An Uncivil Action

MUMIA ABU-JAMAL[†]

> *We are under a constitution, but the constitution is what the judges say it is.*
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> --U.S. Supreme Court Chief Justice Charles Evans Hughes (1862-1948)

For most people in the nation who wear the label of "American," the courts of the land are like memorial sites in the heart of a city; many, perhaps most, folks know they are there, but few people actually go to see them. In an age when the national town meeting is more apt to be experienced while sitting on one's sofa than actually going out of the house into the public, what happens in the nation's courts depends upon what the media reports happens.

Popular reporting of such events depends upon the objectives, biases, and expertise of the reporter and the interests of the publisher, editor, or owner.

Every civil trial is, at base, a conflict, a contest, or a war of words. The arbiter of that conflict is also engaged in a struggle, for although we like to think judges are Olympians who rule over courts with Delphic equanimity, they are but mortals driven and sometimes driven by the same passions as other men and women.

The civil case *Abu-Jamal v. Price*[1] began, as so many cases, with a small step. As the writer waited for the magistrate's ruling, with a date to die, a guard sidled up to Cell B-4 and laid a write-up on the opened tray slot. Typed on the pressure-sensitive, yellow-tinted paper was a damning indictment: the writing of the book *Live from Death Row*, and articles for *Scoop* newspaper, *Against the Current* journal, and other publications, were proof that inmate Jamal was guilty of operating "a business or profession" of "journalism." Also, inmate Jamal was a "professor of economics" for the New York-based Henry George Institute (and thus, perhaps, guilty of the profession of "teacher" of a correspondence course). The June 1995 write-up, served up on the

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[†] Mumia Abu-Jamal is a Pennsylvania journalist who labored to expose police violence against minority communities in the 1970s and 1980s. In 1982, Mr. Abu-Jamal was convicted of the first-degree murder of Philadelphia police officer Daniel Faulkner. Mr. Abu-Jamal, who maintains his innocence, is currently on death row in Pennsylvania.

[1] 154 F.3d 128 (3d Cir. 1998).

writer's second day of the magistrate's hearing, made writing (and teaching) an institutional offense, punishable by a sharp reduction in privileges. Sentenced to thirty days in the "hole," with fewer than sixty days to live, meant no phone calls, no visits, no TV, no radio, and no commissary privileges. It was being placed in a prison within a prison within a prison—for writing. I was sentenced to die in silence.

While waiting for the institutional "hearing," I got word to some friends, and they in turn got in touch with one of the foremost prisoner's rights lawyers, Jere Krakoff, in nearby Pittsburgh.

Krakoff wrote and offered his considerable assistance, which was accepted quickly. I was aware of his work as a jailhouse lawyer, principally in the landmark *Tillery v. Owens*[2] case, where the court found, in a conditions-of-confinement case, that double-ceiling was an element in determining that Western State Correctional Institution at Pittsburgh was being operated in an unconstitutional manner, in violation of the "cruel and unusual" clause of the Eighth Amendment. Given the conservative bent of the judiciary and the repressive tenor of the times, such a decision was a product of remarkable lawyering, and I realized similar skills were needed in this case.

We went to work.

I. THE HEARING

When one claims a violation of the First Amendment (regarding freedom of speech, of the press, of religious practice, and to petition the government for redress of grievances) in an institutional misconduct hearing, it may be more fruitful to claim a violation of the Ten Commandments, for it certainly cannot go any worse.

Misconduct "hearings" are held before a prison official called a hearing examiner, who is untrained in the law. Prisoners brought before the examiners have no right to legal counsel and may be assisted by only a willing inmate or staff. All the same, I requested the presence of Jere Krakoff, Esquire, to represent me at the hearing, but this was denied out-of-hand.

Failing this, I presented my written version, arguing that any prison rule must yield to the U.S. and Pennsylvania Constitutions, which both have provisions that protect freedom of speech and freedom of the press. No intentional role, I argued, could trump the first article in Pennsylvania's Declaration of Rights, nor the First Amendment to the U.S. Constitution. The hearing examiner disagreed, saying essentially

[2] 907 F.2d 41 (3d Cir. 1990).

that punishing someone for writing a book, or an article, had "nothing to do with first amendment Rites [sic]" (a Freudian slip?).

On June 9, 1995, she found me guilty of "engaging in the profession of journalism," writing

> I find an abundance of evidence exists in the misconduct report that Jamal has been actively engaged in the profession of journalism. He has authored a book known as *Live from Death Row,* he currently writes columns for different newspapers including, *Scoop USA, First Day* and the *Jamal Journal*. In addition Jamal has made taped commentaries for broadcast over National Public Radio. These undisputed facts combine to establish a clear preponderance of evidence that Jamal has been engaged in both the business and profession of journalism.

And with that, on to court.

II. THE COURT HEARING

When one enters a U.S. court, in a civil action, the basis for action is claimed violation of the U.S. Constitution. Presumably, any prison rule must fall when it violates what has been called the supreme law of the land (the Constitution). But, as we have learned, courts engage in complex, extensive "balancing tests" when state rules and constitutional rights collide. Our case would prove no different.

In many such civil cases, the case opens with what is called a motion for a temporary restraining order or a preliminary injunction (TRO/PI). These motions, although rarely granted, place cases on a fast track, as it usually requires a prompt hearing to test the claims in a case and to determine the likelihood of success for the side bringing the suit.

In a case where a person is being punished by the state for writing (a form of speech), the First Amendment comes into play, and a violation of the First Amendment requires what courts have called "strict scrutiny" (or closer-than-usual judicial attention).

The magistrate judge selected to hear the TRO/PI motion was Kenneth J. Benson, a relatively short, mustached, blue-eyed man. The hearing was held in a carpeted, highly air-conditioned courtroom that had once been assigned to former Third Circuit Judge Tim Lewis, in the federal building in central, downtown Pittsburgh. Although this was only sixty-one miles from SCI Greene, the Department of Corrections

(DOC) chose to bind me in chains and shackles and to temporarily transfer me to the state prison in Pittsburgh for the duration of the TRO/PI hearings.

SCI Pittsburgh is one of the oldest prisons in the state, over a century old, situated in the city's north side, a collection of mostly black and ethnic neighborhoods, with some areas zoned for industrial use.

Assigned to a pod of nine other cells, I could easily sense the lower degree of tension on Pittsburgh's death row. Men spoke to each other easily, whether guard or inmate. A thirty-something guard with three chevrons on the shoulders of his gray uniform walked up to the door, identified himself, and gave what seemed to be his standard rap: "Here at Pittsburgh the rules are simple: you don't fuck with us—we don't fuck with you; you treat us like men—we'll treat you like a man; if you give us shit—we'll give you shit."

When I discussed this with guys on the pod, they said everybody got the same rap—and I was assured they meant it. As a rule, I was informed, they did not harass the men, and they did not set up and "false-ticket" prisoners (give bogus misconduct reports based on lies or concoctions). That accounted for the low level of tension sensed there. For the duration of the civil TRO/PI hearing, this would be where I slept.

Although the civil court session began at nine o'clock in the morning, court began for me shortly before 5 a.m., with a guard opening the pie slot in the door and placing a tray therein. A quickly swallowed breakfast, a shower, and it was on to the receiving room. There, a dark suit jacket and trousers would be found, and inseams would be stapled to make the slacks stay up.

By a quarter after six, I would be chained, shackled, and seat-belted in the back of a white DOC vehicle, en route to the federal building. The armed DOC guards were a Mutt and Jeff team, one short, the other tall; one driving, the other riding shotgun. The daily escort was a state trooper, in a marked vehicle, with lights flashing through the streets of the north side.

Arriving at the federal building meant being met by at least twelve U.S. Marshals, who took custody of the prisoner. It is difficult to describe the sensation of being "escorted" to and from the courtroom by a phalanx of approximately twelve armed U.S. marshals, but it happened so often (at least four times a day) that it seems it should have become routine.

The magistrate judge began the day's session by stating:

> Good morning, all. Before we begin—and I

> sincerely want this not to be offensive or insulting to anyone, because no one has given me any reason to believe that there will be any misbehavior or misconduct of any kind—but it is important, I think, that I begin by informing all concerned that I will rigorously enforce... the principle that behavior in court must be appropriate at all times . . . .
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> Consequently it is appropriate for me to say at the beginning that if there is any display of emotion, if there is any outburst, if there is any misbehavior or misconduct, then I will ask that the marshals and court security personnel remove the person who engages in that misconduct. There will be no second chance. Once someone is removed from the courtroom, they will not be allowed back in . . . .

Clearly, the tone was set. The warning seemed virtually to expect some form of disruption, but where did this notion come from? Perhaps the marshals, who seemed to anticipate some form of violence, had whispered such suggestions in the judge's ear. It was unclear.

There was a barely audible grumble of resentment, but it passed quickly. Jere, who visited me briefly down in the holding cell area, accompanied by attorney Rachel Wolkenstein, confided that the magistrate had formerly been in the employ of the Department of Corrections, and as such, might not prove impartial in a case where prison officials were named as defendants. Under the Federal Rules of Civil Procedure, a motion could be brought to recuse him, Jere counseled. After some consideration, this option was rejected. He would do.

As I sat shackled in the plaintiff's seat, I looked at the man, seeking a gestalt-like impression of him. Yet he rarely, if ever, looked in my direction. As the civil TRO/PI hearings took place in the same period as the state PCRA (post-conviction) criminal hearings in Philadelphia, I was struck by the apparent differences between this federal magistrate and former common pleas judge Albert F. Sabo. Although both appeared to be relatively short men, Sabo would occasionally glare down at the defendant's bench, his hatred a palpable, tangible thing. Where Benson seemed glacial and professionally distant, Sabo seemed *invested.* His long, baleful, venomous stare, lasting for perhaps a quarter of a minute, was so nasty that I almost prayed someone else took notice of it.

Seeing no such overt expressions of malevolence, I reasoned Benson would be no better or worse than any other jurist. The hearing began with attorney Leonard I. Weinglass taking the stand. Speaking of the initial reason the suit was filed, Weinglass spoke of learning that letters he wrote to me were seized, opened, held, and delivered in that state to me over a week later. He spoke of his paralegals being unceremoniously turned away from the prison. He spoke slowly, lawyerly, of learning that my letters to him never arrived at his office. He called this succession of events "unprecedented" and "shocking." In nearly thirty years of law practice, Weinglass said, he had never seen such interference with his and his client's legal correspondence.

It was for this very reason, he explained, that paralegals were utilized; to provide a channel of communication that was not compromised.

Under prompting by counsel, Weinglass recounted receiving a letter written by me, explaining that the "state has opened and reviewed your letters/documents . . . outside of my presence—there isn't even the pretense of client-lawyer confidentiality." This was confirmed when a photocopy of my letter to Weinglass, and this letter to me, turned up in the Commonwealth's file, found during the course of discovery for the case. Krakoff continued his examination of Weinglass:

> Q: When you wrote Mr. Jamal on August 16, 1994, did you send a copy of the letter to prison officials or to the Department of Corrections personnel?
> A: No.
> Q: Prior to writing Mr. Jamal on August 16, had you authorized prison officials or the Office of General Counsel or anyone within the Governor's Office or the Department of Corrections to read your mail?
> A: No, hardly.
> Q: Had you authorized any of them to photocopy your mail?
> A: No.
> Q: Had you authorized them to read the enclosed materials that you sent to Mr. Jamal on the 16th?
> A: No.
> Q: Had you authorized them to distribute your letters to anybody?
> A: No.
> Q: Had you authorized them to retain your letters in a file?

> A: No.
> Q: Did you expect that your letter would not be read by prison official when you sent it to Mumia Abu-Jamal on the 16th of August?
> A: In over twenty years of practicing law, to my knowledge no letter that I had ever written to an inmate had ever been opened or read by prison officials. And I expected the same would apply in this instance.

Informed of this breach of confidentiality, neither counsel nor client could dare write the other, for fear such correspondence would find its way into the hands of the state. Similarly, mail from another of my lawyers, Rachel Wolkenstein, was seized by the DOC, photocopied, and forwarded to various government officials. Her letter, properly marked as legal mail, contained a copy of a witness statement that was helpful to the defense. Her mail, she testified, went the same way as Len's mail: out of the prison, out of the DOC, and to various agencies of government.

Like Weinglass, Wolkenstein, an experienced criminal lawyer found this experience to be "unprecedented." Neither this witness statement, nor a lawyer's memo, were ever returned, nor acknowledged by the state.

The DOC's attorney, David Horwitz, would attempt to mitigate these actions by prison officials by arguing that the seizure of legal papers was justified by the ongoing "investigation" into whether a rule prohibiting prisoners from engaging in a business or profession was being violated.

In this testimony, Horwitz ordered further investigation even as prison officials announced they had more than sufficient evidence to prepare an institutional misconduct as noted in a memo written by Horwitz liaison and grievance officer Diane Baney:

> It has recently been brought to our attention that Mumia Abu-Jamal, AM-8335, may be violating Department of Corrections policy by accepting payment for interviews, essays, etc. This information came to light when National Public Radio announced that Abu-Jamal had produced 10 three to four minute commentary radio shows which he would be compensated for in the amount of $150.00 apiece. Upon reviewing his account, it was detected that he had received payment from other publications which went

> unnoticed and were placed in his account. On 5-16-94, NPR issued a decision that the commentaries would not be run. However, they did indicate that Abu-Jamal would be compensated with a standard "kill fee" of $75.00 each, which is given when work is accepted but not used.
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> It is clear that Abu-Jamal is in violation of Department of Corrections policy . . . .

This Baney memo, sent to Horwitz, was dated May 18, 1994. Yet the so-called investigation continued for over a year, thus allowing the state to peruse my legal mail, dealing with critical issues involving my state court appeals and conviction, with impunity!

The warden at Huntingdon Prison advised his superiors at the DOC Central Office that sufficient information had been gathered to prove a violation of DOC policy, and therefore further mail scrutiny was unnecessary. Horwitz rejected the warden's recommendation and ordered the "investigation" to continue. He admitted at the TRO/PI hearing that he ordered all legal mail intercepted, had its contents removed and photocopied, and sent copies to his office. He copied these items, and forwarded them to Brian Gottlieb of the governor's office in Harrisburg, and to Cheryl Young, chief counsel. Horwitz testified he had no idea what these persons did with these items of privileged legal correspondence: [Questions on direct examination by the plaintiff's co-counsel, Timothy O'Brien:]

> Q: Now, one thing is clear, Mr. Horwitz, with respect to Mr. Weinglass's letter—to whatever extent you read it—you came to the conclusion, did you not, that only two paragraphs in that entire correspondence could conceivably have anything to do with the investigation that you were conducting, isn't that so?
> A: Yes.
> Q: With respect to Mr. Jamal's letter to Mr. Weinglass, you came to the conclusion that nothing in that correspondence could be of assistance to you in your investigation; isn't that correct?
> A: That's correct.
> Q: So you, before you disseminated this information to anyone else, you had concluded that there was privileged material in the correspondence that had nothing to do with

> your investigation, correct?
> A: That's correct.
> Q: You also came to the conclusion that there are materials in the correspondence that had to do with Mr. Jamal's defense of the death case; isn't that correct?
> A: That's correct.

He further stated that the invasion of the attorney-client correspondent privilege was needed to determine whether lawyers were helping me to evade the business or profession rules.

Another witness who testified for the defendants was James Hassett, the head of Greene's security staff. It was he who actually opened, read, and photocopied legal letters and documents for forwarding to David Horwitz of DOC central office, and who wrote the misconduct report of June 2, 1995, and signed the document. The report the writer attempted to explain the delay by claiming "the justification for the timing of the misconduct is that the investigation was not completed until May 19, 1995, and that the assembly of the evidentiary materials in presentation format required additional time." In fact, Hassett's explanation fell flat when he testified at the hearing, for there he admitted that Horwitz had prepared the report, not he. And as we have seen from the Baney memo of May 18, 1994, Horwitz had more than enough "evidentiary materials" to show a violation of the business and profession rule—if that was their actual intent—fully a year before!

Thomas Fulcomer, a former warden at Huntingdon and later deputy regional commissioner of the DOC, advanced the department's justification for their punishment for my writing. The DOC, Fulcomer announced with a straight face and an impressive title, was concerned about what he termed the "big wheel syndrome," or the circumstance where a prisoner "persistently and flagrantly violates Department of Corrections policies," and by so doing becomes a countervailing authority in the prison. Fulcomer's testimony was a smart one, as it was designed to tickle a judge's core fear and concern when deciding any prison case: security. It had several key problems, however: (a) Hassett, the DOC's point man during the so-called investigation, and Greene's chief of security, could point to no "big wheel" effects at Greene, and when asked about the impact of the publishing of *Live from Death Row* on the prison, admitted that guards had to field questions from prisoners about how they could put out books; and (b) Ted Alleman, a former teacher at Huntingdon, testified that the prison not only had not opposed the publishing of a book by a prisoner there, but had supported and

facilitated it. Alleman set up a small publishing outfit to put out a book written by the late Aubrey "Buddy" Martin, a former death row prisoner at Huntingdon. Guess who was the warden at that time? When testimony was provided showing that the prison had actually allowed and assisted in radio interview of Martin to promote his book, Fulcomer's "big wheel" theory sprang a major leak, for he never utilized this rationale when he was the warden at Huntingdon. Martin was never given a misconduct sanction for this book, or even threatened in that regard. In fact, he was praised for it.

Martin, serving several life terms stemming from the January 1970 slayings of United Mine Workers leader Joseph "Jack" Yablonsky along with his wife and daughter, was an accomplished painter and sculptor. Huntingdon officials provided him studio-like space to do his work, and later applauded the publishing of his book, which featured photographs of many of his works of art. In direct examination by Mr. O'Brien, Alleman testified:

> Q: Mr. Alleman, after you came to know Mr. Martin, did you become aware of a book that he was writing?
> A: Buddy Martin was a student of mine in my class and I knew him for many years, and over a period of time we started to talk about documenting his life story, and that eventually resulted in a book.
> Q: And was this book written by him while he was incarcerated at the State Correctional Institution in Huntingdon?
> A: Yes.
> Q: And when the book was written and while it was being written, was it understood that this book would be published for purposes of sale outside the institution?
> A: Yes.
> Q: And did you in fact have a publishing company at that point in time?
> A: The publishing company was formed in 1985 and it was formed for the purpose of publishing this book.
> Q: And was there a contract between yourself and Mr. Martin with respect to the publishing of the book?
> A: Yes.
> Q: And could you tell the Court whether, in accordance with the contract, if there were sales of the book in question, whether Mr. Martin was to receive any royalties?

> A: The contract was that the publishing company would receive the initial revenue from the book up to the point where the costs of publication were covered, and then there was a fifty-fifty split on royalties of the book.
> Q: And could you tell the Court, with respect to any of these efforts to involve the media with Mr. Martin regarding the sale of this book, if there was any involvement whatsoever with SCI Huntingdon?
> A: The book was partially promoted through talk shows, and the situation was such that I was live on the air with a talk show host from my office at Tower Press, and the institution provided the capability for Buddy Martin to be in a room with a telephone and he was also live on the air and we answered questions from both the host of the show and the general public that would call in with questions....
> Q: Now, aside from these particular interviews, was the institution otherwise aware of this book having been written and published?
> A: Yes.
> Q: Were there any reviews of the book in the local newspapers, for example?
> A: Yes.
> Q: What were these?
> A: Well, the Huntingdon paper did a review, an extensive review of the book, and also I was on a talk show with the local host in the town of Huntingdon.
> Q: Okay. And when the book was published, was there any accompanying public opposition to the book by any influential political group?
> A: No, not that I know of.
> Q: To your knowledge, from the date that the book was published to the date that Mr. Martin passed away, was he ever disciplined for writing the book on the basis that he had violated a rule at SCI Huntingdon prohibiting the conduct of a business or a profession?
> A: No, not at all.

So much for the "big wheel" theory. The trial, like all trials, was only tangentially about truth; central to these public performances is power, and how power is defended, articulated, used, and hidden. The state, of course, is used to exercising power, but it is rarely asked to

justify its use. And when forced to answer to its use of power behind prison doors, it resorted to the handiest tool in an age-old arsenal—lies. Nonsense about "big wheels" and "security" and "burdens upon staff" were administrative lies designed to obscure a naked political attack against a radical voice that they opposed.

III. THE MAGISTRATE RULES

Magistrate Judge Benson heard all of the principals testify at hearings in September and October 1995. Lawyers Jere Krakoff and Tim O'Brien battled in raging paper wars against Thomas Halloran of the attorney general's office.

In early June 1996 Benson issued a remarkable "Report and Recommendation" that was sixty-six pages long. Among the sources quoted or cited from were former British Prime Minister Winston Churchill[3] and U.S. President Abraham Lincoln.[4] He lauds the defendants as "conscientious" and "scrupulous" men,[5] and goes out of his way to describe one of the defendants: "Superintendent Price appeared to this court to be an estimable man in every way."[6] He goes on, however, to point out how they lied either on the stand or in sworn depositions, for example:

> [Finding of Fact] 64. Superintendent Price's explanation that requests for interviews with plaintiff were denied due to limited staff resources are not entirely credible . . . .[7]
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> . . .
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> [T]he decisions to deny plaintiff media interviews were first made Immediately [sic] after plaintiff's decision to publish his book was communicated to defendants [DOC deputy general counsel David] Horwitz and Price. The decisions continued, with a variety of purported justifications, for several months. These purported reasons are demonstrably false. There is no credible evidence that

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[3] Abu-Jamal v. Price, No. 95-618, 1996 U.S Dist. LEXIS 8570, at *5 (W.D. Pa. June 6, 1996).*Id.* at *4.
[4] *Id*. at *3-*4.
[5] *Id.* at *5.
[6] *Id*. at *6.
[7] *Id*. at *34.

> the conditions at the prison were such that security concerns necessitated denying the requests for interviews.[8]

Despite the court's finding that prison officials put forth "demonstrably false"[9] evidence in support of their actions, Benson found their "big wheel" defense a "reasonable" one, and a "legitimate concern of the institution."[10] He therefore upheld the "business or profession" rule as constitutional, and upheld the state's right to open and read privileged legal mail, if that rule was being violated.[11] To this U.S. judge at least, a prison rule was more important than the First Amendment to the U.S. Constitution. If I wrote for publication, I could be punished for doing so, and my legal mail could be rifled. The state was allowed to refuse paralegals if unlicensed, even if no such licensure is now possible. The state was enjoined from denying media interviews and from disclosing the contents of legal mail to persons outside of the DOC.

After my years of studying civil cases, nothing in the opinion was unexpected to me. Krakoff prepared for appeals.

I resolved to continue writing, no matter what. The district court upheld the main points of the magistrate's recommendation, although expanding the legal mail provisions. We therefore had to go on.

IV. THE COURT OF APPEALS

Although relatively little known in America (quick—name three judges on your circuit court of appeals!) the circuit courts of appeal are the final arbiters of almost every legal conflict in the nation. They are the last court before the U.S. Supreme Court, a body that hears (in the last decade or so) roughly seventy-five cases a year, and as such refuses to hear thousands of cases throughout the court term.

Pennsylvania is the largest state in both population and area in the U.S. Court of Appeals for the Third Circuit. It was to this court, one described as among the most conservative, that the case would be appealed. The panel randomly selected to hear the case were similarly some of the court's more conservative jurists, Judges Richard L. Nygaard, Samuel A. Alito, Jr., and Donald P. Lay, a judge from the Eighth Circuit (having jurisdiction over the southern and mid-western

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[8] *Id.* at *75.
[9] *Id.* at *75.
[10] *Id.* at *60 (footnote omitted).
[11] *Id.* at *88-*89.

areas of the country), sitting by designation.

Initially, the Third Circuit noted the "formidable barrier"[12] to a prisoner's claim that a prison regulation is unconstitutional. That "barrier" is a 1987 U.S. Supreme Court case known as the *Turner v. Safley*[13] ruling. In *Turner,* the nations highest court ordered deference to prison officials in many of their administrative decisions if those decisions were "reasonable."[14] *Turner* established a four-part test as to whether a given prison regulation is reasonable: (1) there must be a valid, rational correlation between the regulation and the government objective at issue; (2) alternative means must exist to exercise the prisoner's asserted right; (3) the impact that accommodation would have on the prison environment, and prison resources generally, must be taken into account; and (4) the existence (or absence) of ready alternatives must be considered.[15]

When the First Amendment is implicated, the regulation, to be approved, must be content-neutral.[16] The Third Circuit panel looked at the appeal through that four-part test, and declared that

> [t]he superintendent of the S.C.I. Huntingdon was aware of Jamal's writings when Jamal published the Yale article in 1991. An August 16, 1992 letter to the Department noted that Jamal was approaching publishers regarding a book deal. Nevertheless, the Department did not begin to investigate him until May 6, 1994, after National Public Radio sought permission to broadcast Jamal's interviews as regular commentaries. The district court determined that "the investigation was initiated after public complaints concerning Jamal's proposed NPR commentaries were made by the Fraternal Order of Police" and concluded that any delay in the Department's enforcement of the rule was attributable to its investigatory procedures. As a result, it held that Jamal was unlikely to succeed in showing that the action was in retaliation against the content of his writings. *We disagree, and conclude that the district court erred.*[17]

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[12] Abu-Jamal v. Price, 154 F.3d 128, 132 (3d Cir. 1998).
[13] 482 U.S. 78 (1987).
[14] *Id.* at 89.
[15] *Price*, 154 F.3d at 133 (citing *Turner*, 482 U.S. at 89-91).
[16] *Id.*
[17] *Id.* at 134 (emphasis added).

Without specifically mentioning the "big wheel" theory, the court's opinion seemed to give this idea little weight, finding the prison could easily accommodate the activities of a writer, because "the record contains no evidence of such a 'ripple effect.' As explained before, Jamal was acting as a journalist from 1986, and the Department did not claim to be burdened by his actions until the Fraternal Order of Police outcry in 1994."[18]

The court found the justification for the state's rifling of attorney privileged mail to be pretextual, writing

> [t]he district court held that the reading and copying Jamal's legal mail was acceptable if the prison officials had "a reasonable suspicion that plaintiff was violating an institutional regulation by engaging in a business or profession in which wittingly or not one or more of his attorneys was complicit." The Department argues in support that its decision to open Jamal's legal mail was necessitated by its investigation into whether Jamal was conducting a business or profession. *This argument is nonsensical.* We have difficulty seeing the need to investigate an act that Jamal openly confesses he is doing. Jamal's writing is published, and he freely admits his intent to continue. Continued investigation and enforcement of the rule invades the privacy of his legal mail and thus directly interferes with his ability to communicate with counsel.[19]

We had won two of the three issues appealed to the court and lost the third. On the state's barring of paralegals, the circuit court agreed. The court determined that a paralegal was also a social visitor (even though she actually did act as a courier for legal papers from counsel), and paralegal visits were pretexts for what were really social visits.[20]

Thus, the court approved the application of a "rule" that had never been applied elsewhere, and was neither written nor disseminated to the general population. As such, it was as much a new "rule" (that is, one never utilized) as the "business or profession" rule, if not more so. For here was a "regulation" that required satisfaction that was impossible to meet: state licensure. SCI Greene's Superintendent Price wrote a

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[18] *Id*. at 135.
[19] *Id.* at 136 (emphasis added).
[20] *Id.* at 136-37.

letter to my lawyers dated February 24, 1995, that stated:

> It is not sufficient merely to designate persons as investigators and paralegals unless the identified individuals can produce documentation that they are investigators or credentialed paralegals acting under contract with or as employees of the attorney. Accordingly, please submit copies of the state licensure documents and paralegal credentials under which these individuals conduct business as investigators, or paralegals and such contract or employment documents which verify their relationship with your office as independent contractors or employees.

Krakoff assembled an impressive array of affidavits from another state prison superintendent, secretaries, and other personnel associated with several state legal services programs, which proved these conditions were unprecedented. Indeed, many working paralegals had no such formal training, or certification, or degrees. Indeed, at trial the DOC softened its stance, suggesting that some equivalent training would suffice in lieu of credentialing (although Horwitz never communicated this to defense counsel). In fact, in Pennsylvania, no licensure for paralegals is provided.

On this issue, however, the circuit court deferred to the state, reasoning that "visitation—whether it is legal or personal—may jeopardize the security of a facility" (Third Circuit, 15). Thus, the interests of the state prevailed.

V. AFTER THE COURT DECISION

No case is really over when a court issues its decision. This is especially so in prison civil rights cases, when the winner (a prisoner) goes back into the custody of the loser (the prison). While courts regard prisons as institutions to which they owe deference, prison administrators regard courts as institutions that deserve a barely concealed contempt. They are to courts what pimps are to prostitutes: useful perhaps, but hardly ever respected.

Prison administrators oppose court orders as the work of interlopers, and are sure to undermine such edicts, if not openly. After *Jamal v. Price* it would seem that if anything is safe, it would be privileged legal mail from lawyers. Several months after the circuit court

ruling a letter arrived from a lawyer, with her name, her title (Esquire), her law office address, and the legend "legal mail" stamped on the front of the envelope. The envelope was ripped open and taped shut, and the words "opened by mistake" were scribbled on the envelope face.

Neat, huh?

See with what ease a court's order is made obsolete?

In a nation that claims to be run in strict accordance with the tenets of the Constitution, in which the Constitution and its amendments are termed the "supreme law of the land," what should be the fate of one who violates the "supreme law"?

What about nothing at all?

The prison warden who ordered and participated in some of the unconstitutional acts, and who lied on the stand, James Price, remained prison superintendent, working briefly at SCI Pittsburgh in that role, until his return to Greene, retiring from the post in the spring of 1999. He remains a consultant to the superintendent at Greene.

The deputy commissioner, Thomas Fulcomer, who signed off on some (if not all) of the unconstitutional actions of his subordinates at Huntingdon and Greene, who propounded the preposterous "big wheel" theory in court (while applauding the publication of one of his prisoner's books while warden at SCI Huntingdon) remains western regional deputy commissioner of the DOC.

The Greene head of security, James Hassett, who actually illegally opened, read, and copied legal correspondence from both the court and counsel (and from me to the court and to counsel) was a captain when he testified. He is now a major.

The lesson could hardly be clearer that the DOC regards violations of the so-called supreme law of the land as little more than a mere annoyance.

In such a context, what can the word "unconstitutional" really mean? That term, which seems to go to the core principles upon which the state rests, is instead a minor obstruction, which pales beside the state's coercive powers. It is, in fact, the civil equivalent to the slap on the wrist given to the offender. In the midst of the hearings I asked Jere to speak to the magistrate judge about wearing the shackles for hours on end in the courtroom. After several long days in shackles, of sitting in pain, I thought it was time for the court to act. Jere did talk to the judge, who said it was out of his hands. It was a decision made by the marshals, and he had no say in the matter.

To sit in pain, for hours, for days, in a U.S. courtroom during a so-called hearing to determine if someone's civil rights were violated

months before is an exercise in Kafkaesque absurdity. Is this not an admission of judicial impotence for something that happens right there in the courtroom? "Out of my hands, pally."

Indeed, how can any court that draws its authority and jurisdictional powers from the Constitution decide, in any case, that any administrative regulation, which contemplates punishment for exercise of one's constitutional rights, is superior to the Constitution?

In such a context, how can the constitution be deemed to be anything other than irrelevant? Courts are inherently conservative institutions that loathe change, and defer to the status quo. That is, they tend to perpetuate existing power relations, even though their rhetoric perpetuates the illusion of social equality. In many instances, courts barely conceal their hostility to prisoner litigants, as evinced by increasingly restrictive readings of rights raised in the courts these days.

In that sense then, *Abu-Jamal v. Price* was different from some cases, yet strikingly similar to others.

From death row, this is Mumia Abu-Jamal.