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Comment

LIKE, COMMENT, OR SUBSCRIBE—UNLESS YOU ARE A PRISONER: HOW PRISONERS' FIRST AMENDMENT RIGHTS ARE THWARTED FOR PENOLOGICAL INTERESTS

“The Government may not suppress lawful speech as the means to suppress unlawful speech.”¹

JEROME SHAEN*

I. BE IT A MYSPACE PAGE OR A PAGE IN *GAME OF THRONES*, PRISONERS MIGHT NOT HAVE ACCESS²

In the age of technology, social media is an instantaneous forum to share information, ideas, and beliefs of any kind.³ As of September 2020, 1.82 billion people log onto Facebook every day and use the site to share photos, post life updates, and stay in touch with friends and family.⁴ Instagram alone has over 854 million users—almost three times the number of citizens of the United States.⁵ Understandably, the social media realm has become a legally protected space to exercise First Amendment rights—unless you are incarcerated.⁶

In June 2020, authorities placed Michael Cohen, President Trump’s former attorney, back in prison after he refused to sign a Federal Location Monitoring

* J.D. Candidate 2022, Villanova University Charles Widger School of Law; B.B.A. 2019, College of William & Mary. This Comment is dedicated to my parents, Michael and Linda, whose relentless support and affinity for generosity, care, and selflessness inspired me to attend law school and become a lawyer. I would also like to thank the staff of the *Villanova Law Review* for sticking with this piece through many rounds of editing and brainstorming. “Think before you speak. Read before you think.” Fran Lebowitz, *Tips for Teens*, NEWSWEEK (Jan. 1, 1979).

1. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

2. See *Banning Books in Prisons*, EQUAL JUSTICE INITIATIVE (Jan. 7, 2020), <https://ejl.org/news/banning-books-in-prisons/> [<https://perma.cc/XQN5-K34D>] [hereinafter *Banning Books in Prisons*] (reporting how courts have given authority to prison officials to censor reading materials, but many states have arbitrary policies that exclude books including the *Game of Thrones* series).

3. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (discussing positive uses of social media which include the ability to immediately find information and discuss it with others).

4. Dan Noyes, *The Top 20 Valuable Facebook Statistics*, ZEPHORIA (Oct. 29, 2020), <https://zephoria.com/top-15-valuable-facebook-statistics/#:~:text=1.82%20billion%20people%20on%20average,billion%20DAU%20for%20December%202019> [<https://perma.cc/C9GQ-87BV>].

5. Jasmin Enberg, GLOBAL INSTAGRAM USERS 2020 (Dec. 8, 2020), <https://www.emarketer.com/content/global-instagram-users-2020> [<https://perma.cc/5UXA-YGMQ>].

6. See *Packingham*, 137 S. Ct. at 1737 (“In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”); see also *Aguiar v. Recktenwald*, 649 F. App’x 293, 295 (3rd Cir. 2016) (ruling that a prison had a legitimate penological interest to support deactivating an inmate’s social media account).

Agreement that included a stipulation prohibiting him from interacting with the media in any way.⁷ This condition would prevent Cohen from publishing a book critical of former President Donald Trump, an intention Cohen shared on social media.⁸ While the Southern District of New York deemed this action retaliatory on the part of the government and more than likely politically motivated, a representative from the Board of Prisons asserted this was a normal practice.⁹ Mr. Cohen suffered a constitutional injury at the hands of the criminal justice system; a reality that is, unfortunately, commonplace. The COVID-19 Pandemic has emphasized the confining nature of prison, especially when it comes to communication.¹⁰ Incarcerated individuals across the country feel these effects.

Jerry Metcalf is imprisoned at Thumb Correctional Facility in Michigan.¹¹ He wakes up every morning in an eight-by-ten foot cell, with one small window, that he shares with a cellmate.¹² While this has been his routine for twenty-five years, the

7. See Benjamin Weiser & Alan Feuer, *Judge Orders Cohen Released, Citing 'Retaliation' Over Tell-All Book*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/nyregion/michael-cohen-trump-book.html> [<https://perma.cc/6A5U-ZJJ7>] (summarizing how Michael Cohen was released on furlough for Coronavirus, “[b]ut to remain at home, he was asked to sign a document that would have barred him from publishing a book during the rest of his sentence.”). Michael Cohen was serving a three-year sentence after he pled guilty to campaign finance violations and tax evasion in 2018, all in the course of working with Donald Trump. See *id.*

8. See *id.* (stating how the condition would prevent Cohen from engaging with any kind of media, including print, TV, film, and books, as well as posting on social media). Cohen had been alluding to a book on his social media for months, including the use of the hashtag “#WillSpeakSoon” in June 2020. See also Michael Cohen (@MichaelCohen212), TWITTER (June 26, 2020, 6:52 AM), <https://twitter.com/michaelcohen212/status/1276468446344208384?s=21> [<https://perma.cc/5W9U-LL7X>]. The book, *Disloyal*, was made available on September 8th, 2020. See also Anastasia Tsioulcas, *Trump Fired a 'Faux-Bama,' Michael Cohen Says in Tell-All Memoir*, NATIONAL PUBLIC RADIO (Sept. 7, 2020), <https://www.npr.org/2020/09/07/910550523/trump-fired-a-faux-bama-michael-cohen-alleges-in-tell-all-memoir> [<https://perma.cc/5UBH-XUDR>] (detailing the release of Cohen’s book and the contents).

9. See *Cohen v. Barr*, 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) (ruling that the government’s conduct was retaliatory in response to Cohen’s exercise of his First Amendment rights); see also Weiser & Feuer, *supra* note 7 (citing Justin Long, a Board of Prisons representative, who stated it was not uncommon for prison officials to restrict inmate’s contact with media).

10. See Mark Rumold, *Now More than Ever, Prisoners Should Have Some Access to Social Media*, ELECTRONIC FRONTIER FOUNDATION (Mar. 27, 2020), <https://www.npr.org/2020/09/07/910550523/trump-fired-a-faux-bama-michael-cohen-alleges-in-tell-all-memoir> [<https://perma.cc/G6EW-4MM4>] (reporting on the effect of the pandemic on prisons and how it is becoming increasingly difficult to hear prison perspectives with prisoners limited access to the internet).

11. Jerry Metcalf, *No, your Coronavirus Quarantine is not Just Like Being in Prison*, THE MARSHALL PROJECT: LIFE INSIDE (Mar. 25, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/03/25/no-your-coronavirus-quarantine-is-not-just-like-being-in-prison> [<https://perma.cc/N99K-Y698>] (introducing Metcalf in his biographical byline). Metcalf was convicted in 1996 and is serving a forty-to-sixty-year sentence for second-degree murder and two years for a weapons felony. *Id.* In addition to having his work published, Metcalf volunteers as an aid for those with mental health conditions and trains service dogs for Paws with a Cause. *Id.*

12. See *id.* (summarizing Metcalf’s morning routine in prison).

last thirteen months have made the little things even more meaningful to Metcalf.¹³ The pandemic has made him fearful of a death alone in prison, where the last faces he sees will be those of prison guards instead of loved ones.¹⁴ Accounts of this nature are becoming increasingly important, especially as COVID-19 turns prisons into breeding grounds for the virus.¹⁵ Outside correctional facility walls, virtual communication is essential in the pandemic, especially to say goodbye to loved ones as they lie dying alone in hospitals and nursing homes.¹⁶ Yet, prison systems in numerous states limit or completely prohibit access to social media or online communication of any nature.¹⁷

Historically, legislatures continuously grapple with protecting their constituents, especially victims of crime, while still accounting for the guaranteed rights of criminals.¹⁸ In the 1970's, starting with New York, many states passed laws forbidding convicted criminals from sharing the story of their crimes in order to make a profit.¹⁹ These laws were a reaction to the public's fear that the newly convicted Son of Sam murderer, David Berkowitz, would profit from publishing tales of his serial murders.²⁰ While the New York law was challenged and amended, in many states laws of this nature still stand, prohibiting persons convicted of certain felonies from profiting from their criminal actions, including the sale of the stories for a book or movie.²¹ Beyond this, even if prisoners write books on subject matter

13. *See id.* (providing insight into what has gotten Metcalf through the pandemic).

14. *See id.* (explaining why he would like to be anywhere besides prison during the pandemic).

15. *See, e.g.,* Rumold, *supra* note 10 (emphasizing how the humanitarian crisis prisoners face in the pandemic calls for first-hand accounts of the conditions they face while incarcerated); Metcalf, *supra* note 11 (“And let’s be honest, I now live in a death trap.”).

16. *See* Ken Beckley, *My Wife and I Got the Virus. I got the Virus. I got Better. We Had to Say Goodbye Over FaceTime.*, THE WASHINGTON POST (Sept. 28, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/09/28/covid-goodbye-facetime/> [<https://perma.cc/2ALG-EEGZ>] (detailing how the author had to say goodbye to his wife suffering from COVID-19 through FaceTime).

17. *See* Rumold, *supra* note 10 (summarizing extensive restrictions states place on inmates’ access to internet).

18. *See, e.g.,* *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (invalidating a law that made it a felony for registered sex offenders to use online sites, most of which were social media sites); *Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991) (ruling that a law preventing criminals from selling the story of their crime was too broad).

19. *See* Cady Drell, *How Son of Sam Changed America*, ROLLING STONE (July 29, 2016, 7:10 PM), <https://www.rollingstone.com/culture/culture-features/how-son-of-sam-changed-america-118562/> [<https://perma.cc/YR5N-6NRP>] (outlining the history of the Son of Sam murders and introduction of the first Son of Sam law in New York).

20. *See Simon & Schuster*, 502 U.S. at 108 (“Berkowitz’s chance to profit from his notoriety while his victims and their families remained uncompensated did not escape the notice of New York’s Legislature. The State quickly enacted the statute at issue”). David Berkowitz, also known as the Son of Sam, killed six people between July 1976 and August 1977 in New York City. *See also* Drell, *supra* note 19. Berkowitz would write notes to local tabloids that sensationalized the murders and many think encouraged Berkowitz to kill again. *See id.* (summarizing the effect Berkowitz’s murders had on the tabloid industry). This media frenzy is what pushed the New York legislature to pass the Son of Sam law at issue in *Simon & Schuster*. *See id.* (connecting the mishandling of the coverage by New York’s tabloids to the legislation passed by New York).

21. *See* N.Y. EXEC. LAW § 632-a (McKinney 2020) (outlining the now narrowly defined parameters by which a convicted felon cannot profit from their crime, including selling the story).

unrelated to their crime, reimbursement laws may require that they forfeit any profits to the state for the cost of their incarceration.²²

Developments in access to literature under the First Amendment serve as an aspirational end result for social media access reform.²³ Courts have given prison officials discretion to censor reading material, yet many states currently have arbitrary policies that exclude books on civil rights, human rights, and American history.²⁴ A policy in Wisconsin illustrates such a phenomenon; while inmates cannot read Ralph Ginzburg's *100 Years of Lynchings*, they do have access to Hitler's *Mein Kampf*.²⁵ As recently as 2019 a Georgia sheriff took books away from inmates and only allowed them access to selections on the jail book cart in an effort to "reduce the amount of combustible material" in an inmate's cell.²⁶ These bans have extended to literature about mass incarceration and gifted books.²⁷ Prison systems have even attempted to restrict the type of online vendors inmates can order books

22. See MICH. COMP. LAWS ANN. §§ 800.401–.406 (West 2020) (outlining the Michigan law that would give the state a cause of action to sue Dawkins for the profits from his book to reimburse them for the cost of his incarceration); see also Alexandra Alter, *A Prisoner Got a Book Deal. Now the State Wants Him to Pay for His Imprisonment*, N.Y. TIMES (February 17, 2018), <https://perma.cc/M2MQ-HVKH> (summarizing the case of Curtis Dawkins, a convicted felon serving a life sentence for murder who wrote a book of short stories).

23. See, e.g., Bobby Allyn, *Arizona Prisons Lift Ban On Book About Mass Incarceration*, NATIONAL PUBLIC RADIO (June 21, 2019, 3:12 AM), <https://www.nytimes.com/2018/02/17/books/curtis-dawkins-graybar-hotel-prisoner-book-deal.html> [<https://perma.cc/N3AS-G9FD>] (reporting a case where an Arizona prison placed *Chokehold: Policing Black Men*, a book criticizing the criminal justice system, on its unauthorized content list for prisoners); Press Release, American Civil Liberties Union, ACLU Calls on Prison System to Reverse Rule Severely Limiting Access to Books in Violation of First Amendment (May 31, 2018) [hereinafter ACLU Calls on Prison System], <https://www.aclu-md.org/en/press-releases/aclu-calls-prison-system-reverse-rule-severely-limiting-access-books-violation-first> [<https://perma.cc/R2L4-FYRZ>] (reporting how the ACLU was challenging a Maryland DOC regulation that ban prisoners from receiving gifted books from online vendors other than two private choices); Press Release, American Civil Liberties Union, South Carolina Jail Agrees to End Unconstitutional Censorship (Jan. 10, 2012) [hereinafter South Carolina Jail Agrees], <https://www.aclu.org/press-releases/south-carolina-jail-agrees-end-unconstitutional-censorship> [<https://perma.cc/CX5W-N2RY>] (summarizing the end of a South Carolina prison regulation that bans any publication bound by staples or including nudity of any kind); Shelby Copeland, *ACLU Says Georgia Sheriff is Illegally Denying Books to Prisoners*, CNN (Apr. 11, 2019, 10:51 PM), <https://www.cnn.com/2019/04/11/us/georgia-county-jail-book-ban-trnd/index.html> [<https://perma.cc/MGB6-M4JL>] (reporting how a Georgia sheriff banned books that arrive to prisoners by mail or from family members, as well as taking books away from prisoners and only allowing them to read what is on the jail book cart).

24. *Banning Books in Prison*, *supra* note 2 (introducing how these book prohibitions came to be).

25. *Id.* (addressing specific states and the inconsistencies within their lists of banned books). Compare Ralph Ginzburg, *100 Years of Lynchings* (1962) (showing the history of racial atrocities in America through articles from a range of American newspapers), with Adolf Hitler, *Mein Kampf* (1925) (detailing Hitler's manifesto, antisemitism, and his plans for Germany).

26. See Copeland, *supra* note 23 ("The policy, implemented March 4, not only restricts incoming books from family, publishers and organizations, but also removes existing books from inmates. Under this policy, an inmate would only be able to read books from the jail book cart.").

27. See Allyn, *supra* note 23 (reporting that the ban of *Chokehold: Policing Black Men* was motivated by the possible threat the book posed to order at the prison); see also Copeland, *supra* note 23 (reporting how the sheriff banned gifted books as a means to keep combustible materials out of inmates' cells as well as control the flow of contraband material).

from.²⁸ In most of these instances, with the threat of lawsuit, prison systems have overturned these regulations, calling the legitimacy of the interests behind the regulations into question.²⁹

Prison systems have intensely regulated prisoners' access to social media, but courts have not been as committed to protecting access to these platforms as they have been with access to literature.³⁰ Cell phones are banned from prisons and many prisoners only have access to prison regulated email programs.³¹ Through these programs prisoners will engage with proxies, oftentimes a family member, who post to their social media pages for them.³² These posts maintain meaningful connections for a prisoner, ultimately aiding reentry into the community after release.³³ Regardless of this positive effect, the courts have deemed the practice unlawful

28. See ACLU Calls on Prison System, *supra* note 23 (“Citing the First Amendment rights of prisoners . . . ACLU’s National Prison Project (NPP) is calling on the Maryland Department of Public Safety and Correctional Services Recruitment (DOC) to immediately rescind Institutional Bulletin # 2018-02, which categorically forbids gift books even when sent directly from a seller like Amazon to those detained in Maryland prisons; forces prisoners to purchase books from one of two private vendors with extremely limited book offerings; and prohibits any person in custody from possessing more than 10 books.”).

29. See Allyn, *supra* note 23 (“An uproar over the ban of Chokehold: Policing Black Men, including threats of a lawsuit from the American Civil Liberties Union, prompted Arizona prison officials to review a publication blacklist and reverse suspending the book.”). New Jersey had a similar ban on Michelle Alexander’s *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* that was overturned after the ban was questioned by the ACLU. *See id.* (summarizing the New Jersey ban that was challenged by the ACLU). Pennsylvania has also been similarly challenged when the state banned books such as the State Employees’ Retirement Code and a book of Pablo Picasso paintings, in addition to halting prison donation programs. *See id.* (summarizing the challenges the ACLU pitted against Pennsylvania prison regulations). Both of these policies were revised to more narrowly address the concerns behind them, such as preventing access to information on how to escape and drug smuggling into state prison facilities. *See id.* (detailing the outcome of the ACLU challenges on Pennsylvania prison regulations). *See also* South Carolina Jail Agrees, *supra* note 23 (reporting how a South Carolina prison agreed to settle a lawsuit brought by the ACLU by dropping a ban on any publication bound by staples or that included nudity). The ACLU argued that these bans had no penological interest behind them. *See id.* (quoting David Shapiro, a staff attorney at ACLU, stating how the systematic prevention of reading by prisoners is unconstitutional as it is not supported by penological interest).

30. Compare *Sisney v. Kaemingk*, 469 F. Supp. 3d 903, 918–19 (D.S.D. 2020), *appeal docketed*, No. 20-2460 (8th Cir. Jul. 20, 2020) (holding that a pornography policy regulating prison literature was overinclusive), with *Aguiar v. Recktenwald*, 649 F. App’x 293, 296 (3rd Cir. 2016) (holding that a prison was justified in working with a social media site to suspend an inmate’s account).

31. See Seth Ferranti, *How Prison Inmates Get on Facebook, Twitter, and Instagram*, VICE (Feb. 11, 2015, 10:11 AM), https://www.vice.com/en_us/article/bn5qmv/how-convicts-get-on-facebook-twitter-and-instagram-in-prison-211 [<https://perma.cc/G5FB-3SNG>] (describing the prison regulated Trust Fund Inmate Computer System or TRULINCS that allows prisoners to exchange emails with the general public).

32. *See id.* (outlining how prisoners communicate with a proxy via a prison regulated email system, who then posts to their social media pages).

33. *See id.* (“Maintaining family ties can improve the likelihood of a successful reentry into the community, thus reducing the potential for recidivism.”). Inmate Alex Cook explains:

My mom forwards my emails and I send her my artwork and she takes pictures and posts them for me. When people comment on my art or just my page, she forwards the messages for me. It helps me let my friends and family see what I am up to and know that I’m doing something productive.

Id.

because of the burden it may place on prisons to monitor this activity.³⁴ Yet, prisons have still found ways to monitor these activities, especially in an effort to segregate inmates into security risk groups pretrial.³⁵ Meanwhile, in areas tangential to the prison system, such as parole or at-home monitoring agreements, the courts have ruled that a complete ban on interaction with social media runs contrary to the First Amendment.³⁶

These regulations placed on prisoners' First Amendment rights are draconian. This Comment will argue that overzealous structures of punishment affect broad regulations that infringe upon the First Amendment rights of incarcerated persons, especially as applied to their ability to publish works and access social media. While courts offer protection for access to reading materials, incarcerated persons' ability to publish works and access social media has not experienced such a revolution. Part II explains the legal standard courts use to determine whether these regulations infringe upon prisoners' First Amendment rights, as well as Supreme Court cases protecting convicted criminals' First Amendment rights. Part III discusses recent relevant statutes and cases exploring prisoner's ability to publish works and social media regulation in correctional facilities. Part IV argues that broad regulations of social media use and profit forfeiture relating to convict-written material violate a prisoner's First Amendment rights and are counterintuitive to the goals of rehabilitation. Additionally, part IV posits that social media access should be protected as robustly as access to literature. Finally, part V discusses the impact of these regulations and how they will continue if not reformed.

II. I'VE BEEN SCROLLING THROUGH PRECEDENT FOR HOURS: HOW THE CRIMINAL JUSTICE SYSTEM IMPLICATES THE FIRST AMENDMENT

Courts have analyzed challenges to First Amendment regulations in prison systems methodically, depending on the context of the situation.³⁷ The First

34. See *Aguilar*, 649 F. App'x at 295 (summarizing the legitimate penological interest prisons have in preventing unmonitored communications by prisoners).

35. See *Benway v. Aldi*, No. 3:19-cv-208 (VAB), 2020 WL 4433561, at *1 (D. Conn. July 30, 2020) (summarizing how a prisoner's Facebook page was assessed in determining his points to qualify for a Security Risk Group Designation); see also *Caves v. Payne*, No. 3:20-cv-15 (KAD), 2020 WL 1676916, at *1 (D. Conn. April 6, 2020) (introducing the facts of the case that state the detainee was placed into segregation due to the Security Risk Group assessment of posts on his Facebook page).

36. See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (holding that a North Carolina law criminalizing registered sex offenders interacting with social media sites was a violation of the First Amendment as social media is one of the most prevalent modern ways to express those rights); *Cohen v. Barr*, 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) (ruling that a complete ban on interacting with the media as a condition of an at-home prison stay was a violation of plaintiff's first amendment rights); *Manning v. Powers*, 281 F.Supp.3d 953, 960–61 (C.D. Cal. 2017) (holding that the plaintiff would likely be successful in challenging a complete ban on interacting with social media sites in a parole agreement on First Amendment grounds).

37. See, e.g., *Packingham*, 137 S. Ct. at 1736 (2017) (applying a strict scrutiny Due Process analysis to a law concerning registered sex offenders access to social media and the internet more generally); *Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*, 502 U.S.

Amendment analysis of prison regulations changes, and separate standards apply depending on whether the restricted person is a currently incarcerated or a formerly incarcerated person.³⁸ Ultimately, these cases illustrate how the courts cannot ignore the First Amendment rights of prisoners.³⁹

This section discusses key cases in which the Supreme Court has performed First Amendment inquiries regarding speech restrictions levied against people convicted of crimes. First, in *Turner v. Safley*,⁴⁰ the Court found that a lesser standard applied to constitutional challenges of prison regulations than challenges to statutes and regulations governing non-incarcerated persons.⁴¹ Second, the Supreme Court applied a strict scrutiny analysis to a law affecting criminals authoring works in or out of prison in *Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*⁴² This is the Due Process analysis used for regulation of First Amendment rights.⁴³ In *Packingham v. North Carolina*,⁴⁴ applying an intermediate scrutiny standard, the Court ruled on a law banning social media use by convicted sex offenders.⁴⁵ More importantly in this case, the Court discusses the importance of social media and the internet, especially to those who have been sanctioned by the criminal justice system and need to reacclimate to released life.⁴⁶ These cases build the foundation of arguments for broader First Amendment privileges in prisons, especially access to social media.

A. Turner v. Safley: A Jailee’s Rights Only Extend So Far As to Not Burden the Jailer

The Supreme Court developed the analysis for constitutional challenges to prison regulations in *Turner v. Safley*.⁴⁷ *Turner* involved a challenge to two Missouri

105, 118 (1991) (applying a strict scrutiny Due Process analysis of a law governing criminal’s ability to sell the stories of their crimes); *Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (showing how the court created a new standard of analysis for prison regulations concerning constitutional rights).

38. See, e.g., *Packingham*, 137 S. Ct. at 1736 (applying a Due Process analysis to a law regulating released sex offenders and the internet); *Simon & Schuster*, 502 U.S. at 118 (applying a Due Process analysis to criminals, in or out of prison, and their ability to profit from sharing the story of their crimes); *Turner*, 482 U.S. at 89 (creating a lesser standard of scrutiny to be applied to prison regulations of constitutional rights).

39. See *Packingham*, 137 S. Ct. at 1736 (finding that access to social media and internet accounts should not be broadly regulated for anyone, including sex offenders); see also *Simon & Schuster*, 502 U.S. at 118 (finding that laws could not disincentivize speech on crime).

40. 482 U.S. 78 (1987).

41. See *id.* at 89–91 (applying rulings of other prison regulations, the Court creates a new test to assess the validity of such policies).

42. 502 U.S. 105 (1991).

43. See *id.* at 105–118 (quoting *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)) (“In order to justify such differential treatment, ‘the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.’”).

44. 137 S. Ct. 1730 (2017).

45. See *id.* at 1736 (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)) (“In order to survive intermediate scrutiny, a law must be ‘narrowly tailored to serve a significant governmental interest.’”).

46. See *id.*

47. See *Turner v. Safley*, 482 U.S. 78, 90–91 (1987) (creating a new standard of analysis for prison regulations based on previous case precedent and the factors used within each to make a determination).

Division of Corrections' prison regulations.⁴⁸ First, prisoners were only allowed to communicate with inmates at other facilities if they were immediate family members or if the correspondence concerned legal matters.⁴⁹ Otherwise, the correspondence needed to be assessed by prison officials.⁵⁰ Second, prison inmates could only marry at the discretion of the prison superintendent's finding of "compelling reasons to do so."⁵¹

The Eighth Circuit, applying a strict scrutiny analysis, found that both regulations violated respondents' constitutional rights.⁵² The Supreme Court overruled this decision, holding that a lesser standard should apply--the reasonable relationship test.⁵³ Using the reasonable relationship test, the Court upheld the regulation on correspondence, yet invalidated the marriage regulation.⁵⁴

In formulating the reasonable relationship test, the Court considered *Procunier v. Martinez*⁵⁵ as the lower court did, which stated that the courts must recognize the constitutional claims of prisoners.⁵⁶ However, the Court recognizes that it must exercise judicial restraint, as the power to regulate these prisons--as well as the power to allocate resources to them--falls under the role of the executive and legislative branches.⁵⁷ Previous precedent ultimately called for an analysis of whether the regulation was reasonably related to legitimate penological interests or an

48. *See id.* at 81.

49. *See id.* at 81–82 (summarizing the permitted correspondence between inmates under the regulation).

50. *See id.* (quoting App. 34) (summarizing the regulation's guidelines for permitting other types of correspondence outside of the two allowed types, stating, "the classification/treatment team of each inmate deems it in the best interest of the parties involved"). The Court goes on to acknowledge trial testimony that showed this determination was based on the inmate's records, such as conduct violations and psychological reports, rather than each piece of mail. *See id.*

51. *See id.* at 82 (quoting App. 47) (summarizing the marriage regulation). The Court goes on to recognize that there is no standard to identify "compelling," and the only testimony of its application was in the case of pregnancy or birth of an illegitimate child. *See id.* The previous regulation did not require the assistance of prison officials in such a marriage, but it also did not require the superintendent to prohibit marriages. *See id.*

52. *See id.* at 81 ("The Court of Appeals for the Eighth Circuit, applying a strict scrutiny analysis, concluded that the regulations violate respondents' constitutional rights.").

53. *See id.* (holding the Eighth Circuit erred in applying a strict scrutiny analysis because "a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules"). The Court stated that subjecting everyday decisions of prison officials to a strict scrutiny standard would harm their ability to create solutions to security risks. *See id.* at 89.

54. *See id.* at 81 ("Applying [the lesser] standard, we uphold the validity of the correspondence regulation, but we conclude that the marriage restriction cannot be sustained.")

55. 416 U.S. 396, 405 (1974).

56. *See Turner*, 482 U.S. at 84–85 (citing *Martinez*, 416 U.S. at 405–06) (summarizing the opening principles of *Martinez*). *Martinez* focused on two principles: federal courts must recognize valid constitutional claims of prisoners and courts are ill equipped to deal with the problems of prison leadership and security. *See id.* (citing *Martinez*, 416 U.S. at 405–06).

57. *See id.* at 84–85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.").

exaggerated response to such concerns.⁵⁸ Using these same cases, the Court established the four-part reasonable relationship test to analyze these claims: 1) whether there is a valid, rational connection between the regulation and the governmental interest; 2) whether there are alternate means to express this right available to the prison inmates; 3) whether the impact accommodating the right will have on prison guards and fellow inmates; and 4) whether the absence of alternatives suggests the reasonableness of the regulation.⁵⁹

B. *Write What You Know, Unless it's a Crime: Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*

Son of Sam laws aim to prevent criminals from profiting from media—such as books, shows, and movies—about their crimes.⁶⁰ The history of such laws begins in the late 1970s when New York was terrorized by renowned serial killer, the Son of Sam; speculation arose that the killer, David Berkowitz, was going to sell the story.⁶¹ The state passed a law (known colloquially as “The Son of Sam Law”) in response to these rumors, requiring that any entity contracting with a criminal for the depiction of their crime must notify the New York State Crime Victims Board and turn over any income earned to be held available as a remedy in a potential civil suit brought by victims or their families.⁶² The statute was so broad as to include any person who had entered a guilty plea or been convicted of a crime, as well as any person who voluntarily and intelligently confessed to a crime for which they were not prosecuted.⁶³

58. *See id.* at 87 (surmising from four cases identified—*Pell, Jones, Bell, Block*—that “the Court . . . instead inquired whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns”). The Court first discusses *Pell v. Procunier*, in which a regulation banned inmates from partaking in face-to-face media interviews. *See id.* at 86 (citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974)). The Court rejected the challenge in this case, stating that prison officials have expert judgement that should be deferred to, especially there is no evidence showing that the regulation is an exaggerated response. *See id.* Next, the Court looks to *Jones v. North Carolina Prisoners’ Union*, in which regulations prohibited many of the normal functions of a union. *See id.* Again and, again, the Court rejected the challenge as the regulation was rationally related to the objectives of prison administration. *See id.* (citing *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119, 129 (1977)). In *Bell v. Wolfish*, the regulation banned receipt of hardback books unless they were sent directly from the seller. *See id.* at 87 (citing *Bell v. Wolfish*, 441 U.S. 520, 550 (1979)). Once again, the Court found the regulation was a rational response and it should defer to prison administrators. *See id.* at 87 (citing *Bell*, 441 U.S. at 550–51). Finally, in *Block v. Rutherford*, the Court upheld a ban on physical visits as the sound discretion of prison officials determined it would jeopardize prison security and that the regulation was reasonably related to such. *See id.* (citing *Block v. Rutherford*, 468 U.S. 576, 589, 586 (1984)).

59. *See id.* at 89–90 (summarizing new four-factor analysis based on precedent from *Pell, Jones, Bell*, and *Block*).

60. Sandra Thomas, *Son of Sam Laws*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1242/son-of-sam-laws> [<https://perma.cc/TE7G-GPAV>] (explaining the basics of Son of Sam Laws).

61. *See Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*, 502 U.S. 105, 108 (1991) (summarizing history of the law at issue in the case).

62. *See id.* at 109–10 (connecting the history of the law to what the law prohibits); *see also* N.Y. EXEC. LAW § 632-a (McKinney 2020).

63. *See Simon & Schuster, Inc.*, 502 U.S. at 110 (“Subsection (10) broadly defines ‘person convicted of a crime’ to include ‘any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently

The case arose when the publishing company Simon & Schuster contracted with mobster Henry Hill to publish and sell an autobiographical book on his life.⁶⁴ The book, *Wiseguy*, outlined the day-to-day life of Hill, and detailed many of the crimes he committed.⁶⁵ The Crime Victims Board notified Simon & Schuster about violating the Son of Sam law, informing the company that it must turn over all amounts owed to Hill, and Hill was to surrender any payments already made.⁶⁶ Simon & Schuster brought a 42 U.S.C. Section 1983 claim, seeking a declaration that the law violated the First Amendment.⁶⁷

Applying a strict scrutiny standard, the Supreme Court ruled that the law was inconsistent with the First Amendment.⁶⁸ Following prior precedent, the Court held that a statute violates the First Amendment when it places a financial burden on an individual because of the content of their speech.⁶⁹ When a statute infringes upon a fundamental right, like any First Amendment right, the state can pass strict scrutiny only by justifying said statute with a legitimate state interest the statute advances.⁷⁰ Additionally, the statute must be narrowly tailored to address such an interest.⁷¹ While New York had a legitimate interest in compensating the victims of these crimes, it did not have any interest in limiting such proceeds to that which arose from speech on crime.⁷² Even with this legitimate interest, the inclusion of works on any subject—so long as it relates to the author’s thoughts or recollections on his crime—as well as any person who had allegedly committed a crime—prosecuted or

admitted the commission of a crime for which such person is not prosecuted.”) (quoting N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 2020)).

64. *See id.* at 111.

65. *See id.* at 112–13. Hill’s crime organized crime career spanned 25 years, with most of said crimes being mundane such as extortion, importing and distributing narcotics, and numerous robberies. *See id.* However, he masterminded some of the largest crimes of his time, including the 1978–1979 Boston College basketball point-shaving scandal and the organized theft of six million dollars from Lufthansa Airlines. *See id.* Hill was arrested in 1980, yet obtained immunity as he testified in the trials of many of his colleagues. *See id.* At the time of writing his book, Hill was in the Federal Witness Protection Program under an assumed name. *See id.* The book accounts in first-person narrative Hill’s daily activities over this career and the crimes he committed. *See id.*

66. *See id.* 114–15 (summarizing the events that occurred after the Crime Victims Board became aware of the situation and reviewed Hill’s contract with Simon & Schuster).

67. *See id.* at 115 (introducing the procedural history of the case). *See generally* 42 U.S.C. § 1983. 42 U.S.C. § 1983 created a civil cause of action designed to address constitutional deprivations and enforce constitutional rights.

68. *See Simon & Schuster, Inc.*, 502 U.S. at 123.

69. *See id.* at 115 (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)). The Court found this principle so innate in the First Amendment that it does not require explanation. *See id.* at 115–16 (citing *Leathers*, 499 U.S. at 447).

70. *See id.* at 118 (“In order to justify such differential treatment, ‘the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.’” (quoting *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

71. *See id.* at 121 (stating that the Court must analyze if the law is narrowly tailored to address the interest in compensating victims of crime).

72. *See id.* at 120–21 (“In short, the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer’s speech about the crime.”).

not—made the statute overinclusive and not narrowly tailored to address this interest.⁷³

C. Packingham v. North Carolina: Access to Social Media is a First Amendment Right, Even for Registered Sex Offenders

In 2008, North Carolina passed a law that made it a felony for registered sex offenders to access social media sites where minor children could have a presence.⁷⁴ After the petitioner was convicted in state court of violating this statute, he petitioned for certiorari, challenging the law on First Amendment grounds.⁷⁵ Highlighting the importance of social media to previously incarcerated individuals and recognizing the unbounded limits of cyberspace, the Court called for narrow restrictions on social media access, as “what [the courts] say today might be obsolete tomorrow.”⁷⁶

Applying an intermediate scrutiny standard, the Supreme Court invalidated the statute.⁷⁷ Under intermediate scrutiny, a law must be narrowly tailored to address a significant government interest.⁷⁸ While North Carolina had an interest in protecting possible victims of such crimes, it did not prove that such a sweeping law was necessary to further that interest.⁷⁹ The Court held it would be possible to create a statute that more narrowly targets illicit conduct on the internet as opposed to banning access to most internet sites completely.⁸⁰

Additionally, the Court expanded on the importance of social media and the internet.⁸¹ The Court stated that the law “bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”⁸² To do so prevents an individual from accessing “the most powerful mechanisms available to a private citizen to make his

73. *See id.* at 121 (proffering the law is overinclusive as it covers any subject as long as it details the author’s story of their crime, as well as including any person who has committed a crime whether they have been prosecuted or not).

74. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1733 (2017) (introducing the issue that gave rise to the case). The law gave a four-part test to determine which sites fell under this law: operated by a person who garners revenue from membership fees, ad sales, or other sources for operation of such site; facilitates interaction between two individuals for the purposes of friendship; allows users to create personal profiles; and provides users with the mechanisms to communicate with each other. *See id.* at 1733–34 (quoting N.C. GEN. STAT. ANN. §§ 14–202.5(a)–(b), (c) (West 2015)).

75. *See id.* at 1734–35 (summarizing the procedural history of the case).

76. *Id.* at 1735–36.

77. *Id.* at 1738.

78. *Id.* at 1736 (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)).

79. *Id.* at 1737.

80. *See id.* (“Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.”)

81. *Id.* at 1735 (“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997))).

82. *Id.* at 1737 (emphasizing the First Amendment speech the law is prohibiting).

or her voice heard.”⁸³ Most pertinently, the Court discussed the benefits a convicted criminal can have from accessing networking sites of this nature: “Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.”⁸⁴ The Court emphasizes that social media is part of a revolution in thought occurring in cyberspace, and because it is uncertain how this revolution may proceed, the Court should be cautious about rulings that may prove quickly obsolete.⁸⁵ With this in mind, the Supreme Court recognized that the First Amendment needs to adapt as speech does, stating that it must be cautious before providing scant protection to the internet as it fosters this arena for new realizations.⁸⁶

III. THE COURTS’ ‘COMMENT’ ON FIRST AMENDMENT RIGHTS FOR PRISONERS, BUT THEY ONLY ‘LIKE’ SOME OF THEM

In the past five years, incarcerated people have experienced inconsistent developments in the protection of their First Amendment rights.⁸⁷ Most recently, in *Sisney v. Kaemingk*,⁸⁸ inmates achieved success when challenging a South Dakota Board of Corrections pornography policy that prohibited any literature with sexual content or that depicted nudity, including works of art.⁸⁹ This decision reflects the modern understanding of the First Amendment and how it applies to prisons.⁹⁰ While the courts are willing to recognize how the First Amendment is changing, especially in the context of the internet, there is still a disconnect in the application

83. *Id.* (arguing the weight of the forum that the internet provides).

84. *Id.* (arguing the importance of the internet to convicted criminals, especially as they readapt to everyday life).

85. *Id.* at 1736.

86. *See id.* (“This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.”).

87. *Compare* Aguiar v. Recktenwald, 649 F. App’x 293, 295 (3d Cir. 2016) (upholding the prison’s deactivation of a prisoner’s social media account), *with* Cohen v. Barr, 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) (holding that a complete bar on interaction with the media in a Federal Location Monitoring Agreement did not address the true penological interests of the government), and Manning v. Powers, 281 F. Supp. 3d 953, 960–61 (C.D. Cal. 2017) (holding that the plaintiff would likely be successful in challenging a complete ban on interacting with social media sites in a parole agreement on First Amendment grounds).

88. 469 F. Supp. 3d 903 (D.S.D. 2020).

89. *See id.* at 918–19 (holding that a complete ban on any publications with nudity was too broad, infringing upon prisoner’s First Amendment rights).

90. *See* Christine D. Truter, *Comment, First Amendment Rights of Prisoners: Freedom of the Prison Press*, 18 U.S.F.L. REV. 599, 600 (1984) (explaining how after the erosion of the hands-off doctrine with prisons and censorship, the Supreme Court ruled that prisoners do retain their First Amendment rights in *Pell v. Procunier*) (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

of these changes.⁹¹ Amended Son of Sam laws and reimbursement laws still prevent inmates from keeping any future profits from telling not only the story of their crimes but any story at all.⁹² Prisoners furloughed to at-home sentences or released criminals on parole have won challenges to complete bans on their access to social media, yet prison inmates are still blocked or discouraged from sharing their ideas and beliefs in this forum.⁹³

A. One New Like: Court Expands Prisoners Access to Literature in Sisney v. Kaemingk

Sisney v. Kaemingk illuminates the modern understanding of the First Amendment and how it applies to incarcerated persons. In this case, the court overturned a prison pornography policy that broadly restricted the types of literature prisoners could read.⁹⁴ It reviewed the policy in light of *Turner* as well as recent precedent that discussed disqualifying characteristics for reading material.⁹⁵ Ultimately, the court held that the policy was an exaggerated response to the prison's concerns.⁹⁶

In June 2020, the District Court of South Dakota found that the Department of Corrections pornography policy violated the U.S. Constitution.⁹⁷ The policy prohibited inmates from buying, possessing, or attempting to possess pornographic material.⁹⁸ Pornographic material was defined as any literature that included nudity or sexually explicit conduct, as well as depictions of nudity or sexually explicit conduct.⁹⁹ Nudity was defined as “a pictorial or other graphic depiction where male

91. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (summarizing the revolution of the Cyber Age and the need for courts to be considerate in what they say regarding such, as it may become quickly obsolete).

92. See, e.g., N.Y. EXEC. LAW § 632-a (McKinney 2020) (reflecting the amendments to New York's Son of Sam law to show how it stands today); MICH. COMP. LAWS ANN. §§ 800.401–406 (West 2020) (showing Michigan's reimbursement law, which calls any windfall a prisoner may come into as a means to pay for incarceration); Alter, *supra* note 22 (showing the application of Michigan's reimbursement law on an inmate who wrote a book of short stories unrelated to his crime); Steven P. Vargas, Comment, *New York's Son of Sam Law: Alive and Well Today*, 11 *TOURO L. REV.* 629, 646 (1995) (stating that New York's Son of Sam law was revised to remove the constitutional blemishes the Supreme Court identified in *Simon & Schuster*).

93. See, e.g., *Cohen*, 2020 WL 4250342, at *1 (barring media ban in an at-home sentence agreement); Manning, 281 F. Supp. at 960–61 (barring social media ban in parole agreement); *Aguiar*, 649 F. App'x at 295 (allowing prison deactivation of a social media account).

94. *Sisney v. Kaemingk*, 469 F. Supp. 3d 903, 918–19 (D.S.D. 2020).

95. See *id.* at 911–12, 916–17 (analyzing the prison's pornography policy in light of the *Turner* analysis and a recent case that was more intentional about analyzing reading material broadly).

96. See *id.* at 917.

97. See *id.* at 919 (finding merit in plaintiff's constitutional as applied and facial challenges to the prison regulation).

98. See *id.* at 910 (quoting the regulation at issue, which “prohibits the purchase, possession and attempted possession and manufacturing of pornographic material by offenders in its institutions”).

99. See *id.* (quoting the definition of pornographic material in the regulation that “[i]ncludes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature nudity or ‘sexually explicit’ conduct” and “may also include books, pamphlets, magazines, periodicals or other publications or material that features, or includes photographs, drawings, etchings, paintings, or other graphic depictions of nudity or sexually explicit material”).

or female genitalia, pubic area, buttocks or female breasts are exposed.”¹⁰⁰ The definition of sexually explicit encapsulated this definition of nudity and expanded the prohibited materials even further.¹⁰¹ Charles Sisney, an inmate within the South Dakota Department of Corrections, made both as-applied and facial challenges to this policy because the prison rejected his delivery of seven publications and nine pictures while he was incarcerated.¹⁰²

The District Court applied the *Turner* analysis to both challenges.¹⁰³ As applied, the court ruled that the pornography policy was not related to a penological interest, except in two instances: where the content was overtly sexual or could play to the “prurient interests” of certain offenders.¹⁰⁴ Second, there were no reasonable alternative means by which prisoners could exercise these First Amendment rights.¹⁰⁵ The court acknowledged that the prison could tailor content restrictions based on each individual prisoner’s conviction.¹⁰⁶ However, the court did not expect

100. *Id.* Additionally, the policy exempts “[p]ublished material containing nudity illustrative of medical, educational or anthropological content . . .” *Id.*

101. *See id.* at 910–11 (quoting the definition of sexually explicit in the regulation, which “includes written and/or pictorial, graphic depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation” and “also includes individual pictures, photographs, drawings, etchings, writings or paintings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.”).

102. *See id.* at 910 (summarizing the grounds for the case). Sisney was rejected delivery of *Pretty Face Manga Comics*, Volumes 3, 4, 5, 6, *Thrones of Desire*, *Pride and Prejudice: The Wild and Wanton Edition*, and Matisse, Picasso and Modern Art in Paris. *See id.* The photos Sisney was denied access to were *Paradise* by Michelangelo, *The Expulsion from the Garden* by Michelangelo which is painted on the Sistine Chapel ceiling, *Statue of David* by Michelangelo, *Bronze The Creation of Adam and Eve* by Lorenzo Ghiberti, *The Fall and Expulsion from the Garden of Eden* by Michelangelo, which is also depicted on the ceiling of the Sistine Chapel, *Study of the Resurrection of the Dead* by Michelangelo, and *Paradise Bronze* by Michelangelo. *See id.*

103. *See id.* at 911 (citing *Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989); *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004)) (“*Turner* analysis is applicable to both as applied and facial challenges.”).

104. *See id.* (“The pornography policy is related to a governmental objective, but not reasonably so except in the instances of Manga Comics and Coppertone.”). For the as-applied challenge, the *Turner* factors were applied to each item. *See id.* Under the third *Turner* factor analyzing the impact of assertion of the constitutional right, the court ruled that the Manga Comics include sexual themes that would give them value to be bartered, as well as have an adverse effect on female employees. *See id.* Under the second *Turner* factor analyzing other means to exercise these rights, the court acknowledged it would be too much of a burden for prisons to evaluate each inmate and provide access based on profile which is most pertinent to the Coppertone ad. *See id.* The Coppertone ad depicts the cuteness of a child that would pique the “prurient interests” of child sex offenders. *See id.* at 913. While these criminals are a minority in the prison, the penological interests concerning them must override the constitutional interests of the majority of the prison. *See id.* Ultimately, the regulation was not deemed an exaggerated response when applied to either of these publications. *See id.* at 912.

105. *See id.* at 911–12 (“As for the second factor, there is no alternate means by which prisoners can exercise their First Amendment rights . . .”).

106. *See id.* at 912. In its *Turner* analysis, the court found:

As for the second factor, there is no alternate means by which prisoners can exercise their First Amendment rights unless prisoners were evaluated individually and provided access according to their profile. For example, prisoners inclined to violence would get no violence related materials. *See Murchison v. Rogers*, 779 F.3d 882 (8th Cir. 2015) (single issue of Newsweek magazine banned to all the prison population for its strong depiction of

this level of specificity from prison administrators.¹⁰⁷ Third, the court stated that it was difficult to identify any burden that accommodating these rights would have created for others in the prison.¹⁰⁸ Finally, the court identified a possible alternative to this regulation based on a prior case.¹⁰⁹ The District Court had previously validated a policy that allowed a publication to be judged in its entirety, rather than just its parts—such as a specific page—that may be prohibited.¹¹⁰ Based on this alternative, the court ruled that the pornography policy was an exaggerated response to prison concerns, except in the two exceptions previously mentioned.¹¹¹

For the facial challenge, the court focused on the inclusion of nudity in the policy and its definitions.¹¹² Simple nudity, as the court called it, is not sexually explicit conduct.¹¹³ By removing the word nudity from the definition of sexually explicit as well as pornographic material, the policy would pass the *Turner* analysis.¹¹⁴ Next, the court applied *Turner* to invalidate the prohibition of depictions of simple nudity, stating that there is no legitimate penological interest to support such a ban.¹¹⁵ Finally, the court further stated that banning the written word of sexual

gang violence). Child sex offenders would not get Coppertone type ads or other similar materials. *See id.* at 911–12.

107. *See id.* at 912 (“Although such specific limitations are possible, it is not reasonable for the courts to require that level of specificity from prison administrators.”).

108. *See id.* (acknowledging the difficulty in imagining any burden being created through the exercise of this right, except in the case of the Manga Comics and the Coppertone ad which have bartering value).

109. *See id.* (asserting the application of the policy the court adopted previously as one possible alternative to this regulation, that has not been departed from).

110. *See id.* at 911 (citing *King v. Dooley*, 4:00-cv-04052-LLP, No. 34 (D.S.D. June 16, 2003)) (summarizing the policy the court upheld in *King*). In *King*, the policy looked at what the book featured. *See id.* This definition of “features” considered the entire book, not just a single page, and would not ban a book if material could be prurient, but was not, and only contributed to the greater narrative. *See id.*

111. *See id.* at 912 (asserting the existence of alternative means of regulation, including one ruled on by the court, when the court found the policy to be an exaggerated response as applied).

112. *See id.* at 916 (analyzing the use of nudity, as defined outside of what is sexually explicit material).

113. *See id.* (“Sexually explicit conduct is far removed from simple nudity.”).

114. *See id.* Again, applying the *Turner* analysis, the court stated:

As for the factors underlying that ultimate *Turner* test, the government objective underlying that portion of the regulations is legitimate and neutral, and that portion of the regulations is rationally related to that government objective only with the removal of nudity from the definitions of pornographic material and what is sexually explicit.

Id. The court goes on to say that without these deletions, the policy is overly broad and violates the First Amendment. *See id.* Additionally, banning a publication because of a single sexual reference would also qualify as overly broad. *See id.* For the second factor of the *Turner* test, the court acknowledges that there are no alternative means by which a prisoner could view simple nudity or literature without sexually explicit conduct. *See id.* at 916–17. Third, to allow sexually explicit material would have an adverse effect on the prison and its occupants, yet the court still separates simple nudity and single reference publications from this idea. *See id.* at 917. Finally, if the policy banned only sexually explicit material, it would not be an exaggerated response. *See id.*

115. *See id.* at 917 (“What then about depictions of simple nudity that is not sexually explicit? The regulations banning simple nudity which has no component of being sexually explicit as defined by the policy, has no reasonable relation to any legitimate penological interests.”). Again, applying the *Turner* factors in their entirety, the court says that there are no alternative means for which prisoners can view simple nudity. *See id.* Third, the court believes there would be no “discernible impact” on prison occupants and guards. *See id.* “Finally, the banning of simple nudity,

content violates the First Amendment.¹¹⁶ There must be a distinction between publications that feature sexual content as compared to those where sexual content is merely a part of the publication.¹¹⁷ Overall, the court ruled that the prison system must edit the definitions to exclude nudity in order to focus on sexually explicit material or the policy is overly broad, failing to reasonably relate to the penological interest behind it, violating the First Amendment.¹¹⁸

B. *Modern Son of Sam Laws and Reimbursement Laws*

While the Supreme Court ruled that New York's Son of Sam law was too broad, it did not prevent revision of the law to comport with its holding.¹¹⁹ Today, the law still stands, albeit with more well-defined parameters.¹²⁰ New York Executive Law Section 632-a mandates that any person convicted of a specifically enumerated crime, whether in prison, on parole, or no longer under sanctions or supervision of any kind, cannot profit from their crimes.¹²¹ The statute now more narrowly defines the crimes subject to its purview, including violent felonies, class B felonies, any felony in the first degree, and grand larceny in the fourth degree.¹²² The law goes

nudity which has no component of being sexually explicit, is an exaggerated response to prison concerns." *See id.*

116. *See id.* (emphasizing the gravity of banning the written word of sexual material). *See id.* The court states that the King policy did not even go this far to emphasize the severity of the policy at hand. *See id.* To have a ban of this magnitude could include rejection of the Bible, many of Shakespeare's works, all of the works of John Updike, Philip Roth, Earnest Hemingway, and Gabriel Garcia Marquez. *See id.*

117. *See id.* ("It is a huge leap for the current policy to ban written material with sexual content where the sexual content is a natural part of the written work as opposed to sexual material being the feature of the publication.")

118. *See id.* (summarizing the holding of the court). The court suggests a pornographic material definition, without the words "nudity or" before sexually explicit, to be updated as follows to comply with the First Amendment:

Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature "sexually explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publications or material that features photographs, drawings, etchings, paintings, or other graphic depictions of sexually explicit material. "Feature" means a publication which routinely and regularly featured pornography, or in the case of one-time issues, promoted itself based on pornographic content. Graphic depictions of nudity of minors is prohibited.

Id.

119. *See* Vargas, *supra* note 92, at 646 (stating how New York edited the Son of Sam law to comport with the Supreme Court's ruling it unconstitutional); *see also* Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd., 502 U.S. 105, 123 (1991) (holding that New York's Son of Sam law specifically was overly broad for reasons stated in the opinion and inconsistent with the constitution).

120. *See* N.Y. EXEC. LAW § 632-a (McKinney 2020) (reflecting the revisions made to the law to not only address the Supreme Court's concerns, but generally narrow the scope of the prohibition); *see also* Simon & Schuster, 502 U.S. at 123 ("The Federal Government and many of the States have enacted statutes designed to serve purposes similar to that served by the Son of Sam law."); Vargas, *supra* note 92, at 645 ("The revised statute was essentially a three-point response to the Simon & Schuster, Inc. opinion.")

121. *See* EXEC. § 632-a.

122. *See id.* § 632-a(1)(e)(i) (listing the crimes which fall under the statute). This list includes:

on to state that any such profits will be escrowed by the state, allowing victims of the crime to file a civil action for damages within three years of the discovery of such profits.¹²³ After three years, if no such action commences, the funds will be returned to the respondent.¹²⁴

Even if prisoners do not write about their crime, the state can claim any profits from a book or any windfall that the prisoner may receive.¹²⁵ Incarceration reimbursement laws, currently enacted in forty-nine states, allow a state to file an action against an inmate or former inmate for the cost of their “care,” as the statute states.¹²⁶ In 2017, Michigan applied such a law to file suit against Curtis Dawkins.¹²⁷ Dawkins, who is currently serving a life sentence in prison, had his collection of short stories, *The Graybar Hotel*, published in 2016.¹²⁸ He had transferred any profits from the book to his family for his children’s education.¹²⁹ However, the Michigan Treasury Department filed a complaint stating he had no right to do so, in addition

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- (A) a violent felony offense as defined in subdivision one of section 70.02 of the penal law;
 - (B) a class B felony offense defined in the penal law;
 - (C) an offense for which a merit time allowance may not be received against the sentence pursuant to paragraph (d) of subdivision one of section eight hundred three of the correction law;
 - (D) an offense defined in the penal law that is titled in such law as a felony in the first degree;
 - (E) grand larceny in the fourth degree as defined in subdivision six of section 155.30 or grand larceny in the second degree as defined in section 155.40 of the penal law;
 - (F) criminal possession of stolen property in the second degree as defined in section 165.52 of the penal law; or
 - (G) an offense in any jurisdiction which includes all of the essential elements of any of the crimes specified in clauses (A) through (F) of this subparagraph and either the crime victim as defined in subparagraph (i) of paragraph (d) of this subdivision was a resident of this state at the time of the commission of the offense or the act or acts constituting the crime occurred in whole or in part in this state.

Id.

123. *See id.* § 632-a(3) (“Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim, or the representative of that convicted person, within three years of the discovery of any profits from a crime or funds of a convicted person, as those terms are defined in this section.”).

124. *See id.* § 632-a(7)(b)(iv) (“In the event no claim was filed or judgment obtained prior to the expiration of the three year statute of limitations, the office shall return the escrowed amount to the respondent.”).

125. *See* MICH. COMP. LAWS ANN. §§ 800.401-06 (West 2020) (outlining Michigan’s reimbursement law); *see also* Alter, *supra* note 22 (summarizing an instance where a prisoner’s profits in connection with a book he published were claimed as reimbursement for the cost of his incarceration).

126. *See, e.g.,* Alter, *supra* note 22 (“Michigan is one of more than 40 states where prisoners can be forced to pay for the cost of their incarceration, according to the Brennan Center for Justice at the New York University School of Law.”); *Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUSTICE (Sept. 9, 2019), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy> [https://perma.cc/F7YQ-5Y2Y] (showing that 49 states, where data is available, have pay-to-stay laws); MICH. COMP. LAWS ANN. § 800.403(2) (West 2020).

127. *See* Alter, *supra* note 22 (summarizing the claim filed against Dawkins after an article came out about him and the book he wrote).

128. *See id.* (introducing Curtis Dawkins and his situation).

129. *See id.* (“The book was also a boon for his family: Mr. Dawkins directed the money into an education fund for his three children.”).

to seeking 90% of his assets, stating his imprisonment cost \$372,000 since 2005.¹³⁰ The Michigan State Correctional Facility Reimbursement Act allows the attorney general to ascertain whether a prisoner can cover either at least 10% of the total cost of care or 10% of the cost for two years, whichever is less.¹³¹ Not more than 90% of the prisoner's assets can be used for such costs.¹³²

These statutes have created an overwhelming economic problem in the United States. In a 2015 Brennan Center for Justice report, researchers found that across the country ten million people owe \$50 million for costs related to their imprisonment or arrest.¹³³ Michigan, in fiscal year 2017, collected \$3.7 million from only 294 prisoners.¹³⁴ When poverty disproportionately leads to incarceration, these policies would only perpetuate recidivism and the high rates of imprisonment in this country.¹³⁵ Additionally, criminal conviction makes it difficult to get a job, making any prospect of revenue coveted by released individuals.¹³⁶ Even outside of a First Amendment context, these laws highlight the over-exaggerated, retributivist ideals of punishment in this country.

C. A Parolee, Political Pariah, and a Prisoner Have Entered the Chat: Which One Gets Removed?

Michael Cohen's story further emphasizes how courts are slowly recognizing a First Amendment right to access social media, especially for those who have entered the criminal justice system. Courts have been quick to provide injunctions against complete bans on social media access for Cohen, a convicted felon released on furlough from prison, as well as other convicted persons on parole.¹³⁷ While the

130. *See id.* (summarizing the state's claim and damages sought against Dawkins).

131. MICH. COMP. LAWS ANN. § 800.403(2) (West 2020) ("If the attorney general upon completing the investigation under subsection (1) has good cause to believe that a prisoner has sufficient assets to recover not less than 10% of the estimated cost of care of the prisoner or 10% of the estimated cost of care of the prisoner for 2 years, whichever is less, the attorney general shall seek to secure reimbursement for the expense of the state of Michigan for the cost of care of that prisoner."). If sufficient funds exist, the attorney general can seek reimbursement. *Id.* § 800.404(1).

132. *See id.* § 800.403(3) ("Not more than 90% of the value of the assets of the prisoner may be used for purposes of securing costs and reimbursement under this act.").

133. *See* Alter, *supra* note 22 summarizing the 2015 amounts owed by persons in this country who have had contact with the criminal justice system (citing Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CTR. FOR JUSTICE, 1 (2015)).

134. *See id.* ("During the last fiscal year, Michigan collected some \$3.7 million from 294 prisoners, who account for just a fraction of the state's nearly 40,000 inmates.").

135. *See* Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AMERICAN ACTION FORUM (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/> (explaining how homelessness, the high price of cash bail, poverty's connection with substance abuse, and income inequality lead to imprisonment).

136. *See* Stephanie Francis Ward, *How to Help People with Criminal Records Break Barriers to Employment*, ABA JOURNAL (June 26, 2019), <https://www.abajournal.com/web/article/helping-people-with-criminal-records-break-barriers-to-employment> (outlining how people with criminal convictions make up one-third of the adult population in this country, making employers question the legal implications of hiring these individuals).

137. *See infra* notes 148-56 and accompanying text.

courts have protected these individuals' social media privileges, even with status tangential to incarceration, incarcerated persons have not received the same protections.¹³⁸

In July 2020, Michael Cohen returned to prison after questioning a condition of his Federal Location Monitoring Agreement.¹³⁹ The condition stated:

No engagement of any kind with the media, including print, TV, film, books, or any other form of media/news. Prohibition from all social media platforms. No posting on social media and a requirement that you communicate with friends and family to exercise discretion in not posting on your behalf or posting any information about you. The purpose is to avoid glamorizing or bringing publicity to your status as a sentenced inmate serving a custodial term in the community.¹⁴⁰

Cohen had been released on furlough due to the COVID-19 pandemic and his health concerns.¹⁴¹ He filed suit, challenging his return to prison as an attempt to suppress his First Amendment rights because he was writing a book critical of Donald Trump.¹⁴² The judge ruled that his return to confinement was a retaliatory response to his intentions to publish such a book and discuss it on social media.¹⁴³ The judge enjoined the government from further retaliation towards Cohen in his efforts to exercise his First Amendment rights.¹⁴⁴ After Cohen's release, the judge ordered the parties to negotiate the conditions of his release to "be consistent with the First Amendment and legitimate penological limitations on conduct"¹⁴⁵ Without applying the *Turner* factors, the judge ruled that the condition was not reasonably related to the legitimate penological interest behind it.¹⁴⁶

This is not the first time a federal court has ruled on a release condition of this nature.¹⁴⁷ In 2017, in *Manning v. Powers*,¹⁴⁸ on application for a preliminary injunction, the Central District of California ruled that the petitioner was likely to succeed on a

138. *See infra* notes 157-66 and accompanying text.

139. *See Weiser & Feuer, supra* note 7 (introducing the legal issue surrounding Michael Cohen's return to prison); *see also* Press Release, American Civil Liberties Union, ACLU Files First Amendment Challenge Against Michael Cohen's Retaliatory Imprisonment (July 20, 2020) [hereinafter ACLU Files First Amendment Challenge], <https://www.aclu.org/press-releases/aclu-files-first-amendment-challenge-against-michael-cohens-retaliatory-imprisonment> [<https://perma.cc/2TMC-JKWA>] (summarizing Cohen's legal claim when being returned to prison for questioning his agreement to remain at home for his sentence).

140. ACLU Files First Amendment Challenge, *supra* note 139.

141. *See Weiser & Feuer, supra* note 7 (summarizing why Cohen was furloughed from prison).

142. *See* ACLU Files First Amendment Challenge, *supra* note 139 (detailing the chronology of events that lead to Cohen's return to prison).

143. *See* *Cohen v. Barr*, 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) ("The Court finds that Respondents' purpose in transferring Cohen from release on furlough and home confinement back to custody was retaliatory in response to Cohen desiring to exercise his First Amendment rights to publish a book critical of the President and to discuss the book on social media.>").

144. *See id.* (summarizing the remedy for the claim).

145. *Id.*

146. *See id.*

147. *See, e.g.,* *Manning v. Powers*, 281 F. Supp. 3d 953, 960-61 (C.D. Cal. 2017) (holding that a parole condition calling for a social media ban would be overturned on First Amendment grounds).

148. *Id.*

First Amendment challenge to conditions in his parole agreement that forbade use of social media and messaging sites.¹⁴⁹ Applying *Packingham*, the court recognized the state's interest in deterring future criminal conduct and protecting public safety, yet stated that these interests do not justify such sweeping prohibitions.¹⁵⁰ The court ruled to enjoin officials from enforcing that condition of the agreement pending trial of the action.¹⁵¹

However, the courts have not upheld these same rights for prisoners, even with the expanded understanding of the First Amendment demonstrated in *Sisney*.¹⁵² In *Aguiar v. Recktenwald*,¹⁵³ the Third Circuit upheld a prison system deactivating an inmate's social media page.¹⁵⁴ The petitioner's sister ran his Facebook account while he was in prison.¹⁵⁵ This was a violation of the Bureau of Prisons' policy as well as Facebook's Terms and Conditions.¹⁵⁶ Applying *Turner*, the court found that even if Aguiar had a constitutional interest in accessing his Facebook account, the regulation was reasonably related to the legitimate penological interest of the prison.¹⁵⁷ First, the court found that the prison had a legitimate interest in preventing Aguiar from unmonitored communication, and this was related to the security and order of the facility.¹⁵⁸ Second, he still had alternate means to exercise his rights as he retained other forms of communication in prison.¹⁵⁹ Third, to allow prisoners to communicate in such a way would impose a massive burden on prison officials to

149. *See id.* Special Parole Condition 84, the condition at issue, stated:

You shall not use or access social media sites, social networking sites, peer-to-peer networks, or computer or cellular instant message systems; e.g. Facebook, Instagram, Twitter, Snapchat, Lync, Gmail, Yahoo, KIK messenger, Tumblr, etc. This would include any site which allows the user to have the ability to navigate the internet undetected.

See id. at 957 (citing Manning Decl. ¶ 41, Ex. C at 4).

150. *See id.* at 960-61 (“In the present case, the court recognizes that the state has similar interests in enforcing parole conditions that promote the goals of deterrence and public safety. However, these interests do not justify the sweeping prohibitions detailed in Special Parole Condition 84.”).

151. *See id.* at 966 (summarizing the outcome of the application for preliminary injunction).

152. *See Sisney v. Kaemingk*, 469 F. Supp. 3d 903, 917-19 (D.S.D. 2020) (finding the portion of the policy that bans “simple nudity which has no component of being sexually explicit” to be overbroad and not related to any legitimate penological interests); *see also Aguiar v. Recktenwald*, 649 F. App'x 293, 295 (3rd Cir. 2016) (upholding the prison's deactivation of a prisoner's social media account).

153. 649 F. App'x at 295.

154. *See id.* at 295-96 (summarizing the analysis and holding of the court).

155. *See id.* at 295 (summarizing the situation from which the claim arose).

156. *See id.* (“Prison investigators discovered that Aguiar was using his sister to update his Facebook account and to send messages to others on his behalf—a violation of Bureau of Prisons policy and of Facebook's terms and conditions.”).

157. *See Aguiar v. Recktenwald*, 649 F. App'x 293, 295 (3rd Cir. 2016) (“Even if he enjoys such an interest, we have no doubt that Defendants' decision to exclude Aguiar from this activity—when his specific use violated BOP policies—was ‘reasonably related to legitimate penological interests,’ and thus constitutionally permissible.”) (quoting *Turner v. Safley*, 482 U.S.78, 89 (1987)).

158. *See id.* at 296 (applying the first factor of the *Turner* analysis).

159. *See id.* (“Secondly, despite the deactivation of his account, Aguiar still retained traditional methods of communication, including phone calls, postal mail, and prison visitation.”).

monitor such communications.¹⁶⁰ Finally, the only less restrictive alternative to regulating this right would be to monitor these accounts, which the court believed was an unfeasible burden on prison officials.¹⁶¹

IV. REAL INTERESTS OR JUST TROLLING: INMATES SHOULD BE ABLE TO EXERCISE THESE PIVOTAL RIGHTS IN PRISON

While incarcerated individuals may lose certain rights in the name of punishment, it is evident that First Amendment rights cannot be broadly limited just because of conviction status.¹⁶² State punishment for penal infraction is justified in many ways, and while the most cited goals are retribution, deterrence, and rehabilitation, the modern focus is on the latter two.¹⁶³ Limits on First Amendment rights and the ability to profit in prison seem to reinforce retributive and deterrent goals, but do not comport with rehabilitation, especially in light of the recent Supreme Court ruling in *Packingham*.¹⁶⁴ Additionally, the courts have evolved in their understanding of the First Amendment, as exhibited in *Packingham*, one of the first Supreme Court cases to discuss the First Amendment and the internet, and in cases surrounding banned reading material in prisons.¹⁶⁵ Yet, cases concerning social media access in prison erroneously do not follow this zeitgeist.¹⁶⁶ Further, while social media access has been protected in sanction statuses tangential to incarceration, prisoners, essentially with the same sanctioned-status, are kept from social media because they are behind iron bars and cinder-blocked walls.¹⁶⁷

160. *See id.* (applying the third factor of the *Turner* analysis). Even though the court acknowledges this communication would be occurring through a proxy, the court still says that prison officials would have to be apprised of it. *See id.*

161. *See id.* (applying the fourth factor of the *Turner* analysis).

162. *See Turner*, 482 U.S. at 84 (1987) (citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). The *Turner* court explained that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Id.*

163. *See* Joel Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 595, 595 (1968) (introducing the societal needs for punishment and the goals punishment aims to achieve); *see also* *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)) (stating that while retribution is still an available objective, it is not the dominant objective of punishment).

164. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) (emphasizing the benefits of social media).

165. *See id.* at 1736 (discussing the implications of failing to recognize the relationship between the First Amendment and the internet); *see also* *Sisney v. Kaemingk*, 469 F. Supp. 3d 903, 918–19 (D.S.D. 2020) (holding that books need to be closely scrutinized to determine if they are disqualified by prison censorship, rather than broadly).

166. *See Aguiar*, 649 F. App’x at 295 (holding that a prison’s broad ban on social media was justified).

167. *See, e.g., Packingham*, 137 S. Ct. at 1737 (2017) (holding that a North Carolina law criminalizing registered sex offenders interacting with social media sites was a violation of the First Amendment as social media is one of the most prevalent modern ways to express those rights); *Manning v. Powers*, 281 F. Supp. 3d 953, 960-61 (C.D. Cal. 2017) (holding that the plaintiff would likely be successful in challenging a complete ban on interacting with social media sites in a parole agreement on First Amendment grounds); *Cohen v. Barr*, 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) (ruling that a complete ban on interacting with the media as a condition of an at-home prison stay was a violation of plaintiff’s first amendment rights).

A. Retribution: As Outdated as MySpace

Criminal punishment has been grounded in the ideals of retribution, deterrence, and rehabilitation to create society's modern methods of enforcing conformity and handling offenders.¹⁶⁸ Time has created a significant dichotomy between what was once acceptable in the name of punishment and what is now common practice.¹⁶⁹ This is especially true concerning retribution, a theme first identified in practices that inflicted pain upon offenders in the name of revenge.¹⁷⁰ The Supreme Court has recognized that retribution is no longer a dominant motivation of the criminal justice system, and it should not outweigh deterrence and rehabilitation.¹⁷¹ As punishment continues to evolve, as seen in other countries, modern practices focus on rehabilitation and providing occupational training to incarcerated individuals in an effort to reduce recidivism.¹⁷²

Rehabilitation aims to return those who have committed criminal acts “to society neither embittered nor resolved to get even for [their] degradation and suffering, but possessing a new set of values and morals and a desire to contribute to society.”¹⁷³ This country's criminal justice system is often criticized for releasing incarcerated persons without any programs to help them reacclimate to society.¹⁷⁴ Policies preventing social media access in prison and the ability to profit from published works are analogous to these shortfalls. The Supreme Court acknowledged that social media presents the opportunity for criminals to make something of their lives as they reacclimate to society.¹⁷⁵ Additionally, connection to family and friends is a pivotal factor in successful re-entry, and social media is a key resource in fostering this connection, as seen in the pandemic.¹⁷⁶ It is irrelevant

168. See Meyer, *supra* note 163, at 595 n. 1 (defining punishment and what it has meant historically to society).

169. See *id.*

170. See *id.*

171. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (outlining how a misguided weight is placed on ensuring offenders receive the punishment they deserve, when deterrence should be more heavily considered).

172. See Gordon B. Dahl & Magne Mogstad, *The Benefits of Rehabilitative Incarceration*, THE REPORTER (March 2020), <https://www.nber.org/reporter/2020number1/benefits-rehabilitative-incarceration> [<https://perma.cc/G7TE-8SYQ>] (summarizing research on incarceration practices in Norway and how they can be applicable for prison reform in the United States).

173. Meyer, *supra* note 163, at 597.

174. See, e.g., *10 Keys to Preparing Prisoners for Re-Entry*, CTR. FOR JUSTICE & RECONCILIATION [hereinafter *10 Keys*], <http://restorativejustice.org/am-site/media/re-entry-en.pdf> [<https://perma.cc/MZ2U-9AQF>] (detailing how recidivism rates are high for ex-prisoners due to a lack of preparation by prison systems).

175. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (“Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.”).

176. See, e.g., *10 Keys*, *supra* note 174 (outlining how constructive relationships are pivotal for successful re-entry); Beckley, *supra* note 16 (discussing how FaceTime is a pertinent resource in connecting loved-ones in the pandemic, especially as they face death); Ferranti, *supra* note 31 (“Maintaining family ties can improve the likelihood of a successful reentry into the community, thus reducing the potential for recidivism.”).

whether this process begins during or after prison time; actually, rehabilitation and re-acclimation efforts are most successful when they start at the onset of incarceration.¹⁷⁷ Moreover, economic laws that aim to cover the costs of prisoners' care inadvertently stifle First Amendment rights as they make it almost impossible for prisoners to profit in the pursuit of literary success, even in an effort to provide for their families.¹⁷⁸ While modern Son of Sam laws appear more appropriate, as they further efforts to repay victims, they must be closely monitored to ensure that they don't stifle First Amendment rights and comport with the holding in *Simon & Schuster*.¹⁷⁹

B. *Literature Receives a Status Update, but Social Media and Publishing Remain Offline*

Developments in prisoners' access to literature demonstrate the legal system's modern understanding of the First Amendment and how it interacts with our penal systems.¹⁸⁰ Prison systems often succumb to public outcry prior to litigation when access to any published material is overly regulated.¹⁸¹ When these issues are brought to court, as in *Sisney*, the restrictions are strictly scrutinized, overturned, and must be replaced with narrower regulations that address the true penological concerns behind them.¹⁸² Additionally, in *Packingham*, the Supreme Court acknowledged this updated understanding of the First Amendment, carefully, yet broadly, applying its protections to the internet.¹⁸³

If these same principles are applied to social media access, especially in the case of *Aguilar*, it becomes apparent how inconsistent this ruling is, especially through the lens of the *Turner* test. While the prison does have a legitimate interest in preventing prisoners from partaking in unmonitored communications, the rationality of the connection to a complete ban on social media access should be called into question,

177. See United Nations Office on Drugs and Crime, *Introductory Handbook on The Prevention of Recidivism and the Social Reintegration of Offenders* 19 (2018), https://www.unodc.org/documents/justice-and-prison-reform/18-02303_ebook.pdf [<https://perma.cc/5G9E-4QPP>] (“Prison-based rehabilitation programmes are most effective when they are based on a full diagnostic and individual assessment of the offender and his or her situation. Such an assessment needs to occur as soon as possible after the offender’s admission to an institution and, if at all possible, serve as the basis for a comprehensive and individualized intervention plan. That way, programmes can focus on the dynamic risk factors and other challenges faced by offenders in order to prepare them for their release and successful social reintegration.”) (footnote omitted).

178. See, e.g., MICH. COMP. LAWS ANN. §§ 800.401–406 (West 2020); N.Y. EXEC. LAW § 632-a (McKinney 2020); Vargas, *supra* note 97, at 646–48 (describing potential problems of the amended Son of Sam laws).

179. See Vargas, *supra* note 92, at 645–46 (explaining how the amendments changed the Son of Sam laws).

180. See *Sisney v. Kaemingk*, 469 F. Supp. 3d 903, 918–19 (D.S.D. 2020) (holding that a prison regulation banning publications with nudity that were not sexually explicit was overbroad and unreasonable).

181. For a discussion of instances where regulations have been overturned in such a manner, see *supra* note 22.

182. See *Sisney*, 469 F. Supp. 3d at 912 (discussing King and possible narrower regulations to address penological concerns about prisoners and sexually explicit material).

183. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (emphasizing how the current revolution in thought is occurring on the internet, and as the bounds of the medium expand, the Court must be careful in providing no First Amendment protections to the forum).

especially because of the broad scope of the prohibition.¹⁸⁴ In *Sisney*, the court found the connection between banned content and penological interests irrational simply because of an overinclusive definition of pornography that included general nudity.¹⁸⁵ The Supreme Court in *Turner* practically analyzed whether a marriage ban would truly address love triangles and rivalry, ultimately finding they would exist in prison with or without a marriage ceremony.¹⁸⁶

Furthermore, *Packingham* and *Simon & Schuster* shed light on justifiable state interests, especially as they concern prisons and inmates posting on social media. *Simon & Schuster* ultimately held that individuals should not be discouraged from writing about their crimes, and *Packingham* further found that if a convict's crime is connected to social media use, the government may not ban lawful speech to prevent potentially unlawful conduct.¹⁸⁷ *Packingham* and *Simon & Schuster* invalidate justifications for complete social media bans that are rooted in prison concerns for potential to commit crimes online, or the prisoners' criminal history.¹⁸⁸ Thus, it is clear that the Third Circuit failed to consider whether the regulation is rationally connected as the courts have done previously, and it only focused on if a relation exists.¹⁸⁹ The court did not give the requisite amount of weight to the interests behind the regulation and the interests' connection to what the regulation actually achieved; thus, it has failed to follow the spirit of *Turner*, *Sisney*, *Simon & Schuster*, and *Packingham*.

Continuing to analyze the *Turner* analysis in *Aguiar*, while *Aguiar* might retain his phone, mail, and visitation privileges, these are not equivalent means of expressing the First Amendment rights that social media provides.¹⁹⁰ Social media is instantaneous and accesses a large audience, as well as a myriad of resources

184. See *Aguiar v. Recktenwald*, 649 F. App'x 293, 296 (3rd Cir. 2016) ("As to the first factor, prison officials facilitated the deactivation of *Aguiar's* account to prevent him from communicating, through his sister, with unmonitored contacts—a legitimate interest related to the security and order of the facility.").

185. See *Sisney*, 469 F. Supp. 3d at 916 ("As for the factors underlying that ultimate *Turner* test, the government objective underlying that portion of the regulations is legitimate and neutral, and that portion of the regulations is rationally related to that government objective only with the removal of nudity from the definitions of pornographic material and what is sexually explicit.").

186. See *Turner v. Safley*, 482 U.S. 78, 98–99 (1987) (holding that the regulation did not logically connect to an intent to prevent love triangles and subsequent rivalries or a rehabilitative goal).

187. See *Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*, 502 U.S. 105, 119–20 (1991) (outlining how the state's interest to disincentivize speech around crime was content restrictive, a practice the Court had previously invalidated); see also *Packingham*, 137 S. Ct. at 1738 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 235 (2002)).

188. See *Simon & Schuster*, 502 U.S. at 119–21; see also *Packingham*, 137 S. Ct. at 1737–38.

189. See, e.g., *Packingham*, 137 S. Ct. at 1735; *Turner*, 482 U.S. at 97–98 (considering both reasonability and logic into question when analyzing the rationality of the connection between the regulation on marriage and the penological interests behind it); *Aguiar*, 649 F. App'x at 296 ("As to the first factor, prison officials facilitated the deactivation of *Aguiar's* account to prevent him from communicating, through his sister, with unmonitored contacts—a legitimate interest related to the security and order of the facility."); *Sisney*, 469 F. Supp. 3d at 916 (identifying rationality as a part of analyzing the connection between a penological interest and a regulation motivated by such).

190. See *Aguiar*, 649 F. App'x at 296 (acknowledging that *Aguiar* still had traditional methods of practicing his First Amendment rights).

especially helpful to an incarcerated person’s ability to reacclimate into society, as the Supreme Court acknowledged in *Packingham*.¹⁹¹ Further, the Supreme Court stated that the internet provides a new space for revolutionary thought, and as such, “[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.”¹⁹² Thus, social media’s unique qualities, and characterization as the arena for the modern revolution of thought, make it unlike the modes of communication the Third Circuit considered similar.

Finally, to discuss both the burden placed on the prison and possible less restrictive means in the *Turner* analysis, the Third Circuit found that monitoring such activity would be too burdensome.¹⁹³ Yet, in many cases, prisoners do not post content themselves, but communicate directions to a proxy through methods already monitored by the prison, such as prison email systems and the traditional forms of communication the court mentions above.¹⁹⁴ The prison system is already monitoring the communications which are being used as direction for such posts.¹⁹⁵ Therefore, it would appear as if the communications are in fact being monitored.¹⁹⁶ Regardless, the court still treated the situation as if the prisoner was accessing social media directly, without any oversight.¹⁹⁷ A further consideration is, if the proxy who is posting violated some social media site community standard, the site has systems in place to review and remedy any indiscretion.¹⁹⁸ Additionally, as of recent, prison systems have demonstrated that close monitoring of social media accounts is possible, especially in an effort to place pretrial detainees in segregation through the Security Risk Group program assessment.¹⁹⁹ Rulings such as *Aguiar*, that place an emphasis on the possible burdens that the prison system could face, fail to account

191. See *Packingham*, 137 S. Ct. at 1735 (summarizing the numerous functions social media can be used for, as well as stating that cyberspace and social media are the most important forums for expressing one’s First Amendment rights).

192. *Id.* at 1736.

193. See *Aguiar*, 649 F. App’x at 296 (“As to the third factor, permitting inmates to maintain Facebook accounts through their agents, and to send unmonitored messages through these accounts, would impose a massive burden on prison administrators to keep themselves apprised of inmate communications. Finally, no other feasible less restrictive alternative exists—aside from continuously monitoring *Aguiar*’s account—that would allow prison administrators to maintain the security of inmate communications while allowing *Aguiar* to maintain his account.”).

194. See *id.* at 295 (summarizing how prison investigators found out that *Aguiar* was managing his account through his sister); see also Ken Armstrong, *A Phone Call From Jail? Better Watch What You Say*, THE MARSHALL PROJECT (Sept. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/09/04/a-phone-call-from-jail-better-watch-what-you-say> (asserting that prison telephone calls are often recorded and admissible at trial; Ferranti, *supra* note 31 (summarizing how the TRULINCS secure prison email system works)).

195. See Ferranti, *supra* note 31 (describing how prisons monitor the email system).

196. For a discussion on this monitoring, see *supra* note 31.

197. See *Aguiar*, 649 F. App’x at 295 (summarizing the behavior at issue); see also Ferranti, *supra* note 31 (summarizing how prisoners access social media, as cell phones are contraband in prison).

198. See *Aguiar*, 649 F. App’x at 296 (acknowledging that *Aguiar*’s activities violated Facebook’s terms and conditions).

199. See *Benway v. Aldi*, No. 3:19-cv-208 (VAB), 2020 WL 4433561, at *1 (D. Conn. July 30, 2020) (summarizing how a charged suspect was placed into a restrictive housing unit because of Facebook posts that were deemed to be gang-related); see also *Caves v. Payne*, No. 3:20-cv-15 (KAD), 2020 WL 1676916, at *1 (D. Conn. April 6, 2020) (summarizing how a prisoner was placed in segregation because Facebook filters, emojis, and comments from other users suggested gang activity).

for updated technology and the changing ideas of what access should be afforded to inmates, again appearing obsolete, as discussed in *Packingham*.²⁰⁰

C. *Prisoners Have Their Accounts Deleted, but Others Do Not*

While the courts have been committed to overturning complete bans on social media access for those on parole, home monitored incarceration, or criminals who have served their time, the courts still leave inmates in the dark.²⁰¹ Michael Cohen had pleaded guilty to tax evasion for concealing over \$4 million from the IRS, making false statements to a federally-insured bank, and paying off two women to remain quiet in connection with a presidential campaign.²⁰² His furlough status did not signal that he was less culpable than those still confined in correctional facilities, but he received stronger First Amendment protection by the court system than other inmates in prison.²⁰³ “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”²⁰⁴ To rule that such a ban is still applicable to and appropriate for prisoners is antithetical to the developing law.²⁰⁵ Additionally, the support these regulations once had has been overturned and eroded.²⁰⁶

V. RETWEET AND SHARE: ENSURING PRISONERS MAINTAIN THEIR RIGHTS

The First Amendment was not written for a chosen few.²⁰⁷ It was not intended to apply to a population of only good persons or those who haven’t erred in our

200. *Compare Aguiar*, 649 F. App’x at 296 (explaining that permitting inmates to maintain Facebook accounts and send unmonitored messages would “impose a massive burden”), *with Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (emphasizing the importance of considering the changing nature of the internet when analyzing First Amendment issues).

201. *Compare Aguiar*, 649 F. App’x at 295 (upholding the prison’s deactivation of a prisoner’s social media account); *with Cohen v. Barr*, 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) (holding that a complete bar on interaction with the media in a Federal Location Monitoring Agreement did not address the true penological interests of the government); *and Manning v. Powers*, 281 F. Supp. 3d 953, 960-61 (C.D. Cal. 2017) (holding that the plaintiff would likely be successful in challenging a complete ban on interacting with social media sites in a parole agreement on First Amendment grounds).

202. Press Release, Department of Justice, Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations (Aug. 21, 2018), <https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax> (describing the various charges Cohen pled guilty to).

203. *See id.* (acknowledging Cohen’s culpability); *Compare Cohen*, 2020 WL 4250342, at *1 (granting Cohen’s motion for injunctive relief), *with Aguiar*, 649 F. App’x at 295-96 (allowing the prison to deactivate the prisoner’s social media account).

204. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (reiterating the first principle in framing the analysis of a prison regulation case).

205. *See Packingham* 137 S. Ct. at 1735-36 (explaining the importance of considering the evolution of the Internet and social media when evaluating prisoners’ First Amendment rights).

206. *See id.*

207. *See id.* at 1735 (“A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”).

society.²⁰⁸ Its assurances provide protection for those who may not have chosen what society views as the straight and narrow path to success.²⁰⁹ Its parameters encompass everyone.²¹⁰ To thwart its intentions by allowing it to apply to only those who have complied with the penal code would deny the full intentions and scope of its declarations upon society.²¹¹

To jeopardize the rights of a prisoner to speak out through prose or postings on social media platforms chips away at the very essence of what the authors of the constitution provided.²¹² Prison regulations need to evolve with the times--as they have done repeatedly.²¹³ Interactions with literature, social media, and an individual's own written works have a myriad of benefits for both current prisoners and formerly imprisoned individuals.²¹⁴ "Even convicted criminals--and in some instances especially convicted criminals--might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives."²¹⁵ In an effort to rehabilitate this country's prison population of over two million individuals, social media and, generally, opportunities for incarcerated persons to publish their thoughts, may offer pivotal opportunities for successful re-acclimation and decreased recidivism.²¹⁶ If prisoners do not have access to these important forums to exercise free speech, they are not only excluded from the possible benefit, but they may also be precluded from calling attention to the systems they are subject to, especially in a time where the criminal justice system is being scrutinized.

208. See *Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

209. See *id.*

210. See *id.*

211. See Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 111 (1971) (asserting that mail prohibitions should not be based on the identity of the recipient, especially if it is a prisoner).

212. See *Packingham*, 137 S. Ct. at 1735 (emphasizing the fundamental principles of the First Amendment).

213. See *id.* at 1736 ("While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.").

214. See, e.g., *id.* at 1737 ("By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."); Ferranti, *supra* note 31 ("Maintaining family ties can improve the likelihood of a successful reentry into the community, thus reducing the potential for recidivism.").

215. *Id.* at 1737.

216. See, e.g., *10 Keys*, *supra* note 174 (outlining key resources and programs that prisoners need access to for successful re-entry into society, including vocational programs, treatment, and transitional housing); Dahl & Mogstad, *supra* note 172 (describing how the opportunity to gain employment decreases the likelihood of recidivism by 46%, yet inability to keep a job previously held due to imprisonment leads to no change in employment or recidivism rates; Ferranti, *supra* note 31 (stating that social media access helps maintain family ties, which improve the likelihood of a successful reentry into the community, thus reducing the potential for recidivism). *Packingham* emphasizes that social media, such as LinkedIn, can help individuals get jobs or access to these resources. *Packingham*, 137 S. Ct. at 1735.