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NOTE

REACHING OUT FROM BEHIND BARS: THE CONSTITUTIONALITY OF LAWS BARRING PRISONERS FROM THE INTERNET*

This is the man who murdered my father, telling strangers that he's a nice guy! He was a meth addict who had been on drugs for a week straight before he killed my dad. Why should he and other inmates get to post their pictures and messages on the Web at all, telling people to write to them because they are lonely?¹

[A] computer is a tool which allows a prisoner freedom to function and develop irrespective of physical restrictions. To present [oneself] as a human being and a citizen in society, not reduced to an animal in a cage with a number.²

Access to the Internet is not a necessary tool for the correctional process.³

The aim of our prisons should be to release people who are able to reintegrate themselves into society.⁴

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¹ Alissa Quart, *This Man Murdered My Father*, ON MAG., Apr. 2001, at <http://www.onmagazine.com/on-mag/magazine/article/0,9985,103342-1,00.html> (last visited Oct. 28, 2001).

² [PRISONACT] *Update Prisoner Computer Access*, Oct. 6, 1999, at <http://www.prisonactivist.org/pipermail/prisonact-list/1999-October/003338.html> (last visited Oct. 28, 2001).

³ Steve Silberman, *Twice Removed: Locked Up and Barred from Net*, Dec. 3, 1997, at <http://www.wired.com/news/culture/0,1284,8854,00.html> (last visited Oct. 28, 2001).

⁴ *Id.*

INTRODUCTION

In 1995, when U.S. District Court Judge Sam Sparks sentenced Chris Lamprecht to seventy months in the Federal Correctional Institution in Bastrop, Texas for money laundering, he added a special requirement to the computer hacker's punishment—Lamprecht was forbidden any access to the Internet until 2003.⁵ At the time, *Swing* magazine dubbed Lamprecht "the first person to be officially exiled from cyberspace."⁶ If Lamprecht was, in fact, the first person ever explicitly denied access to the Internet, he was certainly not the last. Starting with an internal memo circulated within the Federal Bureau of Prisons in 1996 keeping inmates from the Internet,⁷ and continuing through to the passage of federal and state laws denying prisoners either direct or indirect access to the Web, Internet, or both,⁸ inmates' free speech rights, and often times those of outsiders, have been impeded.

Speech, regardless of the popularity of the content of the message, is one of the most valued rights in our nation.⁹ The guarantees of free speech under the First Amendment ensure that we can have an open dialogue regarding our thoughts and feelings and that we can hold our government responsible.¹⁰ Thus, the Supreme Court has long maintained that in order to "abridge First Amendment freedoms of people in the free world, the government must have a 'compelling state interest.'"¹¹ The same standards, however, are not applied in the prison environment.¹²

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See *infra* Part IV.

⁹ "The 'Constitution's most majestic guarantee' is the free speech clause of the First Amendment." MICHAEL MUSHLIN, *RIGHTS OF PRISONERS* 213 (2d ed. 1993) (citing LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §12-1, at 785 (2d ed. 1988)).

¹⁰ *Id.*

¹¹ *Id.* at 214 (citing as examples *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)). See also *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

¹² See MUSHLIN, *supra* note 9, at 213.

Incarceration is the American way of telling members of society that if they do not follow the laws of the land, punishment is the automatic response.¹³ Where incarceration is imposed as the appropriate punishment, it follows that those convicted of a crime lose certain rights until they have served the time to compensate for their actions. The Supreme Court has recognized, however, that prisoners do not lose all of their constitutional freedoms once they are placed behind bars.¹⁴ The difficulty lies in striking a balance between "the constitutional rights at issue and the legitimate institutional requirements and goals [of the penal system]."¹⁵

Likewise, the purposes of punishment are oft-debated¹⁶—whether it be retribution, rehabilitation, or deterrence. But it is undeniable that since approximately ninety percent of all inmates will one day be released,¹⁷ allowing prisoners to communicate with the outside world has important consequences:

Without such contact with society outside the prison walls, rehabilitation would be adversely affected, prison morale weakened, perhaps inviting riots and other forms of internal disorder, and the inmates' ability to readjust to the world outside the institution upon release would be markedly impaired.¹⁸

Free speech in the prison context is also important since it is the only first-hand account we have as to how the

¹³ For an elaboration on the purposes of incarceration, see James L. Esposito, Comment, *Virtual Freedom-Physical Confinement: An Analysis of Prisoner Use of the Internet*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 59-66 (2000).

¹⁴ *Turner v. Safley*, 482 U.S. 78, 84 (1987). Though the Court refused to take an aggressive approach in this case, it still recognized that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.*

¹⁵ BARBARA B. KNIGHT & STEPHEN T. EARLY, JR., *PRISONERS' RIGHTS IN AMERICA* 215 (1986).

¹⁶ For a discussion of the notions of criminal punishment and how they fit within the context of prisoners' communication rights, see *supra* note 13.

¹⁷ Michael James, *LEARNING BEHIND BARS: State program Gives Inmates a Chance to Earn College Degrees via Well-Guarded Net Connections*, BALT. SUN, Feb. 12, 2001, at 1C, available at 2001 WL 6150656.

¹⁸ KNIGHT & EARLY, *supra* note 15, at 216. A Rhode Island district judge wrote that "[l]etter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation." *Palmigiano v. Travisono*, 317 F. Supp. 776, 786 (D.R.I. 1970). See also LEONARD ORLAND, *JUSTICE, PUNISHMENT, TREATMENT* 389 (1973).

penal system is run.¹⁹ Communication also plays a vital role in an inmate's access to the courts and his relations with counsel.²⁰

Although prisoners' mail and telephone rights have already been established by case law, the advent of the Internet poses new problems for both the courts and penal systems. New regulations and laws, both federal and state, have raised interesting questions regarding whether these pieces of legislation are constitutional and whether prisoners' existing communication rights need to be altered in light of the Internet. The dilemma lies in the fact that these new pieces of legislation wish to regulate inmates' rights on the Internet, a medium that prisoners are able to reach through already established mail and phone rights. Given this, regulation of access to the Internet will probably, if not inevitably, affect prisoners' communication rights in a general manner as well as specifically as to the type of medium chosen.

Part I of this Note will discuss the current status of inmates on the Internet. Part II will briefly describe the evolution of prisoners' mail rights and the current constitutional standards of review. Part III will investigate federal initiatives to curtail inmate use of the Internet. Other federal Internet legislation and litigation will be examined in an effort to predict how the courts will deal with this issue vis à vis inmates. Part IV will explore recent state legislation, particularly in Arizona and Ohio, in order to highlight differences and to hypothesize whether these laws will pass constitutional muster. Part V will analyze a recent appellate court decision in California—the first case to confront the issues associated with prisoners' communication rights with respect to the Internet.

This Note will conclude that efforts by Congress and the legislatures of Arizona and Ohio to curtail inmate use of the Internet will confront daunting constitutional challenges. The Supreme Court's current standards of review to determine prisoners' communication rights will need to be reevaluated if these new laws are to be upheld. The federal initiative, however, is far less likely to fail a test of constitutionality than the laws passed at the state level. Given that only one case has

¹⁹ MUSHLIN, *supra* note 9, at 214.

²⁰ See KNIGHT & EARLY, *supra* note 15, at 216.

come before a court of this nation involving these issues, the recent California decision upholding a prison regulation, which prohibits sending information downloaded from the Internet to an inmate, is an interesting development.²¹ Should other courts follow suit when confronted with similar problems, it begs the question of whether prison officials should be granted such a high level of latitude in the face of both inmates' and outsiders' constitutional rights. If the Supreme Court does, in fact, change its standards of review to uphold statutes such as the one promulgated in Arizona, such a decision could allow for the regulation of speech in general.

I. PRISONERS ON THE INTERNET

Though every state bans inmates from direct access to the Internet to some extent, keeping prisoners "one step behind the digital revolution . . . still, their Web presence is substantial."²² Typing "inmates" or "prisoners" into any large search engine yields a multitude of sites.²³ Despite the lack of direct access to the Web, prisoners are able to reach the Internet through the use of the regular postal service and the help of third parties. Inmates write letters including the content of their personal ad or of their Web site, complete with desired graphics, and send them via regular mail to site designers or family members, who in turn manifest the prisoner's wishes on the Internet. Should the inmate receive email to his site, the message is simply printed and sent to the inmate, who answers by mail, sending the letter to the creator of the Web site. Whoever runs the Web page from the outside will then post the response on the Internet.

Relatives of victims have expressed outrage at the existence of such sites. Marc Klaas, father of twelve-year-old Polly Klaas killed in 1993, states that "these guys . . . have

²¹ *In re Aaron Collins*, 104 Cal. Rptr. 2d 108 (Cal. Ct. App. 2001).

²² Michelle Locke, *Prison Inmates Find Their Way Onto Web Despite Restrictions*, MORNING NEWS TRIB. (Tacoma, Washington), Oct. 4, 2000, at D1, available at 2000 WL 5338633 [hereinafter Locke I].

²³ Search engines such as <http://www.yahoo.com> and <http://www.excite.com> are usually the most effective. Some of the Web pages that come up when you type in "prisoners" or "inmates" include <http://www.prisonpenpals.org>, <http://www.meet-an-inmate.com>, and <http://www.prisonactivist.org> (last visited Jan. 15, 2001).

been taken out of society because we're trying to deny them access and influence."²⁴ Victim sympathizers assert that since not every home, school, or business in the United States has access to the Internet,²⁵ the fight to give such a luxury to prisoners seems ridiculous. In contrast, inmates and their advocates argue that contact with the outside world and access to educational resources and practical technical skills are extremely important given that most prisoners will reenter society at some point in the future.

In the state of Washington, inmate Paul Wright has edited *Prison Legal News* for the past ten years.²⁶ This publication offers a medium for interested outsiders to find out about prison-related news from the inside.²⁷ In April 1998, a Web site was established to extend the newsletter's reader base, but the publication is still circulated predominantly through regular mail and Wright has never seen the Web page.²⁸ Wright has analogized prisoner access to the Internet to "sitting beside the information superhighway watching the traffic go by."²⁹ He likens the fight for inmate Internet access to the fight waged years ago regarding the issue of prisoner telephone use.³⁰ Wright contends that such access is important: "Having contact with the outside world . . . gives us a human face as opposed to the caricature that dominates the media

²⁴ Locke I, *supra* note 22. Many prisoner pleas for companionship and help are met with little sympathy. Martin Draughon, a man currently on Texas' death row for killing a bystander during a robbery, has a Web site maintained with the help of a Danish man opposed to the death penalty. A visitor to the site once wrote: "The whole world is out here. Today I ate at MacDonald's, I saw pretty women, even got laid last night. But you are never going to see a MacDonald's again, and will only get laid in your imagination. All of the suffering is because of your ACTIONS." Jennifer Gonnerman, *Prisoner Uses Web Site to Communicate With the Outside World*, May 17, 2000, at <http://www.cnn.com/2000/TECH/computing/05/17/prison.web.idg/> (last visited Oct. 28, 2001) (emphasis in original).

²⁵ For example, Hispanics and African-Americans are only forty percent as likely as whites to have Internet access in the home. See Jeremy Pelofsky, *FCC Head: Net Access a "Civil Rights" Issue*, REUTERS, May 13, 2000, at <http://www.zdnet.com/zdnn/stories/news/0,4586,2569305,00.html> (last visited Jan. 15, 2001). In addition, "one survey showed that fewer than 5 percent of towns of 10,000 people or less have cable modem services while more than 65 percent of all cities with populations over 250,000 have such a service." *Id.*

²⁶ Locke I, *supra* note 22.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

image.”³¹ Like other states, Washington prohibits direct access to the Internet, forcing inmates to look to third parties to post their material online.³²

In Cameron, Missouri, a widowed mother named Rene Mulkey operates a Web site, www.cyberspace-inmates.com,³³ that allows prisoners, for a monthly fee of \$10, to place personal ads and seek pen pals on the Internet.³⁴ Inmates pen alluring ads, leaving out important negative details,³⁵ and then mail the information to Ms. Mulkey to post on the net.³⁶ The loneliness and isolation associated with incarceration inspire

³¹ Locke I, *supra* note 22.

³² *Id.*

³³ There are numerous other Web sites that provide similar services to those found on [cyberspace-inmates.com](http://www.cyberspace-inmates.com). For example, on www.jailbabes.com, twenty-three-year-old Senia, who is expected to be released from prison on July 30, 2004, is looking for “one good man to spoil and pamper one fiercely independent, daring, mischievous, sexy, wild, caged kitty who is in need of love and attention from a generous, educated, quick-witted gentleman. He must know how to make this kitty purr by stroking her not just sexually but mentally, physically and financially.” Jail Babes, at <http://www.jailbabes.com> (last visited Jan. 13, 2001). On www.outlawsonline.com, Kayle Bates, currently on death row, writes of how he wants a “true and caring woman.” Most Wanted Outlaws Online, at <http://www.outlawsonline.com> (last visited Jan. 13, 2001). He even includes a poem to describe the kind of relationship he and that special lady could have:

A Friend . . . A confidante, sharing deep dark secrets, we wouldn't tell but only to each other . . . Baring the soul to relieve us from anxieties and guilt, building a strong trust . . . reaching out across time and space . . . drawing the other into our mind . . . using a ‘special power’ that would make others cower. Never letting another soul enter that special space in our heart that we hold for each other . . . Leaning on each other, coming through when things are down . . . sharing the ‘Good Times’ too and being a true friend, Is loyalty. [sic] Without the signing of a contract.

Id. See also <http://www.prisonpenpals.org> (last visited Jan. 15, 2001); *supra* note 23 and accompanying text.

³⁴ Jeanette White, *Pen Pals: Prisoners Use the Internet to Trawl for Female Friends—and Perhaps Their Money*, SPOKESMAN REV. (Spokane, Washington), Sept. 10, 2000, at F1, available at 2000 WL 22735000. Similar services have opted instead to charge outsiders for the ability to attain the inmate’s mailing address. *Id.*

³⁵ In San Quentin, death row inmate Morris Solomon writes that he is “‘romantic, and loves to meet people,’” but fails to add that he has murdered six women. Locke I, *supra* note 21, at D1. Susan Fisher of a Sacramento-based Doris Tate Crime Victims Bureau: “‘I don’t necessarily think this is a First Amendment issue. I think that this is a truth-in-advertising issue.’” *Id.* Some sites such as www.penpals.com now mandate that inmates using their services disclose the nature of the crime of which they were convicted. Ian Ith, *Killers Fishing Online for Pen Pals: “I Miss Talking With Women . . . I Miss Smelling Perfume,”* SEATTLE TIMES, May 11, 2001, at B1, available at 2001 WL 3508717.

³⁶ White, *supra* note 34, at F1.

these prisoners to seek companionship and romance. Victims' rights advocates respond to these ads with horror.³⁷ In addition, there is concern that many outsiders are made vulnerable to the coaxing of the inmates to provide money, sex, or cigarettes in addition to the occasional friendly letter.³⁸

Some prisons have implemented sanctions for situations in which prisoners deceive outsiders to send money, but no such penalties are available for lying about one's personal or physical characteristics.³⁹ Upon discovering that inmates were using Web sites to get men to send them money, one private women's facility in Oklahoma started issuing "misconducts," which can result in a prisoner doing more time.⁴⁰ These sanctions are in accordance with a policy adopted by the Oklahoma Department of Corrections, which prohibits both direct and indirect access to the Internet for inmates.⁴¹ Even with policies as those adopted in Oklahoma, enforcement is difficult and inmates still find their way onto the Internet.

³⁷ Susan Fisher of a Sacramento-based Doris Tate Crime Victims Bureau: "For them to have access to the general public is outrageous." Locke I, *supra* note 22, at D1.

³⁸ *Id.* Even before the Internet, inmates were successful at coercing pen pals into sending them money, so the concern lies in the fact that with ads being posted on the net, the number of potential victims rises exponentially. *Id.* For example, Frankie Cruz, an inmate in Canon City, Colorado, uses the Internet not only to talk freely about prison life, but also to make money: "In here on the inside it's a whole new ball game, stuff goes on in here you would not believe, stuff you's [sic] never hear about out therein [sic] respectful society . . . If you would like to be schooled on one of the following issues or all three issues, 'Jailhouse Politics,' 'Drugs in Prison,' or 'Gang Rapes,' I'll run it down to you from experience, in details." Rhonda Cook, *Prisoners of Love are Waiting For You: Inmates Online Seek Cybermates*, ATLANTA J. CONST., May 11, 1997, at G04, available at <http://www.ou.edu/oupd/inmate.htm> (last visited Oct. 28, 2001). Cruz asks interested parties for \$40 for an explanation of one issue, or \$100 for all three issues. *Id.* Prison administrators are disheartened by the fact that "the Internet has allowed prisoners to have soapboxes and to prey on the innocent and softhearted." Dirk Johnson, *Prison Inmates' Use of Web Kindles Debate on Free Speech*, CHICAGO TRIBUNE, Sept. 11, 2000, at 8, available at 2000 WL 3707353.

³⁹ White, *supra* note 34 (explaining that at the Walla Walla State Penitentiary such infractions include more cell time).

⁴⁰ Barbara Hoberock, *Prison Cracks Down on Web Scams*, TULSA WORLD, May 29, 2001, at 4, available at 2001 WL 6929884.

⁴¹ *Id.* While the policy enforced in the private prison denies inmates even indirect access to the Internet for the purposes of "purchasing items through the Internet, [or] subscribing to any services offered including any personal advertising or electronic mail," the warden acknowledges that "the correspondence is not the issue You can become a pen pal through an ad in the back of magazines. The issue is the misrepresentation and the receiving of huge sums of money from these guys who don't have that kind of money and under false pretenses." *Id.*

Despite the distaste and anger that many victims have expressed,⁴² regulation of such inmate writings proves to be difficult given the differing standards of review used by the Supreme Court regarding prisoners' communication rights.⁴³

The Internet has also become a medium for publishing written works and other artistic creations.⁴⁴ Very often, inmates have used the Internet not only to look for pen pals⁴⁵ and counsel,⁴⁶ but also as a way to convey the inner workings of the American prison system or to tell their stories in order to garner support from the outside.⁴⁷ Others write of their personal growth⁴⁸ while incarcerated or share their creative writing or art work.⁴⁹

Presumably, regulation of these types of writings would be subject to the test⁵⁰ associated with outgoing correspondence and expression intended for a civilian audience. It follows that,

⁴² Jennifer Johnson Lopez [now Jennifer Martinez] is the daughter of the deceased musician Roy Johnson, the victim of Arizona inmate Beau Greene's brutal beating. When she discovered that the prisoner had a Web site asking for pen pals, Ms. Lopez was "disgusted . . . He said he missed companionship. I thought, 'Serves you right.'" Johnson, *supra* note 38, at 8. Victims are not the only ones, however, who are disturbed by the presence of inmates on the net. True-crime novelist, Ann Rule, was appalled when she discovered an ad on the Internet describing a serial killer who had been the subject of one of her works. Jerry Brudos, a resident of the Oregon State Penitentiary, advertised for a "special lady." Ms. Rule tried to take action by calling both the prosecutor's office and prison officials, but was informed that there was nothing she could do. White, *supra* note 34.

⁴³ See *infra* Part II.

⁴⁴ See, e.g., <http://dunelm.freeyellow.com/books.html> (last visited Jan. 6, 2001).

⁴⁵ See Esposito, *supra* note 13, at 46-47.

⁴⁶ See *id.* at 44-46.

⁴⁷ Inmates are not prohibited from drafting books and manuscripts as long as such creative endeavors do not conflict with prison work duties. With respect to the federal prison system, see 28 C.F.R. § 551.81.

⁴⁸ In San Quentin, Jarvis Masters, incarcerated for armed robbery and then sentenced to death for the murder of a guard, writes about meditation and being a Buddhist. Michelle Locke, *Inmates Use Internet as Lifeline Beyond the Walls*, L.A. TIMES, Oct. 15, 2000, at B1, available at 2000 WL 25907355 [hereinafter Locke II].

⁴⁹ Also in San Quentin, thanks to a Canadian Web page sponsored by an anti-death penalty group, Richard Allen Davis, a death row inmate, exhibits photographs of his artwork. *Id.*

⁵⁰ Discussed *infra* Part II. The *Martinez* test is applied in situations where mail leaves the prison's gates and is meant for a civilian audience. The test requires that in these situations, courts must apply an intermediate level of scrutiny to see if the regulation is closely related to the penological interest claimed. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) [hereinafter *Martinez*]. This test is utilized because these situations implicate the First Amendment rights of outsiders, and because the threat of outgoing mail to prison security is far more tenuous than the threat posed by mail that enters the institution. See *id.* at 416.

according to the constitutional standard applied by the courts in these situations, there is a direct conflict between the current standards of review regarding inmate mail and the movement to suppress prisoner expression on the Internet. Since inmates reach the Web via written correspondence, efforts to curtail prisoner expression that involve writing and contact with outsiders are antagonistic to the Supreme Court's distinction between incoming and outgoing mail. The standards of review for prisoners' communication rights are already established.⁵¹ If the Court does in fact reconsider and alter the standard of review for outgoing mail so that these new statutes can be upheld, the tenets of the First Amendment will be compromised in a manner that makes the future for freedom of expression uncertain, not only for prisoners, but also for those not incarcerated.

Interestingly, while some states are passing legislation to keep inmates offline, other states are working hard to make access to the Internet a reality for certain qualified prisoners. Maryland is at the forefront of this movement. At Patuxent Institution, a maximum-security prison, twenty-three offenders are preparing to earn a college degree via the Internet while incarcerated.⁵² The focus is on rehabilitation and treatment. Students will "submit . . . assignments by computer, e-mail . . . [to] professors and complete . . . homework with information found on the World Wide Web."⁵³ Technicians have been brought into the facility to ensure that internal security is not breached in any manner. Students enrolled in the program will only be introduced to a closed universe with a controlled connection.⁵⁴ The connection allows for information to be sent and received long after the students have left the terminals for the day.⁵⁵ When they return, the data they require will be on their computer, but no connection to the outside world can be established at that point in time.⁵⁶

⁵¹ See *infra* Part II.

⁵² James, *supra* note 17.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

States such as California, Pennsylvania, Ohio, Indiana, North Carolina, Colorado, and Idaho have expressed interest in the results of the pilot program in Maryland.⁵⁷ It is possible that educational programs such as this one may spread throughout the country, competing with the interest in denying prisoners any access to the Internet. Proponents of the Internet-based educational program argue that it is relatively inexpensive compared with other training alternatives.⁵⁸ In addition, prison officials are beginning to recognize that "computer and technical skills are important for inmates, most of whom will eventually earn parole or finish their sentences . . . [C]onvicts locked up for years without contact with the digital world emerge from prison with a severe technical handicap."⁵⁹ In fact, in the near future, "some prison officials and tech company executives expect convicts will be surfing the Web to start job searches before their releases, exchanging e-mail with teachers of online courses, even sharing virtual classroom space with non-incarcerated students."⁶⁰

Some institution officials are beginning to realize the role that the Internet has come to play in society and are afraid they might be irresponsible if they allow inmates back into the world without the necessary skills. Conversely, other prison officials and legislators are fearful of the message sent to society every time a member of the public comes across an inmate's Web page on the Internet. This latter group has lobbied and passed legislation denying prisoners any Internet access to prisoners whether direct or indirect.⁶¹ The language chosen to explain the content of each of these pieces of legislation may be the determinative factor in deciding

⁵⁷ James, *supra* note 17. Ohio's interest in the program is somewhat surprising considering the law its legislature has passed regarding inmate Internet access; however, the law does allow for access for certain educational ventures. See *infra* Part IV. California's interest in the Maryland project is far more interesting given a recent appellate court decision prohibiting any material printed off of, or originating on, the Internet from entering the institution. Perhaps prison officials would consider an education exception. See *infra* Part V.

⁵⁸ James, *supra* note 17.

⁵⁹ *Id.*

⁶⁰ Damien Cave, *Jailhouse Net: Inmates With E-Mail? It Could Happen at Some State Prisons Experimenting With Technology Behind Bars*, July 13, 2000, at <http://www.salon.com/tech/feature/2000/07/13/prison/print.html> (last visited Oct. 28, 2001).

⁶¹ See *infra* Parts III and IV.

whether these laws will be deemed constitutional. An understanding of the standards adopted by the Supreme Court over the years in the arena of prisoners' communication rights is imperative in order to attempt to predict the life span of these laws.

II. THE EVOLUTION OF PRISONERS' COMMUNICATION RIGHTS⁶²

The treatment of prisoners' free speech rights has undergone some important changes over time, the results of which may now need to be reconsidered in light of the pervasiveness of the Internet, its far-reaching capabilities, and the effect the Web will have on the future of freedom of expression rights in general. Initially, courts adopted a very "hands off" approach, deferring to the expertise of corrections and penal personnel with respect to prisoner communication.⁶³ The judiciary contended that these bodies were best able to determine their own needs with regard to prison administration and internal security.⁶⁴

Prison officials have explained that limitations on inmates' freedom of speech are necessary in order to be able to maintain peaceful and secure conditions within the institution.⁶⁵ In addition, officials warn that mail is an easy way for prisoners to receive contraband, plan escapes or other disruptive behavior, and gain exposure to ideas or information that prison administrators would prefer to keep from inmates.⁶⁶ Finally, operators of correctional facilities have made administrative arguments that point to procedural problems when the influx of incoming and outgoing mail reaches proportions that are deemed too large.⁶⁷ Some of these

⁶² For a helpful elaboration and explanation of prisoners' mail rights through case law and constitutional standards of review, see Jennifer A. Manetta, Note, *The Proper Approach to Prison Mail Regulations: Standards of Review*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 209 (1998).

⁶³ See e.g., *McClosky v. Maryland*, 337 F.2d 72, 74-75 (4th Cir. 1964) ("Control of the mail to and from inmates is an essential adjunct of prison administration"). See also Manetta, *supra* note 62, at 214.

⁶⁴ KNIGHT & EARLY, *supra* note 15, at 215.

⁶⁵ MUSHLIN, *supra* note 9, at 215.

⁶⁶ *Id.* See also, KNIGHT & EARLY, *supra* note 15, at 216.

⁶⁷ *Id.*

propositions, however, become less convincing when it is considered that telephone calls and prison visits, arguably an easier manner in which to plot escapes and other such problematic scenarios, are not always monitored.⁶⁸ Nonetheless, the exchange of written correspondence is far more frequent than these communication alternatives, making regulation of the mail an important issue. However, though inmate correspondence does pose some admitted dangers to the internal security of the prison environment, such threats should not be overstated so as to freeze inmates' First Amendment rights entirely. Such an exaggerated conclusion could begin a movement to regulate freedom of expression rights in general.

Despite the previous trend to leave rules regarding prisoner correspondence to the expertise of prison officials, courts have recently become more active in determining inmates' communication rights.⁶⁹ Three main cases illustrate this progression: *Procunier v. Martinez*,⁷⁰ *Turner v. Safley*,⁷¹ and *Thornburgh v. Abbott*.⁷²

A. *Procunier v. Martinez*

In 1974, the Supreme Court had the opportunity to issue a broad ruling on prisoners' communication rights, but it opted to decide this case, challenging mail censorship rules in California state prisons, on narrower grounds. The rules in question allowed prison officials to open and read all personal incoming and outgoing mail.⁷³ Mail that was considered to "unduly complain" or "magnify grievances," along with any correspondence that expressed "inflammatory political, racial, (or) religious" views or was "lewd, obscene or defamatory," could be censored.⁷⁴ Here, the First Amendment rights of

⁶⁸ Title III, Omnibus Crime Control Act protects prisoners from having their telephone conversations overheard by a prison official using an extension phone, thereby protecting an inmate's right to privacy. *KNIGHT & EARLY*, *supra* note 15, at 294 (citing 18 U.S.C. §§ 2510-2520).

⁶⁹ *KNIGHT & EARLY*, *supra* note 15, at 215.

⁷⁰ 416 U.S. 396 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

⁷¹ 482 U.S. 78 (1987).

⁷² 490 U.S. 401 (1989).

⁷³ *MUSHLIN*, *supra* note 9, at 216.

⁷⁴ *Martinez*, 416 U.S. at 399-400.

prisoners were directly implicated, but the Court shied away from that issue, focusing instead on the freedom of speech ramifications for those in the free world attempting to correspond with inmates.

The Court, forced to resolve the conflict between the rights of those not incarcerated to communicate with those behind bars, and the interests of those trying to control the prison environment, decided to compromise. First Amendment rights are generally subject to a heightened level of scrutiny,⁷⁵ whereas prisoners' communication rights traditionally have been subjected to the lowest level of scrutiny—a simple showing that the rule bears a rational relation to a penological interest.⁷⁶ The Supreme Court ordered that in these situations, where the free speech rights of outsiders are involved, courts should implement a mid-level standard of review.⁷⁷ A two-part test was created: "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."⁷⁸

Using this test, the Court held that the California prison rules were unconstitutional since there was no proven connection between inmate-outsider correspondence and threats to prison security.⁷⁹ The Court also reasoned that the rules were overinclusive because they included material that did not jeopardize institutional interests.⁸⁰ The significance of this decision lies in the fact that the Court took some power away from prison officials to determine inmates' communication rights. Given the *Martinez* decision, "inmates (could) now claim a right to send and to receive mail, not simply a privilege granted them by prison officials at their discretion."⁸¹ *Martinez* did not represent, however, a true victory for inmates and their advocates. Rather than decide prisoners' free speech rights, the Court basically reiterated its

⁷⁵ See *KNIGHT & EARLY*, *supra* note 15, at 215.

⁷⁶ *Turner*, 482 U.S. at 89.

⁷⁷ *Martinez*, 416 U.S. at 413.

⁷⁸ *Id.*

⁷⁹ *Id.* at 416.

⁸⁰ *Id.*

⁸¹ *KNIGHT & EARLY*, *supra* note 15, at 216.

position on the rights of outsiders. By doing this, the Court gave little guidance as to how to protect inmates' First Amendment guarantees in other situations.

In *Bell v. Wolfish*,⁸² the Supreme Court was once again confronted with the issue of prisoners' freedom of expression rights. Pretrial detainees challenged numerous regulations in a federally operated short-term custodial facility in New York City,⁸³ including the facility regulation regarding receipt of reading material, as violative of the detainees' First Amendment rights.⁸⁴ The "publisher-only" rule allowed hardcover books into the facility only if they had been sent directly from the publisher, a book club, or a bookstore.⁸⁵ Justice Rehnquist, writing for the Court, held that such a regulation did not violate the First Amendment.⁸⁶ The fact that contraband could be easily transported inside the institution via a hardcover book was a sufficient showing that there was a rational state interest.⁸⁷

Even though the rights of outsiders were involved to the extent that no one besides those designated by the rule could send a detainee hard bound reading material, the Court failed to even mention the *Martinez* decision. Since there were alternative means to get the books,⁸⁸ and since the threat posed to the facility was legitimate,⁸⁹ the Court saw no problem with upholding the regulation. Though the decision in *Bell* is understandable, since books are an easy way to smuggle escape plans and contraband, it exhibits the importance of the fact that the Supreme Court did not take the opportunity to rule on the larger issues in *Martinez*.⁹⁰ The Court in *Martinez* failed to address prisoners' communication rights, and by doing so, left inmates with almost no avenues of relief when prison officials

⁸² 441 U.S. 520 (1979).

⁸³ *Id.* at 523.

⁸⁴ *See id.* at 527.

⁸⁵ *Id.* at 550.

⁸⁶ *Id.*

⁸⁷ *Bell*, 441 U.S. at 551.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ After *Martinez*, but prior to *Bell*, the Supreme Court again backed away from deciding prisoners' communication rights when it upheld a prison regulation that allowed officials to refuse to deliver bulk packets of union literature to specific inmates for distribution to others. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

impeded on their First Amendment rights. This was highlighted when the issue of prisoners' mail rights came before the Supreme Court again in 1987.

B. *Turner v. Safley*

One of the prison rules challenged in *Turner* involved a ban on correspondence between prisoners within the Missouri State penal system.⁹¹ The lower court declared that this rule was unconstitutional, but the Supreme Court reversed in a 5-4 decision.⁹² The Court found that the application of the *Martinez* test would be erroneous in this situation where only the speech rights of inmates were implicated.⁹³

The *Turner* decision reflects a step back towards the "hands off"⁹⁴ approach. The Court noted that the judicial branch of government lacked the "expertise" necessary to make such decisions.⁹⁵ In addition, the Court stated that using the *Martinez* test in this instance would be problematic in that it would "seriously hamper [prison officers'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."⁹⁶ It would also place courts as the rulers of prison operations, a role relegated to the executive and legislative branches of government, thereby having serious ramifications for the tenets regarding separation of powers.⁹⁷ Confronted with the *Turner* regulation that solely implicated prisoners' free speech rights, the Court once again backed away.

The Court created a four-part test, utilizing the rational relation standard of review, to be implemented in situations that solely involve prisoners' mail rights: (1) the prison regulation must be rationally related to a legitimate governmental interest; (2) the existence of alternative means of

⁹¹ *Turner*, 482 U.S. at 81. The ability to correspond with other prisoners regarding legal issues was still allowed, as was correspondence that received staff permission, but since these were such rarities, the rule operated as a practical ban. *Id.* at 81-82.

⁹² MUSHLIN, *supra* note 9, at 218.

⁹³ *Turner*, 482 U.S. at 87-88.

⁹⁴ See Manetta, *supra* note 62, at 214.

⁹⁵ *Turner*, 482 U.S. at 85.

⁹⁶ *Id.* at 89.

⁹⁷ MUSHLIN, *supra* note 9, at 218.

exercising the right must be examined; (3) the burden that accommodating the prisoner's rights places on the institution should be taken into account; and (4) the lack of alternatives available to prison administrators must be recognized.⁹⁸ Based on this test, the Court found the Missouri rule constitutional since it was "reasonably related to legitimate security interests."⁹⁹

This decision emphasized the Court's stand that it will defer to the abilities of prison officials to determine the policies necessary to maintain institutional security when the free speech rights of outsiders are not being threatened. The *Turner* decision also seems to indicate that the Court is more concerned with the First Amendment rights of outsiders than those of inmates. The major difference between *Martinez* and *Turner* is that in the former the rights of outsiders were implicated, therefore imposing a far greater burden of proof upon prison administrators to regulate inmates' communication rights.¹⁰⁰ Only two years later, however, the Court would offer new distinctions in the arena of prisoners' mail rights.

C. *Thornburgh v. Abbott*

The claims in *Thornburgh* concerned the rules established by the Federal Bureau of Prisons regarding the censorship of incoming publications. The rule allowed the warden to reject publications that, in his opinion, were "detrimental to the security, good order, or discipline of the institution, or . . . [that] might facilitate criminal activity."¹⁰¹ Prisoners could challenge the decision of the warden within the prison system,¹⁰² and the regulation had safeguards in place to prevent the warden from censoring "a publication solely because its content [was] religious, philosophical, political, social, or sexual, or because its content [was] unpopular or repugnant."¹⁰³ The Federal Bureau of Prisons rule also allowed

⁹⁸ *Turner*, 482 U.S. at 89-90 (citations omitted).

⁹⁹ *Id.* at 91.

¹⁰⁰ MUSHLIN, *supra* note 9, at 220.

¹⁰¹ *Thornburgh*, 490 U.S. at 404 (citing 28 C.F.R. § 540.71(b)).

¹⁰² *Id.* at 406.

¹⁰³ *Id.* at 405 (citing 28 C.F.R. § 540.71(b)).

for complete censorship of a publication if any one of its parts was found worthy of being banned.¹⁰⁴

The United States Court of Appeals for the District of Columbia Circuit, applying the *Martinez* test, found that the rules failed the test and were therefore unconstitutional.¹⁰⁵ It explained that the *Martinez* test was appropriate in this case because outsiders, such as publishers and authors, were having their free speech rights curtailed.¹⁰⁶ In a 6-3 decision, however, the Supreme Court reversed, stating that the *Turner* test governed this case, and that under that standard, the rules passed constitutional muster.¹⁰⁷

Justice Blackmun, writing for the Court, offered two reasons to explain why the *Martinez* decision did not apply. First, Justice Blackmun stated that since *Martinez*, lower courts had been applying strict scrutiny to free speech in the prison context erroneously, given that such application does not properly accord "sufficient sensitivity to the need for discretion in meeting legitimate prison needs."¹⁰⁸ Second, Justice Blackmun made a significant distinction between incoming and outgoing mail. *Martinez*, he argued, must only be used in situations where mail from prisoners to outsiders is involved.¹⁰⁹ His rationale was that incoming mail poses greater threats to prison security than does outgoing mail, thereby making it necessary to give prison officials greater latitude to make decisions about incoming mail.¹¹⁰

Justice Stevens, in his dissenting opinion, accused the Court of engaging in "a headlong rush to strip inmates of all but a vestige of free communication with the world beyond the prison gate."¹¹¹ Justice Stevens argued that the Court had changed the meaning of *Martinez* by confusing the distinction between the free speech rights of outsiders and inmates with the distinction between incoming and outgoing mail.¹¹² This

¹⁰⁴ See 28 C.F.R. § 540.71(b) (1988).

¹⁰⁵ *Abbott v. Meese*, 824 F.2d 1166 (D.C. Cir. 1987).

¹⁰⁶ *Id.* at 1170-71.

¹⁰⁷ *Thornburgh*, 490 U.S. at 404. The Court did remand though with respect to the issue of whether the rules had been constitutionally applied. *Id.*

¹⁰⁸ *Id.* at 410 (citing *Turner*, 482 U.S. at 89-90).

¹⁰⁹ See *id.* at 412.

¹¹⁰ *Id.* at 411-12.

¹¹¹ *Thornburgh*, 490 U.S. at 422.

¹¹² *Id.* at 424.

distinction made by Justice Stevens becomes particularly important when discussing prisoners' rights to communicate via the Internet.

To date, *Thornburgh* is the Court's final say on prisoners' communication rights.¹¹³ As such, there are currently differing standards of review regarding mail that enters the institution and that which exits the prison's gates. This rule of law could prove to be problematic given the new legislation, especially at the state level, that regulates prisoners' access to the Internet. Whether or not inmates are allotted direct access to the Internet via educational or work programs,¹¹⁴ many prisoners gain access to electronic communication via regular "snail mail."¹¹⁵ If a prisoner can currently write a letter and send it out of the facility, and yet that same prisoner is prohibited from accessing the Internet by writing a simple letter, there is a conflict between existing inmate rights and the legislation attempting to curtail them. The federal legislation that has been passed so far has a good chance of passing constitutional muster. In contrast, in states, such as Arizona, where inmate Internet access is prohibited on virtually all levels,¹¹⁶ the implementation of such laws could prove to be problematic given the existing discrepancy between

¹¹³ In 2001, the Supreme Court was once again confronted with issues of prisoners' communication rights. *Shaw v. Murphy*, 532 U.S. 223 (2001). In *Shaw*, Kevin Murphy was incarcerated at Montana State Prison. *Id.* at 255. While serving his prison term, he was an "inmate law clerk," providing legal assistance to fellow inmates. *Id.* After hearing that a prisoner he knew was being accused of assaulting a corrections officer, Murphy wrote a letter to the inmate in question, advising him of what his course of action should be and informing him that Murphy was more than willing to help with the case. *Id.* Prison officials during the course of the regular screening process intercepted the letter. *Id.* at 226. Murphy was disciplined for violating "rules prohibiting insolence [and] interference with due process hearings." *Shaw*, 532 U.S. at 266. Murphy sued for injunctive and declaratory relief based on the theory that prisoners have a First Amendment right to provide legal assistance to fellow inmates. *Id.* Justice Thomas, writing for the Court, applied the standards enunciated in *Turner* and found there to be "no such special right." *Id.* at 228.

¹¹⁴ See *infra* Parts III and IV for further elaboration of these programs and their implications.

¹¹⁵ The term "snail mail" refers to the regular postal service, which is slower than e-mail. http://www.whatis.com/WhatIs_Search_Results_Exact/1,282033,,00.html?query=snail+mail (last visited Nov. 20, 2000). For a discussion of this process, see *infra* Parts III and IV.

¹¹⁶ See *infra* Part IV for an in depth discussion of the recent Arizona legislation.

the standard used for incoming mail and that which is used for outgoing correspondence.

III. FEDERAL INITIATIVES

The Internet has raised numerous problems regarding First Amendment rights. One such issue revolves around the existence of pornography on the Web. The Internet gives people who post information and pictures a worldwide audience, the equivalent of which was not previously available by other means.¹¹⁷ Congress has taken various initiatives to regulate content on the Internet,¹¹⁸ especially when such regulation aids in the protection of children.¹¹⁹ Specifically, with respect to prisoners and the Internet, Congress passed an amendment entitled Stop the Trafficking of Child Pornography in Prison Act of 1998 ("STOPP")¹²⁰ in an effort to curtail federal inmates' access to the Internet. Despite the differing standards of review, STOPP will likely be upheld because it was narrowly written to protect a particular governmental interest. In fact, looking to other Congressional acts regarding more general Internet regulation that have been deemed unconstitutional, STOPP's language makes concerted efforts to avoid First Amendment problems.¹²¹

On April 30, 1998, Representative Bill McCollum, (R-Fla.), presented the Protection of Children From Sexual Predators Act of 1998¹²² to protect the young citizens of America from being lured by "Cyber-predators."¹²³ Just days

¹¹⁷ See *supra* note 38 and accompanying text.

¹¹⁸ See, e.g., Telegraphs, Telephones, and Radiotelegraphs provisions, Pub. L. No. 104-104, Title I, § 104, 110 Stat. 86 (1996) (amending 47 U.S.C.A. § 151).

¹¹⁹ See, e.g., Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, Title IV, § 401, 114 Stat. 476 (2000).

¹²⁰ H.R. 3729, 105th Cong. (1998) (codified as amended at 18 U.S.C. § 4042 (1998)) [hereinafter STOPP].

¹²¹ See *infra* notes 126-75 and accompanying text.

¹²² Pub. L. No. 105-314 (H.R. 3494), 112 Stat. 2974-92 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter the Protection of Children From Sexual Predators Act of 1998].

¹²³ H.R. REP. NO. 105-557, at 11 (1998); see also Child Protection & Sexual Predator Punishment Act, 1998: *Hearings on H.R. 3494 Before the Subcomm. on The Child Protection and Sexual Predator Punishment Act*, 105th Cong. 314 (1998) (opening statement of Bill McCollum, Subcommittee Chairman) (transcript available at 1998 WL 11517121).

before, on April 23, Congresswoman Deborah Pryce, (R-Ohio), had introduced STOPP as an amendment to Congressman McCollum's bill, prohibiting¹²⁴ any "agency, officer, or employee of the United States...[from providing] any financial assistance to[] any Federal program or Federal activity in which a Federal prisoner is allowed access to any electronic communication service or remote computing service without the supervision of an official of the Federal Government."¹²⁵

STOPP was drafted as a response to a 1996 case in Minnesota involving inmate George Chamberlain.¹²⁶ Chamberlain, incarcerated with a twenty three-year sentence for criminal sexual conduct, had earned admission into a prison-based education and work program that allowed him to work for Insight, Inc. while behind bars.¹²⁷ His access to the Internet, which was required in order for him to do his job, was unsupervised, and Chamberlain used the unfettered time to download over 280 pictures of child pornography.¹²⁸ As a result, he was found guilty of violating 18 U.S.C. § 371 (conspiracy against the United States) and 18 U.S.C. § 2252(a)(4)(B) (possession of material involving sexual exploitation of minors obtained by computers) and was sentenced to an additional eighty-seven months.¹²⁹

Though STOPP may be considered an important piece of legislation, especially in light of the above case, it does not provide for much bite. The bill does not in any way hamper or even mention inmate access to the Internet via third parties, and in fact only impedes direct access to the extent that Internet use must be properly supervised. The government interest is clear—no repeat Chamberlain performances—and the bill is sufficiently narrow to withstand constitutional challenges based on vagueness or overbreadth. The language of STOPP, and the bill of which it is a part, will save it from the

¹²⁴ Esposito, *supra* note 13, at 52.

¹²⁵ *Id.* at 52-53 (citing to § 801 of the Protection of Children From Sexual Predators Act of 1998).

¹²⁶ *United States v. Chamberlain*, 163 F.3d 499 (8th Cir. 1999).

¹²⁷ *Id.* at 501.

¹²⁸ Esposito, *supra* note 13, at 52-53.

¹²⁹ *Chamberlain*, 163 F.3d at 501. *See also* § 802(a)(1)-(5) of the Protection of Children From Sexual Predators Act of 1998 (findings of Congress regarding the *Chamberlain* case).

fate that other pieces of legislation regarding Internet regulation have met.

Congress has endeavored to regulate the Internet. Not all of its attempts, however, have been successful. Most notably, the Supreme Court decision that the Computer Decency Act of 1996 is unconstitutional¹³⁰ alerted Congress that its legislation would have to be written carefully. The Computer Decency Act ("CDA") was passed as Title V of the Telecommunications Act of 1996.¹³¹ Though the main focus of the law was to promote competition in the arena of telecommunications, the CDA was directed at eradicating the use of telecommunications as a medium to convey obscene and harassing speech.¹³² Under 47 U.S.C. § 223 (a) and (d), a person could be fined or imprisoned for up to two years for using a telecommunications device or the Internet in order to transmit anything that could be viewed by anyone under the age of eighteen¹³³ that is either "obscene,"¹³⁴ "indecent,"¹³⁵ or "patently offensive as measured by contemporary community standards."¹³⁶ The day the CDA was signed by Congress, numerous plaintiffs, led by the American Civil Liberties Union ("ACLU"), requested an injunction to keep the government from enforcing the Internet-related provisions of the CDA.¹³⁷ Among the plaintiffs were organizations that had posted information online regarding prison rape, which, though it was meant to be educational and informative, could be considered "patently offensive" in certain communities.¹³⁸ The CDA allowed both creators of the Web pages, as well as the Internet service providers, to be held liable.¹³⁹ In addition, violators of the CDA did not need to know specifically that a minor would

¹³⁰ *Reno v. ACLU*, 521 U.S. 844 (1997) [hereinafter *Reno II*].

¹³¹ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. (1996)).

¹³² See Communications Decency Act § 502 (amending 47 U.S.C. § 223 (1996)). For a helpful discussion of the Telecommunications Act of 1996, the Communications Decency Act amendment, and the litigation that followed their passage by Congress, see John McGuire, Comment, *The Sword of Damocles is Not Narrow Tailoring: The First Amendment's Victory in Reno v. ACLU*, 48 CASE W. RES. L. REV. 413 (1998).

¹³³ See Communications Decency Act § 502 (amending 47 U.S.C. § 223 (1996)).

¹³⁴ *Id.* (amending 47 U.S.C. § 223(a) (1996)).

¹³⁵ *Id.*

¹³⁶ *Id.* (amending 47 U.S.C. § 223(d) (1996)).

¹³⁷ *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) [hereinafter *Reno I*].

¹³⁸ See *id.* at 849 (Finding 123).

¹³⁹ See McGuire, *supra* note 132, at 417.

find the offensive site, but only that a mere possibility existed.¹⁴⁰ Finally, all Web page creators and Internet service providers would be held hostage by the most conservative community's views.¹⁴¹

The initial case challenging this legislation, *ACLU v. Reno*¹⁴² ("Reno I"), was brought before the Eastern District of Pennsylvania. The court noted that the Internet is "a unique and wholly new medium of worldwide human communication."¹⁴³ The district court examined the various mechanisms the government suggested as tools to be implemented within the context of the CDA. One such mechanism, "tagging," would allow for certain sites with offensive material to be "tagged" with codes that would alert a minor's computer to filter out the site.¹⁴⁴ The court determined, however, that though the technology existed by which a site could be coded, no filtration system yet existed.¹⁴⁵ As such, the court refused to uphold the constitutionality of a statute based on the promise that the relevant technology would be developed in the future.¹⁴⁶ The court dismissed the other mechanisms suggested by the government as being prohibitively costly to Web page creators and Internet service providers.¹⁴⁷

The district court also evaluated existing software made available to the private sector that allows parents to tailor the Internet content to which their children are exposed.¹⁴⁸ The court concluded that these programs were not too costly to the individual, and allowed parents to make individualized decisions regarding Internet content—"a benefit not afforded

¹⁴⁰ See *id.*

¹⁴¹ Reporter and writer for WCBS-AM in New York City, Lisa Fantino: "What may be accepted behavior on the streets of Times Square will not necessarily sit well in the Mormon communities of Utah The Communication Decency Act's attempt to sanitize the Internet of indecency would homogenize the unprecedented information exchange taking place in cyberspace." Symposium, *The First Amendment and the Media: The V-Chip & the Constitutionality of Television Ratings, Political Campaign Spending Caps, & Restricting Speech on the Internet*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 303, 412 (1999) [hereinafter Symposium].

¹⁴² *Reno I*, 929 F. Supp. 824.

¹⁴³ *Id.* at 844 (Finding 81).

¹⁴⁴ See *id.* at 847-48 (Findings 108-116).

¹⁴⁵ See *id.* at 848 (Finding 114).

¹⁴⁶ See *id.* at 857.

¹⁴⁷ See *Reno I*, 929 F. Supp. at 846-47.

¹⁴⁸ See *id.* at 842 (Finding 69).

by the CDA's blanket prohibition."¹⁴⁹ The court did not, however, base its final decision on the fact that there were less-intrusive means available to protect the compelling state interest involved.

The three judge panel based its decision on the fact that the CDA was not only vague through its use of such terms as "indecent,"¹⁵⁰ but that it was not adequately tailored to meet the interest of protecting children.¹⁵¹ Judge Buckwalter argued that since terms used in the CDA were not defined, there would be no guidance for courts when asked to apply the statute.¹⁵² Judge Dalzell contended that the CDA was a content-based regulation and as such would have to be held to the strict scrutiny standard,¹⁵³ which requires the pursuit of "a compelling state interest through a narrowly tailored regulation."¹⁵⁴ Judge Dalzell noted that compliance with the CDA would be quite costly, leaving the Internet as a haven for speech only to those who could afford it.¹⁵⁵ In contrast, Chief Judge Sloviter argued that the CDA was too far-reaching in that it censored from minors important information such as Stop Prisoner Rape or the Critical Path AIDS Project, which some could deem indecent.¹⁵⁶ For these reasons, the district court granted the injunction.¹⁵⁷ The government appealed to the U.S. Supreme Court¹⁵⁸ in *Reno v. ACLU* ("Reno II").¹⁵⁹

In *Reno II*, the government argued that the protection of America's youth was indeed a compelling interest and that the CDA was written in a sufficiently narrow manner to accommodate that interest.¹⁶⁰ Justice Stevens, writing for the

¹⁴⁹ McGuire, *supra* note 132, at 421. "[I]t can be argued that the framers [of the Constitution] sought to firmly establish paternal protectionism by encouraging the marketplace of ideas and leaving it to parents to present it to their children in terms they see fit and at the appropriate time in their development." Symposium, *supra* note 141, at 415.

¹⁵⁰ See *Reno I*, 929 F. Supp. at 866.

¹⁵¹ See *id.* at 864.

¹⁵² See *id.* at 865.

¹⁵³ See *id.* at 866.

¹⁵⁴ McGuire, *supra* note 132, at 421.

¹⁵⁵ See *Reno I*, 929 F. Supp. at 877-78.

¹⁵⁶ See *id.* at 853.

¹⁵⁷ See *id.* at 870.

¹⁵⁸ The appeal went straight to the United States Supreme Court pursuant to § 561(b) of the Telecommunications Act of 1996, 47 U.S.C. § 561.

¹⁵⁹ 521 U.S. 844 (1997).

¹⁶⁰ McGuire, *supra* note 132, at 423.

majority, stated that the vagueness of the CDA's language contributed to the overbreadth of the statute.¹⁶¹ The Court noted that "[e]ach medium of expression . . . may present its own problems."¹⁶²

Justice Stevens analogized the use of the Internet to that of the telephone rather than to other types of speech.¹⁶³ He stated that the Internet is quite unlike radio or television in the sense that it does not have a history of government regulation,¹⁶⁴ nor does it have an "invasive" nature.¹⁶⁵ Rather, the Internet is like the telephone in that users of the phone must consciously dial numbers in order to seek out certain services and messages.¹⁶⁶ Similarly, in order to find specific content on the Internet, users must consciously look for it by typing in particular addresses.¹⁶⁷ The Court looked to its decision in *Sable Communications of California v. FCC*¹⁶⁸ in order to demonstrate the similarity between use of the telephone and use of the Internet. In that case, a company that offered pornographic messages to those who dialed the appropriate number challenged an amendment to the Communications Act of 1934,¹⁶⁹ which "imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages."¹⁷⁰ Like those susceptible to liability under the CDA, the operators of the pornographic telephone services in *Sable* were unable to determine who was receiving the content of their messages.¹⁷¹ Since Internet usage involves a conscious individual decision as to what content to seek out, the Court found that the Internet should be regulated in the same manner as telephone usage. Therefore, as with *Sable*, where the Court struck down the amendment to the

¹⁶¹ See *Reno II*, 521 U.S. at 871.

¹⁶² *Id.* at 868 (quoting *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)).

¹⁶³ See *id.* at 870.

¹⁶⁴ See *id.* at 867.

¹⁶⁵ See *id.* at 869.

¹⁶⁶ See McGuire, *supra* note 132, at 430.

¹⁶⁷ See *id.*

¹⁶⁸ 492 U.S. 115 (1989).

¹⁶⁹ See § 223(b) of the Communications Act of 1934.

¹⁷⁰ McGuire, *supra* note 132, at 429.

¹⁷¹ See *id.* at 429-30.

Communications Act of 1934, the Supreme Court in 1997 found the CDA to be unconstitutional.¹⁷²

Unlike the CDA, STOPP is neither vague nor overly broad. In fact, STOPP does not really implicate prisoners' First Amendment rights. Technically, it still allows for direct access to the Internet for prisoners in work and educational programs as long as it is properly monitored, which no more impedes inmates' rights than the obstacles already inherent in incarceration. In addition, STOPP makes no mention of hampering inmates' Internet access via indirect means. Therefore, as a result of its language, it is narrowly tailored to protect the state interest involved. It follows that STOPP should not face the same problems, if challenged, that the CDA encountered. As such, its constitutionality, in all probability, will be upheld.

Like the CDA, STOPP's purpose is the protection of minors. It is interesting to note, however, that federal initiatives regarding inmate use of the Internet were not commenced until they could be shrouded in the compelling state interest of protecting American youths. Presumably, victims' families have tried to lobby Congress to pass legislation regarding inmate access to the Internet given all the outrage voiced in response to prisoner Web pages, personal ads, and efforts to get sympathizers via the Internet.¹⁷³ In all probability, however, the protection of children makes a better argument as to why Congress is encroaching on First Amendment rights¹⁷⁴ than does the argument that legislation is

¹⁷² *Id.* at 430.

¹⁷³ Darlene Paris was stabbed to death along with three of her friends in 1990. Janice Keson, the twenty-three-year-old victim's mother has "started a campaign to pass legislation 'prohibit[ing] death row inmates from corresponding with anyone other than their families and attorneys.'" Esposito, *supra* note 13, at 51. See also *supra* notes 38 and 42 and accompanying text.

¹⁷⁴ Courts as well as commentators have debated as to whether the protection of children even qualifies as a compelling state interest, or whether the protection of minors falls more properly under the responsibilities associated with being a parent. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (affirming that states have a legitimate interest in the welfare of minors); *Osborne v. Ohio*, 495 U.S. 103 (1990) (asserting that states have a compelling interest in protecting the physical and psychological well-being of minors and in destroying the exploitation of children by punishing those who possess and view child pornography); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that the state has a right and a duty to protect minor children). But see *Alsager v. Dist. Court*, 406 F. Supp. 10 (S.D. Iowa 1975) (holding that the state's interest in protecting minors is not absolute, but rather must be balanced

necessary because inmates on the Internet offend victims' rights advocates' sensibilities.

STOPP also encourages states to take similar steps to ensure stricter supervision of prisoner Internet access.¹⁷⁵ In order to guarantee that such initiatives are taken at the state level, STOPP requires the U.S. Attorney General to gauge the degree to which "each State allows prisoners access to any interactive computer service and whether such access is supervised by a prison official."¹⁷⁶ Every state has since prohibited inmates from having direct access to the Internet, but some states have responded with more far-reaching initiatives that eradicate the possibility of indirect access as well.¹⁷⁷ The recent initiative in Arizona, in particular, will not be able to pass the test of constitutionality set out by the Supreme Court. Similar to Arizona's law, Ohio's newest initiative may face the same problems, but like STOPP, Ohio's statute will probably be saved by its language.

IV. STATE INITIATIVES

Unlike the federal legislation discussed in Part III, some states have started to take a far more aggressive approach to inmate access to the Internet. Laws passed in Arizona¹⁷⁸ and Ohio exhibit the lengths to which certain legislators are willing to go to make sure that those who "surf"¹⁷⁹ the Internet will not encounter prisoner ads or Web

against the parents' interest in raising their children free from government interference).

¹⁷⁵ Esposito, *supra* note 13, at 53.

¹⁷⁶ See § 803(a) of the Protection of Children From Sexual Predators Act of 1998 (mandating that the Attorney General take a survey within six months after the effective date of the Act, and that a report be made to Congress outlining the results).

¹⁷⁷ See, e.g., ARIZ. REV. STAT. § 31-235C (2000); OHIO REV. CODE ANN. § 5145.31C(1) (West 2000). In addition, Kansas has made it illegal for prisoners to contract with Web site designers, and New York has limited prisoner correspondence to family and counsel in the hope that it will help to curtail inmate access to the Internet. See Esposito, *supra* note 13, at 54.

¹⁷⁸ For a comprehensive discussion of the passage of the law in Arizona, see Karen J. Hartman, Comment, *Prison Walls and Firewalls: H.B. 2376—Arizona Denies Inmates Access to the Internet*, 32 ARIZ. ST. L.J. 1423 (2000).

¹⁷⁹ To "surf" the Internet means to explore a series of web sites or to look for something on the Internet in a random manner. http://www.whatis.com/WhatIs_Search_Results_Exact/1,282033,00.html?query=surf (last visited Nov. 20, 2000).

sites.¹⁸⁰ No state allows inmates unfettered direct access to the Internet,¹⁸¹ but Arizona and Ohio have taken these limitations one step further. Passing constitutional muster will prove to be a near-impossible task for the restriction in Arizona¹⁸² because it is so broad in scope. Recent legislation in Ohio,¹⁸³ however, could be construed to be less restrictive. As such, it may have a comparatively easier time surviving a constitutional challenge.

A. *Arizona*

Last year, while Jennifer Martinez was browsing the Internet, she came across a web page featuring the murderer of her father.¹⁸⁴ Staring at Martinez was Beau Green's face, along with a personal ad talking about his search for "fun women."¹⁸⁵ Appalled at the sight of him, and outraged that he would have access to such a luxury, Martinez and her mother began to lobby for the passing of House Bill 2376, sponsored by then-State Representative Jean McGrath.¹⁸⁶ They were successful. In March 2000, Arizona passed amendments to completely prohibit any inmate incarcerated within the state to gain indirect access to the Internet¹⁸⁷ via written correspondence.¹⁸⁸ This statute makes it virtually impossible¹⁸⁹ for any Arizona

¹⁸⁰ See, e.g., *supra* note 33 and accompanying text.

¹⁸¹ See *supra* Part I.

¹⁸² ARIZ. REV. STAT. § 31-235C.

¹⁸³ OHIO REV. CODE ANN. § 5145.31C(1).

¹⁸⁴ Quart, *supra* note 1.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Arizona has prohibited inmates from gaining direct access to the Internet "through the use of a computer, computer system, network, communication service provider or remote computing service" unless authorized by the department. ARIZ. REV. STAT. § 31-242A (2000).

¹⁸⁸ ARIZ. REV. STAT. § 31-235C reads:

An inmate shall not send mail to or receive mail from a communication service provider or remote computing service. The department shall impose appropriate sanctions, including reducing or denying earned release credits, against an inmate if either of the following applies: The inmate corresponds or attempts to correspond with a communication service provider or remote computing service. Any person accesses the provider's or service's internet Web site at the inmate's request.

¹⁸⁹ Presumably, it may still be possible for an Arizona inmate to contact a Web design service by telephone since the statute specifically prohibits contact by written correspondence and since phone calls are often not monitored. Nonetheless, this mode

prisoner to gain access to the Internet. By specifically prohibiting any contact by written correspondence between inmates and a communication service provider or remote computing service,¹⁹⁰ without any procedural safeguards, the Arizona state legislature has created a situation whereby inmates will have salient constitutional claims.

The Arizona amendments affect incoming and outgoing mail as well as inmates' and outsiders' First Amendment rights, for which the Supreme Court has prescribed distinct standards of review.¹⁹¹ The burden on prison officials regarding incoming mail is far easier to meet.¹⁹² Therefore, if a warden argued that mail sent to inmates from Internet service providers would threaten internal security,¹⁹³ then he could prove that the practice was "reasonably related to legitimate penological interests,"¹⁹⁴ and the method might well be declared constitutional.

For outgoing mail, however, since the burden on the state is far greater,¹⁹⁵ Arizona will have difficult obstacles to overcome. Justice Blackmun held for the majority in *Thornburgh* that outgoing mail does not pose threats to internal prison harmony, and as such should be subjected to a comparatively higher standard of constitutional review.¹⁹⁶ Though the protection of society in general can be seen as a compelling end, prison officials do not have the unfettered right to keep inmates from gaining access to the Internet via outgoing written correspondence. The suppression of unpopular or distasteful content based on personal determinations by prison officials cannot be the sole reason for the censorship of letters leaving the institutional premises. Arizona officials will be hard-pressed to provide legitimate reasons that will pass the test of a mid-level standard of

of contact seems improbable because the way in which these services are contacted is predominantly via email or regular correspondence.

¹⁹⁰ See *supra* notes 187-88 and accompanying text.

¹⁹¹ See *Thornburgh*, 490 U.S. at 410.

¹⁹² See *supra* Part II.C.

¹⁹³ For example, a warden might argue that such mail would be disruptive to the institutional environment because inmates may start to fight over who was receiving such mail and who was not, or that it would disturb some sense of discipline. This, of course, would have to be proven.

¹⁹⁴ *Thornburgh*, 490 U.S. at 410.

¹⁹⁵ See *supra* Part II.A.

¹⁹⁶ *Thornburgh*, 490 U.S. at 410.

constitutional scrutiny. The fact that victims' rights advocates are appalled by what they see on the Internet is not reason enough to prohibit all access to prisoners if the tenets of the First Amendment are to be upheld.

The Arizona statute is also problematic because it prohibits outsiders from contacting a "provider's or service's Internet [W]eb site at the inmate's request."¹⁹⁷ This amendment to the Arizona statute not only acts as a practical impediment to the public's First Amendment rights, but the offense also seems hard to prove. There is no mention of inmates' rights in this clause, only those of outsiders. As such, it is highly doubtful that such a rule would gain the Supreme Court's approval since the freedom of expression rights of those in the free world are held to a heightened level of scrutiny.¹⁹⁸ Though the legislature may argue that it is infringing on these rights to spare the general population from having to confront what some would consider highly offensive or disturbing material on the Internet, this is not a "compelling state interest"¹⁹⁹ recognized by the Court.

In addition, it is hard to foresee how prison officials would be able to monitor whether anyone in the outside world had accessed an Internet service provider's Web site at the request of the inmate or whether they endeavored to do so by personal choice. Apart from the instances where prison administrators find particular requests in outgoing mail, other scenarios are entirely possible. It is conceivable, for example, that a concerned friend, family member, or prisoners' rights advocate could choose to contact such a service to disseminate information, obtained either in regular correspondence from the inmate or through telephone calls, without the specific request of the prisoner. Even Martinez, the private individual who pushed for this law to be passed, recognizes the limits on enforcement and the law's efficacy:

¹⁹⁷ See ARIZ. REV. STAT. § 31-242A.

¹⁹⁸ See KNIGHT & EARLY, *supra* note 15, at 215.

¹⁹⁹ In *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017 (5th Cir. 1987), a mother sued the magazine because her son hanged himself after reading an article in *Hustler* about autoerotic asphyxia. Though some may have found the contents of the article offensive, the court held that since the article did not incite the minor to perform the act that led to his death, the speech was entitled to First Amendment protection. *Id.* at 1020.

We have to allow [inmates] to get mail, and we can't prevent them from contacting parties outside of prison . . . Prisoners online is an issue ahead of its time: we can take away prisoners' good time credits for using third-party Web access, but how will prisons know that Arizona prisoners are posting online unless they pay a correction staffer to go to all of these websites all the time?²⁰⁰

The new law in Arizona also allows for the reading of all outgoing mail of any prisoner who violates this section by corresponding with a service or provider or by requesting that someone do it for him.²⁰¹ Stephen Bright of the Southern Center for Human Rights in Atlanta believes that the recent Arizona law is "unconstitutional and impractical—like trying to tell Niagara Falls not to flow."²⁰² Eleanor Eisenberg, executive director of the ACLU in Arizona, has stated that her organization is considering filing suit against the Arizona initiative.²⁰³ The ACLU states that laws like the one passed in Arizona hamper "an inmate's First Amendment right to communicate . . . [and] also chill[] the rights of third parties who have committed no crimes."²⁰⁴

An examination of the Arizona law raises new questions regarding inmates' communication rights, which will have to be explored further as time passes. It is understandable that there is an important link between incoming mail and prison security, thereby necessitating a lower level of scrutiny in deference to the expertise of prison officials. However, the Supreme Court's recognition that outgoing mail and institutional harmony are more tenuously related should be honored by state legislatures when drafting bills concerning inmates' communication rights. In addition, legislators should also note that the Court has been unwilling to compromise the free speech rights of those not incarcerated. To access the Internet via third parties, the prisoner would have to mail

²⁰⁰ Quart, *supra* note 1. Jennifer Martinez did in fact accomplish her immediate goal: Beau Greene's website has since been removed from the Internet. *Id.*

²⁰¹ ARIZ. REV. STAT § 31-235(c).

²⁰² Locke I, *supra* note 21.

²⁰³ *Internet Gives Prisoners Link to Outside World*, N.Y. TIMES, Aug. 1, 2000, available at <http://www.aclu.org/news/2000/w080100a.html> (last visited Jan. 15, 2001). As of April 1, 2002, the ACLU has yet to file suit.

²⁰⁴ *Id.* "In one case, Eisenberg said, prison officials censored the mail of an attorney who had sent his client legal documents that he had downloaded from the Web." *Id.*

regular correspondence to a designated friend, family member, or Web site designer. Whatever the prisoner wished to have posted on the Internet could not logically be a threat to prison security (the government interest involved), even though it may be viewed as unsavory or offensive to the public at large. In order for material posted on the net to have an adverse effect on the tranquility of a prison or penitentiary, the undesirable content would have to be downloaded, printed, and mailed to the inmate. Upon its arrival at the institution, however, it would be considered incoming mail and would thus be subjected to a lower level of scrutiny, thereby allowing censorship if necessary.²⁰⁵

Though it is entirely understandable that relatives of victims are horrified by the fact that the perpetrator who harmed their loved one is posting romantic want ads on the Internet, this cannot overshadow the importance of upholding the values associated with freedom of speech. To do so would permit this nation to be held hostage by any voice disapproving of certain modes of expression. Such a scenario was presented by the adoption of the CDA, which would have allowed for the most conservative community to dictate content on the Internet.²⁰⁶ The First Amendment was created to allow for a free exchange of ideas, regardless of the content. Laws, such as the one passed in Arizona, are incompatible with this purpose and do not establish a salient tie as to how they provide for the protection of the government interest involved (prison security).

Should litigation concerning Arizona's statute reach the Supreme Court, the Justices will have to reevaluate their stance on prisoners' mail rights if they wish to uphold this recent legislation. Since inmate access to the Internet is secured via outgoing written correspondence, and since it implicates the First Amendment rights of outsiders, the Supreme Court could reasonably implement the intermediate scrutiny test developed in *Martinez*.²⁰⁷ Arizona legislators and prison officials would find this challenge insurmountable since there is no argument connecting outgoing Internet access with internal prison security. The government could contend that

²⁰⁵ See *supra* Part II.C.

²⁰⁶ See *supra* Part III.

²⁰⁷ *Martinez*, 416 U.S. at 413. See also *supra* Part II.A.

Internet access could cause problems among the prison population if riots were started because some inmates were gaining access while others were not. This argument, however, proves to be inherently flawed since access is attained via written correspondence—a right that is granted to all inmates, save perhaps during periods of solitary confinement.²⁰⁸ Therefore, if the Supreme Court wished to uphold the constitutionality of Arizona's amendment, it would have to reconsider the *Martinez* test,²⁰⁹ and make the level of scrutiny that of rational relationship, as discussed in *Thornburgh*.²¹⁰ This seems highly unlikely, however, in this particular case since the Arizona statute places sanctions on the rights of members of the free world to exercise their freedom of speech.

Ultimately, Arizona could assert that content on the Internet coming into the institution could easily pose a threat to the compelling state interest of maintaining prison security. The Court would undoubtedly agree with such an assertion, and would find that in those cases the burden placed on prison officials to prove that censorship was warranted would be far lower than that posed by intermediate scrutiny. The Court, however, even despite recognition of this argument, would still strike down the Arizona law since it is far-reaching in its scope by making currently legal behavior illegal. Interestingly, Ohio's new initiative regarding inmate access to the Internet may contain some of the same flaws associated with Arizona's recent legislation. The language used by the Ohio legislators, however, may save that bill from the same fate that Arizona's statute is destined to meet.

B. *Ohio*

As of November 1, 2000, prisoners in the state of Ohio are no longer able to gain access to the Internet even via indirect means.²¹¹ The Ohio law, however, is not nearly as

²⁰⁸ See *KNIGHT & EARLY*, *supra* note 15, at 218.

²⁰⁹ *Martinez*, 416 U.S. at 413. See also *supra* Part II.A.

²¹⁰ *Thornburgh*, 490 U.S. at 404 (1989). See also *supra* Part II.C.

²¹¹ OHIO REV. CODE ANN. § 5145.31C(1) reads:

No prisoner in a correctional institution under the control or supervision of the department of rehabilitation and correction shall access the Internet through the use of a computer, computer network,

extreme in scope as that which was passed in Arizona. As such, it is less likely to fail a constitutional challenge.

By denying prisoners access to the Internet via computer, telecommunication, or information services,²¹² the Ohio law will face many of the same obstacles as the recent statute in Arizona. Even if the initial step taken by the prisoner is simply to write a letter, an act not proscribed by the Ohio statute, ultimate access to the Internet would still be dependent on someone's use of a computer and service provider on behalf of the inmate, and as such, the statute could be read to have as broad a ban as the law recently passed in Arizona. It follows that this section of the new Ohio legislation will come into conflict with the current varying standards of review for incoming versus outgoing mail. As suits are filed, it will be interesting to see what arguments the Ohio prison officials will make as to the penological interest that this law protects.

Ohio legislators, however, were arguably more careful in drafting their statute than those in Arizona. Ohio still allows Internet access if the inmate is participating in an approved educational program.²¹³ This allows at least a door for prisoners to gain access to the Internet in certain cases; the institutional administrators may be able to argue that excluding everything except educational programs meets a legitimate penological interest. The Arizona law, in contrast, does not provide any procedural safeguards, but rather is a blanket ban, making it harder to pass constitutional muster. It seems that Ohio may be able to have its law upheld due to its language, yet only if it is narrowly read to prohibit access attained through the direct use of a computer, telecommunication, or information service. If, however, Ohio legislators intended for the new law to be a blanket prohibition, including access to the Internet attained through

computer system, computer services, telecommunications service, or information service unless both of the following apply:

- (a) The prisoner is participating in an approved educational program with direct supervision that requires the use of the Internet for training or research purposes.
- (b) The provision of and access to the Internet is in accordance with rules promulgated by the department of rehabilitation and correction pursuant to section 5120.62 of the Revised Code.

Id.

²¹² *Id.*

²¹³ OHIO REV. CODE ANN. § 5145.31C(1)(a).

the initial step of written correspondence, then the Ohio legislation will be subjected to the same fate of unconstitutionality as the Arizona statute. Should the Ohio statute be held constitutional by virtue of narrow construction, this would not be a significant blow to prisoners' First Amendment rights since inmates presumably would still be able to access the Internet via indirect means.

If the true purpose of Ohio's law is to eradicate the presence of inmates on the Internet, the statute will be quite inadequate. If the law is narrowly defined, then sympathetic outsiders may maintain pages by writing on behalf of prisoners using information obtained by written correspondence, phone calls, or visits. Prisoners would even be able to write directly to Web site designers and service providers if Ohio's initiative is interpreted to forbid inmate access to the Internet only by direct use of a computer. If the law is interpreted broadly, however, to include even indirect access to the Internet via written correspondence, and the Court maintains the existing standards of review, then the Ohio bill will be just as ineffective since the Court will strike it down in its entirety as unconstitutional. As such, legislators must truly think about the end they wish to achieve and be careful to recognize whether these ends are, in fact, constitutional.

Government representatives should also note not only the immediate and direct effect of their legislation, but the long-term and indirect consequences as well. It would be interesting to find out whether legislators would reconsider their efforts if they realized the serious ramifications that could follow for freedom of speech rights in general if the rights of inmates to communicate were continuously pared down. In addition, there is a threat to society posed by not allowing prisoners contact with the outside world since many of them will eventually be released. Both prison officials and legislators could argue, however, that Internet access is not necessary to maintain outside ties given that before the Internet's popularity or even its invention, rehabilitative endeavors within the prison system already existed. While this is true, one must be realistic and recognize that as technology progresses, it is in society's best interest that all of its members adapt to the changing conditions. While inmates should not be allowed direct access to the Internet, further restrictions on

their ability to write to outsiders will undoubtedly lead to the possibility of further regulations on outsiders' ability to communicate.

V. CALIFORNIA: THE CASE OF FIRST IMPRESSION

The first case to challenge an inmate's Internet rights came before a California court in February 2001. *In re Aaron Collins*²¹⁴ involved a prisoner incarcerated at Pelican Bay State Prison. Mr. Collins challenged a policy that prohibited any materials downloaded from the Internet to enter the facility. Collins argued that the regulation was unconstitutional under the First Amendment. The First District Court of Appeals for the First Division of California upheld the prison policy as rationally related to a legitimate penological interest. The appellate court failed to recognize the practical problems that its decision creates.

In mid-1997, Mr. Collins subscribed to INMATE Classified, a company that for a fee creates and maintains prisoners' Web pages on the Internet.²¹⁵ Like many other such services, each prisoner Web page has an email address.²¹⁶ Periodically, INMATE Classified will print up a prisoner's emails and mail them to him or her via the postal service.²¹⁷ Aaron Collins received several such packages of emails while incarcerated at Pelican Bay until May 1998, when the warden issued a memorandum stating that the institution would no longer accept such mail.²¹⁸ In fact, the new policy banned all materials downloaded from the Internet from entering the prison gates, as well as any otherwise acceptable mail that included such downloaded material.²¹⁹ Mr. Collins filed a petition for habeas corpus challenging the regulation on First Amendment grounds.²²⁰

²¹⁴ 104 Cal. Rptr. 2d 108 (Cal. Ct. App. 2001).

²¹⁵ *Id.* at 110.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* The warden cited California Code of Regulations, title 15, § 3138(f)(1) as authority, claiming that material downloaded from the Internet fell under the category of unauthorized publications.

²¹⁹ *Collins*, 104 Cal. Rptr. 2d at 110.

²²⁰ *Id.*

At the hearing on the petition, the trial court conducted an in-depth factual investigation into the factors the warden cited as dispositive proof of the need for such a regulation, namely the potential for an unduly burdensome workload on the institutional staff and prison security. Among those to testify at the hearing on behalf of Pelican Bay were the warden, the supervisor of the prison mailroom, and a detective acting in the capacity of an expert in Internet law enforcement and investigation.²²¹ Both the warden and the mailroom supervisor went into great detail explaining the volume of mail received each day by the prison, noting that each piece of mail was subject to a high level of scrutiny and physical inspection before determining whether the addressee inmate will actually receive the letter or package.²²² Given the "quick and easy accessibility of communication by email," prison authorities were concerned that the volume of mail received by inmates would increase exponentially, causing an excessive strain on institutional resources.²²³ To allow prisoners to receive printed copies of all their emails, which could easily contain junk mail, would lead to an "exorbitant workload."²²⁴

In addition, the warden argued that due to the nature of Pelican Bay, namely as an institution housing many gang-related inmates who have attempted to use the mail for illegal purposes both inside and outside the prison, the allowance of Internet-generated material would allow the prisoners an easy avenue via which to propagate their illegal activities.²²⁵ The detective stated that email causes particular security risks given its inherent nature: it is easier for a sender to disguise his or her identity on an email than it would be on more traditional forms of mail.²²⁶ This danger, however, was placed in perspective by a computer consultant who testified at the court's request. While he acknowledged that it could be more

²²¹ *Id.* at 110-11.

²²² *Id.* at 111. Approximately two to five thousand pieces of mail are opened at Pelican Bay each day between Monday and Friday. Each piece of mail is checked to make sure there is no inmate-to-inmate communication, as well as to ensure prison security by looking for contraband, illegal plans, etc. In addition to such traditional screening, another ten percent of the mail is randomly subjected to closer scrutiny.

²²³ *Id.*

²²⁴ *Collins*, 104 Cal. Rptr. 2d at 111.

²²⁵ *Id.*

²²⁶ *Id.*

difficult to trace the source of a particular email, most people are unaware of the steps necessary to hide their identities.²²⁷ The consultant did admit that it was possible to send an unlimited amount of information via email, but that it was not true that email automatically lent itself to allowing for coded messages. Rather, "that would depend on the sender's ingenuity rather than the medium."²²⁸ Based on the testimony in the aggregate, the trial court ultimately held that inmates could continue to receive Internet-generated material subject to certain restrictions, most importantly that it be deemed non-confidential and scrutinized accordingly.²²⁹ The warden appealed.²³⁰

While noting the first impression nature of this case, the First District Court of Appeals for the First Division of California nevertheless cited to the principles in *Turner* as guidance.²³¹ Placing much emphasis on the tradition of deference given to institutional authorities with respect to matters concerning prison rules, the court found that the policy banning information received from the Internet was rationally related to a legitimate penological interest.²³²

The appellate court implemented the four-part *Turner* test,²³³ citing *Thornburgh* as authority that the same principles apply regardless of whether the First Amendment rights of prisoners are involved.²³⁴ Recognizing that security concerns are always a legitimate penological interest,²³⁵ the court looked to the remaining pertinent factors. The policy was considered by the court to be neutral in that it banned all Internet-generated material regardless of content.²³⁶ Furthermore, the court found the warden's concerns based on the nature of email to be rational.²³⁷ Judge Strankman, writing for the court,

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Collins*, 104 Cal. Rptr. 2d at 111.

²³⁰ *Id.* at 112.

²³¹ *Id.*

²³² *Id.* at 115.

²³³ *See infra* Part II.B.

²³⁴ *Collins*, 104 Cal. Rptr. 2d at 113.

²³⁵ *Id.* at 114.

²³⁶ *Id.*

²³⁷ *Id.* The court conceded, however, that had *Collins* presented evidence to refute that conclusion, the outcome would very well have been different. *Id.* (citing *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999)).

pointed out that Pelican Bay need not prove that email or any other material downloaded from the Internet actually caused a breach in security, but rather only that the connection between the two is a rational fear based on the facts.²³⁸

As to whether there were any less restrictive means available to achieve the same end, the court found that the policy adopted by Pelican Bay State Prison hardly impeded inmates' rights. Judge Strankman reasoned that each prisoner's Web page on INMATE Classified included a postal address in addition to an email address.²³⁹ As such, inmates could continue to keep such Web pages, but would have to simply receive and send mail via more traditional means.²⁴⁰ The warden pointed out that this would have very little impact on prisoners' communication rights since there are no limits imposed on how many letters an inmate may send or receive so long as such letters meet the existing requirements.²⁴¹

Finally, the court found that the burden on the institution was too great.²⁴² Evidence was presented to exhibit the already significant backlog in the Pelican Bay mailroom.²⁴³ In addition, the mailroom was already understaffed by six people, and the warden argued that the potential increase in mail due to Internet-generated material could force the screening measures to be compromised or at the very least ensure that inmates would receive their mail late.²⁴⁴ All of these facts combined convinced the appellate court that the regulation imposed was rational given the prison's security concerns and the probability of an undue burden on the institution. Mr. Collins, in the court's opinion, failed to present any evidence to rebut the prison's arguments: "Collins has not demonstrated that there are obvious, easy alternatives to the policy that would accommodate the rights at issue at *de minimis* cost to the prison's legitimate security concerns."²⁴⁵

²³⁸ *Collins*, 104 Cal. Rptr. 2d at 115.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Collins*, 104 Cal. Rptr. 2d at 115.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

The decision in *Collins* is surprising because it fails to take into account the practical problems associated with enforcing such a regulation. The logical extension of the reasoning used by the appellate court is that an inmate could receive an article from the *New York Times*, barring any other restrictions, so long as it was physically cut out of the newspaper and not downloaded from the Internet. The same is true with any other information that can be obtained from multiple sources. To say that security concerns are foremost in this case would misstate the true issue.

If the problem is that it is far easier to hide one's identity through the use of email, then perhaps there would be a rational basis for the regulation, but the ease with which people can do so is highly questionable. If the issue is that large documents can be attached to emails helping to hide contraband or escape plans the same way that large publications are able to do, then the prison should limit the number of pages that a piece of mail can include. To simply ban all material from a particular source without any concern for content simply does not make much sense.

The only things that truly distinguish Internet-generated material from any other letter or piece of information that is typed instead of handwritten, are graphics, URL address and time/date print at the bottom of the page, and perhaps the actual layout of the information. All these things, however, can be easily changed or deleted in order to make an email or any other material downloaded from the Internet look like any other typewritten letter, which barring restricted content, would be allowed through the prison's gates. Safeguards already exist: any piece of mail that enters the institution is already subjected to such a high level of scrutiny, and prison authorities can censor any individual piece of mail if it is questionable. Even when the Supreme Court allowed the ban of all hardcover books from prisons, it still permitted such material to enter the institution so long as it was sent from the publisher. No such allowances are made here, however, when all Internet-generated material is banned.

Collins is another case that exhibits the movement of courts back to the highly deferential position taken with respect to prison matters. Courts will seldom second-guess the decisions of institutional authorities when it comes to internal

prison rules and regulations.²⁴⁶ However, in *Collins* the real issue is who would bear the cost of any potential increase in prison mail. The true result is that inmates have their constitutional rights curtailed because of money, not safety, concerns.

Finally, if *Collins* only considered whether Mr. Collins would be able to receive email from his INMATE Classified Web page, then the case would be different. The Web page does in fact have a postal address where he could be reached. However, the regulation at Pelican Bay bans all information from the Internet. Some material can only be accessed via the Internet, material that if it were not for its source would not be restricted from the prison environment. As such, the regulation upheld by the California appellate court is overinclusive, by restricting activities and information that would otherwise be allowed.

CONCLUSION

As people continue to innovate and technology progresses, society must adapt to the changing conditions. So too, must the courts. The drafters of the Constitution could not possibly have foreseen the advent of such inventions as the Internet or its pervasiveness. Nor could they possibly predict which rights enumerated within the Constitution would be implicated by these developments. As such, it is the duty of all three branches of the government to consider the Constitution as a living organism that grows with society. This is not to say, of course, that the interpretation of the Constitution must alter each time we are confronted with new technology. Rather, the legislature and the judiciary must reevaluate and make changes, when needed, to existing laws when rights are implicated. This is no easy task, however, when the rights involved are those of a prisoner's ability to communicate.

One of the most exalted aspects of this nation is that it is based on freedom of expression. The free exchange of ideas, whether faultfinding or praising, popular or unpopular, is

²⁴⁶ The Seventh Circuit in *Rogers v. Morris*, No. 01-3903, slip op. at 2 (7th Cir. Mar. 20, 2002), has since cited *Collins* as authority to uphold a regulation in a Wisconsin prison prohibiting material downloaded from the Internet.

critical for a progressive society to exist. One's ability to express one's thoughts is based on the premise that the next person can do the same. The notions of free will and choice also have close connections to the First Amendment in that silence and non-choice are forms of expression as well. The fact that something horrifies someone does not mean that someone else did not have the right to say it, but rather that anyone has the right to tune out or turn away. This is not to say that all forms of speech are allowable or should be remedied by simple avoidance, but that only a small class of expression falls into this category.²⁴⁷

Granted, when one breaks the law and is thereafter incarcerated, the most elementary purposes are to punish and to deprive one of societal luxuries.²⁴⁸ For many, though, incarceration is temporary and so rehabilitative factors should, to some extent, be considered. A prisoner's ability to maintain contact with the outside world should be as important to the public as it is to the individual in that the inmate will one day reenter society. The crux of inmate access to the Internet, however, revolves around the issues of the nature of the technology involved and the First Amendment rights implicated, rather than around the problem of rehabilitation. This is true in that even before the invention of the Internet, rehabilitative programs and initiatives existed within the prison environment.

The Internet allows both inmates and outsiders access to a far larger audience than was ever available before. Granted, in the past, a prisoner's personal ad had a much smaller chance of passing a victim's family's path due to the confines of regular mail. Yet the reason we praise the Internet for being the instrument that connects all voices of the world should not be the reason that we denounce it if some of those voices are those of inmates. Even if Internet technology acts as

²⁴⁷ Speech that incites violence or other criminal behavior is one example. *See, e.g., Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (maintaining that the First Amendment does not protect speech that causes damage to reputation from libel or defamation); *Miller v. California*, 413 U.S. 15 (1973) (stating that speech that is deemed obscene is not protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that free speech protection does shelter advocacy of force, but does not protect speech that incites or produces imminent lawless action or is likely to do so).

²⁴⁸ *See generally* Esposito, *supra* note 13, at 60-64.

a microphone for prisoners, it does so also for people who advocate racism, sexism, and other patently offensive messages. The Internet allows for the free exchange of ideas in a manner that has never existed before. In some senses, it has provided the ultimate stage upon which free speech rights can be exercised. This is not to say that prisoners should have completely unfettered access to the Internet. It is only to say that there should be no blanket prohibition of inmate Internet access.

The Supreme Court will have some important decisions to make regarding inmate communication rights given the influx of legislation and the possible litigation challenging each bill's constitutionality. If the Court wishes to uphold the constitutionality of this legislation, it will undoubtedly have to reevaluate the current standards of review surrounding prisoners' First Amendment rights, and when these standards should be applied.

As it stands now, while direct inmate Internet access is basically obsolete,²⁴⁹ prisoners are still gaining access to the Web via written correspondence and the help of third parties. Such indirect access has proven to be quite controversial. The fact that the manner in which inmates gain indirect access to the Internet involves the already established right of sending outgoing mail and the free speech rights of those not incarcerated, suggests that any legislation regulating such access would be subject to the intermediate level of scrutiny by the Supreme Court.

The argument "that outgoing mail should be closely regulated for the purposes of public safety and that any beliefs that outgoing mail is not harmful should be discouraged"²⁵⁰ is problematic in that it hampers inmates' rights to freedom of expression in a way that courts have been unwilling to uphold.²⁵¹ This is not to say, however, that proponents of such a view do not have a notable point, but rather that should the Supreme Court reconsider its stance on the differing standards of review for incoming and outgoing mail in light of new litigation, the reason will be the pervasive use of the Internet

²⁴⁹ One exception is educational programs in designated prisons.

²⁵⁰ Manetta, *supra* note 62, at 210.

²⁵¹ See *Martinez*, 416 U.S. 396 (1974). See also *supra* Part II.A.

in society and the problems that such use now poses, not because of larger notions of general public safety.

Prohibition of direct Internet access for inmates is understandable given the *Chamberlain* situation and the fact that access to the Web remains a luxury to a certain extent. Prisoners should not have laptops in their cellblocks or be granted entrance into chat rooms while incarcerated, but blanket prohibitions of inmate Internet access via indirect means would open the flood gates, allowing for various types of speech to be censored even outside the prison arena. It follows that no matter how offensive an inmate's presence on the Internet may be, the alternative would threaten one of the most fundamental and exalted principles of this nation—the freedom of speech.

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