Washington Journal of Law, Technology & Arts

Volume 11 | Issue 4 Article 2

1-1-2016

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WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 11, ISSUE 4 WINTER 2016

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Cite as: 11 Wash. J.L. Tech. & Arts 285 (2016)
http://digital.lib.washington.edu/dspace-law/handle/1773.1/1557

ABSTRACT

The First Amendment protects not only our right to share ideas, but also to some extent, our right to choose the specific method by which we share them. Generally speaking, these protections apply to inmates' rights to communicate with those outside of prison. However, the protection of those rights must be balanced with the penological interests of prisons and jails. Electronic messaging has now become a standard form of communication within most American homes and businesses. Accordingly, the Federal Bureau of Prisons has implemented the TRULINCS program, a program which allows inmates to communicate with those outside of prison through electronic messaging. The Washington State Department of Corrections has installed JPay kiosks in state-operated facilities that allow inmates to send and receive electronic messages. However, most state prison systems and county jails currently do not offer inmates the option of receiving or sending electronic messages. The Supreme Court of the United States has indicated that prisoners have a constitutional right to send and receive mail, and some circuit courts have extended that right to telephone use. This Article examines the foundational aspects of free speech in prison settings and how the

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evolution of communication might affect the breadth of an inmate's free speech rights. This Article argues that, in certain situations, the First Amendment should protect inmates' interests in sending and receiving emails.

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INTRODUCTION

Times have changed drastically since Tom Hanks and Meg Ryan sat anxiously at their computers awaiting that famously infectious chime, "*You've got mail*." Email has since developed into an everyday staple of communication. On average, 182.9 billion emails are sent worldwide every day.[1] In 2013, the number of email accounts existing was approximately 3.9 billion.[2] That number is expected to rise to 4.9 billion by the end of 2017.[3]

Despite the prolific use of email in everyday communications, email has only recently started being used in prisons. It was not until 2006 that prisoners in eleven federal facilities gained access to a limited electronic messaging service through the Trust Fund Limited Inmate Communication System pilot program.[4] By early 2009, the system was accessible in over thirty federal prisons[5] and was renamed the Trust Fund Limited Inmate Computer System ("TRULINCS")[6]. Today, the Federal Bureau of Prisons ("BOP") can boast that all BOP operated facilities enjoy access to electronic messaging through TRULINCS.[7]

While electronic messaging remains unavailable to almost all prisoners in state and county custody, a small number of state prison systems have begun to provide electronic messaging

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[1] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[2] THE RADICATI GROUP, EMAIL STATISTICS REPORT 2013–2017 — EXECUTIVE SUMMARY 2 (Sara Radicati ed., 2013), http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf.

[3] *Id.*

[4] OFFICE OF THE INSPECTOR GENERAL, EVALUATION AND INSPECTIONS REPORT NO. I-2006-009, FEDERAL BUREAU OF PRISONS' MONITORING OF MAIL FOR HIGH-RISK INMATES app. IV (2006).

[5] Douglas Galbi, *Email for Prisoners Highly Successful*, PURPLE MOTES (Sept. 11, 2011), http://purplemotes.net/2011/09/11/email-for-prisoners-highly-successful/.

[6] FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT NO. P5265.13, TRUST FUND LIMITED INMATE COMPUTER SYSTEM (TRULINCS) - ELECTRONIC MESSAGING (2009).

[7] *TRULINCS Topics*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/inmates/trulincs.jsp (last visited Jan. 12, 2015).

systems to inmates. For instance, the Washington Department of Corrections ("WDOC") has become the only prison system in the Ninth Circuit to provide incoming and outgoing email services to inmates by partnering with a service called "JPay" and installing commercial email kiosks in most WDOC operated facilities.[8] Likewise, the Michigan State Department of Corrections has installed JPay kiosks in all of its facilities.[9] Apart from Washington and Michigan, a total of five other state prison systems provide email access to inmates in at least some of their facilities—Virginia,[10] Louisiana,[11] North Dakota,[12] Ohio,[13] and Maryland.[14] Some facilities in the Washington, Louisiana, North Dakota, and Virginia prisons systems have even implemented special tablets with limited functions to make email services more accessible to inmates.[15]

Whether in federal or state prison, email access comes to prisoners at a price. To send and receive messages through

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[8] *JPay Communication System (Email)*, WASH. STATE DEP'T OF CORR., http://www.doc.wa.gov/family/jpay.asp (last visited Jan. 12, 2015).

[9] *Electronic Messages – Sending to Prisoners*, MICH. DEP'T OF CORRECTIONS, http://www.michigan.gov/corrections/0,4551,7-119-68854_68856_63694-201925--,00.html (last visited Jan. 12, 2015).

[10] *Virginia Department of Corrections*, JPAY, http://www.jpay.com/Agency-Details/Virginia-Department-of-Corrections.aspx (last visited Jan. 12, 2015).

[11] *Louisiana Department of Corrections*, JPAY, http://www.jpay.com/Agency-Details/Louisiana-Department-of-Corrections.aspx (last visited Jan. 12, 2015).

[12] *North Dakota State Penitentiary*, JPAY, http://www.jpay.com/Facility-Details/North-Dakota-Department-of-Corrections/North-Dakota-State-Penitentiary.aspx (last visited Jan. 12, 2015).

[13] *Ohio Department of Rehabilitation and Correction*, JPAY, http://www.jpay.com/Agency-Details/Ohio-Department-of-Rehabilitation-and-Correction.aspx (last visited Jan. 12, 2015).

[14] *Maryland Correctional Institution – Women*, MD. DEP'T OF PUB. SAFETY & CORRECTIONAL SERVICES, http://www.dpscs.state.md.us/locations/mciw.shtml (last visited Jan. 12, 2015). It should be noted that Maryland is implementing electronic messaging on a trial basis, and only in one women's correctional facility.

[15] *Mini-tablet for Prisons Now Available in Louisiana, Virginia, Washington and N. Dakota!*, JPAY BLOG, http://blog.jpay.com/mini-tablet-for-prisons-now-available-in-louisiana-and-virginia/ (last visited Jan. 12, 2015).

TRULINCS, JPay, or some other state implemented service, inmates and their loved ones must pay between seventeen and sixty cents per email.[16] As the BOP states: "No taxpayer dollars are used for this service. Funding is provided entirely by the Inmate Trust Fund, which is maintained by profits from inmate purchases of commissary products, telephone services, and the fees inmates pay for using TRULINCS."[17]

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[18] This prohibition applies equally to the several states that have incorporated this system through the Fourteenth Amendment's Due Process Clause.[19] In an era when technology has significantly increased the channels of communication available to the public, changing times have forced courts to evaluate the First Amendment guarantee of free speech in increasingly complex scenarios. This Article examines the intersection of free speech protections and access to electronic messaging in prison.

I. EMAIL AND THE FREE SPEECH FRAMEWORK

To understand how free speech protections interact with an inmate's access to electronic messaging systems, it is necessary to recognize (1) how the First Amendment might interact with email communications and (2) what level of scrutiny applies to various restrictions on free speech rights.

A. Applying the First Amendment to Email Communications

Internet communications, such as emails, presumptively fall within the ambit of free speech protections.[20] In assessing an

[16] Derek Gilna, *Prison Systems Increasingly Provide Email - For a Price*, PRISON LEGAL NEWS, Nov. 2015, at 35.

[17] *TRULINCS Topics*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/inmates/trulincs.jsp (last visited Jan. 12, 2015).

[18] U.S. CONST. amend. I.

[19] U.S. CONST. amend. XIV, § 1; *see also* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (incorporating the First Amendment's free speech clause into the Fourteenth Amendment's due process clause).

[20] *See* Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1151 (9th Cir. 2004).

alleged violation of free speech, the initial consideration regarding any claim is whether a limitation implicates any free speech rights. These rights are not limited by form. Courts have found that Internet communications deserve the same protections as other more traditional forms of speech.[21]

Generally, communication enjoys a presumptive implication of First Amendment protection.[22] As iterated by the Supreme Court, "[m]ost of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation."[23] As such, when government action limits the communicative use of words, free speech protections are implicated.

In the context of Internet communications, courts have determined that the First Amendment "protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era."[24] Accordingly, attempts to communicate over the Internet, which incorporate linguistic elements,[25] such as most emails, presumptively fall within the First Amendment's scope; the presumption is rebuttable only if there is an established tradition of exclusion.[26]

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[21] *See id.*; *see also* Reno v. ACLU, 521 U.S. 844, 868 (1997).

[22] *See* Charles W. Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 404 (2014).

[23] United States v. Stevens, 559 U.S. 460, 479 (2010) (internal quotation marks omitted).

[24] *Clement*, 364 F.3d at 1151; *see also Reno*, 521 U.S. at 868.

[25] *See* Rhodes, *supra* note 22 ("The use of words or language to attempt to communicate any assertion, idea, perception, emotion, or thought—or any attempt to receive such words or language—is presumptively covered by the First Amendment.").

[26] *See* Rhodes, *supra* note 22. See this article for a discussion of the types of exclusions that are common or may apply to free speech rights. Although many communications that are sent via the Internet could trigger such exclusions, they are irrelevant to the more general discussion of email *access* in a prison setting. Because such a discussion focuses on the initial ability to access email rather than the content of a particular inmate's communications, there is no context here in which to address these exclusions.

B. Applying the Appropriate Level of Scrutiny to Restrictions on Free Speech

Once a government action has been shown to implicate free speech protections, the inquiry becomes whether the action imposes restrictions that are "content-neutral." A regulation is content-neutral if its applicability to a given expression does not turn on the content of the speech.[27] Here, "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral . . . ."[28] In contrast, "[r]ules are generally considered content-based when the regulating party must examine the speech to determine if it is acceptable."[29]

If the action is not content-neutral, then the action will be examined under strict scrutiny, which means it violates the First Amendment unless shown to be "the least restrictive means of achieving a compelling state interest."[30] However, if the action is content-neutral, then it is subject to intermediate scrutiny, which means that the court will determine if the action is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information."[31] The application of intermediate scrutiny in the context of content-neutral governmental action is based on the premise that "the government may impose reasonable restrictions on the time, place, or manner of protected speech."[32]

Although the government may create reasonable time, place, or

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[27] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Ward v. Rock Against Racism, 491 U.S. 781, 790–91 (1989).

[28] *Ward*, 491 U.S. at 791.

[29] United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB, 540 F.3d 957, 964 (9th Cir. 2008); *see also Clark*, 468 U.S. at 293 ("[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

[30] McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).

[31] *Clark*, 468 U.S. at 293.

[32] *Ward*, 491 U.S. at 791.

manner restrictions in public forums,[33] the foreclosure of an entire avenue of speech should be subject to strict scrutiny. The Ninth Circuit has recognized that, in addition to the right to communicate the content of a message, "free speech protections extend to the 'right to choose a particular means or avenue of speech . . . in lieu of other avenues.'"[34] Accordingly, the "[g]overnment may regulate the *manner* of speech in a content-neutral way but may not infringe on an individual's right to select the *means* of speech."[35] The total foreclosure of an avenue of speech, even while alternative avenues remain open, acts as the total abrogation of a protected constitutional right.

For example, in *Meyer v. Grant*,[36] the Supreme Court determined that a prohibition on paid petition circulators violated the First Amendment when it foreclosed the opportunity for the petitioner to communicate its message through the "most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication."[37] Specifically, the Court held that such actions by the government "involved a limitation on . . . expression subject to exacting scrutiny."[38] Applying strict scrutiny, the Court concluded that the government action violated the First Amendment, even though multiple other avenues of expression remained open to the petitioner.[39] In reaching its conclusion, the Court determined that the First Amendment protects not only the right to communicate a message, "but also to select what [one] believe[s] to be the most effective means for so doing."[40] This protection of the First Amendment may be applicable to the selection of email services to convey protected communications, especially when email has become such an efficient, fundamental, and economically advantageous avenue of discourse.

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[33] *Clark*, 468 U.S. at 293.

[34] *United Bhd. of Carpenters*, 540 F.3d at 969 (quoting Foti v. City of Menlo Park, 146 F.3d 629, 641 (9th Cir. 1998)).

[35] *Foti*, 146 F.3d at 641–42.

[36] Meyer v. Grant, 486 U.S. 414 (1988).

[37] *Id.* at 424.

[38] *Id.* at 420.

[39] *Id.* at 424.

[40] *Id.*

II. THE FREE SPEECH FRAMEWORK IN A PRISON CONTEXT

Prisons and jails can be dangerous places, and some of the people inside can pose a serious threat to other prisoners and the outside world if their communications are not limited. Accordingly, to protect both the public and prisoners alike, free speech protections must be analyzed with greater caution in a prison context. Understanding how free speech protections might work in a prison setting requires examining: (1) the general principles behind the constitutional rights of prisoners, (2) the historical framework for free speech challenges in prison settings, and (3) the government's traditionally limited power to regulate time, place, or manner of free speech.

A. Guiding Principles Regarding Constitutional Rights of Prisoners

The analysis of the constitutional rights of prisoners is guided primarily by two often-conflicting principles: an inmate's retention of constitutional rights, and deference to prison authorities. When these two principles come into tension, courts must balance the "traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights."[41]

Incarceration does not deprive inmates of their constitutional rights and protections. The Court in *Turner v. Safley* exemplifies this principle, stating that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[42] This principle applies wherever a prisoner in government custody asserts constitutional protections.[43]

However, in the context of prison administration, courts should

[41] Procunier v. Martinez, 416 U.S. 396, 406 (1974), *abrogated by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

[42] Turner v. Safley, 482 U.S. 78, 84 (1987).

[43] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (applying due process protections); Johnson v. Avery, 393 U.S. 483, 485–86 (1969) (protecting the right to petition the government); Lee v. Washington, 390 U.S. 333, 333 (1968) (applying Equal Protection Clause).

"accord deference to the appropriate prison authorities."[44] Because the expertise, planning, and commitment of resources involved with running a prison fall "peculiarly within the province of the legislative and executive branches of government," separation of power concerns support a policy of judicial restraint on questions that would affect these issues.[45]

It is easy to see how deference to prison administrators might conflict with an inmate's assertion of his or her retained constitutional protections. These principles are supposed to be "balanced" against the other when they conflict. However, the analysis in *Turner* suggests that the Court favors deference to prison authorities.

B. The Framework for Free Speech Challenges in Prison

Separate standards govern the evaluation of incoming and outgoing correspondence restrictions. The historical framework of free speech challenges in a prison context suggests that "heightened scrutiny" will be applied to restrictions on outgoing communications while a more deferential "reasonableness test" will be applied to limitations on incoming communications.

The Supreme Court's first major articulation of a standard of review for prison regulations on free speech occurred in *Procunier v. Martinez*.[46] The Court required that such regulations "further an important or substantial governmental interest unrelated to the suppression of expression" and do not impinge on First Amendment protections more "than is necessary or essential to the protection of the particular governmental interest involved."[47] Although this test largely mirrors the effective language of a heightened—or even strict—scrutiny standard, subsequent cases obscured this standard and it devolved into a vague test based on the "reasonableness" of prison regulations.[48]

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[44] *Turner*, 482 U.S. at 85.

[45] *Id.*

[46] Procunier v. Martinez, 416 U.S. 396 (1974).

[47] *Id.* at 413.

[48] *See* Block v. Rutherford, 468 U.S. 576, 586 (1984); Bell v. Wolfish, 441 U.S. 520, 550 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119,

Thirteen years after its decision in *Martinez*, the Court in *Turner* explicitly set forth a "reasonableness" standard for evaluating prison regulations that dealt with incoming correspondence.[49] There, the Court stated that prison regulations are "valid if [they are] reasonably related to legitimate penological interests."[50] To evaluate the reasonableness of a regulation, the Court provided four factors to consider:

> (1) [W]hether the regulation is rationally related to a legitimate and neutral governmental objective, (2) whether there are alternative avenues that remain open . . . to exercise the right, (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.[51]

Two years later, in *Thornburgh v. Abbott,*[52] after recognizing that the "implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials,"[53] the Court clarified that the reasonableness standard applied subsequent to *Martinez*, and articulated in *Turner*, applied specifically to *incoming* correspondence. Pursuant to this conclusion, the Court explicitly overruled the standard of *Martinez* as it only applies to *incoming* correspondence. However, while the more deferential standard of *Turner* applies to incoming correspondence, it appears that the heightened scrutiny standard of *Martinez* remains in force for outgoing correspondence. Accordingly, it appears that separate standards govern the evaluation of incoming and outgoing correspondence restrictions: the *Martinez* heightened scrutiny test

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131 (1977); Pell v. Procunier, 417 U.S. 817, 822 (1974).

[49] Turner v. Safley, 482 U.S. 78 (1987).

[50] *Id.* at 89.

[51] Prison Legal News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005) (citing *Turner*, 482 U.S. at 89).

[52] Thornburgh v. Abbott, 490 U.S. 401 (1989).

[53] *Id.* at 413.

for outgoing communications and the *Turner* reasonableness test for incoming communications.

Although "[l]awful incarceration brings about the necessary . . . limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system,"[54] neither the *Martinez* nor the *Turner* standard turn on an individual's status as an inmate. The only policy consideration supporting a lower standard of scrutiny for communications inside and outside of prisons is the deference that is due to the executive officers responsible for prison management. The evaluation of a prison regulation that implicates free speech rights is logically connected to the legitimate or substantial security concerns of running a prison, not a lessened value imputed to the constitutional rights of inmates. It is thus irrelevant whether the regulations implicate the free speech protections of inmates or of the free citizens who seek to communicate with them.

C. What Happened to the Limited Power to Regulate Time, Place, or Manner?

While the *Turner* standard attempts to balance conflicting policies by applying a "reasonableness" standard to prison regulations, it fails to account for the government's limited power to regulate the time, place, or manner of free speech.[55]

Many prison practices may designate limitations on speech such as the number of correspondences sent and received each day, the volume of single messages, or the manner of packaging written communications. These types of limitations would fall squarely within the power of the government to reasonably limit the time, place, or manner of speech. However, in establishing the *Turner* standard, the Court failed to account for government actions that go beyond the mere regulation of time, place, or manner. In doing so, it overlooked longstanding checks on the power to regulate

[54] O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (alteration in original) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)) (internal quotation marks omitted).

[55] *See* "Applying the Appropriate Level of Scrutiny to Restrictions on Free Speech," *supra* at p. 7.

speech and instituted a standard that evaluates the reasonableness of abrogating a constitutional right by deferring to the executive authority of local prison administrators.

This viewpoint overlooks the risk of restrictions that go beyond the government's traditional power to regulate the time, place, and manner of speech and applies a "reasonableness" test to regulations that entirely abrogate certain First Amendment rights, such as the right of free citizens or inmates to select a particular means to communicate with one another. In any other context, such a significant abrogation of a constitutional right would be evaluated under the strict scrutiny standard. Nonetheless, modern courts reviewing a restriction that completely abrogates certain means of communication (such as written letters, phone calls, postcards, or emails) might evaluate such restrictions under the *Turner* reasonableness test when such sweeping regulations should be evaluated under a standard of strict, or at least heightened scrutiny. Otherwise, courts run the great risk that such regulations will unnecessarily violate constitutional rights. A standard of strict scrutiny is far more stringent than the *Turner* test, but it is not necessarily fatal to government regulations. Prisons would still be permitted to apply the least restrictive means available to achieve legitimate and compelling administrative interests.

III. DOES FAILURE TO PROVIDE EMAIL IN PRISON IMPLICATE FIRST AMENDMENT RIGHTS?

Although socially controversial, it is settled law that prison walls neither sever inmates from their constitutional rights nor "bar free citizens from exercising their own constitutional rights by reaching out to those on the inside."[56] As stated earlier, the threshold inquiry of any claim to free speech protections is whether or not the limitation at issue actually infringes on any free speech rights.

In the context of inmate email access, it is helpful to recognize:

[56] *Thornburgh*, 490 U.S. at 407 (citing *Turner*, 482 U.S. at 94–99; Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974)) (internal quotation marks omitted).

(1) the cases that address access to other modern communication systems like telephones, (2) the lack of direct persuasive authority in the context of email, and (3) the fact that courts dealing with prisoner communications seem to have overlooked the right to choose a particular avenue of communication over another.

A. Comparing the Right to Telephone Use

There is a strong similarity between the uses of telephonic and of electronic messaging in the context of prisons. Both involve an inmate's access to a means of communication provided by modern technology and consequently implicate similar free speech considerations. But where email access for inmates is a novel issue, several circuit courts have directly addressed the assertion of telephone access as an inmate's constitutional right. Therefore, cases involving inmate assertions of a right to telephone use provide a helpful comparison for determining whether or not the assertion of a right to email access would implicate protected free speech rights. Currently, there is a pronounced circuit split on the issue of whether or not inmates possess a constitutional right to telephone access. This split illustrates that the success of asserting rights to email may depend on the jurisdiction in which the claim is brought.

The Ninth Circuit has held that "prisoners have a First Amendment right to telephone access," though this right remains "subject to reasonable limitations arising from the legitimate penological and administrative interests of the prison system."[57] Additionally, the Sixth Circuit has held that prisoners have a First Amendment right to limited telephone access,[58] while the Eighth Circuit has recognized that the First Amendment *may* include a right to prisoner telephone access.[59]

Conversely, in *Arsberry v. Illinois*, the Seventh Circuit held that prisoners in Illinois have no First Amendment right to use the

[57] Johnson v. State of Cal., 207 F.3d 650, 656 (9th Cir. 2000) (citing Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir.1986)).

[58] Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994).

[59] Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989).

telephone.[60] Focusing solely on the general content of inmate communications, Judge Posner stated:

> Although the telephone can be used to convey communications that are protected by the First Amendment, that it is not its primary use and it is extremely rare for inmates and their callers to use the telephone for this purpose. Not to allow them access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme.[61]

Although only in dictum, the First Circuit has agreed with the court in *Arsberry*, stating that inmates have "no per se constitutional right to use a telephone."[62] However, the First Circuit has also affirmed at least one district court order that required jail officials to provide inmates with access to telephones.[63]

While claims asserting a right to email access may succeed in jurisdictions like the Ninth Circuit, where access to telephone use is considered a constitutional right, they seem highly unlikely to succeed in jurisdictions like the First and Seventh Circuit.

B. A Lack of Direct Persuasive Precedent

The issue of whether inmates have a constitutional right to email access is a novel question. As of yet, it has only arisen in a few unpublished district court cases. These cases occurred in the Fourth Circuit,[64] the Sixth Circuit,[65] and the Tenth Circuit.[66] In

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[60] Arsberry v. Illinois, 244 F.3d 558, 564–65 (7th Cir. 2001).

[61] *Id.*

[62] United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000).

[63] Inmates of Suffolk Cnty. Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974).

[64] Grayson v. Fed. Bureau of Prisons, No. 5:11cv2, 2012 WL 380426, at *3 (N.D. W. Va. Feb. 6, 2012) ("[P]risoners have no First Amendment constitutional right to access email.").

[65] Bristow v. Amber, No. 2:12-CV-412, 2012 WL 1963577, at *1 (S.D. Ohio May 31, 2012).

[66] Rueb v. Zavaras, No. 09–cv–02817, 2011 WL 839320, at *6 (D. Colo.

each instance the district court determined that "inmates have no established First Amendment right to access email."[67]

Although this narrow selection of cases rejects the notion that the First Amendment provides inmates with a right to email access, the reasoning behind each case suffers from a substantial deficit. In each case, the court based its decision on: (1) the lack of express authority establishing a constitutional right to email access, and (2) the precedent of one particular unpublished district court case from the Eighth Circuit, which stated that the government is not obligated to "provide telephones, videoconferencing, email, or any of the other marvelous forms of technology that allow instantaneous communication across geographical distances."[68]

First, as a novel issue, the lack of express authority establishing an inmate's right to elect email access as an avenue of free speech does not suggest that such a right does not exist. Because inmates retain their constitutional rights during incarceration, limited only by the legitimate security concerns of the prison administration, precedent suggests that a complete limitation on the right to access a communicative avenue such as an email or phone service necessarily infringes upon the free speech interest of selecting the means of one's communication.

The second basis for these decisions is troubling, especially where a district court within the Eighth Circuit relied upon the limitations of the First Amendment to impose positive obligations on a prison rather than the rights protected by the First Amendment.[69] Furthermore, if taken to mean that the First Amendment fails per se to protect inmate access to telephones, such a conclusion would directly contradict precedent from the Court of Appeals for the Eighth Circuit stating that limitations on telephone use may violate First Amendment protections.[70]

Mar. 7, 2011).

[67] *Id.*

[68] Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891, at *7 (E.D. Ark. Jan. 21, 2011).

[69] *Id.*

[70] *See* Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989).

C. Inmate Email Access in the Context of the Right to Select an Avenue of Speech

The conflicting guidance provided by cases dealing with phone or email use in prison focus narrowly on the right to send correspondence in and out of prison facilities. In doing so, they fail to account for the right to select a particular avenue or means of speech. It seems that a limitation that completely bars access to email systems would implicate First Amendment protections. Such a restriction would utterly eliminate an efficient, fundamental, and economically advantageous avenue of discourse. By eliminating the right to select email as a method of communication, prison officials do more than limit prisoners' right to send and receive correspondence—they entirely abrogate their right to choose the means of their speech.

IV. THE POSITIVE OBLIGATION HURDLE

In its traditional sense, the First Amendment acts as a security of negative obligations, prohibiting government *action* (as opposed to *inaction*) that violates certain protections. The failure of state prison systems to provide inmates with email access is not the same as a regulation barring access to email services that are already in place. Accordingly, it would be difficult to enforce a right to email access if prisons and jails state that they simply cannot provide the resources to facilitate this particular form of communication.

"[I]n those jurisdictions [such as the Ninth Circuit] where courts exercise constitutional review of state omissions and not only of state action, the guidelines for protecting social rights can be used to enforce the positive dimension of . . . freedom of expression."[71] Some district courts have applied this concept by ordering prison or jail officials to *provide* access to telephones in jurisdictions that have determined that inmates possess a First Amendment right to access them.[72] Such orders imply that a

[71] Ivar A. Hartmann, *A Right to Free Internet? On Internet Access and Social Rights*, 13 J. High Tech. L. 297, 370 (2013).

[72] Owens-El v. Robinson, 442 F. Supp. 1368, 1386 (W.D. Pa. 1978) (citing

positive obligation can exist to provide communication services where inmates have a constitutional right to access. However, other courts have determined that affirmative obligations on prisons are limited to the protections guaranteed by the Eighth Amendment, and that the First Amendment cannot give rise to such duties.[73]

Accordingly, while the failure of state prison systems to provide inmates with email access is not the same as a regulation barring access to communication methods that are already in place, administrators might still have a duty to install email services or unlock certain features of an existing service where they are affordable or already installed in a limited form. In prisons where services have not yet been implemented, the inquiry becomes whether courts may impose an affirmative duty on prison systems to provide inmates with access to methods of communication. In prisons where a service is already installed but the administrators implement some features while not implementing others—such as allowing money deposits or incoming messages but not outgoing messages[74]—the question is whether such choices constitute "limiting" the features of those services.

Whether or not the First Amendment can create positive obligations on a prison is a complicated issue worthy of thorough examination. This Article will not endeavor to take up that immense discussion. Suffice it to say that this is a controversial subject that is not resolved. While some jurisdictions have acted in

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Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975); Inmates of Suffolk Cnty. Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974); Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976); O'Bryan v. Cnty. of Saginaw, Mich., 437 F. Supp. 582 (E.D. Mich. 1977)).

[73] *Holloway*, 2011 WL 204891, at *7.

[74] For instance, in 2014, Nevada State Prison System had implemented JPay email services, but only allowed incoming messages. The state has since stopped implementing JPay systems all together, but still allows incoming emails to be sent to the prison where they are printed by prison staff and then delivered in paper format. Nevada Prisons Inmate, Family & Friends Share Page, *Email from JPay*, FACEBOOK, https://www.facebook.com/NevadaPrisons/posts/784982748258964 (last visited Jan. 23, 2015); *Inmate Email Information*, STATE OF NEV. DEP'T OF CORRECTIONS, http://doc.nv.gov/Inmates/Inmate_Email_Information/ (last visited Jan. 24, 2015).

a manner suggesting that they may impose a positive obligation on prisons to provide access to a particular means of communication, others will refuse to recognize a positive dimension of First Amendment protections.

V. EVALUATING THE LACK OF EMAIL ACCESS IN PRISON UNDER CURRENTLY EXISTING STANDARDS

The "reasonableness test" of the *Turner* standard seemingly rejects the need to apply strict scrutiny to sweeping limitations or regulations that abrogate entire avenues of free speech, such as email. Nonetheless, despite the potential pitfalls of such an extremely deferential standard, courts evaluating the free speech rights of inmates will analyze government limitations under the existing framework for free speech rights in prison. As such, courts faced with demands for email access in prisons will look to the standard outlined in *Turner* for incoming message services and that of *Martinez* for outgoing messages.

A. Failure to Provide Email Under the Turner Standard

Examining whether a regulation fails or passes the *Turner* standard requires assessing: (1) if the limitation is rationally related to a legitimate and neutral governmental objective; (2) if alternative avenues remain to exercise the asserted right; (3) the impact that accommodating the right will have on staff, prisoners, and prison resources; and (4) if easy and obvious alternatives indicate that prison practices are overly restrictive.[75]

1. Restricting Email Use Has No Rational Relation to a Legitimate and Neutral Governmental Objective

The first *Turner* factor requires that a court determine (1) if the governmental objective behind the policy is legitimate and neutral, and (2) if a rational relationship exists between the asserted

[75] Prison Legal News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005) (citing *Turner*, 482 U.S. at 89).

objective and the policy regulation.[76] If a regulation lacks a rational relationship to a legitimate objective under this first factor, then it cannot be reasonably related to the motive behind judicial deference to prison administrators, and "a court need not reach the remaining three factors."[77]

The burden of showing a rational relationship lies with prison systems, and is initially satisfied by presenting an "intuitive, common-sense connection" between the objective and the regulation.[78] If challengers to prison practices show sufficient evidence refuting the connection, the prisons must additionally present enough evidence to show that the connection is not "so remote as to render the policy arbitrary or irrational."[79]

Email in prisons has the power to drastically reduce the potential of prisoners receiving contraband through postal mail. Furthermore, prison email systems like TRULINCS have been shown to be financially self-sustaining and even contributory to the funding of other traditional means of communication and prison maintenance. Although prison email could lead to an increase in incoming correspondence, electronic messages are more readily screened for dangerous or prohibited content. Any displacement of incoming postage will likely result in an overall increase of prison mail efficiency.

Perhaps more importantly on a social level, it has been recognized that such communication with family and friends "advances rather than retards the goal of rehabilitation."[80] It seems unlikely that the failure to provide email access could be considered rationally related to a legitimate governmental interest. Although this factor is in itself not dispositive of the issue, it is of value to consider the remaining three *Turner* factors.

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[76] Thornburgh v. Abbott, 490 U.S. 401, 414 (1989).

[77] *Prison Legal News*, 397 F.3d at 699; *see also* Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990).

[78] Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999).

[79] *Turner*, 482 U.S. at 89–90.

[80] Procunier v. Martinez, 416 U.S. 396, 413 (1974).

2. Alternative Avenues Exist to Exercise the Basic Right of Communicating, But May Not Offer Many of the Benefits That Might Lead an Inmate to Choose Email Over Postage

In order for a prison or jail regulation that implicates free speech rights to be considered reasonable under the *Turner* standard, the inmate must retain some avenue of exercising his protected free speech. In evaluating this factor, "alternative means need not be ideal,"[81] but instead "need only be available."[82] Nonetheless, "the right in question must be viewed sensibly and expansively."[83]

Analysis of this factor depends largely on how the asserted right is framed. If the right infringed by email limitations is viewed as narrowly as the right to send or receive written communications, it is obvious that alternative avenues remain available for sending written correspondence, such as letters and postcards. Nonetheless, the nature of handwritten postage differs greatly from that of electronic messaging. Email is cost-effective, allows for rapid response from those in correspondence with each other, is protected from physical decay, and is recallable from multiple locations due to its stored electronic form. It might be said that these characteristics of email so differ from those of paper correspondence that the loss of these enhanced features implicates some other subtle right couched in free speech protection—the most likely being the right to choose the means of communicating in a form that retains similar protections offered by email services. If the right infringed upon by email limitations is viewed expansively as the right to select a particular means or avenue of communication, it would appear that absolutely no alternative avenue for exercising that right remains.

3. The Impact on Staff, Prisoners, and Prison Resources is Minimal, if Not Beneficial

Assessing the appropriateness of a speech restriction under the

[81] Overton v. Bazzetta, 539 U.S. 126, 135 (2003).
[82] *Id.*
[83] Mauro v. Arpaio, 188 F.3d 1054, 1061 (9th Cir. 1999).

Turner standard also requires examining the impact that accommodating the right will have on staff, prisoners, and prison resources.[84] Because of the high likelihood that even the smallest changes will have some "ramification of the liberty of others or on the use of the prison's resources," this third factor weighs most heavily when "accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates and staff."[85] Also, "the policies followed at other well-run institutions [are] relevant to a determination of the need for a particular type of restriction."[86]

As stated in regards to the first *Turner* factor, the economic effects of email systems on prison resources are actually positive. It requires less manpower to monitor than physical mail, does not necessitate physical contact with mail, and can be reviewed by computer systems. Furthermore, such systems are self-financing. Looking to the policies of another well-run institution, the universal implementation of TRULINCS by the Federal Bureau of Prisons suggests that there is no need to arbitrarily restrict access to email communications.

4. The Easy and Obvious Alternative of Implementing an Email Service Indicates That Prison Practices are Overly Restrictive

Under the fourth *Turner* factor, courts consider whether easier and obvious alternatives exist for meeting the government's interest in denying a privilege or implementing a regulation. If so, this would suggest that the prison practice might be overly restrictive. This factor should not be mistaken for a least restrictive alternative analysis. Under the *Turner* standard, prisons do not need to adopt the least restrictive alternative.[87] However, courts may consider "an alternative that fully accommodates the [asserted] rights at *de minimis* cost to valid penological interests" as evidence that the policy unreasonably infringes upon First

[84] Prison Legal News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005) (citing *Turner*, 482 U.S. at 89).
[85] *Turner*, 482 U.S. at 90.
[86] Morrison v. Hall, 261 F.3d 896, 905 (9th Cir. 2001).
[87] *See Turner*, 482 U.S. at 90–91.

Amendment rights.[88] Under the fourth *Turner* factor, the availability of easily implemented services like JPay, considered together with the success of the TRULINCS program, suggest that denying email access is unnecessarily restrictive.

The difficulty with this factor is determining what penological interests are actually advanced by restricting email communications. Fortunately, services like JPay have made installing email access in prisons a simple process. Perhaps, the theorized benefit to denying access to electronic communications is found in the simple reduction in the volume of communications that can enter and exit a prison. However, services like JPay can limit how many emails each inmate may send in a given time period. Additionally, any increase in the volume of communications might be offset by the added security benefits that accompany email services. Accordingly, the most reasonable alternative to prevent too high a volume of communications would be to limit the number of emails or letters allowed per day, but still provide access to email and postal services.

B. Failure to Provide Email Access Under the Martinez *or* Thornburgh *Standard*

If a prison practice does not satisfy the more deferential test of the *Turner* standard, it will logically fail the scrutinizing *Martinez* standard as well. Nonetheless, some prison systems offer incoming email services to inmates, but do not allow outgoing emails. For instance, in 2014, the Nevada State Prison System was using JPay email services, but only allowed those functions that provided inmates with *incoming* messages.[89] It should be noted that under the current framework for evaluating free speech rights in a prison context, prisons engaging in this practice should be subject to the more exacting scrutiny of *Martinez*. Once a prison implements email services such as JPay, and establishes that such services are available, limiting the service to incoming email should be permitted only if it furthers an important or substantial prison

[88] *Id.* at 91.
[89] *See supra* note 74.

interest and is no more restrictive than necessary to protect the particular interest involved.[90]

CONCLUSION

Serious free speech concerns arise when prisons prevent inmates from accessing email services. This is true even under the currently accepted framework for assessing First Amendment claims of inmates, despite the extreme deference shown to prison administrators. Although actions eliminating an entire means of communication should be examined under a heightened level of scrutiny (prison setting or not), the more deferential *Turner* factors still suggest that preventing inmates from accessing email systems is unreasonable. Furthermore, the practice of implementing services such as JPay for incoming email services but not outgoing services should be evaluated under the even stricter standard of *Martinez*.

In jurisdictions such as the Ninth Circuit, where courts have imposed positive obligations on prisons in a First Amendment context, the right to access communication systems such as telephones suggests that free speech protections could likewise be evolving towards inmates' right to access email services.

[90] *See* Procunier v. Martinez, 416 U.S. 396, 413 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

PRACTICE POINTERS

- Remember that separate standards typically apply to ingoing and outgoing prison correspondence.
- Keep in mind that the policy behind valid limitations on an inmate's constitutional rights is couched in the need to promote prison security, not a degradation or reduction to the constitutional rights of inmates.
- Although intermediate scrutiny typically applies to content-neutral regulations on free speech, strict scrutiny might still apply where the government completely restricts a *means* or avenue of communication rather than its time, place, or manner.