

## CHAPTER 19

### YOUR RIGHT TO COMMUNICATE WITH THE OUTSIDE WORLD\*

#### A. Introduction

Prison administrators often restrict your right to communicate with courts, attorneys, family, friends, and the news media. They may also limit the types and sources of materials that you may read. Prison authorities do not, however, have absolute power to limit your right to communicate. The U.S. Constitution, state constitutions, and federal, state, and city regulations limit prison authorities' power to restrict your access to the outside world. Upon imprisonment, you keep some constitutional rights, including some of your First Amendment protections of speech, press, and association.<sup>2</sup> Within prisons, however, these rights can be limited under certain circumstances to accommodate the prison's "legitimate penological interests."<sup>3</sup>

This Part of the chapter addresses constitutional protections that apply to all incarcerated people in the United States and outlines the protections that state and federal regulations add to your right to correspond with the general public. Part B discusses your rights to communicate with the general public (friends, relatives, etc.). This Chapter focuses on New York State and federal law. Your own state's law may be different from the New York laws and may provide you with additional protections. See Chapter 2 of the *JLM*, "Appealing Your Conviction", for information on how to conduct thorough legal research.

Part C addresses your right to correspond with courts, public officials, and attorneys. Part D discusses your right to communicate over the Internet, both directly and through third parties. Part E provides a general outline of your right to receive publications such as magazines and books, and includes a discussion of your right to receive sexually explicit materials. Part F examines your right to communicate with the news media, and Part G discusses your right to receive visitors. Finally, Part H discusses telephone access.

The legality of a prison's restrictions on all of these rights are determined by a four-part test. Courts ask whether: (1) the prison regulation is rationally related to a legitimate government interest, (2) there is an alternative way for the incarcerated person or outside communicator to exercise the right even with the restriction in place, (3) the burden or cost to the prison is too great if the right is accommodated, (4) there are no readily available alternative options that the prison could put in place.<sup>4</sup> This Chapter refers to this test as the "*Turner* reasonableness standard" (or sometimes just the

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2. U.S. CONST. amend. I; *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) (explaining that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison"). Courts generally avoid deciding to what extent rights survive incarceration and instead determine whether the restriction is reasonable regardless of whether the right survives. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162, 169–170 (2003) (declining to "explore or define" a an incarcerated person's right to associate upon finding that the restriction was rationally related to a "legitimate penological interest").

3. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)) (noting that the warden may only reject communication if it is "determined [to be] detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.>").

4. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987); *see also Thornburgh v. Abbott*, 490 U.S. 401, 414–416, 109 S. Ct. 1874, 1882–1883, 104 L. Ed. 2d 459, 473–475 (1989) (applying *Turner* test to incoming mail); *Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167–2168, 156 L. Ed. 2d 162, 170 (2003) (applying *Turner* test to visitation restrictions); *Beard v. Banks*, 548 U.S. 521, 530–533, 126 S. Ct. 2572, 2578–2580, 165 L. Ed. 2d 697, 705–708 (2006) (applying *Turner* test to denial of publications and photographs).

“*Turner* standard”) because of the Supreme Court case that announced the test.<sup>5</sup> Restrictions on legal mail, outgoing general correspondence, and the practice of your religion are not considered under this test. For instance, prison officials may not restrict your right to communicate without a reason, but they may legally do so in situations where exercising that right might endanger the security or order of the prison, or the rehabilitation of incarcerated people. To determine the legality of a prison’s restrictions on your religious practice, courts ask whether the restriction places a substantial burden on your ability to practice your religion.<sup>6</sup>

Another important term that this Chapter will use is “discretion.” As you will learn, although the courts will independently examine all four of the *Turner* factors, they often give a lot of weight to the prison officials’ reasoning for the decision to restrict your right to communicate. One definition for discretion is: “An individual’s power to make decisions without anyone else’s advice or consent.”<sup>7</sup> This means that the courts will allow the prison officials to decide (prison officials have the *discretion* to decide) whether or not to restrict your right to communicate based on their understanding of the effect that the exercise of the particular right would have on the prison’s interests. As long as their decision does not violate the Constitution. The reasoning is that prison officials understand the prison conditions better than judges and are therefore better able to determine how certain acts will affect the prison.

The rights this Chapter describes are about the conditions of your confinement, and are subject to the Prison Litigation Reform Act. Because of this, if you believe your right to communicate has been improperly denied, you *must* first raise the problem through your institution’s administrative grievance procedure, if there is one, before you can file a federal claim. See Chapter 15 of the *JLM*, “Inmate Grievance Procedures”, for further information on inmate grievance procedures. If you are unsuccessful or do not receive a satisfactory result through the inmate grievance procedure, you can bring a case under a federal law, 42 U.S.C. § 1983, in federal or state court. You could choose instead to file a tort action in state court (in the Court of Claims if you are in New York), or to file an Article 78 petition in state court if you are in New York. More information on all of these types of cases can be found in Chapter 5 (on choosing a court and a lawsuit), Chapter 14 (on the Prison Litigation Reform Act), Chapter 16 (42 U.S.C. § 1983 and *Bivens* Actions), Chapter 17 (Tort Actions), and Chapter 22 (New York’s Article 78) of the *JLM*.

If you decide to pursue a claim in federal court, you need to read *JLM*, Chapter 14, on the Prison Litigation Reform Act (“PLRA”). Failure to follow the PLRA’s requirements can lead, among other things, to the loss of good time credits and the loss of your right to bring future claims in federal court without paying the full filing fee.

## **B. The Right to General (Non-Legal) Correspondence**

If you are incarcerated in a state facility, your right to communicate with the outside world is protected by the U.S. Constitution, and the constitution, statutes, and regulations of the state in which you are imprisoned. If you are incarcerated in a federal facility, your rights are protected by the U.S. Constitution and federal statutes and regulations. If your mail is coming from state or federal courts, attorneys, or certain public officials, your mail is considered “legal mail.” For more information on your rights regarding legal mail, see Section C of this chapter of the *JLM*. This Section B talks about your rights regarding general or non-legal correspondence.

### **1. Federal Constitutional Protections**

The First Amendment to the U.S. Constitution creates a minimum level of protection of your right to communicate with the outside world. No government body may pass laws or regulations falling below this level of protection. Some states may also provide more protection through state constitutions and statutes. The following is a discussion of the U.S. Constitution’s minimum

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5. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

6. 42 U.S.C. § 2000cc-1 (2020).

7. *Discretion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

guarantees of your right to communicate. While reading the information below, it is important to keep in mind that courts distinguish between incoming and outgoing mail.

Originally, the case of *Procunier v. Martinez* provided a standard to determine the legality of prison regulations on both incoming and outgoing mail. In that case, the U.S. Supreme Court held that unless the regulation was implemented to support the substantial government interests of security concerns, order, or rehabilitation, arbitrary censorship of both incoming and outgoing general prison correspondence (regulations preventing you from sending or receiving all or part of your mail) violates the First Amendment right to free speech of both incarcerated people and their correspondents.<sup>8</sup> The Court also held that when some censorship was justified, the censorship could not be greater than necessary to serve valid government interests.<sup>9</sup> This case applied to both incoming and outgoing mail. Later, the case *Thornburgh v. Abbott*, the Supreme Court partially overruled *Martinez* by specifying that the *Martinez* standard applies only to outgoing correspondence, which is correspondence sent by an incarcerated person to someone outside the prison.<sup>10</sup>

Restrictions on incoming mail are greater than on outgoing mail because incoming mail can pose a greater security threat. For incoming correspondence (correspondence received by an incarcerated person from the outside), a different standard applies. This standard comes from *Turner v. Safley*, and states that restrictions on incoming mail are valid if they are “reasonably related to legitimate penological interests.”<sup>11</sup> A penological interest is an interest of the prison system related to the management of incarcerated people, such as maintaining security or rehabilitation. Four factors must be considered in determining whether a limitation on your incoming mail meets this standard:

- (1) the rational connection between the mail restriction and the prison’s penological interest,
- (2) alternatives available to incarcerated people to exercise their rights,
- (3) the burden of accommodating rights, and
- (4) the lack of alternatives available to prisons in satisfying their interests.<sup>12</sup>

The reason the *Abbott* Court gave for treating incoming and outgoing mail differently was that mail containing contraband that comes into the prison is more of a security threat than mail that leaves the prison.<sup>13</sup>

Although the *Turner* standard may appear to be similar to the *Martinez* standard, there is a significant difference between the two. To satisfy the *Turner* standard (for incoming correspondence), prison officials must simply show the regulation could potentially achieve a legitimate goal. To meet the *Martinez* standard (for outgoing correspondence), officials must demonstrate that the restriction actually achieves an important goal. There are two main differences between the two standards: (1) the purposes that restrictions on outgoing mail are meant to serve must be important and not just legitimate, and (2) restrictions on outgoing mail must be shown to be more effective than restrictions on incoming mail need to be. As a result, it is easier to convince a judge that restrictions on outgoing mail are unconstitutional than it is to show that restrictions on incoming mail are unconstitutional. The standards for incoming and outgoing correspondence are explained further below with the help of examples to indicate how courts have interpreted them.

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8. *Procunier v. Martinez*, 416 U.S. 396, 412–414, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 239–240 (1974).

9. *Procunier v. Martinez*, 416 U.S. 396, 412–414, 94 S. Ct. 1800, 1811–1812, 40 L. Ed. 2d 224, 239–240 (1974). Note that the Supreme Court has severely limited the force of this requirement by refusing to interpret it as imposing a “least restrictive means” test. This means that lower courts will not invalidate a regulation simply because a less restrictive alternative is proposed. *See Thornburgh v. Abbott*, 490 U.S. 401, 411, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 474 (1989), partially overturning *Procunier*.

10. *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989).

11. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79 (1987). *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (finding that outgoing materials are less likely to cause disorder than incoming materials and determining that incoming mail should be held to a higher standard of inspection than outgoing mail).

12. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987).

13. *Thornburgh v. Abbott*, 490 U.S. 401, 412–414, 109 S. Ct. 1874, 1881–1882, 104 L. Ed. 2d 459, 472–473 (1989).

### (a) Outgoing Correspondence

Restrictions on outgoing, non-legal mail must further an important governmental objective, and the restriction must not be greater than necessary.<sup>14</sup> Courts have generally upheld four important types of regulations on outgoing mail under this standard: (1) regulations banning letter kiting (including mail to a third party in your letter to someone else), (2) setting postage limits, (3) banning inmate-to-inmate correspondence, and (4) requiring approved correspondence lists.<sup>15</sup>

Under New York State regulations, when the prison authorities have a reason to suspect that an incarcerated person is kiting mail, they may open that person's outgoing mail.<sup>16</sup> Kiting is when you send a message to one person, and inside that letter, include another message that will be sent to someone else. The authorities must have proof that the officials reasonably believed the incarcerated person was kiting mail.<sup>17</sup> Receiving incoming kited mail is also prohibited, though it is permissible for someone to send you the writing of a child within an adult's correspondence.<sup>18</sup>

Courts have also held that prison authorities are permitted to limit the amount of postage you can spend on outgoing mail.<sup>19</sup> Similarly, courts have generally allowed prison policies that limit receiving postage in the mail and providing free postage.<sup>20</sup> These restrictions must relate to the legitimate interest of prison security. Examples of legitimate interests of security could be concerns of increased theft and unregulated transactions when stamps are used as currency, or because drugs can be smuggled on stamps.<sup>21</sup>

Many prisons completely ban inmate-to-inmate correspondence, and these restrictions have generally been upheld as reasonably relating to prison security.<sup>22</sup> As inmate-to-inmate correspondence

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14. *Procurier v. Martinez*, 416 U.S. 396, 413–414, 94 S. Ct. 1800, 1811–1812, 40 L. Ed. 2d 224, 240 (1974); *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (limiting the *Martinez* test to outgoing mail).

15. *See, e.g., United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (holding that interception of mail sent in violation of anti-kiting regulations [regulations banning communicating to a third party through someone else] was not unconstitutional, because the government had evidence from letters written by incarcerated defendant that the defendant attempted to send mail for the purposes of recruiting for membership of his gang and planning to commit further crimes). *See, e.g., Davidson v. Mann*, 129 F.3d 700, 702 (2d Cir. 1997) (holding that limiting the number of stamps incarcerated people could purchase was not unconstitutional). *See, e.g., Purnell v. Lord*, 952 F.2d 679, 683 (2d Cir. 1992) (holding that banning correspondence between two specific incarcerated people for security reasons did not violate the First Amendment). *See, e.g., Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970) (holding that a requirement for an approved addressee list was not a constitutional violation so long as “the criteria used to create lists are rationally related to purposes of confinement and security” of the prison facility).

16. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(p) (2020); *see United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (upholding restrictions on kiting).

17. *See Ode v. Kelly*, 159 A.D.2d 1000, 1000, 552 N.Y.S.2d 475, 476 (4th Dept. 1990) (finding inspection of an incarcerated person's outgoing mail violated his rights where the superintendent had no reason to suspect an incarcerated person was kiting mail). *But see Minigan v. Irvin*, 977 F. Supp. 607, 609–610 (W.D.N.Y. 1997) (permitting screening of an incarcerated person's outgoing mail provided there is “good cause pursuant to legitimate prison regulations and directives.”).

18. STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCCS INMATES 6 (2019), *available at* <https://doccs.ny.gov/system/files/documents/2020/01/family-handbook-english-final-12.2019-002.pdf> (last visited May 22, 2020).

19. *See Gittens v. Sullivan*, 670 F. Supp. 119, 123 (S.D.N.Y. 1987) (finding “\$1.10 per week for stamps and an additional advance of \$36 for legal mailings satisfie[d] the constitutional minimum for access to the courts”); *see also Davidson v. Mann*, 129 F.3d 700, 702 (2d Cir. 1997) (upholding limits on an incarcerated person's access to stamps for non-legal mail).

20. *See Johnson v. Goord*, 445 F.3d 532, 534 (2d Cir. 2006) (holding that an incarcerated person has no “constitutional right to unlimited free postage for non-legal mail”).

21. *Johnson v. Goord*, 445 F.3d 532, 535 (2d Cir. 2006).

22. *See, e.g., Purnell v. Lord*, 952 F.2d 679, 683 (2d Cir. 1992) (finding restriction on correspondence between specific incarcerated people at different facilities reasonably related to security interests); *Farrell v. Peters*, 951 F.2d 862, 863 (7th Cir. 1992) (finding prevention of correspondence between two incarcerated people

involves both outgoing and incoming correspondence, it presents different circumstances from purely outgoing mail to a person that is not incarcerated. Inmate-to-inmate correspondence was at issue in *Turner v. Safley*, in which the Supreme Court announced the reasonable relation standard that is applied in all incoming correspondence cases and in many outgoing correspondence cases.<sup>23</sup> In addition, courts have also found restrictions barring correspondence between current and former inmates to be constitutional because they are rationally related to security interests such as preventing escapes and violent acts.<sup>24</sup>

It is unclear whether “approved correspondence lists” for outgoing non-legal mail are constitutional. In *Milburn v. McNiff*, a New York court found unconstitutional a policy requiring incarcerated people who wanted to communicate with people not on their “approved correspondence lists” to submit a “request to correspond form” to the addressee.<sup>25</sup> On the other hand, various federal district courts have found this kind of regulation to be “a reasonable method of maintaining prison security without undue restriction on the First Amendment rights of prisoners.”<sup>26</sup> Such lists, of course, must pass *Martinez* and have only been upheld when a substantial penological interest in security or rehabilitation is involved.<sup>27</sup> In New York, state courts might follow *McNiff* and prohibit the use of this type of list all together. But, in other states or in federal court, the lists may be upheld, provided they are legitimately used to further prison security or rehabilitation.<sup>28</sup>

In addition to the above, if you have already been sentenced and are in a minimum or low security level prison, you generally must provide a complete return address on all outgoing mail, otherwise it may be opened by prison staff.<sup>29</sup>

Finally, courts do not allow prison officials to censor and discipline incarcerated people based on statements in mail that are intended to insult prison personnel, even if such statements would be

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who claimed to be common-law spouses was reasonably related to security where they had been criminal accomplices prior to their incarceration).

23. *See generally* *Turner v. Safley*, 482 U.S. 78, 91–93, 107 S. Ct. 2254, 2262–2264, 96 L. Ed. 2d 64, 80–82 (1987) (upholding regulation barring inmate-to-inmate correspondence because prison had legitimate interest in stopping plans to escape or plans to commit violent acts shared in correspondence).

24. *See* *Nasir v. Morgan*, 350 F.3d 366, 371–372 (3d Cir. 2003).

25. *Milburn v. McNiff*, 81 A.D.2d 587, 589, 437 N.Y.S.2d 445, 448 (2d Dept. 1981) (further finding that there was no substantial government interest in restricting an incarcerated person’s ability to send letters to a local newspaper).

26. *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970) (holding that the approved correspondence lists were constitutional, but striking other mail surveillance on First Amendment grounds); *see also* *George v. Smith*, No. 05-C-403-C, 2005 U.S. Dist. LEXIS 16139, at \*20 (W.D. Wis. Aug. 2, 2005) (*unpublished*) (“In the interest of maintaining prison security, prison officials may lawfully limit an inmate to corresponding with individuals on a pre-approved list.”); *Collins v. Schoonfield*, 344 F. Supp. 257, 276 (D. Md. 1972) (disagreeing with the broad prohibition on reading inmate mail under *Palmigiano v. Travisono* and discussing potential legitimacy of prisons reading some outgoing mail). *But see* *Guajardo v. Estelle*, 580 F.2d 748, 755 (5th Cir. 1978) (finding unconstitutional a policy limiting letters sent by incarcerated people to family and an approved list of ten individuals, excluding immediate family members, religious leaders, special correspondents, attorneys or media correspondents, because it is not essential to further legitimate security interests and is often abused as applied); *Finney v. Arkansas Bd. of Corr.*, 505 F.2d 194, 211–212 (8th Cir. 1974) (rejecting an approved correspondence list procedure because the following justifications were not enough under *Martinez*: prospectively investigating potential visitors, universally prohibiting correspondence with former incarcerated people, and assuring that no unwanted mail was received by unapproved recipients).

27. *See* *Finney v. Arkansas Bd. of Corr.*, 505 F.2d 194, 211 (8th Cir. 1974) (finding an approved correspondence list unconstitutional where the prison justified it as pre-screening potential visitors and protecting those who might not want to receive mail from incarcerated people).

28. *Cf.* *United States v. Felipe*, 148 F.3d 101, 110–111 (2d Cir. 1998) (upholding as serving security interests the unique, severe restrictions on mail and visitation to a court-approved list for gang member convicted of racketeering).

29. *See, e.g.*, 28 C.F.R. § 540.14(c)(1)(iv) (2020) (staff at a minimum or low security federal prison may open the incarcerated person’s outgoing mail if the incarcerated person has not filled out the return address properly); N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(i) (2020) (requiring New York State incarcerated people to include their return addresses on outgoing mail).

prohibited if made verbally.<sup>30</sup> Courts have also allowed regulations that call for the routine inspection of all non-legal outgoing mail.<sup>31</sup> They have distinguished between censorship and inspection for security reasons.<sup>32</sup> One court has even upheld the censorship of outgoing mail under the *Martinez* standard, although the incarcerated plaintiff in the case was held in a mental institution, rather than a jail or prison.<sup>33</sup>

When the regulation at issue involves both incoming and outgoing correspondence, courts have applied the *Turner* standard.<sup>34</sup> A few courts have even departed entirely from the *Martinez* standard, instead applying the *Turner* reasonableness standard to outgoing mail as well. In general, courts are increasingly accepting of prison officials' reasons for placing restrictions on outgoing correspondence.<sup>35</sup>

### (b) Incoming Correspondence

Regarding the restriction of incoming correspondence (mail and publications sent to you), the Court in *Thornburgh v. Abbott* held that the proper standard of review was the one stated in *Turner v. Safley*.<sup>36</sup> In *Thornburgh*, the Court held that “[w]here the regulations at issue concern the entry of materials into the prison, . . . a regulation that gives prison authorities broad discretion is

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30. Cases where incarcerated people are not certain if their defamatory (insulting) comments will be read are treated differently than cases involving defamatory comments directed at prison officials (for example, if someone wrote threats to a guard in a letter so that the guard reading the letter would see them). See *Loggins v. Delo*, 999 F.2d 364, 367 (8th Cir. 1993) (finding that prison official violated incarcerated people's 1st Amendment rights by disciplining an incarcerated person after reading an incarcerated person's letter to his brother that commented about prison guards where the letter did not raise a security risk and was not directed towards staff); *Brooks v. Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987) (finding no government interest in censorship); *Hall v. Curran*, 818 F.2d 1040, 1044–1045 (2d Cir. 1987) (finding the district court should not have granted summary judgment to prison administrator against an incarcerated person's 1st Amendment claim for censorship of his statements critical of prison administration). *But see* *Leonard v. Nix*, 55 F.3d 370, 376 (8th Cir. 1995) (finding that incarcerated people cannot use supposed personal communication to send letters that are extremely offensive to prison personnel if their purpose is only to defame (insult) prison personnel and not to communicate).

31. *Bell-Bey v. Williams*, 87 F.3d 832, 837–838 (6th Cir. 1996) (holding that a mail inspection procedure did not violate an incarcerated person's 1st Amendment rights because the procedure was limited to protecting the legitimate government interest of managing limited prison resources and satisfied the *Martinez* rule); *Stow v. Grimaldi*, 993 F.2d 1002, 1004 (1st Cir. 1993) (finding that inspection procedures requiring outgoing mail to be submitted for inspection in unsealed envelope served the legitimate government interest of safety).

32. *Altizer v. Deeds*, 191 F.3d 540, 549 (4th Cir. 1999) (holding that inspection of an incarcerated person's outgoing mail for contraband was not a constitutional violation since there is a substantial government interest in security and the incarcerated person had previously tried to mail a homemade knife).

33. *Martyr v. Mazur-Hart*, 789 F. Supp. 1081, 1086–1087 (D. Or. 1992) (upholding a mental institution's refusal to send letters written by an incarcerated person because the censorship furthered the important governmental interest of rehabilitation; the writing hindered the incarcerated person's progress).

34. See *Duamutef v. Hollins*, 297 F.3d 108, 113 (2d Cir. 2002) (upholding mail watch on all incoming and outgoing mail based on *Turner* standard as furthering the government interest of security where inflammatory material had previously circulated through the mail); *Sisneros v. Nix*, 884 F. Supp. 1313, 1331–1333 (S.D. Iowa 1995) (upholding under the *Turner* standard a regulation that prohibited the delivery to or from an incarcerated person of letters written in a language other than English, unless that language was the only one an incarcerated person spoke); *Martin v. Rison*, 741 F. Supp. 1406, 1413–1417 (N.D. Cal. 1990) (upholding a regulation that prohibited incarcerated people from acting as reporters for newspapers published outside the prison; the court based its decision in part on the fact that the article, although published outside the prison, was read within the prison and caused agitation amongst incarcerated people resulting in a need for security adjustment, and meriting application of the *Turner* standard to the regulation).

35. *Perry v. Secretary, Florida Dept. of Corr.*, 664 F.3d 1359, 1365 (11th Cir. 2011) (citing *Turner* standard as basis for reviewing incarcerated people's solicitation of pen pals); *Butti v. Unger*, No. 04-5381, 2005 U.S. Dist. LEXIS 14408, at \*9 (S.D.N.Y. July 15, 2005) (*unpublished*) (citing *Turner* standard as basis for surveillance of an incarcerated person's outgoing mail when officials had “a reasonable suspicion of his continuing criminal activity, and [the surveillance] was reasonably related to legitimate penological interests”).

36. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79 (1987)).

appropriate.”<sup>37</sup> Under the *Turner* standard, restrictions are valid if they are reasonably related to a legitimate penological interest (for example, security, order, or rehabilitation of incarcerated people). This “reasonably related” standard is more general than the *Martinez* standard and less protective of your right to communicate.

The Court has identified four factors for determining whether a restriction meets the reasonably related standard. The first and most important factor is whether the regulation is both neutral and rationally related to the alleged legitimate government interest.<sup>38</sup> This factor can be broken down into three subparts:

- (1) Whether the government interest or goal is legitimate,
- (2) Whether the regulation is rationally related to that interest or goal, and
- (3) Whether the regulation is neutral.<sup>39</sup>

Subpart (1), government interest in restricting mail, is usually either maintenance of prison security or screening for contraband. Courts almost always hold these two interests legitimate.<sup>40</sup> For subpart (2), under the *Turner* standard, the relationship between a mail restriction and the stated government interest does not need to be very close. Prisons do not need to prove the restrictions will actually promote security or screen contraband in all cases; they only need to convince the court that the restriction *might* achieve these goals. Courts usually find the government’s argument to be valid.<sup>41</sup> Nevertheless, when a court does invalidate a mail restriction, it usually does so because there is no rational relationship between the restriction and the government interest.<sup>42</sup> Finally, for subpart (3), regulations are considered neutral when the government interest is unrelated to suppressing expression. In other words, the restriction is neutral as long as the purpose of the restriction is something other than to stop you from expressing yourself.<sup>43</sup>

The second factor of the reasonably related standard is whether the regulation leaves you, the incarcerated person, with another way to exercise the asserted right.<sup>44</sup> Courts usually define the right broadly, which makes it easier to find some way for you to still exercise that right. For example, the regulation in *Thornburgh v. Abbott* prohibited publications containing sexually explicit material. Instead of defining the right in question as the right to receive sexually explicit materials, the court

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37. *Thornburgh v. Abbott*, 490 U.S. 401, 416, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 475 (1989).

38. *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987).

39. *Thornburgh v. Abbott*, 490 U.S. 401, 414, 109 S. Ct. 1874, 1882, 104 L. Ed. 2d 459, 473 (1989).

40. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 407–408, 109 S. Ct. 1874, 1878–1879, 104 L. Ed. 2d 459, 469 (1989) (“Acknowledging the expertise of [prison] officials and that the judiciary is ‘ill equipped’ to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world”); *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (emphasizing that courts should defer to prison administrators’ judgment regarding the danger of contraband being introduced into prisons); *Pell v. Procunier*, 417 U.S. 817, 823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 502 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”).

41. *E.g., Avery v. Powell*, 806 F. Supp. 7, 10 (D.N.H. 1992) (finding a regulation that prohibited incarcerated people from receiving blank greeting cards from anyone other than the vendor to be rationally connected to the interests of promoting security and screening for contraband; the court noted that cards are often multipart, contained within envelopes, or decorated with metals or flammable substances, so cards received from non-vendors would necessitate time-consuming searches). *See also Turner v. Safley*, 482 U.S. 78, 93, S. Ct. 2254, 2264, 96 L. Ed. 2d 64, 82 (1987) (holding constitutional a regulation restricting correspondence between incarcerated people); *Giano v. Senkowski*, 54 F.3d 1050, 1056 (2d Cir. 1995) (affirming constitutionality of policy prohibiting incarcerated people from possessing sexually explicit photographs).

42. *See, e.g., Crofton v. Roe*, 170 F.3d 957, 960–961 (9th Cir. 1999) (invalidating a regulation that limited the publications incarcerated people can receive to those ordered and paid for directly by the incarcerated person because the court found no rational relation between the regulation and the asserted interests of screening for contraband, minimizing fire hazards, or preventing overcrowding).

43. *See Thornburgh v. Abbott*, 490 U.S. 401, 415–416, 109 S. Ct. 1874, 1882–1883, 104 L. Ed. 2d 459, 474 (1989).

44. *See Thornburgh v. Abbott*, 490 U.S. 401, 417, 109 S. Ct. 1874, 1883, 104 L. Ed. 2d 459, 475–476 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)).

defined the right more broadly as the right to expression, which it held could be exercised through the many other publications that were not prohibited.<sup>45</sup>

The third and fourth factors are usually interrelated. The third factor is the impact that accommodating the right will have on other incarcerated people, guards, and prison resources. The fourth factor is whether there are any ready alternatives to the proposed regulation.<sup>46</sup> Because the accommodation of a right will usually require alternatives to the regulation, these two factors are often combined. For example, accommodating an incarcerated person's right to receive blank greeting cards from non-vendors would require extensive searches of more incoming mail. Such searches may be considered both an unacceptable impact of the accommodation of the right and an unacceptable alternative to the regulation at issue.<sup>47</sup>

### (c) “As Applied” versus “Facial” Challenges

Most cases discussed in this Chapter so far involve “facial” challenges—challenges to the regulation as written. But, because many prison regulations are vague, it is often hard for judges to object to them. In such cases, incarcerated people may instead bring an “as applied” challenge. As applied challenges occur when an incarcerated person objects to the way prison officials apply a regulation to him, rather than to the regulation itself.

*Nichols v. Nix*<sup>48</sup> and *Lyon v. Grossheim*<sup>49</sup> are good examples of as applied challenges to prison policies.<sup>50</sup> In both cases, the regulation at issue gave the superintendent power to deny an incarcerated person any publication likely to be disruptive or to produce violence. The court upheld the regulation as it was written because it facially passed the *Turner* standard: Preventing disruptions and violence is always a legitimate goal, and the regulation only applies to publications that are likely to hinder this goal. However, the court held that prison officials applied the regulation in an unconstitutional manner. In both cases, the court found that there was no evidence that the publications at issue were likely to threaten prison security because other incarcerated people had possessed similar publications without incident.<sup>51</sup>

If you think a prison policy is being applied in an unconstitutional way, you can challenge it even though it may look, as written, like policies that courts have upheld in the past.

### (d) Procedural Safeguards

Note that several important procedural safeguards upheld by the Supreme Court in *Procunier v. Martinez* must still be respected by prison officials.<sup>52</sup> First, an incarcerated person should be notified if prison officials return a letter addressed to him or if a letter by an incarcerated person is returned to the prison. Second, the author of the returned letter should be given a reasonable opportunity to protest the decision to restrict.<sup>53</sup>

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45. *Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989).

46. *See Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)).

47. *Avery v. Powell*, 806 F. Supp. 7, 10–11 (D.N.H. 1992).

48. *Nichols v. Nix*, 810 F. Supp. 1448, 1466–1467 (S.D. Iowa 1993) (striking down a regulation as it was used to restrict publications that promoted racial segregation).

49. *Lyon v. Grossheim*, 803 F. Supp. 1538, 1540, 1554–1555 (S.D. Iowa 1992) (invalidating an official action denying incarcerated people access to “anti-Catholic” comic books which also contained negative references to homosexuality and the Soviet Union).

50. The cases were both decided in the Southern District of Iowa. Though they are only binding on prisons in that district, they provide good examples of as-applied challenges that you can bring elsewhere.

51. *Nichols v. Nix*, 810 F. Supp. 1448, 1463 (S.D. Iowa 1993) (“[T]he record is...devoid of evidence of past inmate confrontations as a result of other inmates possessing or reading [such] publications.”); *Lyon v. Grossheim*, 803 F. Supp. 1538, 1552 (S.D. Iowa 1992) (“There is...no evidence of past confrontations as a result of other inmates possessing or reading [such] publications.”).

52. *Procunier v. Martinez*, 416 U.S. 396, 418–419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974). *See also* Michael Mushlin, *Rights of Prisoners* § 14.6 (5th ed. 2017 & Supp. 2020) (describing procedural safeguards required of any prison censorship scheme).

53. *Procunier v. Martinez*, 416 U.S. 396, 418–419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974).

## 2. State and Federal Protections of the Right to General (Non-Legal) Correspondence

State and federal regulations may give you more rights than those the U.S. Constitution provides—these regulations cannot take away any rights guaranteed by the Constitution, but they can provide more than the Constitution does. The following is a discussion of New York State and City regulations, as well as federal regulations governing your right to communicate in writing with the general public. Incarcerated people in other states must consult their state and local regulations.<sup>54</sup>

### (a) New York State and City Regulations

In New York, the specific regulations governing your right to communicate with the outside world depend on the type of institution in which you are imprisoned. There are three different sets of regulations. One set applies only to prisons run by the New York State Department of Correctional Services (for example, Attica). The second applies to all city and county prisons and jails (for example, Nassau County Jail), and the third applies only to New York City prisons and jails (for example, Rikers Island). The Department of Correctional Services issued the first set of regulations; the New York State Commission of Correction, the second; and the New York City Department of Correction and/or the Board of Correction, the third. If you are in a New York City jail, both the second and third sets of regulations apply to you. If more than one set of regulations applies to you, courts will use the one that gives you more protection.

New York State regulations, which apply to prisons run by the Department of Correctional Services, provide protections to your right to communicate beyond the minimum required by the Constitution. These regulations allow incarcerated people, with some restrictions, to correspond with any person.<sup>55</sup> State regulations only prohibit incarcerated people from corresponding with people who have indicated they do not wish to receive mail from the incarcerated person or with persons listed on a court order of protection.<sup>56</sup> Furthermore, incarcerated people must receive advance approval in order to correspond with unrelated minors, persons on parole or probation, other New York incarcerated people, employees or former employees of the Department of Correctional Services, and victims of the incarcerated person's crime(s).<sup>57</sup> State regulations also prohibit prison officials from opening, inspecting, or reading outgoing correspondence (except for oversized envelopes, parcels, and incarcerated person-to-incarcerated person correspondence) without written authorization from the facility superintendent.<sup>58</sup> The superintendent cannot provide such authorization unless there is a reason to believe that the correspondence violates the department's regulations or that it threatens the safety, security, or good order of the prison. If authorization is given, the superintendent must set forth, in writing, the specific facts justifying it.<sup>59</sup>

With respect to incoming mail, New York State regulations require the inspection of all such mail, but prohibit the reading of incoming correspondence (except for letters between incarcerated people and business mail) unless there is evidence that the mail contains plans for sending contraband in or out of the prison, plans for criminal activity, or information that would create a danger to others or to the prison's security and good order.<sup>60</sup> The facility superintendent must provide written authorization to read incoming correspondence and must specify why reading the mail is necessary.<sup>61</sup> It is also important to be aware of your facility's specific restrictions on what can be sent through the mail; failing to follow these rules can result in your mail not reaching you.<sup>62</sup>

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54. *JLM*, Chapter 2, "Introduction to Legal Research," will be helpful in conducting this research.

55. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3 (2020).

56. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(a) (2020).

57. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(b) (2020).

58. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 720.3(c)–(e) (2020).

59. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.3(e)(1) (2020).

60. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.4(a)(2) (2020).

61. N.Y. COMP. CODES R. & REGS. tit. 7, § 720.4(f) (2020).

62. Items prohibited in incoming correspondence include obscene, threatening, or fraudulent materials, nude photographs, Polaroid pictures, postage stamps, and letters from others (kiting) except minor children. There is also a five-page limit on incoming correspondence. N.Y. COMP. CODES R. & REGS. tit. 7, §§ 712.2, 720.4(c)–

The local county jail regulations also provide protections.<sup>63</sup> These regulations provide that you may correspond, with a few restrictions, with anyone you wish. Prison officials may not impose restrictions based on the amount of mail sent or received, or based on the language in which the correspondence is written.<sup>64</sup> Outgoing correspondence may not be opened or read unless the chief administrative officer gives written approval based on a “reasonable suspicion” that the correspondence threatens the security of the prison or of another person.<sup>65</sup> Incoming correspondence may be opened outside the presence of the incarcerated person-recipient to ensure the absence of contraband, but it may not be read without the written approval of the chief administrative officer.<sup>66</sup> Any information prison officials obtain by opening your incoming correspondence without the superintendent’s authorization may not be used in a disciplinary hearing against you.<sup>67</sup>

New York City has additional standards set out in the Minimum Standards Regulating the Conditions of Confinement.<sup>68</sup> New York City incarcerated people are urged to familiarize themselves with these standards. Find out if your prison library has a copy; if it does not, ask the librarian to get one. Copies of “Minimum Standards” can be obtained by writing to:

City of New York  
Board of Correction  
51 Chambers Street, Room 923  
New York, NY 10007

#### (b) Federal Regulations

If you are incarcerated in a federal prison (in a prison run by the Bureau of Prisons), you are subject to mail regulations the Federal Bureau of Prisons has issued. These rules apply only to incarcerated people who have been sentenced to serve a period of time in a prison run by the Bureau of Prisons. Some rules concerning general correspondence follow. The warden of each prison has the authority to establish your rules of correspondence.<sup>69</sup> The specific rules the warden develops must be communicated to you in writing upon arrival at the prison.<sup>70</sup> Prison authorities may open and read your mail if they determine doing so is necessary to maintain security or monitor a specific problem.<sup>71</sup> They may not read mail that is “special” or “privileged,” although they may open it (in your presence only) to ensure that there is no contraband in the envelope.<sup>72</sup> “Special” or “privileged” mail includes mail from attorneys, law enforcement officers, courts, and public officials. Regulations governing privileged mail are discussed further in Part C of this Chapter.

Prison officials may not open and read mail you are sending from a minimum-security or low-security prison unless they have “reason to believe [the mail] would interfere with the orderly running [of the prison], that it would be threatening to the recipient, or that it would facilitate

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(d) (2020). *See also* State of N.Y. Department of Corrections And Community Supervision, Directive No. 4911, Packages & Articles Sent or Brought to Facilities (2013) (*as revised*, Jun. 28, 2019), <http://www.doccs.ny.gov/Directives/4911.pdf> (last visited May 23, 2020) (additional restrictions on packages brought or sent to you in prison).

63. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004 (2020).

64. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.1(b) (2020).

65. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.2 (f)–(g) (2020).

66. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.3 (a)–(b) (2020).

67. *See* Chavis v. Goord, 265 A.D.2d 798, 798, 697 N.Y.S.2d 409, 410 (4th Dept. 1999) (reversing a disciplinary decision because prison investigation relied on information obtained through unauthorized review of an incarcerated person’s mail).

68. Rules of the City of New York, Tit. 40, Ch. 1, § 11, *available at* <http://www1.nyc.gov/site/boc/jail-regulations/jail-regulations.page> (last visited May 23, 2020).

69. 28 C.F.R. § 540.10 (2020).

70. 28 C.F.R. § 540.12(b) (2020).

71. 28 C.F.R. §§ 540.12(b), 540.14(a) (2020).

72. 28 C.F.R. § 540.12(b) (2020).

criminal activity.”<sup>73</sup> In medium- and high-security institutions, prison officials may read all mail other than “special mail.”<sup>74</sup>

Federal prisons must supply you with paper and envelopes at no cost, but you must pay for stamps. If you cannot afford postage, the warden must provide stamps for a reasonable number of letters per month.<sup>75</sup>

For more information and details about the federal regulations, you should consult the relevant regulations themselves. They can be found in the Code of Federal Regulations, 28 C.F.R. § 540.

### 3. A Note on Foreign-Language Materials

The ability of prisons to restrict correspondence in foreign languages remains unclear. Some courts have found that regulations prohibiting incarcerated people from writing and receiving letters in languages that cannot be understood by prison officials are permissible as reasonably related to the legitimate prison interest of security.<sup>76</sup> On the other hand, some courts have held that a complete ban on all foreign-language correspondence is not rational.<sup>77</sup> Additionally, some courts have found the exclusion of foreign-language publications unreasonable under this standard.<sup>78</sup> By statute in New York State, prison officials may not impose restrictions based on the language in which the mail is written.<sup>79</sup> Make sure to check statutes, regulations, and court decisions in your state to find out what the law is.

#### C. Legal Correspondence with Courts, Public Officials, and Attorneys: Privileged Correspondence

Under *Procunier v. Martinez* and *Thornburgh v. Abbott*, two important cases discussed in Part B(1) of this Chapter, both legal and non-legal correspondence generally receive protection under the First Amendment.<sup>80</sup> However, correspondence with courts, public officials, and attorneys (“legal mail”) receives heightened protection because censorship of this mail implicates two other important concerns: your right of meaningful access to the courts and the attorney-client privilege. This Section discusses each of these sources of protection separately. Mail to and from attorneys, courts,

73. 28 C.F.R. § 540.14 (c)(1)(i) (2020). Prison authorities can also read this mail if you are on a restricted correspondence list, if the mail is being sent to another incarcerated person, or if the return address on the envelope is incomplete. 28 C.F.R. §§ 540.14 (c)(1)(ii)–(iv) (2020).

74. 28 C.F.R. § 540.14(c)(2) (2020).

75. 28 C.F.R. §§ 540.21(a), (b), (d), (e) (2020). *See also* Gittens v. Sullivan, 670 F. Supp. 119, 121, 123 (S.D.N.Y. 1987) (finding reasonable the provision of an amount equal to five free stamps per week for all correspondence, in addition to a \$20 advance for legal mail, where the superintendent may advance additional funds for postage on legal mail if the incarcerated person exceeds the twenty dollar limit), *aff'd*, 848 F.2d 389 (2nd Cir. 1988).

76. *See, e.g.*, Ortiz v. Fort Dodge Corr. Facility, 368 F.3d 1024, 1026–1027 (8th Cir. 2004) (finding acceptable a regulation that prohibited incarcerated people from writing letters in Spanish absent a ready alternative interpreter option). *See also* Sisneros v. Nix, 884 F. Supp. 1313, 1331–1333 (S.D. Iowa 1995) (upholding a regulation that prohibited the delivery of letters to or from an incarcerated person written in a language other than English unless that language was the only one spoken by an incarcerated person), *aff'd in part and rev'd in part on other grounds*, 95 F.3d 749, 750 (8th Cir. 1996); Nelson v. Woodford, No. C 04-03684 CRB (PR), 2006 U.S. Dist. LEXIS 11120, at \*25–30 (N.D. Cal. Mar. 2, 2006) (*unpublished*) (stating that a ban on foreign-language publications was rationally related to the security goal of preventing coded communication by gangs), *aff'd*, 249 Fed. Appx. 529, 530 (9th Cir. 2007).

77. *Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994) (holding that since the prison could have secured free translation services and the facility did not otherwise read every single piece of correspondence anyway, the ban on a Lao incarcerated person’s correspondence was not rational).

78. *See, e.g.*, *Kikimura v. Turner*, 28 F.3d 592, 598–600 (7th Cir. 1994) (invalidating a complete ban on foreign-language materials under the Turner test where the prison had made an attempt to accommodate the incarcerated person).

79. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.1(b)(2) (2020).

80. *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974); *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

paralegals, and legal organizations is treated as privileged and receives heightened protection (for instance, this mail cannot usually be censored). Mail to and from other public officials and agencies, such as U.S. Congressmen and the Department of Justice, is also usually treated as privileged and given greater protection than regular mail.

### 1. First Amendment Protections

Some courts have held that legal mail is entitled to a higher degree of First Amendment protection than other mail. The censorship or interference with an incarcerated person's mail is justified only "if it further one or more substantial governmental interests."<sup>81</sup> This interference still must not be greater than necessary to the protection of said governmental interest. Even when this analysis is not applied, courts generally give legal mail more consideration than non-legal mail in evaluating restrictions.<sup>82</sup>

#### (a) Incoming Legal Correspondence

Correspondence from your attorney is incoming mail, and so restrictions on it are evaluated under the *Turner* standard.<sup>83</sup> Restrictions on privileged incoming mail do not violate the First Amendment if the restrictions are reasonably related to a legitimate need to manage the prison or carry out your penalty. In *Wolff v. McDonnell*, the U.S. Supreme Court held that a state can require your lawyer to clearly mark her letters as coming from an attorney, and can require that her address be written on the envelope if the letters are to receive special treatment, and, finally, can require your lawyer to identify herself to prison officials before correspondence with you begins.<sup>84</sup> For example, in 2009, the Ninth Circuit of the U.S. Court of Appeals denied an incarcerated person's constitutional claims because the return address on his legal mail did not indicate that it came from an attorney, a valid prerequisite under California law for legal mail to receive special treatment.<sup>85</sup> *Wolff* seems to imply that prison officials cannot read or censor correspondence with your attorney if there is no suspicion that the correspondence is illegal, but this is not entirely clear.<sup>86</sup> According to *Wolff*, a requirement that letters from an attorney to an incarcerated person be opened by prison officials only in the presence of the incarcerated person may be more than what the Constitution demands.<sup>87</sup> Since *Wolff*, however, many courts have ruled that the incarcerated person must be present if the prison is opening his letters, or that the incarcerated person at least be given the opportunity to request such a safeguard.<sup>88</sup>

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81. *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

82. *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) ("In balancing the competing interests implicated in restrictions on prison mail, courts have consistently afforded greater protection to legal mail than to non-legal mail..."); *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) ("[W]hen the incoming mail is 'legal mail,' we have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts.").

83. *Thornburgh v. Abbott*, 490 U.S. 401, 414–419, 109 S. Ct. 1874, 1882–1885, 104 L. Ed. 2d 459, 473–477 (1989).

84. *Wolff v. McDonnell*, 418 U.S. 539, 576–577, 94 S. Ct. 2963, 2984–2985, 41 L. Ed. 2d 935, 963 (1974).

85. *See Paulino v. Todd*, 338 F. App'x 720, 721–722 (9th Cir. 2009).

86. *See Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 925, 963 (1974) ("As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence ensures that prison officials will not read the mail.").

87. *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 935, 963 (1974) ". . . we think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires"; *see also Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993) (holding "that the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights.").

88. *See Fontroy v. Beard*, 559 F.3d 173, 183–184 (3d Cir. 2009) (upholding under *Turner* and *Wolff* a policy requiring attorneys to apply for a Control Number and put it on all legal mail so that it could be identified as such and then opened in front of the incarcerated people. Even though this policy did place a burden on incarcerated

### (b) Outgoing Legal Correspondence

Prisons cannot restrict correspondence sent *to* attorneys unless the restriction furthers an important or substantial governmental interest.<sup>89</sup> This rule applies to incarcerated people who are detained prior to their trial, which may result in incarceration. It also applies to those who have been convicted, but face further criminal prosecution. Some courts have found that outgoing legal correspondence does not present the same security threat as non-legal correspondence, and so there is minimal government interest in restricting it.<sup>90</sup> Letters to some government agencies, elected officials, and legal assistance and civil liberties groups enjoy the same protection as mail addressed to your attorney.<sup>91</sup> Also, the government has a duty to provide indigent incarcerated people with stationery and a reasonable amount of postage for legal mail.<sup>92</sup> However, one federal district court case found

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people's First Amendment rights when attorneys did not properly request control numbers, the court found the procedure constitutional because it balanced the right with the facility's desire to avoid people sneaking in contraband through fake legal mail which had happened before and facilitated an escape); *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) (reaffirming that an opt-in policy, where an incarcerated person had to request being present when legal mail was opened, is constitutional so long as the incarcerated person is given written notice of it); *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974) (*per curiam*) (holding that because "prison officials in inspecting incoming mail outside the presence of an inmate are provided with an opportunity to obtain advanced warning of potential litigation which might involve the prison and more significantly, could become privy to stratagems being formulated between attorney and client with regard to pending litigation," the incarcerated person is entitled to be present during the opening of legal mail addressed to him); *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996) (holding that an incarcerated person's right to be present during opening of his legal mail extends to hand-delivered correspondence as well as correspondence received through the U.S. Postal Service). *But see* *John v. New York City Dept. of Corr.*, 183 F. Supp. 2d 619, 629 (S.D.N.Y. 2002) (dismissing (with leave to amend) an incarcerated person's claim for denial of access to courts when prison officials opened mail outside his presence because he failed to allege either that the officials acted deliberately and maliciously in doing so or that he suffered any injury).

89. *Procunier v. Martinez*, 416 U.S. 396, 412–415, 94 S. Ct. 1800, 1811–1812, 40 L. Ed. 2d 224, 239–242 (1974), *overruled in part by* *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (noting that the ruling in *Martinez* only applies to outgoing correspondence).

90. *See* *Cancel v. Goord*, No. 00 Civ. 2042 (LMM), 2001 U.S. Dist. LEXIS 3440, at \*16–17 (S.D.N.Y. Mar. 21, 2001) (*unpublished*) (finding that without more than general security interests, interference with outgoing legal mail is unconstitutional) (citing *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982)); *Taylor v. Sterrett*, 532 F.2d 462, 473–474 (5th Cir. 1976) (finding that censoring outgoing mail to attorneys, the courts or to government agencies is not significantly related to the advancement of jail security and thus unconstitutional); *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970) (holding that the reading of any outgoing mail violates the 1st Amendment unless pursuant to a duly obtained search warrant).

91. *See* *Davidson v. Scully*, 694 F.2d 50, 53–54 (2d Cir. 1982) (striking down regulation restricting outgoing mail to government agencies because "[i]f prison officials are able to deny inmates free access to public officials and agencies, the fundamental right [of access to the courts] is restricted just as surely as if the government denied prisoners access to traditional legal materials. In many cases an inmate's claim might be substantially furthered by information or aid available through government agencies."). *But see* *O'Keefe v. Van Boening*, 82 F.3d 322, 322–323 (9th Cir. 1996) (upholding regulation treating grievance mail to state agencies as non-legal); *Jackson v. Mowery*, 743 F. Supp. 600, 606 (D. Ind. 1990) ("[T]he legal mail protected by the Constitution extends only to safeguard communications between an inmate and his attorney, and [defendant] has no basis for his claim of interference with 'legal mail' to and from his family and friends.").

92. *See* *Bounds v. Smith*, 430 U.S. 817, 824–825, 97 S. Ct. 1491, 1496, 52 L. Ed. 2d 72, 81 (1977) (stating that it is "indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them") *overruled in part by* *Lewis v. Casey*, 518 U.S. 343, 354, 116 S. Ct. 2174, 2181, 135 L. Ed. 2d 606, 619–620 (1996) ("It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present . . . These statements appear to suggest that the State must enable the prisoner to discover grievances, and to litigate effectively once in court. *See* *Bounds*, 430 U.S. at 825–826, and n. 14. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them"). *But see* *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (citing *Bach v. Coughlin*, 508 F.2d 303, 307 (7th Cir. 1974)) (explaining that while incarcerated people have a right to access the courts, they are not entitled to unlimited free postage, and

that a ten-day delay in sending an incarcerated person's legal mail did not violate his limited constitutional right to freedom of association.<sup>93</sup> The mail was initially delayed because of insufficient funds on two occasions.<sup>94</sup>

## 2. Your Right to Meaningful Access to the Courts and Assistance of Counsel

You have a constitutional right to meaningful court access and assistance of counsel.<sup>95</sup> In *Davidson v. Scully*, the Second Circuit held that restrictions on an incarcerated person's legal mail can violate this right.<sup>96</sup> For example, courts have stated that allowing prison officials to read mail to courts or between attorneys and incarcerated people can prevent incarcerated people from bringing abuses to the attention of courts because they fear retaliation.<sup>97</sup> Thus, even if your First Amendment claim fails because the restriction at issue is related to an important government objective, you can still challenge the restriction if it prevents you from having meaningful court access.

However, these claims will likely not succeed unless you also prove that there was some actual harm to your ability to assert a legal claim.<sup>98</sup> In one recent New York case, the district court reiterated

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prison officials can balance incarcerated people's rights to use the mails against budgetary concerns); *Chandler v. Coughlin*, 763 F.2d 110, 114 (2d Cir. 1985) (finding that state is not required to provide indigent incarcerated people unlimited free postage, but only a "reasonably adequate" amount of postage for access to the courts); *Gittens v. Sullivan*, 670 F. Supp. 119, 123 (S.D.N.Y. 1987) (finding that "\$1.10 per week for stamps and an additional advance of \$36.00 for legal mailings satisfies the constitutional minimum for access to the courts"), *aff'd*, 848 F.2d 389, 390 (2d Cir. 1988).

93. *See* *Branham v. Mansfield*, No. 2:04-CV-286, 2009 U.S. Dist. LEXIS 87195 at \*15 (W.D. Mich. 2009) (*unpublished*).

94. *See* *Branham v. Mansfield*, No. 2:04-CV-286, 2009 U.S. Dist. LEXIS 87195 at \*15 (W.D. Mich. 2009) (*unpublished*).

95. *See* *Bounds v. Smith*, 430 U.S. 817, 821–823, 97 S. Ct. 1491, 1494–1495, 52 L. Ed. 2d 72, 78–80 (1977) (reviewing the history of Supreme Court decisions that have established a right of access to the courts and the assistance of counsel). *But see* *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (holding that an incarcerated person must prove that lack of necessary legal assistance or library actually hindered case). *See* Chapter 12 and Chapter 9, Part G of the *JLM* for a full discussion of the right to effective assistance of counsel.

96. *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982) (holding that prison officials who did not allow an incarcerated person to mail sealed letters to various public agencies violated the incarcerated person's right to meaningful access to the courts).

97. *See* *Taylor v. Sterrett*, 532 F.2d 462, 476 (5th Cir. 1976); *Martin v. Brewer*, 830 F.2d 76, 78–79 (7th Cir. 1987) (distinguishing incoming from outgoing mail to the courts on this ground).

98. *See* *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (holding the incarcerated person must prove his prison's law library or legal assistance program was lacking in a way actually hindering his efforts to pursue a legal claim); *Bourdon v. Loughren*, 386 F.3d 88, 98–99 (2d Cir. 2004) (holding appointment of counsel to an incarcerated person was sufficient to satisfy the incarcerated person's right of access to the courts; assistance from that counsel is measured not by the "effectiveness" standard of the Sixth Amendment, but by the counsel's capabilities as a qualified and trained person); *DeLeon v. Doe*, 361 F.3d 93, 94 (2d Cir. 2004) (dismissing incarcerated person's claim for denial of court access when prison officials caused delays to his court filings because case was not dismissed for untimeliness but instead on the merits after a bench trial); *Oliver v. Fauver*, 118 F.3d 175, 178 (3d Cir. 1997) (holding interference with mail, if it reaches its intended destination, is insufficient to show actual injury); *Taylor v. Coughlin*, 29 F.3d 39, 40 (2d Cir. 1994) (*per curiam*) (holding prison's failure to supply incarcerated people with adequate typewriters did not cause any injury; the incarcerated people were able to access the courts through handwritten documents); *Shango v. Jurich*, 1988 U.S. Dist. LEXIS 7597 at \*63–64 (N.D. Ill. July 15, 1988) (*unpublished*) (holding that "the mere fact that some inmates may suffer delays or other inconveniences in obtaining access to the law library...does not amount to a constitutional violation."); *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (holding that the loss of outgoing court documents was not a sufficient injury because the error was noted in time to allow the plaintiff to re-file the documents); *Jermosen v. Coughlin*, 877 F. Supp. 864, 871 (S.D.N.Y. 1995) (holding that the confiscation of a tape mailed to an incarcerated person did not qualify as a sufficient injury because the incarcerated person had access to the tape when preparing his civil action, and at the time the tape was taken, the incarcerated person's case had already been settled). *But see* *Key v. Artuz*, No. 95 CV 0392 (HB), 1995 U.S. Dist. LEXIS 13201, at \*5–6 (S.D.N.Y. Sept. 19, 1995) (*unpublished*) (holding that a prison's mishandling of legal mail that resulted in the incarcerated person missing a court-imposed deadline was a sufficient showing of injury).

that to state a claim for denial of access to the courts, the incarcerated person must show that the defendant's actions actually hindered his pursuit of legal claims and caused actual injury.<sup>99</sup> The court determined that the incarcerated person in this case experienced only inconvenience and a delay in sending outgoing mail.<sup>100</sup> Neither of those reach the necessary threshold. The threshold requires that you experience a constitutional deprivation that is severe enough to bring a Section 1983 claim. Some courts have also required that the interference be "deliberate and malicious."<sup>101</sup> In other words, they require that the prison authorities have intentionally interfered with an incarcerated person's legal mail with the purpose of denying him access to the courts. However, some courts have ordered that a claim of interference should be reviewed liberally if brought by a pro se litigant.<sup>102</sup>

### 3. Attorney-Client Privilege

For communications with your attorney, you have the additional shield of the *attorney-client privilege*.<sup>103</sup> This privilege allows you to refuse to disclose, and to prevent any other person from disclosing, confidential communications between your attorney and you. The protection that it provides is limited in two ways. First, because the privilege only protects you against disclosure of your legal correspondence, it may only be used to challenge the reading of your legal mail, not the inspection of it.<sup>104</sup> However, even though prisons may declare temporary emergencies requiring them to open your mail, they may not use an emergency to justify indefinitely opening your mail out of your presence.<sup>105</sup> Second, there are exceptions to the kinds of communication that are protected by the privilege. For the attorney-client privilege to apply, you must intend for your communication to remain confidential.<sup>106</sup> In other words, if you disclose information to someone other than your attorney, this information will no longer be considered privileged. Disclosure to representatives of the attorney, such as his or her secretary or student clerk, however, is considered the same as communication with the

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99. See *Wesolowski v. Washburn*, 615 F. Supp. 2d 126, 129 (W.D.N.Y. 2009).

100. See *Wesolowski v. Washburn*, 615 F. Supp. 2d 126, 129 (W.D.N.Y. 2009).

101. *Smith v. O'Connor*, 901 F. Supp. 644, 649 (S.D.N.Y. 1995) (holding that although corrections officials destroyed an incarcerated person's personal property, including his legal papers, the incarcerated person failed to show prejudice because the motion allegedly destroyed was one that could be filed any time and thus he failed to state a claim that he was denied access to the courts); *Herrera v. Scully*, 815 F. Supp. 713, 723 (S.D.N.Y. 1993) (holding that prison officials did not act in an "intentional and deliberate manner to deprive [the incarcerated person] of his constitutional rights by preventing his legal mail from arriving at court in a timely manner.").

102. See, e.g., *Key v. Artuz*, No. 95 CV 0392 (HB), 1995 U.S. Dist. LEXIS 13201, at \*7 (S.D.N.Y. Sept. 13, 1995) (*unpublished*) (reading complaint liberally and denying defendant's motion to dismiss where interference caused incarcerated person to miss court-imposed deadline but incarcerated person failed to allege invidious (malicious) intent).

103. Attorney-client privilege will generally have its own statute in your state. In New York, the relevant statute can be found at N.Y. C.P.L.R. 4503 (McKinney 2007).

104. *Frye v. Henderson*, 474 F.2d 1263, 1264 (5th Cir. 1973) (*per curiam*) (stating opening mail to check for contraband is legitimate); *People v. Poe*, 193 Cal. Rptr. 479, 481, 145 Cal. App. 3d 574, 578 (Cal. Ct. App. 1983) (citing *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985, 41 L. Ed. 2d 935, 963 (1974)). Some courts have even held prison officials can open mail from a court outside your presence, since court documents are public records and therefore not subject to the same protections. See *Keenan v. Hall*, 83 F.3d 1083, 1094 (9th Cir. 1996) (finding incoming mail from a court not "legal mail").

105. See *Jones v. Brown*, 461 F.3d 353, 362–363 (3d Cir. 2006) (finding that though a risk of anthrax terrorism might have justified temporarily opening incarcerated people's mail after September 11, 2001, there was no rational basis for continuing this policy more than three years later in the absence of a continuing risk).

106. *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) (holding that the fact that a meeting between an incarcerated person and his attorney "take[s] place away from public view" is not enough to prove that the incarcerated person intended the communication between them to be confidential); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962) (holding that in the case of an attorney preparing a tax return, no privilege could be expected since the form is not intended to be confidential but "is given for transmittal by the attorney to others"); *Priest v. Hennessy*, 51 N.Y.2d 62, 68–69, 409 N.E.2d 983, 986, 431 N.Y.S.2d 511, 514 (1980) ("[N]ot all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services") (citing *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219, 391 N.E.2d 967, 970, 417 N.Y.S.2d 884, 887, (1979)).

attorney and is covered under the privilege.<sup>107</sup> It does not matter if your communications with your lawyer are written or oral; both are equally privileged.<sup>108</sup> An exception is that you cannot claim the attorney-client privilege if the communication furthers future wrongdoing.<sup>109</sup>

#### 4. Legal Correspondence and New York State and City Regulations

The following is a discussion of additional New York rules governing legal mail restrictions. Incarcerated people in other states must consult their state and local regulations. The New York Department of Correctional Services regulations state that incoming legal mail should be opened and examined only in the presence of the incarcerated person and will not be read by prison authorities without written superintendent authorization.<sup>110</sup> Outgoing privileged mail may not be opened, inspected, or read without written superintendent authorization. The regulations applying to city and county jails in New York have essentially the same provisions, except they additionally state that mailed communications with attorneys may not be read without a search warrant.<sup>111</sup>

The standards applicable to jails in New York City distinguish between privileged and non-privileged mail. Your privileged incoming mail cannot be opened except in your presence or pursuant to a search warrant, and your privileged outgoing correspondence can only be opened or read pursuant to a search warrant.<sup>112</sup>

#### 5. Legal Correspondence and Federal Regulations

Privileged mail is referred to as “special mail” in the federal regulations governing the Federal Bureau of Prisons.<sup>113</sup> This includes mail from state and federal courts, attorneys, the President and Vice-President, governors, members of the U.S. Congress, embassies and consulates, federal law enforcement officers, and the Department of Justice (excluding the Bureau of Prisons, but including U.S. Attorneys).<sup>114</sup> Mail from any of these sources should be marked as follows on the envelope: “Special Mail—Open only in the presence of the inmate.”<sup>115</sup> Prison authorities may still open these letters to ensure there is no contraband and to confirm the enclosed letter does in fact qualify as special mail. But, they may not read the letter. If the envelope is not marked as special mail, the correspondence will be treated as general correspondence.<sup>116</sup> Mail from attorneys must be marked as described above and must indicate the attorney’s name and the fact that he or she is an attorney. While the word “Attorney” does not need to appear on the envelope, there must be some indication that the person sending the letter is an attorney. This indication does not have to be placed on any particular place on the envelope.<sup>117</sup>

As a practical matter, whether you are incarcerated in a state or federal prison, you should clearly label envelopes of privileged correspondence: “*Privileged Correspondence (Special Mail)—Do Not Open Except in the Presence of Intended Inmate-Recipient.*” You may also want to suggest your lawyer tape shut all mail sent to you. This will let you know whether your mail had been opened and read when you were not present, since you would be able to see where the tape was removed from the envelope.

107. See N.Y. C.P.L.R. 4503(a)(1) (McKinney 2007).

108. *Le Long v. Siebrecht*, 196 A.D. 74, 76, 187 N.Y.S. 150, 150 (2d Dept. 1921).

109. *In re Associated Homeowners & Businessmen’s Org., Inc.*, 87 Misc. 2d 67, 68, 385 N.Y.S.2d 449, 450 (Sup. Ct. N.Y. County 1976) (pointing towards the exception for communications “in furtherance of fraudulent or other unlawful acts” as reason for a denial of an application to quash subpoena of an attorney).

110. N.Y. COMP. CODES R. & REGS. tit. 7, § 721.3(b)(1) (2020).

111. N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.4(d) (2020). Note that this section of the regulations distinguishes legal privileged correspondence from general privileged correspondence.

112. Rules of the City of New York, Tit. 40, Ch. 1, §1-11(c)(6), (e) *available at* <http://www1.nyc.gov/site/boc/jail-regulations/jail-regulations.page> (last visited May 24, 2020).

113. 28 C.F.R. § 540.2(c) (2020).

114. 28 C.F.R. § 540.2(c) (2020).

115. 28 C.F.R. § 540.2(c) (2020).

116. 28 C.F.R. § 540.18(b) (2020).

117. *Merriweather v. Zamora*, 569 F.3d 307, 313–314 (6th Cir. 2009); 28 CFR 540.19 (2020).

### D. Internet Communication

The right of an incarcerated person to access the Internet is a new subject. There are not many cases testing the rights of incarcerated people to communicate through the Internet. However, the *Turner* standard applies to cases involving Internet communication.<sup>118</sup>

Most states ban incarcerated people from direct, unsupervised access to the Internet.<sup>119</sup> Federal legislation prevents access without official supervision.<sup>120</sup> Though this statute has not yet been tested in court, it will likely be upheld because it does not completely ban access, but rather just requires supervision, and is related to a valid prison interest—security. Some states allow certain incarcerated people to access the Internet under supervision for educational and professional courses.<sup>121</sup> Similarly, the Federal Bureau of Prisons has a program called the Trust Fund Limited Inmate Computer System (TRULINCS). This system lets incarcerated people send electronic messages to families and attorneys without actually using the Internet.<sup>122</sup> Keep in mind, however, that in order to use TRULINCS, you must consent to monitoring of your messages by prison officials<sup>123</sup> Attorney-client privilege does not apply to messages sent through TRULINCS.<sup>124</sup> You should look into the regulations of your own state to find out its specific rules.

Indirect use of the Internet happens when incarcerated people use third parties (non-incarcerated people) to help them communicate or receive information. For instance, an incarcerated person might write a letter to a third party describing the information he wants posted on the Internet or that he wants sent in an email. The third party would then post the information online or send the email, and afterwards would print any Internet response and mail it to the incarcerated person.<sup>125</sup> Some states have passed laws against this type of indirect Internet communication. For instance, Ohio prevents any access, direct or indirect, except for access related to educational programs.<sup>126</sup> Arizona has a similar statute that limits incarcerated people's direct and indirect access to the Internet and email.<sup>127</sup> Minnesota, California, Kansas, and Wisconsin have similar laws.<sup>128</sup>

The reaction to these laws in various courts has been mixed. In 2004, the Ninth Circuit struck down a California policy that prohibited incarcerated people from receiving mail that has material

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118. See Part B, Section 1 of this Chapter for an explanation of the *Turner* standard.

119. See Titia A. Holtz, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 859 (2002). Laura E. Gorgol, *Unlocking Potential: Results of a National Survey of Postsecondary Education in State Prisons*, INSTITUTE FOR HIGHER EDUCATION POLICY (2011).

120. Protection of Children from Sexual Predators Act of 1998, Title VIII, sec. 801, Pub. L. No. 105–314, 112 Stat. 2974, 2990 (1998) (withholding federal funding from any federal program that allows incarcerated people to have unsupervised access to the Internet). This statute was enacted in response to a specific case in which an incarcerated person who had been granted access to participate in online classes instead used his unsupervised time to download child pornography. Protection of Children from Sexual Predators Act of 1998, Title VIII, sec. 802, Pub. L. No. 105–314, 112 Stat. 2974, 2990 (1998).

121. See OHIO REV. CODE ANN. § 5145.31(C)(1)(a) (LexisNexis 2004).

122. Federal Bureau of Prisons, *TRULINCS: Frequently Asked Questions, available at* <https://www.bop.gov/inmates/trulincs.jsp> (last visited May 24, 2020) (discussing the Bureau of Prisons' e-mail program).

123. U.S. Department of Justice, Federal Bureau of Prisons, Form BP-A0934.052, Inmate Agreement for Participation in TRULINCS Electronic Messaging Program.

124. U.S. Department of Justice, Federal Bureau of Prisons, Form BP-A0934.052, Inmate Agreement for Participation in TRULINCS Electronic Messaging Program.

125. At least one court has held incarcerated people cannot be punished if third parties post accounts from those incarcerated people on the Internet for them. See *Canadian Coalition against the Death Penalty v. Ryan*, 269 F. Supp. 2d 1199, 1201, 1203 (D. Ariz. 2003). Keep in mind, however, that this is different from “kiting,” where you send a message to one person, and inside that message, include another message that will be sent to someone else. See section B(1)(a) of this chapter for more information on kiting.

126. OHIO REV. CODE ANN. § 5145.31(C)(1)(a) (LexisNexis 2004).

127. ARIZ. REV. STAT. ANN. § 41-1604 (2012).

128. See Valerie Alter, *Jailhouse Informants: A Lesson in E-Snitching*, 10 J. TECH. L. & POL'Y 223, 232 (2005); *Computer Use for/by Inmates*, <https://www.thefreelibrary.com/Computer+use+for+%2Fby+inmates.-a0208273651> (last visited Oct. 5, 2020).

downloaded from the Internet.<sup>129</sup> Applying the *Turner* standard, the court did not find a logical relationship between the regulation and the legitimate concerns of security, and of increased workload for the mailroom.<sup>130</sup> On the other hand, a 2008 California case confirmed that incarcerated people may be denied direct Internet access, stating that there is no independent First Amendment right to computer and Internet access.<sup>131</sup>

The response at the district court level has also been mixed. A judge in Arizona found the state law to be unconstitutional,<sup>132</sup> while a judge in Kansas upheld a similar law.<sup>133</sup> The Ninth Circuit case and the Arizona district court case show that the policies prohibiting indirect access to the Internet (by receiving Internet-generated materials in the mail) might be more likely to be struck down compared to policies dealing with direct Internet access. However, it is important to remember that there are still not enough cases on this matter to determine exactly how various courts will handle the issue of Internet communication.

### E. Receipt and Possession of Publications

You have a First Amendment right to receive publications, and a publisher has a First Amendment right to send you publications. The same standards that govern censorship of incoming mail apply to your right to receive and possess books, magazines, and other reading material. Before 1989, *Procurier v. Martinez* held that a publication could not be prohibited unless the prison could show that the publication threatened prison security or order, or that the publication would negatively affect an incarcerated person's rehabilitation.<sup>134</sup>

But, in 1989, in *Thornburgh v. Abbott*, the U.S. Supreme Court replaced the *Martinez* standard with a standard easier for prison officials to meet: the *Turner* standard.<sup>135</sup> Now, a court can limit your right to receive and possess publications for reasons related to a legitimate prison interest (the *Turner* standard).<sup>136</sup> The Supreme Court has noted that courts should respect and defer to the "informed discretion of correction officials."<sup>137</sup> This means that while censorship is not allowed just because the publication's content is unpopular or offensive, it will be relatively easy for officials to restrict access to publications by citing security concerns.<sup>138</sup>

Lower federal and state court decisions that cancelled restrictions under the old *Martinez* standard most likely do not reflect current law, so you probably cannot reference them in any court papers. This means that you cannot rely on cases decided before 1989. See the discussion of *Martinez* and *Abbott* in Part B of this Chapter.

#### 1. General Standards for Receiving Publications

Using the *Turner* standard, most courts have upheld restrictions on incarcerated people receiving incoming publications. This is generally the case for restrictions that are reasonably related to the

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129. *Clement v. Cal. Dept. of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004).

130. *Clement v. Cal. Dept. of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004).

131. *Carmony v. County of Sacramento*, No. CIV S-05-1679 LKK GGH P, 2008 U.S. Dist. LEXIS 11137, at \*47-48 (E.D. Cal. 2008) (*unpublished*).

132. *Canadian Coalition Against the Death Penalty v. Ryan*, 269 F. Supp. 2d 1199, 1203 (D. Ariz. 2003).

133. *Waterman v. Commandant*, 337 F. Supp. 2d 1237, 1241-1242 (D. Kan. 2004) (upholding a policy that allows prison personnel to reject incoming mail that has photocopies of publications or materials that do not come directly from the publisher). Note that the Kansas law differed from the Arizona law in that it prohibited what inmates could receive in the mail, as opposed to what inmates could send out to people to put on the internet.

134. *Procurier v. Martinez*, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974).

135. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (holding that restrictions on incoming mail should be analyzed under the standard established in *Turner v. Safley*, 482 U.S. 78, 89-91, 109 S. Ct. 2254, 2261-2262, 96 L. Ed. 2d 64, 79-80 and not the *Martinez* standard which courts had been using for incoming mail since 1974).

136. *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989).

137. *Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1982)).

138. *Thornburgh v. Abbott*, 490 U.S. 401, 415-416, 109 S. Ct. 1874, 1882-1883, 104 L. Ed. 2d 459, 474-475 (1989).

legitimate governmental interests of security and order, screening contraband, preventing fire, and promoting rehabilitation.<sup>139</sup> In *Frost v. Symington*, a federal appeals court upheld regulations which did not allow incarcerated people to have sexually explicit magazines.<sup>140</sup> In *Malik v. Coughlin*, a New York state court, citing *Abbott*, allowed prisons to censor an incoming article that made critical and exaggerated allegations about prison medical personnel.<sup>141</sup> The censored article said that correctional facilities used incarcerated people as guinea pigs for drug testing.<sup>142</sup> Even though the article had been read by incarcerated people at two other prison facilities and had not caused violence, the court found that this prison could ban the article for security reasons.<sup>143</sup> Withholding publications that contain racist statements has also been upheld by federal courts relying on *Abbott*.<sup>144</sup> Prison officials can probably also ban internal incarcerated people's newsletters by claiming that they are contrary to prison security if the newsletters contain similar forbidden content. But, as one court held in *Epps v. Smith*, a prison cannot ban an outside incarcerated person's newsletter that does not contain prohibited content (in this case, a self-described "revolutionary prisoners' newspaper" published in California and distributed in a New York penitentiary).<sup>145</sup> The court there emphasized the rights of those outside the prison to express their political views.<sup>146</sup>

Sometimes courts will not allow publications to be banned if the government does not have an important reason to ban them. In one case, the court did not allow a regulation that only allowed incarcerated people to receive publications they ordered and paid for directly because the government did not have a strong enough reason for imposing the rule.<sup>147</sup> Similarly, in another case, the court said that a restriction on publications that contained any nudity could be rejected as too broad because the restriction included scientific texts and works of art.<sup>148</sup>

A common restriction imposed by prisons is the "publishers-only" rule, which allows incarcerated people "to receive newspapers, magazines, and books from publishers or book clubs

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139. See, e.g., *Waterman v. Farmer*, 183 F.3d 208, 217–218 (3d Cir. 1999) (holding that a state statute prohibiting pornographic materials for incarcerated people had a rational relationship to sex offender rehabilitation); *Dawson v. Scurr*, 986 F.2d 257, 260–261 (8th Cir. 1993) (holding that there was a rational relationship between prohibiting psychologically unfit incarcerated people from seeing sexually explicit materials and the legitimate goal of rehabilitation); *Skelton v. Pri-Cor*, 963 F.2d 100, 103 (6th Cir. 1991) (holding that because hardback books can be used to smuggle contraband, a ban on such books was valid); *Malik v. Coughlin*, 154 A.D.2d 135, 137–138, 552 N.Y.S.2d 182, 184 (3d Dept. 1990) (holding that the accusations contained in the publication were likely to incite disobedience and were therefore properly restricted). But see *Prison Legal News v. Lehman*, 397 F.3d 692, 700 (9th Cir. 2005) (finding that banning catalogs and bulk mailings is not rationally related to decreasing the risk of fire, since limitations already exist on the number of possessions in incarcerated people's cells); *Morrison v. Hall*, 261 F.3d 896, 902 (9th Cir. 2001) (holding that reducing fire hazards is a legitimate government interest but banning bulk mailings does not rationally serve that interest when there are other regulations on the amount of paper incarcerated people can have in their cells).

140. *Frost v. Symington*, 197 F.3d 348, 357–358 (9th Cir. 1999) (finding that regulation of pornographic materials promotes security interests and so it satisfies *Turner*).

141. *Malik v. Coughlin*, 154 A.D.2d 135, 138–139, 552 N.Y.S.2d 182, 184 (App. Div. 3rd Dept. 1990).

142. *Malik v. Coughlin*, 154 A.D.2d 135, 136, 552 N.Y.S.2d 182, 183 (3d Dept. 1990).

143. *Malik v. Coughlin*, 154 A.D.2d 135, 137–138, 552 N.Y.S.2d 182, 184 (3d Dept. 1990).

144. See, e.g., *Thomas v. U.S. Sec'y of Def.*, 730 F. Supp. 362, 364–365 (D. Kan. 1990) (holding that restriction of materials that could cause racial confrontations was valid); *Chriceol v. Phillips*, 169 F.3d 313, 315–317 (5th Cir. 1999) (holding that restriction of materials that advocated racial, religious, or national hatred that could cause violence was valid); *Winburn v. Bologna*, 979 F. Supp. 531, 534–535 (W.D. Mich. 1997) (holding that restriction of mail that promoted racial supremacy was valid).

145. *Epps v. Smith*, 112 Misc. 2d 724, 730, 447 N.Y.S.2d 577, 581–582 (Sup. Ct. 1981).

146. See *Epps v. Smith*, 112 Misc. 2d 724, 728–729, 447 N.Y.S.2d 577, 580–581 (Sup. Ct. Wyoming County 1981) (finding that there was no evidence incarcerated people were using the paper to communicate); see also *Nasir v. Morgan*, 350 F.3d 366, 371–374 (3d Cir. 2003) (upholding a ban on correspondence between incarcerated people and the formerly incarcerated under *Turner* balancing test, despite the 1st Amendment interests of the non-incarcerated).

147. *Crofton v. Roe*, 170 F.3d 957, 960–961 (9th Cir. 1999).

148. *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1082 (W.D. Wis. 2000). But see *Mauro v. Arpaio*, 188 F.3d 1054, 1060 n.4 (9th Cir. 1999) (upholding a restriction on sexually explicit materials, even if it includes art and science texts, as not unconstitutionally overbroad).

only.”<sup>149</sup> The Supreme Court in *Bell v. Wolfish* held that a prison may adopt a publishers-only rule for hardcover books if they deem it necessary to prison security by preventing contraband smuggling.<sup>150</sup> If your prison has such a rule, you have no right to receive hardcover publications directly from friends or family. This case only dealt with hardcover books, so it is unclear to which other publications it applies. Lower courts have extended the publishers-only rule to other publications like magazines and soft-cover books because requiring incarcerated people to receive materials directly from the publisher is a minor inconvenience compared to requiring the prison to search all materials not sent in factory-sealed packages.<sup>151</sup> But, courts have found that some restrictions on your ability to receive publications are not rational and have struck them down. For example, one circuit court has stated that prisons may not require books ordered from approved vendors to have special shipping labels.<sup>152</sup> Also, some courts have said that prisons cannot place certain restrictions on bulk mail.<sup>153</sup> In a recent California case, a federal court held that stopping a vendor from sending free, softbound, religious materials to incarcerated people was not allowed.<sup>154</sup> Finally, one court found that prison officials should allow incarcerated people to receive magazine subscriptions as gifts, though a different, higher court supported a ban on magazine subscriptions.<sup>155</sup>

Bans on certain publications, other than sexually explicit ones, can be found reasonably related to rehabilitation interests. The Supreme Court upheld a Pennsylvania regulation denying all newspapers and magazines to incarcerated people held in segregation and temporarily classified as particularly dangerous or unmanageable.<sup>156</sup> The reason for this was that such a restriction was reasonably related to the prison’s interest in promoting good behavior.<sup>157</sup> It was important in this case that the incarcerated people’s placement in segregation was not permanent, and that they could earn back their privileges to possess publications.<sup>158</sup> One of the Supreme Court justices, Justice Stevens, dissented (disagreed with the outcome) because he thought that the rationale of rehabilitation was too broad and could theoretically justify taking away any right or privilege in prison.<sup>159</sup> Because this case is relatively recent, it is important to note that there is some disagreement on the issue, even within the Supreme Court.

You cannot be punished for having literature that is prohibited if the literature is prohibited by an unconstitutional or illegal rule. If you are punished for having this literature, Chapter 18 of the

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149. See, e.g., *Ward v. Washtenaw Cnty. Sheriff’s Dept.*, 881 F.2d 325, 326–327 (6th Cir. 1989).

150. *Bell v. Wolfish*, 441 U.S. 520, 550–552, 99 S. Ct. 1861, 1880–1881, 60 L. Ed. 2d 447, 475–477 (1979).

151. See *Ward v. Washtenaw Cnty. Sheriff’s Dept.*, 881 F.2d 325, 329–330 (6th Cir. 1989) (finding a publisher’s only rule applying to books, magazines and newspapers was reasonably related to a legitimate interest in maintaining prison security, as it allowed the prison “to control the security problems caused when contraband such as drugs and weapons are smuggled in various books, magazines, and newspapers to inmates from unidentified sources or visitors”).

152. *Ashker v. Cal. Dept. of Corr.*, 350 F.3d 917, 924 (9th Cir. 2003).

153. *Morrison v. Hall*, 261 F.3d 896, 904 (9th Cir. 2001) (holding that prison cannot ban incarcerated people from receiving subscriptions sent by bulk, third, or fourth class mail); *Prison Legal News v. Lehman*, 397 F.3d 692, 700–701 (9th Cir. 2005) (finding prison may not prohibit incarcerated people from receiving non-subscription bulk mail and catalogs).

154. *Jesus Christ Prison Ministry v. Cal. Dept. of Corr.*, 456 F. Supp. 2d 1188, 1201–1202 (E.D. Cal. 2006)

155. *Prison Legal News v. Werholtz*, No. 02-4054-MLB, 2007 U.S. Dist. LEXIS 73629, at \*13 (D. Kan. Oct. 1, 2007) (*unpublished*) (finding that a Kansas policy of banning gift subscriptions was not rational and therefore unconstitutional). *But see* *Grissom v. Werholtz*, 524 F. App’x 467, 471–472 (10th Cir. 2013) (upholding a prison’s prohibition of magazine subscriptions for an incarcerated person who had been placed in isolation and had a history of possessing dangerous contraband).

156. *Beard v. Banks*, 548 U.S. 521, 524–525, 126 S. Ct. 2572, 2575–2576, 165 L. Ed. 2d 697, 702–703 (2006).

157. *Beard v. Banks*, 548 U.S. 521, 533, 126 S. Ct. 2572, 2580, 165 L. Ed. 2d 697, 707 (2006) (“[W]ithholding such privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.” (quoting *Overton v. Bazzetta*, 539 U.S. 126, 134, 123 S. Ct. 2162, 2168–2169, 156 L. Ed. 2d 162, 171 (2003))).

158. *Beard v. Banks*, 548 U.S. 521, 532, 126 S. Ct. 2572, 2579–2580, 165 L. Ed. 2d 697, 707 (2006).

159. *Beard v. Banks*, 548 U.S. 521, 547–548, 126 S. Ct. 2572, 2588–2589, 165 L. Ed. 2d 697, 716–717 (2006) (Stevens, J., dissenting).

*JLM*, “Your Rights at Prison Disciplinary Proceedings,” should help you understand your rights during prison disciplinary proceedings.

Finally, you should remember that state law, and state and federal regulations, might also protect your access to literature. For example, federal regulations allow incarcerated people in minimum and low-security facilities to receive soft-cover books from any source, though they can receive hardcover books only from the publisher, a book club, or a bookstore.<sup>160</sup> Incarcerated people in medium- or high-security facilities must receive all books from the publisher, a book club, or a bookstore.<sup>161</sup> In addition, facility administrators may reject publications if they contain content that could be considered a security risk, like depictions of violence and sexually explicit material (discussed in more detail below).<sup>162</sup> So, you should research additional regulations or laws that might apply to you.

## 2. Receiving Sexually Explicit Materials

Some regulations specifically do not allow sexually explicit materials. Courts have upheld such regulations based on two different government interests: (1) promoting rehabilitation, and (2) protecting prison security. In *Ballance v. Virginia*, the court upheld the confiscation of photographs of partially nude children from a convicted pedophile, reasoning that “due . . . to the prison’s interest in rehabilitating this disease,” prison officials acted reasonably in confiscating the photographs.<sup>163</sup> Similarly, in *Dawson v. Scurr*, the court held that restrictions denying sexually explicit materials to psychologically unfit incarcerated people were justified because exposure to such materials would interfere with their rehabilitation.<sup>164</sup>

The *Thornburgh* standard gives prison officials discretion to ban sexually explicit material if officials reasonably believe the material poses a threat to prison order.<sup>165</sup> Prison officials are given this discretion because allowing an incarcerated person to have such material may encourage violence by leading other incarcerated people to make assumptions about that incarcerated person’s beliefs, sexual orientation, or gang affiliations.<sup>166</sup> At least one federal circuit court has held that a ban on sexually explicit material is reasonable in order to prevent sexual harassment of female staff.<sup>167</sup> But, at least one other circuit has struck down blanket bans on sexually explicit material. Instead, that circuit requires the prison to show that giving a specific publication to incarcerated people will harm their rehabilitation before banning the publication.<sup>168</sup> Even if the prison decides to ban sexually explicit materials, some courts have held that both the incarcerated person and the publisher are entitled to notice of the ban and an opportunity to respond.<sup>169</sup> The reason for granting notice to publishers is that they have a First Amendment right to communicate with individual incarcerated people if they so

160. 28 C.F.R. § 540.71(a)(1), (3) (2020).

161. 28 C.F.R. § 540.71(a)(2) (2020).

162. For an explanation of content that can amount to a security risk, see 28 C.F.R. § 540.71(b) (2020).

163. *Ballance v. Virginia*, 130 F. Supp. 2d 754, 760 (W.D. Va. 2000).

164. *Dawson v. Scurr*, 986 F.2d 257, 260–262 (8th Cir. 1993).

165. *Thornburgh v. Abbott*, 490 U.S. 401, 411–412 109 S. Ct. 1874, 1880–1881, 104 L. Ed. 2d 459, 471–472 (1989).

166. *Thornburgh v. Abbott*, 490 U.S. 401, 412–413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–473 (1989).

167. *Mauro v. Arpaio*, 188 F.3d 1054, 1059–1060 (9th Cir. 1999).

168. *See Ramirez v. Pugh*, 379 F.3d 122, 129 (3d Cir. 2004) (finding that “the connection between the [restrictive statute] and the government’s rehabilitative interest” is not “obvious upon consideration of the entire federal inmate population, including those prisoners not incarcerated for sex-related crimes”).

169. *Montcalm Publishing Corp. v. Beck*, 80 F.3d 105, 106 (4th Cir. 1996) (finding that “publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate subscribers”); *Jacklovich v. Simmon*, 392 F.3d 420, 433–434 (10th Cir. 2004) (holding that publishers as well as incarcerated people have a right to be notified when inmate subscribers are prohibited from receiving the publishers’ publications). Note that the 10th Circuit later clarified that *Jacklovich* governed only intentional rejections of the publications, rather than accidental rejections such as a mistake in the mailroom. *Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1162–1163 (10th Cir. 2007).

choose.<sup>170</sup> Additionally, at least one court has held that incarcerated people have a right to appeal censorship decisions to someone other than the official who ordered the censorship.<sup>171</sup>

In *Thornburgh v. Abbott*, one of the regulations at issue allowed the warden to ban homosexually explicit material depicting people who are the same gender as the prison population.<sup>172</sup> The Supreme Court held that the rule was valid. But, the same regulation in *Thornburgh* does not permit a warden to reject heterosexually explicit material, or non-explicit homosexual material, unless it is “detrimental to the security, good order, or discipline of the institution, or if it might facilitate criminal activity.” Nor does the regulation allow the warden to reject non-explicit homosexual material.<sup>173</sup> The Court reasoned that “prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow [prisoner]’s . . . sexual orientation . . . and cause disorder by acting accordingly . . . [I]t is essential that prison officials be given broad discretion to prevent such disorder.”<sup>174</sup>

It is unclear what this means for the incarcerated person who wants to receive sexually explicit homosexual material because the discretion given to officials in *Thornburgh v. Abbott* may result in different decisions and regulations in different jurisdictions.<sup>175</sup> At least one court has suggested that because exposure of one’s homosexual identity is more likely to lead to assault by others in a maximum-security prison than in a minimum-security facility, security concerns are more legitimate in a maximum-security facility.<sup>176</sup> Such reasoning could mean that incoming sexually explicit homosexual material may be denied at maximum-security facilities, but not minimum-security facilities.

As a general rule, LGBTQ+ incarcerated people may seek to obtain non-sexually explicit homosexual material through the mail. Federal regulations seem to allow the general admission of these materials unless they are found to be detrimental to the security, good order, or discipline of the

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170. *Montcalm Publishing Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996).

171. *Krug v. Lutz*, 329 F.3d 692, 699–700 (9th Cir. 2003).

172. *Thornburgh v. Abbott*, 490 U.S. 401, 405 n.6, 109 S. Ct. 1874, 1877 n.6, 104 L. Ed. 2d 459, 468 n.6 (1989) (The Program Statement No. 5266.5 explained that 28 C.F.R. § 540.71(b)(7) (2007) (the regulation at issue) allowed the warden to reject the following types of sexually explicit material: (1) homosexual (of the same sex as the prison population), (2) sado-masochistic, (3) bestial, or (4) material involving children.)

173. *Thornburgh v. Abbott*, 490 U.S. 401, 404–405, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (quoting 28 C.F.R. § 540.71(b)(7) (2020)).

174. *Thornburgh v. Abbott*, 490 U.S. 401, 412–413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472–473 (1989).

175. *Thornburgh v. Abbott*, 490 U.S. 401, 417 n.15, 109 S. Ct. 1874, 1883 n.15, 104 L. Ed. 2d 459, 475 n.15 (1989) (noting that “the exercise of discretion called for by these regulations may produce seeming ‘inconsistencies,’ but what may appear to be inconsistent results are not necessarily signs of arbitrariness or irrationality.”). *Compare* *Inosencio v. Johnson*, 547 F. Supp. 130, 135–136 (E.D. Mich. 1982), *aff’d sub nom.* *Brown v. Johnson*, 743 F.2d 408, 413 (6th Cir. 1984) (holding that the prohibition of a homosexual worship service to be constitutional because incarcerated people attending such services would be exposing themselves to attacks from other incarcerated people), *with* *Lipp v. Proconier*, 395 F. Supp. 871, 877–878 (N.D. Cal. 1975) (holding the prohibition of homosexual worship services to be a possible violation of incarcerated people’s 1st Amendment right to religious freedom and requiring prison officials to present findings of fact that clearly supported their assertion that such a service would present a danger to the prison population). The Second Circuit has not considered the issue of sexually explicit homosexual materials in prisons, but it has upheld a regulation banning incarcerated people from keeping sexually explicit photos of their wives and girlfriends on the grounds that such photos may create violence among incarcerated people due to their personal nature. *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995). *See also* *Thomas v. Scully*, No. 89 Civ. 4715, 1990 U.S. Dist. LEXIS 16229 at \*3 (S.D.N.Y. Dec. 4, 1990) (*unpublished*) (holding that a ban on nude photographs of incarcerated people’s wives and girlfriends is reasonably related to the prison’s legitimate interest in preventing violence between an incarcerated person and a guard or another incarcerated person and therefore does not violate the 1st Amendment because of the emotionally charged nature of the photographs).

176. *See* *Inosencio v. Johnson*, 547 F. Supp. 130, 135 (E.D. Mich. 1982), *aff’d sub nom.* *Brown v. Johnson*, 743 F.2d 408 (6th Cir. 1984) (citing testimony by the director of the California Department of Corrections that the Department could make a good argument for denying incarcerated people the ability to attend an LGBTQ+ church service in a maximum-security prison while allowing those in a medium-security facility to attend such services). The same court would likely reason that receiving sexually explicit homosexual materials could also put an inmate at a greater risk of attack in a maximum-security prison than in a medium security one. *See also* C.F.R. §§ 540.71(b)(7), 540.72 (2020).

institution.<sup>177</sup> State incarcerated people who desire such material, however, may encounter the same arguments used by prison officials to ban sexually explicit homosexual materials. For instance, one court applied an identification theory in *Harper v. Wallingford* to find that an incarcerated person's First Amendment rights were not violated when non-explicit mail promoting consensual sexual relationships between adult men and juvenile males was withheld from him.<sup>178</sup> The court accepted the prison officials' concern that the material, when seen by other incarcerated people, would make the incarcerated person a target as a homosexual and would thus make him vulnerable to assault.<sup>179</sup> However, these arguments might fail to persuade courts if it is clear that the incarcerated person is already known to identify as LGBTQ. This is because one of the main arguments used by prison officials is identification.<sup>180</sup> For more information on gay, lesbian, bisexual, and transgender issues, see *JLM*, Chapter 30, "Special Information for Lesbian, Gay, Bisexual, Transgender, and/or Queer Incarcerated People."

Courts have also allowed restrictions on explicit heterosexual materials, including sexually explicit photographs of incarcerated people's wives or girlfriends.<sup>181</sup> While these restrictions are almost always found to be constitutional, a few courts have reviewed such regulations much more closely. In *Aiello v. Litscher*, the court held that a regulation banning all written or visual materials containing nudity or sexual behavior was too vague because it would also ban important works of art and literature.<sup>182</sup> It noted that a jury could find that the prohibition of these works is not reasonably related to legitimate prison interests. It also concluded that there was no evidence that the materials threaten security or rehabilitation.<sup>183</sup>

#### F. Access to the News Media

You may want to publicize your case by attracting the media's attention. The Supreme Court has held that a reasonable and effective means of communication between incarcerated people and the media must exist.<sup>184</sup> But, prisons have a legitimate security interest in limiting access to outside visitors, including the press.<sup>185</sup> The Court held that limiting or prohibiting face-to-face interviews with

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177. See *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (noting that publications can be restricted only if they are "detrimental to the security, good order, or discipline of the institution or if [they] might facilitate criminal activity").

178. *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) (determining that the materials at issue could incite violence by and against the incarcerated people reading them).

179. *Harper v. Wallingford*, 877 F.2d 728, 730 (9th Cir. 1989).

180. See *Espinoza v. Wilson*, 814 F.2d 1093, 1098–1099 (6th Cir. 1987) (finding that protecting the sexual identity of incarcerated people was not a valid reason for restricting access to LGBTQ+ publications since the incarcerated people in question were already open about being LGBTQ but finding in favor of the warden because he stated other legitimate reasons for restricting access).

181. *Mauro v. Arpaio*, 188 F.3d 1054, 1059–1060 (9th Cir. 1999) (upholding restrictions on explicit heterosexual materials as reasonably related to the goal of preventing sexual harassment of female prison guards); *Giano v. Senkowski*, 54 F.3d 1050, 1055–1056 (2d Cir. 1995) (holding that the regulation was rationally related to the prevention of violence in prisons; the court pointed out that other avenues are available for reinforcing emotional bonds, such as non-nude photographs or romantic letters, and for satisfying the right to graphic sexual imagery, such as commercially produced erotica or sexually graphic letters).

182. *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1082 (W.D. Wis. 2000).

183. *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1081 (W.D. Wis. 2000); see also *Kaufman v. McCaughtry*, 419 F.3d 678, 685 (7th Cir. 2005) (following *Aiello* in finding that a definition of "pornography" agreed to in a settlement by the parties could not be contested as overly broad).

184. *Pell v. Procunier*, 417 U.S. 817, 841, 94 S. Ct. 2800, 2810, 41 L. Ed. 2d 495, 512 (1974) (1974) (holding that prison officials will be given discretion in regulating the entry of reporters into prison for interviews with inmates so long as reasonable and effective means of communication remain open to incarcerated people).

185. *Pell v. Procunier*, 417 U.S. 817, 826, 94 S. Ct. 2800, 2806, 41 L. Ed. 2d 495, 503–504 (1974); see also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S. Ct. 2811, 2815, 41 L. Ed. 2d 514, 519–520 (1974) (*Pell*'s companion case, finding that under the Federal Bureau of Prisons regulations, the media does not have the right to access prisons and inmates beyond the rights granted to members of the general public. *Saxbe* differs from *Pell* in that *Saxbe* only looks at the rights of the media, while *Pell* also addresses the rights of incarcerated people to communicate with the media).

the press does not violate the First Amendment as long as incarcerated people can still communicate with the press in writing or through visitors.<sup>186</sup> The Court has said that the freedom of the press does not grant the media special access to prisons.<sup>187</sup> This means that the news media's physical access (through visitation, tours, photographs, etc.) can be restricted just like the public's physical access based on security interests can. In a recent case, a court noted that these kinds of restrictions can vary depending on the security of a particular prison or unit.<sup>188</sup>

Federal regulations governing incarcerated people held by the Federal Bureau of Prisons provide that correspondence sent to the media be treated as if it were privileged and is considered special mail.<sup>189</sup> The rules discussed in Part C of this Chapter for privileged correspondence therefore apply to letters to the media for those incarcerated people. Correspondence from the media is subject to inspections for contraband, qualification as media correspondence, and content likely to promote either illegal activity or conduct contrary to Bureau regulations.<sup>190</sup> But an incarcerated person may not receive pay for any correspondence with the media, act as a reporter, or publish under a byline.<sup>191</sup> This restriction on publishing under a byline was recently successfully challenged in a federal district court.<sup>192</sup> The court found the absolute restriction was too broad for the stated interest of maintaining prison security, especially considering incarcerated people were allowed other publishing opportunities.<sup>193</sup> As this is a recent development, you should watch to see if other courts agree.

The warden of a federal prison has a duty to provide information to the media about certain events that take place in the prison. These include deaths, inside escapes, and institutional emergencies.<sup>194</sup> The warden must also provide basic information about an incarcerated person that is a matter of public record if the media requests it, unless the information is confidential.<sup>195</sup>

### G. Visitation

If you have been convicted, your constitutional rights to visitation may be severely restricted. However, pretrial detainees are almost certainly allowed reasonable visitation rights,<sup>196</sup> since lack of access to visitors like attorneys can infringe the right to due process and counsel.<sup>197</sup> In *Overton v.*

186. *Pell v. Procunier*, 417 U.S. 817, 835, 94 S. Ct. 2800, 2810, 41 L. Ed. 2d 495, 509 (1974). For example, the California policy in *Pell* allowed incarcerated people face to face visits with members of their family, their clergy, their attorneys, and friends of prior acquaintance. *Pell v. Procunier*, 417 U.S. 817, 824–825, 94 S. Ct. 2800, 2085, 41 L. Ed. 2d 495, 503 (1974).

187. *Houchins v. KQED*, 438 U.S. 1, 15–16, 98 S. Ct. 2588, 2597, 57 L. Ed. 2d 553, 565 (1978) (holding that a local broadcast company could be subjected to a prison's restrictions on in-person visits, despite the company's investigation into the prison's bad conditions).

188. *Hammer v. Ashcroft*, 570 F. 3d 798, 804–805 (7th Cir. 2009) (upholding a ban on person to person meetings between the media and incarcerated people in the special confinement unit, which contains most incarcerated people facing the federal death penalty).

189. 28 C.F.R. §§ 540.2(b), 540.20(a) (2020).

190. 28 C.F.R. § 540.20(c) (2020).

191. 28 C.F.R. § 540.20(b) (2020).

192. *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1126 (D. Colo. 2007).

193. *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1124–1126 (D. Colo. 2007) (reaching the same outcome under both the *Turner* and *Martinez* standards).

194. 28 C.F.R. § 540.65(a) (2020).

195. 28 C.F.R. § 540.65(b), (c) (2020).

196. *See Jones v. Diamond*, 594 F.2d 997, 1013–1014 (5th Cir. 1979), *on reh'g*, 636 F.2d 1364 (1981); *see also Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 463–465, 109 S. Ct. 1904, 1910–1911, 104 L. Ed. 2d 506, 517–518 (1989) (holding that state regulations setting forth categories of visitors who might be excluded from visitation did not implicate an incarcerated person's liberty interest in receiving visitors under the Due Process Clause of the 14th Amendment); *see also Martinez v. Coombe*, 95-CV-1147, 1996 U.S. Dist. LEXIS 15330, at \*9 (N.D.N.Y. Aug. 22, 1996) (clarifying the language set forth by the Supreme Court in *Thompson*, by concluding that although a court can no longer look only to mandatory language of a statute, the statute is still relevant in determining whether a liberty interest exists).

197. *See Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974) (“[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and

*Bazzetta*, the Supreme Court did not clearly define the rights of incarcerated people to visitation. Instead, the Court ruled that a regulation restricting visits was reasonably related to the prison interest of security and therefore the regulation did not violate the incarcerated person's constitutional rights.<sup>198</sup> Regardless of whether you have been convicted or are still awaiting trial, visitation rights may be restricted for certain reasons, including institutional administration, security, and rehabilitation.<sup>199</sup> Prison officials may regulate the time, place, and manner of visits<sup>200</sup> (but note that for pretrial detainees, those regulations must be reasonable).<sup>201</sup> Prison officials may also restrict some of the rights of visitors.<sup>202</sup> The *Turner* reasonableness standard also applies to visitation, so courts can invalidate unreasonable restrictions.<sup>203</sup> Contact visits are not constitutionally required for pretrial detainees or for convicted people.<sup>204</sup>

Prison officials have broad discretion in decisions about who may visit because visitors do impact security. It is up to the prison official to produce evidence that a visitation restriction was due to a security concern. The incarcerated person then must show by substantial evidence that the prison officials' response was exaggerated and unjustified. Some restrictions on visitation are allowable for security reasons.<sup>205</sup> In one case, for instance, the Supreme Court upheld a regulation requiring an "approved visitor list" as reasonably related to security interests.<sup>206</sup>

Courts have upheld rules restricting visits to those who have a personal or professional relationship with the incarcerated person. They have also upheld rules denying visits by formerly incarcerated people<sup>207</sup> and people suspected of smuggling contraband.<sup>208</sup> The Supreme Court upheld

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practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.").

198. *Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162, 170 (2003) ("We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question.").

199. *See Overton v. Bazzetta*, 539 U.S. 126, 129, 123 S. Ct. 2162, 2166, 156 L. Ed. 2d 162, 168 (2003) (finding that rehabilitation, maintenance of basic order, and prevention of violence are legitimate objectives of the correctional system); *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501 (1974) (finding that an incarcerated person retains 1st Amendment rights that are not inconsistent with legitimate penological objectives).

200. *See Martin v. Tyson*, 845 F.2d 1451, 1455–1456 (7th Cir. 1988) (*per curiam*) (holding that legitimate safety concerns and other practical constraints justified restrictions imposed on pretrial detainees).

201. *See Martin v. Tyson*, 845 F.2d 1451, 1458 (7th Cir. 1988) (*per curiam*) (upholding policy limiting pretrial detainee's telephone access to every other day).

202. *See Gray v. Bruce*, 26 F. App'x. 819, 823–824 (10th Cir. 2001) (holding that subjecting an incarcerated person's wife to drug tests was generally acceptable as people have diminished privacy rights when visiting a prison. However, subjecting her to an "ion spectrometer test," which tests for the presence of illegal drugs, may have been an unlawful search under the Fourth Amendment because it was unreliable and required her to submit to a strip search to enter the facility once a positive result was obtained).

203. *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170 (2003) (applying *Turner* test to Michigan regulations restricting visits).

204. *See Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227, 3234, 82 L. Ed. 2d 438, 449 (1984) (holding contact visits are a privilege, not a right and that visits can be denied due to security concerns).

205. *See Pell v. Procunier*, 417 U.S. 817, 826–828, 94 S. Ct. 2800, 2806–2807, 41 L. Ed. 2d 495, 503–505 (1974) (holding that placing certain restrictions on visitations may further significant governmental interests and is therefore permitted).

206. *Overton v. Bazzetta*, 539 U.S. 126, 131–136, 123 S. Ct. 2162, 2167–2170 156 L. Ed. 2d 162, 169–173 (2003).

207. *See Farmer v. Loving*, 392 F. Supp. 27, 31 (W.D. Va. 1975) (allowing ban on visitation by formerly incarcerated people).

208. *See Robinson v. Palmer*, 841 F.2d 1151, 1156–1157 (D.C. Cir. 1988) (finding a ban on visits by the wife of an incarcerated person, who was caught smuggling marijuana into prison, was justified by prison's interest in preventing drug smuggling and because the incarcerated person had other ways to communicate with his wife); *Thorne v. Jones*, 765 F.2d 1270, 1275 (5th Cir. 1985) (finding a ban on visits from an incarcerated person's mother, who was suspected of smuggling drugs and refused to submit to a strip search, was justified by security interests and did not violate the First Amendment); *Rowland v. Wolff*, 336 F. Supp. 257, 260 (D. Neb. 1971) (holding the

similar regulations in *Overton*.<sup>209</sup> The Seventh Circuit denied the constitutional claims of an incarcerated person whose niece and daughter had been removed from his visitor list.<sup>210</sup> The court held that this was reasonable because the individual had previously been convicted of violent sex offenses and admitted to raping two children. Based on the holdings in *Overton* and *Turner*, the Seventh Circuit stated that a prison policy that restricts an incarcerated person's constitutional rights is valid if it is rationally related to legitimate interests. To decide if a restriction meets this standard, the court must consider four issues: (1) whether a rational relationship exists between the policy and the interest it claims to advance, (2) whether there are other ways to exercise the right in question, (3) the impact that accommodating the right will have on prison resources, and (4) whether there are alternatives to the policy.<sup>211</sup> A 2009 New York case held that the Commissioner of Correctional Services had a rational basis for denying the incarcerated person's request to participate in a family reunion program. The court emphasized that this decision is highly discretionary and will be upheld as long as there is a rational basis.<sup>212</sup> The Commissioner in this case considered the appropriate factors, including the incarcerated person's disciplinary record and participation in counseling sessions. The Commissioner ultimately based his decision on the nature of the incarcerated person's crimes, and the court found this decision rational.<sup>213</sup>

Visits by immediate family usually receive greater protection. Nevertheless, protection of children plays an important role. Regarding visiting children, the court is primarily concerned with the best interests of the children. At least in New York, Family Court has broad discretion to make these decisions.<sup>214</sup> In one 2001 New York case, the court found that an incarcerated father's petition for visitation with his daughters was properly denied based on the children's best interests.<sup>215</sup> The court said that the mere fact of incarceration is not enough to deny visitation.<sup>216</sup> However, in this case, the incarcerated father had almost no contact with his children in the five years he had been incarcerated. The children would have to travel many hours with a paternal grandmother they barely knew in order to visit, and the children themselves did not express any interest in seeing their father.<sup>217</sup> This was enough to deny visitation.

Restrictions on visits from minor children who are not closely related to the incarcerated person are routinely upheld. The court generally views those restrictions as reasonably related to prison security and protecting children.<sup>218</sup> In one case, the court upheld a prison's decision to deny visitation by the three-month-old niece of an incarcerated person convicted of sexual assault. The incarcerated person argued that this restriction violated his familial association rights, and that the decision to

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interest of the state in preventing the introduction of lethal weapons outweighs an incarcerated person's interest in being visited by his sisters).

209. *Overton v. Bazzetta*, 539 U.S. 126, 133–134, 123 S. Ct. 2162, 2168–2169, 156 L. Ed. 2d 162, 171–172 (2003).

210. *Stojanovic v. Humphreys*, 309 F. App'x 48, 49 (7th Cir. 2009).

211. *Stojanovic v. Humphreys*, 309 F. App'x 48, 52 (7th Cir. 2009) (holding that not all prongs must be addressed for the restriction to be valid if the other factors speak overwhelmingly in favor of the restriction).

212. *Philips v. Comm'r of Corr. Servs.*, 65 A.D.3d 1407, 1408, 885 N.Y.S.2d 138, 138 (3d Dept. 2009) (decision to deny an incarcerated person convicted of sexually assaulting four teenage girls, three of them at gunpoint, from participating in a family reunion program was supported by rational basis). *See also Cabassa v. Goord*, 40 A.D.3d 1281, 1281, 836 N.Y.S.2d 351, 351–352 (3d Dept. 2007) (denying an incarcerated person's participation in a family reunion program as supported by a rational basis based on his involuntary protective custody status and the associated security concern).

213. *Philips v. Comm'r of Corr. Servs.*, 65 A.D.3d 1407, 1408, 885 N.Y.S.2d 138, 139 (3d Dept. 2009).

214. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 885, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

215. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 885, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

216. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 886, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

217. *See, e.g., Williams v. Tillman*, 289 A.D.2d 885, 886, 734 N.Y.S.2d 727, 728 (3d Dept. 2001).

218. *Overton v. Bazzetta*, 539 U.S. 126, 133, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162, 170–171 (2003). *See also Wirsching v. Colorado*, 360 F.3d 1191, 1199–1200 (10th Cir. 2004) (upholding rule barring a person convicted of sex offenses from visits with his minor daughter as reasonably related to promoting his rehabilitation and to the child's best interest).

deny visitation was irrational and unreasonable.<sup>219</sup> However, the court found that the restriction had a connection to the prison's legitimate interests in safety and rehabilitation. In that case, the prison's decision was based on a recommendation by the incarcerated person's social worker who recommended that the incarcerated person not see female minors because of his past conduct of sexual assaults and failure to receive sexual offender treatment.<sup>220</sup>

In addition to safety, visitation restrictions are sometimes upheld for reasons of rehabilitation. These restrictions usually take away visitation privileges from incarcerated people who have broken institutional rules. In *Overton*, the Supreme Court upheld a Michigan regulation that prevented incarcerated people with two substance abuse disciplinary violations from receiving visitors (except legal and religious visitors). The court there emphasized the prison's interest in rehabilitation.<sup>221</sup> However, it was important in this case that the visitation ban was not permanent, since visitation could be reinstated for good behavior. It was also important that incarcerated people had other ways to communicate with the persons who were denied visitation.<sup>222</sup> A federal court in New York similarly held that suspending an incarcerated person from the Family Reunion Program did not violate the Constitution, since contact visitation is a privilege, not a right.<sup>223</sup> If the regulation in your case differs from these regulations (for example, if it is permanent), you may be able to challenge it in court. But be careful of filing a claim that might be dismissed as frivolous (having no legal merit), since it would become a strike under the Prison Litigation Reform Act ("PLRA").<sup>224</sup> *JLM*, Chapter 14 has more information on the PLRA. In one New York case, the court struck down a prison's decision to take away an incarcerated person's contact visits. The prison took away visits after a failed urine drug test, but the court questioned whether the new visit restrictions were really connected to any safety or security concerns. The court struck it down because the restriction was arbitrary and capricious and therefore a due process violation.<sup>225</sup>

Incarcerated LGBTQ+ individuals who want visitation from their partners should note the case *Doe v. Sparks*.<sup>226</sup> In that case, an incarcerated person, who is a lesbian, challenged the officials' refusal to allow visits from her girlfriend. There, prison rules only permitted visits between heterosexual people and their opposite sex partners. The court struck down this restriction. The court decided that the visitation policy had a rational relationship to security and disciplinary needs, but that other prison policies weakened this rational relationship.<sup>227</sup> The court found that the connection between the policy and the supposed reasons for the policy were "so remote as to be arbitrary."<sup>228</sup> The policy was thus unconstitutional. *Whitmire v. Arizona*<sup>229</sup> is another helpful decision for LGBTQ+ couples. In this case, an Arizona policy prohibited same-sex kissing and hugging but allowing heterosexuals to

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219. Phillips v. Thurmer, No. 08-cv-286-bbc, 2009 U.S. Dist. LEXIS 46331, at \*1-4 (W.D. Wis. June 1, 2009).

220. Phillips v. Thurmer, No. 08-cv-286-bbc, 2009 U.S. Dist. LEXIS 46331, at \*4-5 (W.D. Wis. June 1, 2009).

221. *Overton v. Bazzetta*, 539 U.S. 126, 134, 123 S. Ct. 2162, 2168-2169, 156 L. Ed. 2d 162, 171-172 (2003).

222. *Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003).

223. See *Giano v. Goord*, 9 F. Supp. 2d 235, 241 (W.D.N.Y. 1998) (stating that it is well-established that contact visits are a privilege, not a right) *overruled on other grounds*, *Giano v. Goord*, 250 F.3d 146 (2d Cir. 2001).

224. *Giano v. Goord*, 9 F. Supp. 2d 235, 242 (W.D.N.Y. 1998) (dismissing an incarcerated person's complaint with prejudice for being frivolous), *overruled on other grounds*, *Giano v. Goord* 250 F.3d 146 (2d Cir. 2001).

225. *Matter of Rivera v. New York City Dept. of Corr.*, 24 Misc. 3d 536, 541, 876 N.Y.S.2d 631, 635 (Sup. Ct. Bronx County 2009).

226. *Doe v. Sparks*, 733 F. Supp. 227, 228 (W.D. Pa. 1990).

227. *Doe v. Sparks*, 733 F. Supp. 227, 233 (W.D. Pa. 1990). Policies limiting the freedoms of incarcerated gay people often focus, in the case of the prison's security interests, on the danger of the gay person being "outed" and thus becoming a target for sexual or non-sexual assault. As for the prison's disciplinary interests, the usual rationale is that the prison runs the risk of appearing to condone gay relations in prison unless it limits some of the freedoms incarcerated people have. *Doe v. Sparks*, 733 F. Supp. 227, 233 (W.D. Pa. 1990).

228. *Doe v. Sparks*, 733 F. Supp. 227, 234 (W.D. Pa. 1990).

229. *Whitmire v. Arizona*, 298 F.3d 1134, 1135 (9th Cir. 2002).

embrace during visits. A gay couple sued, and the Court of Appeals struck down the policy because the policy was not rationally related to prison safety.<sup>230</sup>

Courts today are likely to be even more protective of the rights of same-sex couples. The Supreme Court has grown increasingly suspicious of classifications based on sexual orientation.<sup>231</sup> And, after *Lawrence v. Texas*,<sup>232</sup> decided ten years after *Sparks* and one year after *Whitmire*, the Court would likely recognize a constitutional right of privacy to LGBTQ+ conduct protected under the Due Process and Equal Protection clauses of the Constitution.<sup>233</sup>

One area in which the rights of same-sex couples is particularly relevant is conjugal visitation, or extended family visitation. Certain incarcerated people get visitation with their families for several days at a time at a private location on the prison campus. In June 2007, California became the first state to grant incarcerated LGBTQ+ people in registered domestic partnerships the same rights to conjugal visits as married heterosexual couples.<sup>234</sup> Along with California, only New York, Washington, and Connecticut explicitly allow same-sex partners to participate in conjugal visits.<sup>235</sup> Similar to California, Washington State allows same-sex couples in state registered domestic partnerships the same rights to conjugal visits as married heterosexual couples.<sup>236</sup> However, in Connecticut, conjugal visits with your partner are only allowed if the two of you were legally married before you were incarcerated and the two of you have children in common.<sup>237</sup>

New York has instituted a Family Reunion Program in about one-third of its correctional facilities. The program allows incarcerated people to spend up to several days in privacy with their spouses, children, or parents. In January 2009, the Department of Correctional Services updated its “eligible relations” policy to include same-sex partners validly married to an incarcerated person in a jurisdiction that recognizes same-sex marriage.<sup>238</sup> At the same time, same-sex partners who are not married in this way and who have instead registered their relationship through New York’s domestic partnership program are still excluded from participating in the Family Reunion Program.<sup>239</sup> However, New York courts may be receptive to discrimination claims, because New York law explicitly

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230. *Whitmire v. Arizona*, 298 F.3d 1134, 1135–1137 (9th Cir. 2002).

231. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 *Women’s Rts. L. Rep.* 357, 387 (2009); see, e.g., *Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620, 1629, 134 L. Ed. 2d 855, 867–868 (1996) (finding a Colorado law that banned protecting gay and lesbian people from discrimination unconstitutional).

232. *Lawrence v. Texas*, 539 U.S. 558, 562 123 S. Ct. 2472, 2475, 156 L. Ed. 2d 508, 515 (2003) (holding that a Texas law that made it a crime for persons of the same sex to engage in certain intimate conduct was unconstitutional because it violated the due process right to privacy).

233. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 *Women’s Rts. L. Rep.* 357, 388–389 (2009).

234. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 *Women’s Rts. L. Rep.* 357, 368–369 (2009). See also Cal. Fam. Code § 297.5(g) (2010).

235. See Dana Goldstein, *Conjugal Visits*, THE MARSHALL PROJECT (2015), available at <https://www.themarshallproject.org/2015/02/11/conjugal-visits> (last visited Oct. 7, 2020).

236. See State of Washington Department of Corrections, *Prison Visits*, WA DEPARTMENT OF CORRECTIONS (2020), available at <https://www.doc.wa.gov/corrections/incarceration/visiting/prison-visits.htm#efv> (last visited Oct. 7, 2020); State of Washington Department of Corrections, *Frequently Asked Questions (FAQ)*, WA DEPARTMENT OF CORRECTIONS (2020), available at <https://www.doc.wa.gov/corrections/incarceration/visiting/faq.htm#immediate-family> (last visited Oct. 7, 2020).

237. See Christopher Reinhart, *Extended Family Visits in Prison*, CONNECTICUT GENERAL ASSEMBLY (2014), available at <https://www.cga.ct.gov/2014/rpt/2014-R-0053.htm> (last visited Oct. 7, 2020).

238. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 *Women’s Rts. L. Rep.* 357, 377–378 (2009).

239. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 *Women’s Rts. L. Rep.* 357, 378 (2009). See also State of New York, Department of Corrections and Community Supervision, Directive No. 4500, Family Reunion Program, 5–6 (as revised Jan. 5, 2016), available at <https://doocs.ny.gov/system/files/documents/2019/08/4500%20Family%20Reunion%20Program.pdf> (last visited July 4, 2020).

prohibits discrimination on the basis of sexual orientation, and New York domestic partners have the same right to visitation as any spouse at hospitals, nursing homes, and other health care facilities.<sup>240</sup>

Under *Turner*<sup>241</sup>, it is important to determine whether there are other ways to communicate with those who cannot visit. For instance, oftentimes incarcerated people can still communicate with those restricted from visiting through telephone calls and letters.<sup>242</sup> In addition, *Turner* says courts should consider the burden of accommodating many visits, like security and personnel costs.<sup>243</sup>

Keep in mind that federal, state, and local regulations may give you additional visitation rights. People incarcerated in facilities run by the New York Department of Correctional Services should consult the Family Handbook for visitation restrictions. Most visitors do not need special permission. However, the Superintendent must give approval in writing in advance for visitors under parole or probation, with past or pending criminal histories, or who are also Department employees or volunteers.<sup>244</sup> The Superintendent also has the power to deny visitation as necessary for security or other reasons.<sup>245</sup>

## H. Using Telephones

While some courts hold that incarcerated people have a First Amendment right to telephone access,<sup>246</sup> other courts refuse to hold that incarcerated people have such a right.<sup>247</sup> Even courts

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240. Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 Women's Rts. L. Rep. 357, 379 (2009).

241. *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987), *superseded by statute on other grounds*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018) (prohibiting the government from restricting an incarcerated person's free exercise of religion, unless it serves a compelling government interest, and is narrowly tailored to serve that interest).

242. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (stating that incarcerated people have other means of communication and noting these alternatives need not be ideal, only available).

243. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169, 156 L. Ed. 2d 162, 172 (2003) (citing *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d. 162 (1987)).

244. State of New York, Department of Corrections and Community Supervision, Handbook for Families and Friends of New York State DOCCS Inmates 10–11 (*as revised* Dec. 2019), *available at* <https://doccs.ny.gov/system/files/documents/2020/01/family-handbook-english-final-12.2019-002.pdf> (last visited Jul. 4, 2020).

245. State of New York, Department of Corrections and Community Supervision, Handbook for Families and Friends of New York State DOCCS Inmates 11 (*as revised* Dec. 2019), *available at* <https://doccs.ny.gov/system/files/documents/2020/01/family-handbook-english-final-12.2019-002.pdf> (last visited Jul. 4, 2020).

246. *See Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 1999) (affirming that incarcerated people have a First Amendment right to telephone access but holding that incarcerated people are not entitled to a specific rate for their telephone calls); *see also Walton v. N.Y. State Dep't of Corr. Servs.*, 18 Misc. 3d 775, 786–787, 849 N.Y.S.2d 395, 404–405 (Sup. Ct. Albany County 2007) (upholding constitutional right to telephone access but dismissing claim that rates under a contract between the Department of Correctional Services and MCI, a telephone provider, violated families' and others' rights under the New York constitution). Many decisions involve pretrial detainees' phone access rights; *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984) (holding that the First Amendment protects reasonable access to telephone communication for a pretrial detainee); *Moore v. Janing*, 427 F. Supp. 567, 576–577 (D. Neb. 1976) (affirming the unconstitutionality of institutional eavesdropping on the telephone calls of pretrial detainees but finding timing restrictions on telephone access reasonable); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–1052 (8th Cir. 1989) (finding a policy limiting pretrial detainees to one call to their lawyers every two weeks "patently inadequate" to secure assistance of counsel); *Johnson v. Brelje*, 701 F.2d 1201, 1207–1208 (7th Cir. 1983) (finding limiting pretrial detainee to two 10-minute calls a week and no incoming calls violated his right to court access), *overruled on other grounds by Maust v. Headley*, 959 F.2d 644, 647–648 (7th Cir. 1992). Check if your state has enacted laws granting incarcerated people rights to phone access.

247. *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) (stating that "[p]risoners have no per se constitutional right to use a telephone"); *Edwards v. Horn*, No. 10 Civ. 6194, 2012 U.S. Dist. LEXIS 30968, at \*20 (S.D.N.Y. Mar. 7, 2012) (stating that "phone restrictions do not impinge on a prisoner's constitutional rights where

recognizing a right to telephone access say the right can be severely limited.<sup>248</sup> The *Turner* case governs these restrictions on phone use. Courts point to prison security as a valid reason under *Turner*.<sup>249</sup> Courts also point to the fact that incarcerated people have only a limited need for telephones because they have other ways of communicating with the outside world, like letter-writing and visitation.<sup>250</sup> In short, courts usually uphold restrictions on phone use unless the restrictions eliminate telephone access entirely or get in the way of attorney representation.<sup>251</sup>

These restrictions govern how much you have to pay to make a call, what types of calls you can make, whom you can call, and how many calls you can make. In one case,<sup>252</sup> the Ninth Circuit said incarcerated people were not entitled to a specific telephone rate and so it was okay to charge them a

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an inmate has alternate means of communicating with the outside world.”) (quoting *Henry v. Davis*, No. 10 Civ. 7575, 2011 U.S. Dist. LEXIS 84100, at \*6 (S.D.N.Y. Aug. 1, 2011)).

248. See, e.g., *U.S. v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (upholding the constitutionality of severe restrictions on an incarcerated person’s telephone use where those restrictions were related to the state’s interest in preventing him from ordering further crime from within the prison); *Carter v. O’Sullivan*, 924 F. Supp. 903, 909–910 (C.D. Ill. 1996) (holding the computerized collect calling system employed by a prison, which blocked certain callers and prevented three way calling, was a “reasonable restriction” on the constitutional right to telephone communication and finding “[m]onitoring of inmate telephone calls is acceptable because of legitimate concerns regarding prison security.”); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (holding that incarcerated people have a 1st Amendment right to telephone access but this right can be limited for the legitimate security interests of the prison and finding that denial of access to a telephone in the 30 minutes of imprisonment was not a violation of the incarcerated person’s rights).

249. See, e.g., *United States v. Felipe*, 148 F.3d 101, 110–113 (2d Cir. 1998) (applying the *Turner* test to severe limitations on communication and finding the goal of prison security legitimate to justify restrictions); *Gilday v. Dubois*, 124 F.3d 277, 293–294 (1st Cir. 1997) (finding no right for an incarcerated person to use the telephone “on his own terms,” and holding that, because of reasonable prison security measures, it does not violate any constitutional right, or the Massachusetts Wiretap Act, to interfere with calls by incarcerated people to numbers not on a pre-approved list); *Carter v. O’Sullivan*, 924 F. Supp. 903, 909–910 (C.D. Ill. 1996) (upholding the constitutionality of a prison’s computerized collect calling system that blocked certain callers and prevented three way calling because it provided for additional prison security, among other things); *Wooden v. Norris*, 637 F. Supp. 543, 555 (M.D. Tenn. 1986) (holding that a coinless telephone system requiring operator assistance did not infringe on incarcerated people’s First Amendment rights since it helped to prevent illicit activity between incarcerated people, fraudulent billing, and vandalism).

250. See, e.g., *United States v. Lentz*, 419 F. Supp. 2d 820, 835–836 (E.D. Va. 2005) (holding that, if incarcerated people have other means for confidential communication, monitoring inmate-counsel telephone calls does not infringe on 6th Amendment rights because “prisoners are not entitled to any particular method of access to the courts or to their lawyers”); *Bellamy v. McMickens*, 692 F. Supp. 205, 214 (S.D.N.Y. 1988) (denying a claim of deprivation when the telephone restrictions were not an absolute denial of access to counsel because “states have no obligation to provide the best manner of access to counsel”); *Pino v. Dalsheim*, 558 F. Supp. 673, 675 (S.D.N.Y. 1983) (holding that “the procedures providing for unlimited personal and mail communication with an attorney are constitutionally sufficient,” even though incarcerated people and their attorneys may prefer to communicate by telephone); *Wooden v. Norris*, 637 F. Supp. 543, 554 (M.D. Tenn. 1986) (stating that the court would consider both “the alternative means of communication offered by the prison administration” and “the justification” offered by the incarcerated person in preferring the telephone system in order to determine “the effect the current telephone system and policies have on the ability of inmates’ families to communicate with” those incarcerated).

251. Compare *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (denying an incarcerated person’s claim that he had been deprived of his First Amendment right to telephone access because he could still make calls for emergencies or to his lawyer), with *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–1052 (8th Cir. 1989) (finding a policy limiting pretrial detainees to one call to their attorney every two weeks “patently inadequate” to secure assistance of counsel), with *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1258 (D.N.M. 2003) (finding restrictions, including a ban on attorney visits and a five-minute limit on attorney phone calls, “would unjustifiably obstruct the availability of professional representation”) (quoting *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974), *overruled on other grounds*, *Thornburgh v. Abbot*, 490 U.S. 401, 481, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)).

252. *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000), *rev’d on other grounds*, *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005).

higher rate than people outside prison. In another case,<sup>253</sup> the Ninth Circuit upheld a rule requiring all calls to be operator-assisted and collect (which means that incarcerated people there cannot call toll-free numbers). In another case,<sup>254</sup> the Sixth Circuit upheld a regulation that only allowed calls to people on an approved list. Courts have also upheld restrictions on the number of calls an incarcerated person can make.<sup>255</sup>

Additionally, these restrictions govern your privacy during phone calls. Call monitoring does not violate your Fourth Amendment privacy rights for two reasons. First, there is no reasonable expectation of privacy in outbound calls from prison.<sup>256</sup> Second, incarcerated people are considered to have consented to monitoring when they are made aware of the surveillance, either by signs near the telephones or informational handbooks.<sup>257</sup> However, as an exception to this general rule, many courts have held prisons must allow unmonitored phone calls between an incarcerated person and his attorney so long as the phone call is arranged in advance.<sup>258</sup> If such a call between an incarcerated person and his attorney is not arranged in advance, it can be monitored like any other call. Courts justify monitoring lawyer-prisoner phone calls that were not pre-arranged by noting that incarcerated people have the alternative of corresponding with their lawyers confidentially through the mail.<sup>259</sup>

### I. Conclusion

Limitations on your right to communicate with the outside world, as discussed in this Chapter, may be among the most frustrating restrictions you have to face while in prison. In most circumstances, prison authorities have great discretion to restrict your right to communicate. You may want to challenge a restriction, or its application to you, if you feel that the restriction is not reasonably related to a legitimate prison interest and violates your constitutional rights. You should be careful, however, that your challenge does not appear frivolous. This means that you must have some specific constitutional basis for making your challenge.<sup>260</sup>

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253. *Shoot v. Roop*, No. 92-35532, 1993 U.S. App. LEXIS 5890, at \*5-6 (9th Cir. Mar. 16, 1993).

254. *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994); *see also Carter v. O'Sullivan*, 924 F. Supp. 903, 910-911 (C.D. Ill. 1996) (upholding collect call system requiring each incarcerated person to provide officials with a list of up to thirty individuals the incarcerated person wished to call).

255. *See, e.g., Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (upholding a restriction limiting number of individuals an incarcerated person can call to ten); *Robbins v. South*, 595 F. Supp. 785, 789 (D. Mont. 1984) (upholding a restriction of one call per week); *Moore v. Janing*, 427 F. Supp. 567, 576-577 (D. Neb. 1976) (upholding a restriction of three five-minute calls per week).

256. *See, e.g., United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (holding that "any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls.").

257. *See, e.g., United States v. Workman*, 80 F.3d 688, 693-694 (2d Cir. 1996) (holding that a sign placed below telephones warning that calls would be monitored was sufficient notice of surveillance, and that use of the telephones after such notice indicated implied consent); *see also United States v. Verdin-Garcia*, 516 F.3d 884, 894 (10th Cir. 2008) (holding that "[a] prisoner's voluntarily made choice . . . to use a telephone he knows may be monitored implies his consent to be monitored").

258. *See generally Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991) ("[O]fficials may tape a prisoner's telephone conversations with an attorney only if such taping does not substantially affect the prisoner's right to confer with counsel."); *Martin v. Tyson*, 845 F.2d 1451, 1458 (5th Cir. 1988) (allowing a prison to maintain an unmonitored line for legal calls and monitored lines for all other calls).

259. *See, e.g., United States v. Felipe*, 148 F.3d 101, 110-111 (2d Cir. 1998) (allowing "severe" restrictions on an incarcerated person's ability to communicate with the outside world because the incarcerated person could still contact his attorney, among others, through correspondence); *Gilday v. Dubois*, 124 F.3d 277, 294 (1st Cir. 1997) (citing retention of the right to correspond with counsel and family through the mail as one factor in establishing the reasonableness of a restrictive telephone system); *Pino v. Dalsheim*, 558 F. Supp. 673, 675 (S.D.N.Y. 1983) (holding "the procedures providing for unlimited personal and mail communication with an attorney are constitutionally sufficient").

260. The Prison Litigation Reform Act (PLRA) has a "three strikes" provision that prevents incarcerated people from filing a suit if on three previous occasions, they sued in federal court and their cases were dismissed for being frivolous, malicious, or failed to state a claim. 28 U.S.C. § 1915(g). So, proceed carefully, using this

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Chapter as a guide to successful and unsuccessful suits. For more information on the PLRA, see Chapter 14 of the *JLM*, “The Prison Litigation Reform Act.”