at 796.
the murder, rather than within the confines of the penitentiary. The court ruled his status as a convict attached as soon as he was convicted, and he remained a convict whether he was physically in the penitentiary or not.

Courts' reluctance to interfere in prisoner matters persisted well into the 1900s. Until the turn of the twentieth century, prisoners were denied access to courts based on their status as slaves. Until the late 1960s, federal courts adopted a "hands-off" attitude toward problems of prison administration and traditionally stated that they were "ill equipped to deal with... prison administration." This approach perpetuated the status of prisoners as dead men in the eyes of the law. Justifications for courts' "hands-off" policy "included separation of powers, the difficulty of administering from the bench and the greater expertise of prison officials." One court stated this policy arose from "Herculean obstacles" prison officials face in discharging their duties. Further, prison problems were "complex and intractable", and "not readily susceptible of resolution" by courts. This "hands-off" approach gave credence to prison officials' claims that they, not the courts, were in the best position to evaluate the needs of their prisons and to make decisions concerning prisoners. Because of this approach, prisoners had very little court recourse to address abuse.

38. Id. at 793.
39. Id.
41. Dolovich, supra note 12, at 979 n.306.
42. Martinez, 416 U.S. at 405; FLITER, supra note 28, at 52; Dolovich, supra note 12, at 979 n.306.
44. Ruffin, 62 Va. (21 Gratt.) 796.
45. Donovan, supra note 5, at 1152.
46. Martinez, 416 U.S. at 404.
47. Id. at 405.
48. Id. at 404.
49. Id.
This approach did not change until the late 1960s because of practical and political considerations. Prisoners have never been a sympathetic group to the public, and they are relatively politically powerless. For the most part, they do not even have the right to vote. Further, they are not a high priority for politicians, since "there are few places where a politician will win votes by standing up for the rights of prisoners." Similarly, elected state judges gain little favor by instituting prison reform. Further, the National Association for the Advancement of Colored People ("NAACP") and the American Civil Liberties Union ("ACLU"), organizations that eventually played an instrumental role in future prison reforms, were preoccupied with civil rights litigation. Prior to the 1960s, these organizations focused little of their resources on prisoners' rights, further delaying change. Since courts traditionally deferred to prison officials' judgment, prisoners were in a weak position to challenge prison mail policies. Without a political base that supported prisoners' rights, judges and other elected officials had little incentive to interfere with the "hands-off" approach.

The pendulum swung towards more favorable prisoners' rights decisions in the 1960s and 1970s. During that time, the Warren Court slowly retreated from the "hands-off" approach to prison conditions. Prior to 1963, federal prisoners were unable to bring claims in district courts for torts suffered while in federal prison. However, in 1963, the Warren Court's decision in United States v. Muniz allowed federal prisoners to sue the United States for injuries caused by government employees, and receive damages under the

50. FLITER, supra note 28, at 64; Dolovich, supra note 12, at 979 n.306.
53. FLITER, supra note 28, at 65.
54. Id.
55. Id. at 64.
56. Dolovich, supra note 12, at 979 n.306.
57. Id.; FLITER, supra note 28, at 65.
58. The Warren Court refers to the Supreme Court of the United States between 1953 and 1969, when Earl Warren served as Chief Justice.
59. FLITER, supra note 28, at 65.
60. Dolovich, supra note 12, at 979 n.306.
Federal Tort Claims Act. A year later, the Court expanded this right to state prisoners under Cooper v. Pate, which allowed prisoners to bring a civil action for deprivation of rights against prison officials. These decisions paved the way for the Burger Court to later examine prisoners’ rights issues by expanding prisoners’ access to the court system, and eventually set the stage for the Court’s examination of prison mail policies in Procunier v. Martinez.

In Procunier v. Martinez, the Supreme Court considered the constitutionality of the California Department of Corrections regulations on censorship of outgoing prisoner mail, and for the first time applied the First Amendment’s freedom of speech clause. The mail regulations at issue in Martinez prohibited prisoners from writing letters that unduly complained, magnified grievances, or expressed “inflammatory political, racial, religious, or other views or beliefs” to persons other than licensed attorneys and public officials. If a prisoner wrote such material, a prison employee inspecting the letter could find the letter objectionable and either refuse to mail it, submit a disciplinary report, or place a copy of the letter in the prisoner’s file, where it could potentially be factored into parole eligibility.

In considering these regulations, the Court formulated a test to analyze the constitutionality of prison regulations on outgoing mail. To arrive at the test, the Court focused on the rights of the non-prisoner recipient of the mail, rather than on the prisoners’ rights as senders. Specifically, the Court focused on non-prisoner recipients’ right to “protection against unjustified governmental interference with

63. FLITER, supra note 28, at 69.
65. Id. at 398.
66. Id.
67. Donovan, supra note 5, at 1152.
68. Martinez, 416 U.S. at 399.
69. Id. at 400.
70. Id. at 413-14.
71. Id. at 408.
the intended communication" under the First and Fourteenth Amendments. The Court established a test that required:

First, the regulation or practice in question must further an important or substantial government interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial government interests of security, order, and rehabilitation. Second, the limitation of the First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular government interest involved.

Using this test, the Court found the California prison regulations to be unconstitutional because there was no legitimate "governmental interest unrelated to the suppression of expression." 

Martinez thus formulated the test courts apply to prisoner's general mail. While the holding in Martinez was a breakthrough in the civil rights of prisoners, it was limited to the California prison regulations at issue in that case and applied solely to censorship of general mail. General mail is mail addressed to those who are not involved with or responsible for the prisoner's incarceration, like family members or friends, as opposed to the prisoner's attorney. The definition of "censor" is: "To officially inspect... and delete material considered offensive." According to Martinez, opening and reading outgoing general mail is not unconstitutional censorship because it does not involve the deletion of material. According to

72. Id. (citing Lamont v. Postmaster General, 381 U.S. 301 (1965); Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972); Martin v. City of Struthers, 319 U.S. 141, 143 (1943)).
73. Id. at 409-11.
74. Id. at 413.
75. Taylor v. Sterrett, 532 F.2d 462, 466 (5th Cir. 1976); Donovan, supra note 5, at 1151-52.
76. Martinez, 416 U.S. at 415; Taylor, 532 F.2d at 466; Donovan, supra note 5, at 1151-52.
77. Donovan, supra note 5, at 1152.
78. BLACK'S LAW DICTIONARY (9th ed. 2009).
79. Busby v. Dretke, 359 F.3d 708, 722 (5th Cir. 2004); Donovan, supra note
one circuit court, "freedom from censorship is not equivalent to freedom from inspection or perusal." For example, consistent with this holding, a prison official could open an inmate letter to the media and read it, but if there were unflattering comments about the guards or conditions, the official could black out those comments only if doing so furthered a substantial government interest.

An important distinction lies in the difference between what is termed general mail and what is termed privileged mail. Privileged mail is mail that implicates a prisoner’s constitutional right to communicate with those who facilitate access to the courts. The test formulated in *Martinez* does not apply to privileged mail. The split in the circuit courts as to whether inmates have the right to send unopened and unread mail to the media turns on whether the mail is considered privileged or general mail.

Prison officials may open and read general mail without violating the First Amendment as long as no censorship is involved. Privileged mail, however, is different, since it implicates the constitutional right for an inmate to communicate directly with the courts or with those who communicate to the courts on the prisoner’s behalf. A prisoner’s ability to send mail to his attorney is a conduit for him to exercise his constitutional right of access to the court system; thus, this kind of mail is privileged. As such, outgoing mail to an inmate’s attorney may generally not be opened or read unless there is reasonable cause to suspect contraband is contained in the mail. The test used in *Martinez* applies when determining whether prison officials may constitutionally censor outgoing general mail, but does not apply to privileged mail. Consequently, whether the prisoner is corresponding with courts—or with individuals interacting with the

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5, at 1151-52.  
81. *Busby*, 359 F.3d at 722.  
82. *Id.*  
83. *See supra* note 1.  
84. *Busby*, 359 F.3d at 722.  
87. Taylor v. Sterrett, 532 F.2d 462, 469 (5th Cir. 1976).
courts on the prisoner's behalf—determines the protection afforded to the prisoner's mail.

Thus, prisoners' rights have come a long way since the days when prisoners were treated as slaves and dead persons by the state. Now, prisoners have significant constitutional rights even though they are incarcerated. There is currently a circuit split that necessitates Supreme Court action to protect prisoners' constitutional rights. As a natural continuance of the evolution of prisoners' rights, the Supreme Court should resolve this split in authority by declaring that prisoner mail to the media should be treated as privileged and should not be subject to opening and review by prison officials.

III. CIRCUIT SPLIT REGARDING THE STATUS OF PRISONERS' MAIL TO THE PRESS

Because privileged mail is afforded constitutional protection that general mail is not, the classification of mail as general or privileged is of great consequence. Circuit courts are divided on whether mail sent to the media should be considered general mail—to be scrutinized under the Martinez test—or privileged mail to be afforded a higher degree of protection, similar to correspondence with attorneys and the court system. Taylor v. Sterrett, a Fifth Circuit opinion, and Gaines v. Lane, a Seventh Circuit opinion, illustrate the split in the circuit courts. Taylor has the better-reasoned approach. Under Taylor, prisoners' mail to the media receives the elevated protection of privileged mail.

Taylor involved prison inmates arguing that restrictions on sending mail unopened and unread by prison officials to the media abridged their rights to due process and equal protection under the law. They also argued that opening and reading mail addressed to the press "would at least chill those communications resulting in the diminution of [those constitutional] rights." The court agreed with

88. See infra Section III.
89. Taylor, 532 F.2d at 462; Gaines v. Lane, 790 F.2d 1299, 1299 (7th Cir. 1986).
90. Taylor, 532 F.2d at 462; Gaines, 790 F.2d at 1299.
91. Taylor, 532 F.2d at 470.
92. Id. at 468.
93. Id.
the prisoners’ arguments and recognized that in certain instances, the press participates in, and may influence, judicial proceedings by creating publicity, and is therefore similar to other protected mail sent to redress grievances.\textsuperscript{94}

To reach this conclusion, the Fifth Circuit relied heavily on the Supreme Court’s decision in \textit{Ex parte Hull}, which held that prisoners’ access to the courts could not be abridged.\textsuperscript{95} In \textit{Hull}, the Court reviewed a Michigan regulation that required prisoners’ petitions for a writ of habeas corpus to be approved by the state’s welfare office before filing to ensure the legal documents were “properly drawn.”\textsuperscript{96} The Supreme Court found the requirement to be an unconstitutional impairment of prisoners’ rights of access to the judicial system.\textsuperscript{97}

The Fifth Circuit brought communication with the press within \textit{Hull}’s ambit by classifying the press as a means for “free expression and . . . petitioning the government for redress of grievances.”\textsuperscript{98} \textit{Taylor} holds the \textit{Martinez} test inapplicable when constitutional violations are involved.\textsuperscript{99} The court saw outgoing mail sent to the media as crucial to a prisoner’s rights of free expression and petitioning the government for redress of grievances. As a result, the court held it should be treated like privileged mail to attorneys and the courts, which also implicates constitutional rights.\textsuperscript{100}

In \textit{Gaines v. Lane}, the Seventh Circuit reached the opposite conclusion when considering whether mail to the media should be considered privileged.\textsuperscript{101} There, the Seventh Circuit recognized the media and public could play an important role in petitioning the government for redress of grievances.\textsuperscript{102} However, the court noted prisoners have “substantial opportunities to petition the executive, legislative, and judicial branches directly,” by use of already

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{94} \textit{Id.} at 470.
\item \textsuperscript{95} \textit{Ex parte Hull}, 312 U.S. 546, 547 (1941).
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} \textit{Id.; see also Taylor}, 532 F.2d at 471.
\item \textsuperscript{98} \textit{Taylor}, 532 F.2d at 470-71.
\item \textsuperscript{99} \textit{Id.} at 471.
\item \textsuperscript{100} \textit{Id.} at 481-82.
\item \textsuperscript{101} \textit{Gaines v. Lane}, 790 F.2d 1299, 1306-07 (7th Cir. 1986).
\item \textsuperscript{102} \textit{Id.} at 1306.
\end{itemize}
\end{footnotesize}
allowable privileged mail.\textsuperscript{103} In light of these alternatives and reasonable means of redress, the Seventh Circuit found no need to allow prisoners the right to send unopened and unread mail to the media.\textsuperscript{104} While this approach still allows prisoners to send mail to the media as \textit{general mail}, prison officials can read it in the interest of prison security.\textsuperscript{105} This approach has several negative consequences. For example, there is the possibility that prison officials, after reading prisoner mail, might retaliate against those who complain about prison conditions. Combined with the importance of prisoner access to the media, state data and model codes, and restrictions imposed by PLRA, the Seventh Circuit’s rule is untenable.

The rule from the Fifth Circuit in \textit{Taylor} is that prisoner mail to the media is treated as privileged and may be neither read nor censored, while the rule from the Seventh Circuit classifies prisoner mail to the media as \textit{general mail}, which can be read.\textsuperscript{106} The Supreme Court should resolve this circuit split. Supreme Court Rule 10 embodies a preference for resolving circuit splits: “A petition for a \textit{writ of certiorari} will be granted only for compelling reasons. . . . [One compelling reason is that] a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.”\textsuperscript{107} During his Senate confirmation hearing, Chief Justice Roberts stated the Court should take cases that help to produce more uniform federal law.\textsuperscript{108} There is a glaring lack of uniformity in the circuits’ treatment of prisoners’ media mail and ample authority for the Supreme Court to grant certiorari to review the issue.

\textit{Taylor} should apply nationwide because it properly equates prisoner mail to the media with other constitutionally protected mail sent to correspondents closely connected to the judicial process.\textsuperscript{109}

\begin{footnotes}
\item[103] \textit{Id.} at 1307.
\item[104] \textit{Id.}
\item[105] \textit{Id.} at 1304, 1307.
\item[106] \textit{Id.} at 1307; \textit{Taylor v. Sterrett}, 532 F.2d 462, 482 (5th Cir. 1976).
\item[109] \textit{Taylor}, 532 F.2d at 481-82.
\end{footnotes}
Taylor correctly recognizes the media’s outsized role in publicizing prisoner abuse and obtaining redress for prisoner grievances, protecting prisoners’ constitutional rights the same as other privileged correspondence. Opening mail to the press violates the prisoner’s right to redress grievances, because the press participates in and may influence judicial proceedings by creating publicity, as discussed in the following Section.

IV. HOUCHINS: THE MEDIA IS AN ESSENTIAL CONDUIT BY WHICH PRISONERS CAN PETITION THE GOVERNMENT FOR REDRESS OF THEIR GRIEVANCES

Two examples highlight the critical role the media can play in exposing prison abuse. First is the Supreme Court case Houchins v. KQED. Though the Court ultimately denied KQED’s request to access a prison to report on the conditions there, it recognized the importance of the media as the “eyes and ears” of the public and that the media fulfills an important role by communicating with prisoners through the mail. KQED is a television station in San Francisco that aired reports on conditions at prisons around the Bay Area in the 1970s. One such report discussed a prisoner suicide in the Greystone wing of the Alameda County Jail at Santa Rita. In KQED’s report, one psychiatrist hypothesized that the conditions in that particular wing within the jail might have led the prisoner to commit suicide. Consequently, KQED requested access to the facility to take pictures and investigate the psychiatrist’s remarks. After jail officials denied the request, KQED and the NAACP filed suit. The Ninth Circuit affirmed the district court’s injunction preventing prison officials from denying KQED access to the

110. Id. at 470.
112. Id. at 8, 15.
113. Id. at 3.
114. Id.
115. Id.
116. Id.
117. Id. at 4.
Greystone wing of the jail, and the Supreme Court eventually granted certiorari. In a decision written by Justice Burger, the Court agreed with KQED's argument that the media plays a crucial role in providing information and that "an informed public [is] a safeguard against 'misgovernment.'" Further, the Court reasoned that the media is "a powerful antidote to any abuses by governmental officials and [is a] constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." Within the context of prisons specifically, the Court noted that society owes prison inmates a special duty since correctional facilities are public institutions and "each person placed in prison becomes, in effect, a ward of the state." Accordingly, there can be no doubt prison conditions are "matters of 'great public importance.'"

KQED unfortunately lost its bid for greater access to the prison for its reporters. Although the Court recited the many ways the media plays a beneficiary role by exposing prison conditions and "contributing to remedial action," it found the media does not have a greater constitutional right to access jails and prisons than the general public. According to the Court, the Constitution provided no basis to allow the media to walk through a prison with camera equipment and take pictures. However, the decision only applies to media access to prison facilities, not communication, as the "right to receive ideas and information [was] not at issue." In fact, the Court acknowledged one of the ways the media accomplishes its purpose is through its right to "receive letters from inmates criticizing jail officials and reporting on conditions." KQED is the Court's acknowledgement of the role the press plays as the "eyes and ears" of

118. Id. at 8.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id. at 1, 8-9.
124. Id. at 8-9.
125. Id.
126. Id. at 12.
127. Id. at 15 (citing Procunier v. Martinez, 416 U.S. 396, 413-18 (1974)).
the public by communicating with prisoners by mail.\textsuperscript{128} Prisoners’ unabridged communication with the media by mail is essential to publicizing prison conditions.\textsuperscript{129}

Another example also helps demonstrate that a prisoner’s right to send mail to the media can be crucial to exposing prisoner abuse inside correctional facilities. Beginning in 2010, the Los Angeles Times published a series of articles detailing widespread and staggering abuse allegations within the Los Angeles prison system.\textsuperscript{130} In one instance, a sheriff’s deputy witnessed a guard beating an inmate, leaving him with a fractured cheekbone and injuries to his left ear, rib cage, and face.\textsuperscript{131} In another instance, guards sprayed pepper spray at an inmate’s anus and groin after he used profanity when insulting a guard.\textsuperscript{132} Another article in the series featured a jail monitor who reported seeing deputies treat one inmate like “a punching bag,” beating him and shocking him with a taser as he lay unconscious for at least two minutes.\textsuperscript{133} Yet another article described how deputies would often yell “stop resisting” even when the inmate was compliant so as to later justify their actions.\textsuperscript{134} As a result of these allegations of widespread abuse in prisons, the Federal Bureau of Investigation (“FBI”) initiated an investigation into prison conditions in Los Angeles County.\textsuperscript{135} After the FBI investigation and

\textsuperscript{128} KQED, 438 U.S. at 8, 15.
\textsuperscript{129} Id. at 8.
\textsuperscript{134} Id.
additional investigation by the ACLU, the ACLU publicly called for Sheriff Lee Baca’s resignation. 136

Prisoners in California do not have the right to send unopened and uncensored mail to media organizations like the Los Angeles Times. 137 However, they are permitted to send uncensored and unread mail to legal organizations like the ACLU. 138 In its series, the Los Angeles Times included an annual report on Los Angeles County jail conditions compiled by the ACLU. 139 The series also shared many instances of abuse that prisoners had reported by letter, telephone, or face-to-face interviews. 140 These accounts included the story of an inmate beaten by eight officers but instructed not to tell the medical staff “anything funny” occurred. 141 Another story was about prison guards punching an inmate in the “ribs, back, and mouth and eyes, breaking his eye socket and leaving his body badly bruised. He was then kicked with steel toe boots and forced to strip naked and walk through the cell block while the deputies yelled ‘gay boy walking.’” 142

These instances of abuse illustrate the dangers of guards reading prisoner’s mail to the media. The same guards who were engaged in the abuse would likely have been the readers of inmates’ outgoing mail. It is therefore doubtful that the narratives of abuse in the Los Angeles Times series would have come to the public attention if the prisoners had not had the ability to communicate with the ACLU


137. CAL. CODE REGS. tit. 15 § 3141 (2011); CAL CODE REGS. tit. 15 § 3142 (2011).

138. The mail is still inspected for contraband, which involves opening the letter upside down without reading the text and shaking it to reveal any hidden contraband. CAL. CODE REGS. tit. 15 § 3141 (2011); CAL CODE REGS. tit. 15 § 3142 (2011).


141. Id. at 18.

142. Id. at 17.
without fear prison officials would uncover their grievances. These accounts also illustrate the justified fear and real danger prisoners often face in American prisons. The severity of these accounts demonstrates that instances of prisoner abuse are indeed, in the words of the Justice Burger, matters of "great public importance."\(^{143}\) Taylor's rule recognizing prisoners' right to send unopened mail to the media is a logical extension of \emph{KQED} and recent examples of prisoner abuse affirm the media's outsized role in publicizing prisoner abuse and obtaining redress for prisoners' grievances. The next Section turns the Article's focus from how the media can affect judicial proceedings to how states are already treating the issue of prisoner mail to the media.

\section*{V. CURRENT LAWS: INMATE CORRESPONDENCE WITH THE MEDIA IN THE UNITED STATES}

Should the Supreme Court take up the issue of whether prisoners have the right to send unopened and unread mail to the media, state correctional facility policies show justifications for reading prisoner mail to the press based on prison security concerns are likely overstated. Inmates should thus have the right to correspond with the press free from the prying eyes of the individuals whose abuse they may be reporting. A footnote in \emph{Martinez} says: "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."\(^{144}\)

To compare and contrast states' treatment of prisoners' mail to the press, I conducted a survey of the statutes and administrative rules of all fifty states. Of these, data was unavailable for eighteen states. Of the remaining thirty-two states, fourteen treat mail to the media the same as general mail, including Alaska,\(^{145}\) California,\(^{146}\) Connecticut,\(^{147}\) Idaho,\(^{148}\) Illinois,\(^{149}\) Iowa,\(^{150}\) Kansas,\(^{151}\) Louisiana,\(^{152}\)

\begin{itemize}
\item \cite{Houchins}\textsuperscript{143} v. KQED, Inc., 438 U.S. 1, 8 (2000).
\item \cite{Procunier}\textsuperscript{144} v. Martinez, 416 U.S. 396, 414 (1974).
\item \textit{Alaska Admin. Code} tit. 22, § 05.520 (b) & (c) (2012).
\item \textit{Conn. Agencies Regs.} § 18-81-28(c) (2013).
\item \textit{Idaho Admin. Code} r. 06.01.01.402 (2012).
\item \textit{Ill. Admin. Code} tit. 20, § 525.110(g) & 525.130(h) (2012).
\end{itemize}
Massachusetts, \textsuperscript{153} Minnesota, \textsuperscript{154} New Hampshire, \textsuperscript{155} Oregon, \textsuperscript{156} South Dakota, \textsuperscript{157} and Washington. \textsuperscript{158}

The remaining eighteen states vary in their treatment of mail sent to the media. Some states treat it as privileged, the same as legal mail. \textsuperscript{159} Generally, privileged mail will be sent either unopened, or if it is inspected, opened only in the prisoner's presence and only to check for contraband. \textsuperscript{160} A privileged letter cannot be read, even if contraband is found and removed. \textsuperscript{161} Some states allow all general mail to be sent unopened unless there is a reasonable suspicion it may contain contraband. \textsuperscript{162}

Indiana, \textsuperscript{163} Michigan, \textsuperscript{164} New Jersey, \textsuperscript{165} Texas, \textsuperscript{166} and West Virginia \textsuperscript{167} classify mail sent to the media as privileged. \textsuperscript{168} Generally, all mail from prisoners to the media in these states is delivered to the mailroom sealed and cannot be opened unless there is a reasonable belief that there is a threat to facility order and security. \textsuperscript{169} Georgia, for example, inspects mail sent by prisoners to the media with a fluoroscope and metal detector, without ever opening the letter. \textsuperscript{170}

\textsuperscript{150.} IOWA ADMIN. CODE r. 201-50.19(356,356A) (c), (d) (2011).  
\textsuperscript{151.} KAN. ADMIN. REGS. 44-12-601(a)(1)(C)-(b)(6) (2012).  
\textsuperscript{152.} LA. ADMIN. CODE. tit. 22, § 313(D), (E), & (F)(3) (2012).  
\textsuperscript{153.} 103 MASS. CODE REGS. 481.11(1), 481.13(2) (2013).  
\textsuperscript{154.} MINN. R. 2911.3300(3) (2011).  
\textsuperscript{155.} N.H. CODE ADMIN. R. ANN. 301.05(b), (e), (h) (2011).  
\textsuperscript{158.} WASH. ADMIN. CODE § 137-48-030 (2011).  
\textsuperscript{159.} \textit{See infra} notes 163-67, 170-73.  
\textsuperscript{160.} Id.  
\textsuperscript{161.} Id.  
\textsuperscript{162.} \textit{See infra} notes 175-83.  
\textsuperscript{163.} 210 IND. ADMIN. CODE 3-1-16(c) (2011).  
\textsuperscript{164.} MICH. ADMIN. CODE r. 791.6603 (2011).  
\textsuperscript{165.} N.J. ADMIN. CODE § 10A:18-2.7(b), (c).  
\textsuperscript{166.} 37 TEX. ADMIN. CODE § 291.2(2)(A) (2011).  
\textsuperscript{167.} W. VA. CODE R. § 95-2-17 (17.10.1) (2011).  
\textsuperscript{168.} \textit{See supra} notes 163-67.  
\textsuperscript{169.} Id.  
\textsuperscript{170.} GA. COMP. R. & REGS. 125-3-3-03 (2011).
Arizona,\textsuperscript{171} Arkansas,\textsuperscript{172} and Florida,\textsuperscript{173} similarly treat prisoner’s mail to the media as privileged and unread, though it is also inspected in the presence of the prisoner for contraband.\textsuperscript{174}

Finally, states that are the most protective of prisoners’ mail rights are Maine,\textsuperscript{175} Maryland,\textsuperscript{176} Nebraska,\textsuperscript{177} New York,\textsuperscript{178} North Carolina,\textsuperscript{179} Ohio,\textsuperscript{180} Pennsylvania,\textsuperscript{181} Rhode Island,\textsuperscript{182} and Virginia.\textsuperscript{183} Media mail in these states is not classified as privileged. Instead, all general mail in these states can be sent unopened and unread to whomever the inmate desires.\textsuperscript{184} Generally, all mail from prisoners is not read or inspected unless there is reason to believe it is the subject of illegal or unauthorized activity.\textsuperscript{185} Where illegal activity is reasonably suspected, prison officials then have the authority to inspect and read mail, but only after receiving authorization or fulfilling other prerequisites.\textsuperscript{186}

Whether or not the Court classifies prisoner mail to the media as general or privileged, state practices show that many prisons are already run safely without prison officials reading prisoners’ media mail. Even if the Court classifies media mail as general mail, prison officials should not be permitted to read prisoners’ general mail to the media. Prison officials should only be able to read prisoners’ mail if

\textsuperscript{172} ARK. CODE R. § 004.00.02-860 (2011).
\textsuperscript{173} FLA. ADMIN. CODE ANN. r. 33-210.103(1), (5)(b) (2011).
\textsuperscript{174} See supra notes 170-173.
\textsuperscript{175} ME. CODE R. 03-201 Ch. 1 § II.a(K.2) (2011).
\textsuperscript{176} MD. CODE REGS. 12.02.03.10(F)(30) (2011); MD. CODE REGS. 12.02.04(E) (2011); MD. CODE REGS. 12.02.01(B)(4) (2011).
\textsuperscript{177} 68 NEB. ADMIN. CODE § 007 (2011); 68 NEB. ADMIN. CODE § 009 (2011).
\textsuperscript{179} 5 N.C. ADMIN. CODE 2D.0307(e) (2011).
\textsuperscript{180} OHIO ADMIN. CODE 5120-9-18 (2011).
\textsuperscript{181} 37 PA. CODE § 93.2 (2011).
\textsuperscript{182} 17-1-18 R.I. CODE R. § III (2011).
\textsuperscript{183} 6 VA. ADMIN. CODE § 15-45-1790 (2011).
\textsuperscript{184} See supra notes 175-83.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
doing so is constitutionally permissible under the *Martinez* test.\textsuperscript{187} The *Martinez* test requires prison officials show the regulation allowing prison officials to read general mail to the media is \textit{related to security}.\textsuperscript{188}

State policies suggest there is no cogent security threat in allowing prisoners to send unread mail to the media. Eighteen of the thirty-two states surveyed do not permit prison officials to read mail to the media.\textsuperscript{189} Even more protective of prisoners' rights, nine out of those eighteen states, allow inmates to send mail to whomever they want, even the general public, without the surveillance of prison officials.\textsuperscript{190} The fact that these states have apparently been able to operate their prison systems effectively without reading prisoners' mail to the media and in some cases to the general public suggests security concerns are overstated.

If the Supreme Court resolves the circuit split by treating inmate mail as privileged, as nine states have done,\textsuperscript{191} the *Martinez* test does not come into play, because privileged mail is deemed automatically protected under prisoners' right to access the courts and redress grievances.\textsuperscript{192} Classifying inmates' mail to the media as privileged is the better policy route. At first glance there appears to be no difference between states that classify prisoner mail to the media as "privileged" versus "general," where the ultimate outcome is that prison officials cannot read the mail.\textsuperscript{193} But this distinction will be crucial to resolving the circuit split. If the Supreme Court classifies prisoner mail to the media as privileged, it would be treated the same as mail to legal counsel.\textsuperscript{194} Since PLRA, discussed below, has severely limited prisoners' ability to address grievances through

\begin{itemize}
  \item \textsuperscript{187} \textit{Procunier v. Martinez}, 416 U.S. 396, 413 (1974).
  \item \textsuperscript{188} \textit{Id.; Taylor v. Sterrett}, 532 F.2d 462, 466 (5th Cir. 1976); Donovan, \textit{supra} note 5, at 1151-52.
  \item \textsuperscript{189} \textit{See supra} notes 163-67, 170-73, 175-83.
  \item \textsuperscript{190} \textit{See supra} notes 175-83.
  \item \textsuperscript{191} \textit{See supra} notes 163-67, 170-73.
  \item \textsuperscript{192} \textit{Taylor}, 532 F.2d at 466; Donovan, \textit{supra} note 5, at 1151.
  \item \textsuperscript{193} \textit{See supra} notes 163-67, 170-73, 175-83.
  \item \textsuperscript{194} Donovan, \textit{supra} note 5, at 1151-52.
\end{itemize}
lawsuits, the media should fill the void and provide a conduit for prisoners to redress their grievances.

Treating prisoner mail as privileged would signal the Court’s recognition that media mail is critical to preserving inmates’ constitutional rights. Further, if the mail to the media was classified as general mail, states may be freer to carve out exceptions to their ban on reading general mail should there be increased security concerns. However, if media mail is classified as privileged, prison officials would have a clear mandate from the Court that media mail implicates constitutional rights and may not be read. This state survey lends support to Taylor’s rule, and the idea that prison officials do not need to be reading inmate mail to the press. The next Section discusses how model codes and international standards also lead to this conclusion.

VI. MODEL CODES AND INTERNATIONAL STANDARDS ON A PRISONER’S RIGHT TO COMMUNICATE WITH THE MEDIA

Along with state policies, model codes and international policies may also serve as guidance to the Court in resolving whether prisoners should have the right to send unopened mail to the media. For example, publishers of the Uniform Law Commissioners’ Model Sentencing and Corrections Act recommend a communications procedure similar to the most liberal states. The Act advocates “the opening and search for contraband or prohibited material . . . [only] upon obtaining reliable information that a particular communication may jeopardize the safety of the public or security or safety within a facility.”

Similarly, the Department of Justice’s Federal Standards for Prisons and Jails suggest that “[i]nmate mail, both incoming and outgoing, [should not be] read, censored, or rejected, except where there is a reasonable belief of a threat to the safety or security of the institution . . . [or the mail is] used in furtherance of illegal activities.”

195. See infra Section VII.
197. Id.
The ABA Standards for Criminal Justice would classify media mail as general mail but only allow outgoing general mail to be read if the safety of the public and security of the institution are jeopardized.\textsuperscript{199} Going even further, the National Sheriffs’ Association recommends all outgoing letters be mailed without inspection, stating “[t]he likelihood that contraband will be smuggled out of the jail is too small to justify any other procedure.”\textsuperscript{200}

Finally, the United Nations General Assembly Resolution, Standard Minimum Rules for the Treatment of Prisoners, may also provide some guidance to the Court.\textsuperscript{201} A few states have expressly adopted the Standard Minimum Rules, which likely played a role in the development of the Model Penal Code and the correctional standards discussed in the previous Section, since their principals are comparable.\textsuperscript{202} These rules state that prisoners should be able to make complaints to the inspector of prisons or other inspecting officers “without the director or other members of the staff being present.”\textsuperscript{203} While not involving the same risk or security concerns with mail, the policy gives the impression it is important to allow prisoners the ability to complain away from a jailor’s watchful eye.

These suggested policies by a wide variety of respected organizations demonstrate that even where prisoner mail to the press is classified as general instead of privileged, absent a threat to prison security, prison officials should not open or read prisoners’ media mail. In addition to the state survey discussed in the previous Section, model codes and international policies also show that prison security


\textsuperscript{200} NATIONAL SHERIFFS’ ASSOCIATION, INMATES’ LEGAL RIGHTS, 42-43 (1974); On the other hand, the Manual of Standards for Adult Correctional Institutions recommends reading prisoners mail on a random basis. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, § 4342.01 (1979).


\textsuperscript{203} United Nations Standard Minimum Rules, supra note 201.
claims concerning prisoner mail may be overblown anyway, as many prisons function securely without opening prisoner mail. The following two Sections address two additional reasons why it is critical for prisoners to be able to send unopened mail to the media.

VII. THE PRISON LITIGATION REFORM ACT (“PLRA”)

Should the Supreme Court examine the split regarding whether prison officials may open and read prisoners’ mail to the media, it ought to consider new developments in legislation that have made it harder for prisoners to have their grievances addressed through the courts. Recent laws have greatly restricted prisoner access to the courts compared with prior legislation, and prisoner mail to the media is one of the few tools of redress left for prisoners.

PLRA, an expansive piece of legislation, was passed by Congress and signed into law by President Clinton in 1996.\textsuperscript{204} PLRA was enacted to counteract the perceived problem that prisoners were filing too many frivolous lawsuits.\textsuperscript{205} Proponents claimed PLRA would increase the quality of justice enjoyed by law-abiding persons.\textsuperscript{206} Senator Robert Dole stated during a Senate debate of an early version of PLRA, “[t]his amendment will help put an end to the inmate litigation fun-and-games.”\textsuperscript{207} Further, “[f]rivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens.”\textsuperscript{208} Before the Senate Chamber, Senator Orrin Hatch similarly complained: “[j]ailhouse lawyers with little better to do are tying our courts in knots with the endless flow of frivolous litigation.”\textsuperscript{209} As justification for PLRA, the authors cited a number of seemingly groundless suits based on trivial prisoner complaints including: eating chunky instead of smooth peanut butter,\textsuperscript{210} receiving an unsatisfactory

\begin{footnotesize}
204. HUMAN RIGHTS WATCH, supra note 7, at 1.
205. Id. at 3.
206. Id.
207. Id. at 1.
210. Id.
\end{footnotesize}
haircut, not being invited to a pizza party, and having inadequate locker space. PLRA passed with broad support from both Democrats and Republicans with little serious debate. Despite PLRA's broad support from politicians, prisoners' rights advocates feel the legislation has led to a denial of equal access to the court system for prisoners.

Legislation in place before PLRA was more favorable to prisoners' court access. Before the passage of PLRA, the Civil Rights of Institutionalized Persons Act ("CRIPA") governed prisoners' lawsuits. CRIPA was described as, "[a]n Act to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States." CRIPA placed barriers in front of prisoners before they could access courts, but it was still easier for inmates to petition courts for redress of civil rights violations under CRIPA than under PLRA.

Enacted in 1980, CRIPA aimed to address widespread deprivations of prisoners' civil rights. CRIPA mandated the creation of "minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility." This system created administrative bodies or grievance systems in jails that acted as barriers to prisoners reaching court. Courts had discretion to require the use of these

212. Williams, supra note 211, at 863.
213. HUMAN RIGHTS WATCH, supra note 7, at 1.
214. HUMAN RIGHTS WATCH, supra note 7, at 9.
216. Novikov, supra note 209, at 819.
218. Novikov, supra note 209, at 819.
219. CRIPA, supra note 218.
220. Id.; Joseph Alvarado, Keeping Jailers from Keeping the Keyes to the Courthouse: The Prison Litigation Reform Act's Exhaustion Requirement and
administrative bodies before filing a lawsuit.\textsuperscript{222} A court could, at its own discretion, stay a suit for up to ninety days to require a prison litigant to exhaust jail administrative procedures.\textsuperscript{223} However, courts would not enforce this requirement where the jail administrative procedures did not meet certain minimum standards.\textsuperscript{224} Thus, under CRIPA, courts had discretion to require prisoners to use administrative procedures and exhaustion was not required where the administrative procedures did not meet minimum standards.\textsuperscript{225}

PLRA changed the exhaustion requirement. The discretionary grievance systems under CRIPA became mandatory under PLRA.\textsuperscript{226} PLRA requires prisoners to exhaust all administrative options before filing a claim in federal court.\textsuperscript{227} Despite the increased reliance on grievance systems, PLRA no longer requires that these procedures be “fair and effective.”\textsuperscript{228} Even if the relief sought by prisoners (e.g., compensatory damages) is unavailable through an administrative procedure, they are still required to exhaust that administrative procedure before they may file a complaint.\textsuperscript{229} If these available administrative remedies are not exhausted before filing, the suit is automatically dismissed.\textsuperscript{230}

PLRA is structurally flawed because the prison officials or staff members involved in the grievance procedure are often the same individuals who allegedly violated the prisoner’s rights.\textsuperscript{231} For example, in Sanders v. Bachus, an inmate claimed he was verbally and


\textsuperscript{223} \textit{Id.}

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} \textit{Id.}

\textsuperscript{226} 42 U.S.C. \textsection 1997e(a) (2011).

\textsuperscript{227} Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002).

\textsuperscript{228} 42 U.S.C. \textsection 1997e(a) (2011); Nussle v. Willette, 224 F.3d 95, 98-99 (2nd Cir. 2000).


\textsuperscript{230} Pozo, 286 F.3d at 1026.

\textsuperscript{231} \textit{Human Rights Watch}, \textit{supra} note 7, at 12.
physically abused on multiple occasions by two prison guards. The grievance procedures at the facility stated: “[P]rior to submitting a written grievance, the grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue . . . . If the complaint is not resolved, the grievant may file a Step I grievance.” Instead, the prisoner filed a written grievance and did not confront his attackers. This prisoner was held to have failed to exhaust his administrative remedies because he did not complete the procedure properly. Thus, the court dismissed the prisoner’s complaint without consideration of its merits.

_Minix v. Pazera_ is a shocking example of a court not finding exhaustion. In _Minix_, a mother brought an action on behalf of her son, Steven Zick, for injuries he suffered while incarcerated as a minor at the South Bend Juvenile Facility in 2002 and 2003. The facts are disturbing: Zick sustained bruises and other injuries after other minors in the facility assaulted him as part of an initiation. The guards made no effort to investigate the incident or protect Zick after the incident. The other minors continued to attack him over the remaining period of his incarceration. On one occasion, he had a seizure, causing him to foam at the mouth. Still, the guards did nothing. In addition to the beatings, Zick was raped and witnessed the rape of another child. Zick did not report either of the rapes or any of the beatings to the staff because he feared the consequences of

233. *Id.* at *5.
234. *Id.*
235. *Id.*
236. *Id.* at *6.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at *1-2.
242. *Id.*
243. *Id.*
244. *Id.* at *1.
"being labeled a snitch." Reporting the behavior may not have been effective, as there was evidence of staff members encouraging beatings and even arranging for fights to occur.

According to the district court, Zick's claim rested upon whether he had exhausted the facility's administrative grievance procedures. The court found that his claim failed because he had not filed an internal grievance for these events. Zick’s mother argued that she had, in effect, completed the grievance process on behalf of her son since she complained of her son’s mistreatment to several members of the facility’s staff. She also sought help from multiple superintendents, contacted the Department of Corrections’ Deputy Commissioner, and even contacted the Governor of Indiana. She argued that after contacting all of these sources without recourse, she and her son were left with no other available remedies. The court disagreed and held Zick’s claim was barred since he had not complied with the available administrative process. His mother's efforts, while “heroic,” were not sufficient because she did not complain to the proper officials designated by the grievance process. In denying Zick’s claim, the court reasoned, “a prisoner must comply with the administrative process made available to prisoners as it exists, not as it might have been written.”

In addition to the unfair administrative exhaustion requirement, PLRA imposes several other burdens on prisoners’ access to the federal courts. For example, in a majority of federal courts, prisoners cannot bring any claims for compensatory damages resting on a mental or emotional injury they suffered while confined unless it is accompanied by a physical injury. In one case, a prisoner claimed a

245. Id. at *2.
246. Id.
247. Id. at *3.
248. Id. at *7.
249. Id. at *4.
250. Id.
251. Id.
252. Id. at *7.
253. Id. at *4, *7.
254. Id. at *4. (citing Carroll v. Yates, 362 F.3d 984, 985 (7th Cir. 2004); Pozo v. McCaughtry, 286 F.3d 1022, 1024-25 (7th Cir. 2002)).
255. 42 U.S.C. § 1997e(e) (2011); Jason E. Pepe, Challenging Congress’s
prison staff member fondled his genitals. The court dismissed the claim because the court considered his physical injury to be de minimis and his mental injury to be insufficient.

In another case, the Illinois Department of Corrections housed Alex Pearson, a gang member, at Tamms, a maximum-security prison. Tamms housed only prisoners who either presented safety concerns, like gang affiliation, or had caused problems at a lower security facility. Because of these concerns, prisoners at Tamms had no contact with other prisoners and left their cells only one hour a day for individual recreation. Pearson successfully completed a program that allowed him to transfer out of Tamms if he renounced his gang affiliation. Several weeks later, prison officials requested Pearson complete another, previously undisclosed step in the program, which required him to work as a confidential informant against his former gang. Pearson was unwilling to do so. Shortly before he was to be transferred, Pearson was disciplinarily reprimanded for the first time since he had been at Tamms. His transfer was halted because of the reprimand and he had to spend over another year in solitary confinement. Pearson claimed in his lawsuit that prison officials reprimanded him in retaliation for not becoming an informant. Despite finding the warden and other staff were guilty of unjustifiably confining Pearson to solitary confinement, the court only awarded Pearson nominal damages of $1 and $1.50 in attorney’s fees because he suffered depression, but no physical injury.


257. Id.
258. Pearson v. Welborn, 471 F.3d 732, 734 (7th Cir. 2006).
259. Id.
260. Id.
261. Id. at 735.
262. Id.
263. Id.
264. Id. at 735-37.
265. Id. at 736-37.
266. Id. at 737.
267. Id. at 742, 744.
In addition to the physical injury requirement, PLRA also took away filing fee waivers for prisoners like Pearson\textsuperscript{268} and severely restricted attorney's fees.\textsuperscript{269} The physical injury requirement, restricted attorney's fees, and absence of fee waivers impair prisoners' ability to mount successful abuse claims in federal court.

PLRA has been extraordinarily successful in reducing prisoners' lawsuits.\textsuperscript{270} Between 1995 and 1997, the number of suits filed by prisoners decreased thirty-three percent, despite a prison population increase of ten percent during the same period.\textsuperscript{271} Since PLRA's passage, the success rate of prisoner lawsuits has gone down.\textsuperscript{272} However, it is not clear whether PLRA has been successful at only filtering out frivolous lawsuits, while allowing legitimate ones to proceed.\textsuperscript{273} Professor Margo Schlanger argues that "rather than improving the quality of the inmate docket, the PLRA has both placed affirmative roadblocks (the filing fee and the lawyers' limits) in the way of high-quality cases and added a very high exhaustion hurdle for successful litigation of any constitutionally meritorious cases that are nonetheless filed."\textsuperscript{274}

PLRA—right or wrong, unsound and unfair as it may be—has achieved its purpose of limiting lawsuits by prisoners. Taylor's rule can help compensate for PLRA's limitations, while the Seventh Circuit's rule would exacerbate them. The media must be allowed to lend a voice to prisoners who otherwise will not be heard.

VIII. RETALIATORY RESPONSES TO INMATE GRIEVANCES

Inmate fear of retaliation by prison officials against prisoners who file grievances about staff abuse is rampant.\textsuperscript{275} In one Ohio study,

\begin{itemize}
  \item 271. \textit{Id}.
  \item 272. \textit{Id}.
  \item 273. \textit{Id} at 1664.
  \item 274. \textit{Id}.
  \item 275. James E. Robertson, "One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates, 42 U.
researchers found that "70.1 [percent] of inmates who brought grievances indicated that they had suffered retaliation thereafter; moreover, [eighty-seven percent] of all respondents . . . agreed with the statement, 'I believe staff will retaliate or get back at me if I use the grievance process.'" 276 Even among staff supervisors, the same study found only twenty-one percent believed retaliation never happened, and one warden even stated that he knew retaliation was commonplace. 277 Sixty percent of prison supervisors in the study "responded that 'a substantial number of inmates' do not file grievances despite having legitimate 'issues,'" in part due to inmates' fear of retaliation. 278

Besides the examples of retaliation discussed throughout the Article, one more example illustrates this study's findings: William Walker, an inmate and "jailhouse lawyer" in a Michigan prison, was denied permission to shower. 279 When Walker threatened to file a grievance, guards responded that they were "tired of grievances" and eventually allowed him to shower. 280 However, when Walker returned to his cell, he found that guards had ransacked or "sh[ook] down" his cell, removing many of his legal documents. 281

As previously discussed, PLRA requires prisoners to report grievances to prison officials before they can get to court. 282 These are the same prison officials who commonly retaliate against prisoners who make grievances. The ability to send uncensored and unread mail to the media would allow an alternative means to report prison conditions and grievances, which would circumvent one problem created by PLRA. Prisoners would no longer be complaining only to prison officials, and prison officials would no longer be in a position to discover prisoners' unflattering views by reading their mail. Thus, a policy of unread media mail removes fear of reprisal from the equation so prisoners' can fully disclose to the media the problems

MICH. J.L. REFORM 611, 613 (2009).
276. Id. at 613-14.
277. Id. at 614.
278. Id.
280. Id.
281. Id.
282. See supra Section VII.
they are desperately seeking relief from. This is yet another reason the Supreme Court should resolve the circuit split by treating mail to the press as privileged.

IX. CONCLUSION

Historically, prisoners were not seen as people, and courts took a mostly “hands-off” policy towards prison administration. The pendulum swung towards more favorable prisoners’ rights decisions during the tenure of the Warren Court, which eventually led to the examination of prisoner mail policies in Martinez.

Since Martinez, the circuit courts have split in their assessment of whether prisoners have the right to send letters to the media unopened and unread by prison officials.283 The split turns upon each circuit’s classification of prisoner mail as either general or privileged.284 The Supreme Court should now resolve this split in favor of the Fifth Circuit’s reasoning in Taylor.

In Ex parte Hull, the Court recognized the constitutional importance of a prisoner’s right of access to the court system.285 KQED established that “an informed public [is] a safeguard against ‘misgovernment.’”286 Articles by the Los Angeles Times illustrate the important role the media can play in exposing violations of inmates’ civil rights.287 These newspaper exposés of prison abuse can to lead to prison reform efforts much the same as would occur if inmate lawsuits were filed. Those lawsuits have been greatly curtailed by PLRA, making media exposés all the more vital in publicizing and redressing prison abuse. Model and international codes support inmates’ right to send unread mail to the media.288 Further, more than half of the states where data is available generally allow prisoners unfettered access to the media in one form or another already.289 Both abuse and retaliation against prisoners for filing grievances are

283. See supra Section III.
284. Id.
287. See supra Section IV.
288. See supra Section VI.
289. See supra Section V.
If prisoners cannot communicate with the media free from prison officials’ prying eyes, the media’s position as the “eyes and ears” of the public in the prison system is reduced. Taylor provides that prisoners should have the right to send privileged, unopened, and unread mail to the media. Under Taylor, inmates can address letters to the business office of the media representative they wish to correspond with so that prison officials can check the authenticity of the address against a list of local and state press officials’ business addresses. Prison officials then have forty-eight hours to determine whether the recipient of the letter is in fact a media organization. That policy properly recognizes the media’s role in publicizing prisoner abuse and obtaining redress for prisoner grievances. Opening mail to the press, as allowed under the Seventh Circuit’s rule, violates the prisoner’s right to redress grievances, as the press participates in and may influence judicial proceedings by creating publicity.

In Taylor, Judge Wisdom showed his understanding of the stifling effect onerous mail policies have on prisoners’ ability to redress their grievances. He wrote, “[P]risoners may fear that a prison employee who reads inmate correspondence will abuse the sensitive information to which they have access. Inmates may fear, for example, that jail officials will respond adversely to attempts to bring jail conditions to the attention of [the media].” In light of well-known retaliatory practices, “this concern would not be unreasonable.”

“As Fyodor Dostoevsky, who was imprisoned in Russia for several years for his political beliefs, once said: ‘The degree of civilization in a society can be judged by entering its prisons.’ If PLRA is the new norm and prisoners’ access to courts in the form of litigation is to be severely restricted, prisoners’ free access to the

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290. See supra Sections IV, VII, and VIII.
291. KQED, 438 U.S. at 8, 15.
292. Taylor v. Sterrett, 532 F.2d 462, 482 (5th Cir. 1976).
293. Id. at 482.
294. Id.
295. Id. at 470-71.
296. Id. at 476.
297. Id.
media is all that much more important to upholding prisoners’ constitutional rights. The Supreme Court should adopt the Fifth Circuit’s reasoning in Taylor and help prevent the U.S. from sliding back down the road towards “civil death” for some of its most vulnerable citizens.