LEGAL BULLETIN 2.3

Speech, Visitation, Association

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Introduction

This bulletin focuses on case law concerning the rights of speech and visitation for prisoners under the First Amendment of the Federal Constitution. The right of association is also included, although this right is often addressed within speech and visitation cases. Association and speech rights are also important elements of cases concerning religious practices and are dealt with in that context in Legal Bulletin 2.1 Religious Rights in Prison.

Freedom of Speech

Although the First Amendment guarantees a general right to free speech, the right is not absolute. The government can restrict speech in certain situations, especially when safety or security is involved. In the prison context, most courts apply a reasonableness standard in determining whether a policy or regulation restricting free speech can be upheld as constitutional. This standard originated in the Supreme Court case of Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64, (1987). In this case, the Court set forth four factors to be used when examining the reasonableness of a regulation affecting constitutional rights:

1. whether there is a rational, non-arbitrary connection between the regulation and a legitimate government interest put forward to justify it
2. whether there are alternative means of exercising the asserted constitutional right that remain open to inmates
3. whether the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources
4. whether the regulation represents an "exaggerated response" to prison concerns

It is usually not very difficult for prison regulations to withstand this level of scrutiny, and courts are often deferential to the informed discretion of prison officials in the interests of safety and security.

Inmate Mail

Incoming and Outgoing

Regulations concerning inmate mail are subject to two different standards, depending on whether the mail is incoming or outgoing. Incoming mail restrictions are upheld if they satisfy the Turner test. For example, in Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989), prison officials could reject *incoming* mail if it was deemed detrimental to security, a legitimate penological interest. However, restrictions placed on *outgoin*g mail must further an important and substantial government interest and must also be no greater than necessary to further that interest. Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974). Therefore, regulations regarding *outgoing* mail are subject to stricter scrutiny ("necessary") than regulations regarding *ingoing* mail ("reasonable").

Inmate to Inmate

Correspondence between inmates, while protected by the First Amendment, can be controlled by prison regulations. As the following cases demonstrate, the content of the letters cannot add greater protection to the correspondence than is granted to other inmate-inmate mail, and can actually be used against the prisoner.

In Shaw v. Murphy, 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001), an inmate who was working as a prison law clerk claimed his First Amendment rights were violated when he was disciplined for statements he made in a letter to another inmate in which he gave legal advice. He was disciplined for violating a prison policy prohibiting insolence and interference with due process hearings. The Court found that inmates do not possess a special First Amendment right to give legal assistance to other inmates. If they did possess such a right, in this case it would mean enhancing the usual protection given to inmate-inmate correspondence. Thus, his letter, regardless of its content, was subject to the same regulations as all other letters sent between inmates.

The court in People v. Whalen, 885 P. 2d 293, 1994 Colo. App. LEXIS 150 (1994) ruled that letters between inmates containing incriminating evidence could be admitted in a trial. The letters had been read by prison officials according to the regulation regarding inmate-inmate correspondence. The court found that the prisoner's expectation of privacy had been diminished since the letter was addressed to another inmate, and that the policy was both reasonable and no more restrictive than necessary when considering security interests.

Receiving Publications

(Note: The subject of religious publications can be found in Legal Bulletin 2.1 Religious Rights in Prison)

Beard v. Banks, 126 S. Ct. 2572 (2006). The Supreme Court held that a regulation which permitted the prohibition of the delivery of magazines, newspapers, and photographs to inmates in a long-term segregation unit in Pennsylvania did not violate the inmates' First

Amendment rights. Using the four-part analysis under *Turner v. Safley* and *Overton*, the Court determined that the regulation was reasonably related to the goal of rehabilitating this particular class of inmates, reversed the Third Circuit decision, and remanded the case for further proceedings.

Ramirez v. Pugh, 486 F. Supp.2d 421 (M.D. Pa. 2007). On remand, the court found that BOP regulations which prohibited pornography served a legitimate penological interest related to rehabilitation and institutional security and granted summary judgment for prison officials.

Brittain v. Beard, 932 A.2d 324 (Pa. Commw. Ct. 2007). A DOC policy banning all depictions of nudity, even in the context of medical or anthropological journals, was challenged. The court denied summary judgment for both inmate and prison officials, stating that expert testimony was necessary to establish or refute that there is a rational connection between viewing nudity and prisoner rehabilitation.

(Note: One recent development in this line of cases seems to be an interest on the part of the courts in whether the regulation in question promotes rehabilitation. While rehabilitation can be used by prison official defendants to uphold a prohibitive regulation, plaintiff inmates might find it helpful to argue that such restrictive regulations actually discourage rehabilitation. Expert testimony from a psychological or sociologist could help to support this argument.)

Grievances

The grievance process can raise several free speech concerns for inmates. While a prisoner cannot be punished merely for filing a grievance, courts have found that under some circumstances (such as making false claims), discipline is appropriate. For example, in Hale v. Scott, 371 F. 3d 917 (7th Cir. 2004), an inmate claimed his freedom of speech had been violated when he was disciplined for filing a grievance in which he included an accusation of sexual misconduct by a prison guard. The court found that the accusation was mere rumor, had no basis of truth, and was unrelated to his legitimate claims in the grievance. Therefore, the statement was malicious and libelous, and he could be disciplined accordingly. Hadden v. Howard, 713 F. 2d 1003 (3d Cir. 1983) presents a similar situation. A prisoner filed a report under the inmate complaint review system in which he falsely claimed a guard had forced him to perform sexual acts. As a result, he was disciplined. Although the prison regulation stated inmates could not be disciplined for filing complaints, the court found prison officials were correct in *not* interpreting the regulation as providing protection for maliciously false claims. Thus, disciplining the inmate was a reasonable response to possible security concerns.

Inmates should also be careful in alleging retaliation for filing grievances. In Bryant v. Goord, 2002 U.S. Dist. LEXIS 6496 (U.S.D.C. N.Y. 2002), an inmate claimed he was disciplined in retaliation for filing a grievance. Although the discipline occurred soon after he filed the grievance, the grievance did not include any of the officials responsible for the discipline. The court ruled that there was no basis for the assumption

that the discipline by certain officers was in retaliation for a grievance filed against other officers.

Visitation

Generally, prisoners have no absolute constitutional right to visitation. Newman v. State of Alabama, 559 F. 2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978). Therefore, restrictions on visitation can be imposed if they are necessary to meet legitimate penological goals, such as rehabilitation or security. Lynott v. Henderson, 610 F. 2d 340 (5th Cir. 1980).

Restrictions on Visitations

The following visitation cases illustrate just some of the possible restrictions that courts have upheld concerning the types of visits and the kind of visitors permitted or prohibited. The list is far from exhaustive, but the general standard of review in most cases is the Turner reasonable test.

Overton v. Bazzetta, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003) The Court upheld state prison regulations concerning non-contact visitation that placed restrictions on visits from children and former inmates. These restrictions, as well as a policy temporarily banning visits to prisoners with substance abuse violations, did not violate the constitutional rights of inmates. The Court found there was a rational relationship between the restrictions and the interests of security and the protection of children. Additionally, the Court noted that the prisoners were afforded other ways of communicating besides visitation.

Block v. Rutherford, 486 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) Pretrial detainees were denied contact visits. The Court held there was no constitutional right to contact visits, and because the rationale behind the policy was a legitimate security concern, the policy was non-punitive and therefore constitutional.

State ex rel. Manson v. Morris, 66 Ohio St. 3d 440, 613 N.E. 2d 232 (1993) A former corrections officer was prohibited from visiting an inmate. Since the former officer was familiar with security procedures and the facility's operations, she was considered a security risk, and the prison was justified in preventing her visitation.

Ware v. Morrison, 276 F. 3d 385 (8th Cir. 2002) An inmate filed suit when his visiting privileges were suspended after he was found in possession of contraband following a series of visits. The court ruled that such a suspension was neither an atypical nor significant hardship and was within the ordinary incidents of confinement. Therefore, due process was not triggered, and it did not matter if the suspension was punitive.

Mitchell v. Dixon, 862 F. Supp. 95 (E.D. N.C. 1994) The court found that a prison regulation prohibiting contact visits between an attorney and a maximum security prisoner did not violate the prisoner's constitutional right of access to the courts. Non-

contact visits sufficiently satisfied this right as they allowed for conversations with the attorney and the passing of legal documents to the inmate by prison staff.

Neumeyer v. Beard, 301 F. Supp. 2d 349 (M.D. Pa. 2004) Prison officials were permitted to search visitors' vehicles without needing to satisfy Fourth Amendment scrutiny. The prison had posted signs notifying visitors of the policy and the visitors had consented to the search in writing.

Visits from Spouses

There seems to be no added protection given to spousal visitation or conjugal visits. Generally, courts have allowed prisons to regulate such visits in the same manner as other types of visitations, even when the rights of the spouse are considered.

In Young v. Vaughn, 2000 U.S. Dist. LEXIS 10667 (E.D. Pa. 2000), an inmate's wife's visiting privileges had been terminated after she and the inmate had engaged in improper sexual contact. She claimed the termination violated her constitutional right to maintain a meaningful marriage. The court held no such constitutional right existed. It further noted that even if such a right existed, she could still communicate with her husband through telephone calls and letters. Therefore, her asserted right was really only a claim for visitation rights, which are not constitutionally protected. Additionally, the termination was also permissible under a reasonableness standard since the restriction was related to security interests.

In Champion v. Artuz, 76 F. 3d 483 (2d Cir. 1996), the court stated that the inmate and his wife had no protected liberty interest in conjugal visits. State regulation permitted conjugal visits, but this did not mean it was mandatory for prisons to allow them. There was also no equal protection claim even when the denial was based on the wife's status as an ex-offender. Ex-offenders are not a suspect class that would trigger equal protection, and the denial was reasonable related to security concerns.

Visits from Children

Incarceration of a parent does not alone make visitation inappropriate. Wise v. Del Toro, 122 A.D. 2d 714, 505 N.Y.S. 2d 880 (1986). However, courts will usually weigh the possible benefit or harm visitation will have on the child. For example, in Teixeria v. Teixeria, 205 A.D. 2d 545, 613 N.Y.S. 2d 49 (1994), the denial of an inmate's visitation with his 7 year-old daughter was upheld based on the testimony of a psychologist who stated visitation would be harmful to the child's welfare.

The prison may also consider safety concerns when regulating visitations by minors. The court in Navin v. Iowa Dept. of Corrections, 843 F.Supp. 500 (U.S.D.C. Iowa 1994) upheld a prison policy prohibiting visits by minor children unless they were accompanied by parent, legal guardian, or other specified adult. Since there was not enough prison staff available to supervise the children, the court found there was a legitimate safety concern satisfied by the policy.

PA Restrictions on Children Visiting Certain Offenders

Pennsylvania has specific guidelines preventing contact visitation between certain offenders and children. Pa. Dept. Corr. Reg. DC-ADM 812. The regulation states that any inmate who, as an adult or as a young adult offender, was ever convicted or adjudicated for a physical or sexual offense against a minor is prohibited from having contact visit with any minor child. However, the Facility Manager may grant contact visits for such inmates for special circumstances (i.e. court orders, victim mediations, etc.).

Pennsylvania courts have upheld the regulation. In Garber v. Department of Corrections, 851 A. 2d 222, 2004 Pa. Commw. LEXIS 465 (2004), an inmate attempted to force the prison to allow contact visits between sex offenders and minors and to have DC-ADM 812 ruled unconstitutional. The court found that the inmate had no legal right to such relief, as the constitutional right of association could be restricted during incarceration. Furthermore, DC-ADM 812 was reasonably related to the legitimate objectives of promoting security and protecting children, and therefore was not unconstitutional.

Even if the minors involved are the inmate's own children, visitation can be refused under the policy. The court in Odenwalt v. Gillis, 327 F. Supp. 2d 502 (M.D. Pa. 2004) upheld the regulation prohibiting contact visits between sex offenders and minor children, whether or not they were the inmate's own children. The court cited several factors that led to its decision: The inmate was not denied all visitation with his children, only contact visitation; the prisoner did not show how allowing him contact visits with minors would not impair prison officials from protecting children; the inmate did not suggest an alternative that would satisfy his request without imposing more than the minimum cost to penological interest on which the policy was based (protection of children).

Association

Courts have ruled that inmates do not retain rights inconsistent with incarceration, and since freedom of association is one of the rights least compatible with incarceration, restrictions on this freedom should be expected. Overton v. Bazzetta, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). Furthermore, as long as association is not completely prohibited, courts have often upheld regulations dictating the specifics of inmate association. For example, in Dooley v. Quick, 598 F. Supp. 607 (U.S.D.C. R.I. 1984), the court held that as long as there is some kind of opportunity for contact (physical or otherwise) between inmates, decisions regarding how and when this contact can occur should be left to the discretion of prison officials.

Inmate Organizations

(Note: The constitutional rights of religious organizations in prison are addressed in Legal Bulletin 2.1 Religious Rights in Prison)

Prison regulations restricting inmate organizations often address legitimate issues of safety and security. In Hudson v. Thornburgh, 770 F. Supp. 1030 (W.D. Pa. 1991) the court ruled that The Pennsylvania Association of Lifers could be disbanded because the group posed a security threat. The Court in Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977) also thwarted an attempt by prisoners to organize based on similar reasons. In this case, a prisoners' labor union claimed an attempt by the prison to prevent unionization was a violation of the freedom of association. The Court found the prohibition against unionization to be a justifiable administrative decision considering the detrimental effect of such an organization upon prison order and security.

Prisons can also require inmate organizations to follow additional procedures before acting. In Preast v. Cox, 628 F. 2d 292 (4th Cir. 1980), the court upheld a prison regulation that allowed inmate groups to organize, but required the group to seek and receive official recognition before undertaking any activities.

Petitions

The right to petition is another issue that falls under the First Amendment of the Constitution. Like the other rights included in this bulletin, the right to petition is not an absolute one. For example, in Nickens v. White, 622 F. 2d 967 (8th Cir. 1980), the court held that prison officials could constitutionally prohibit inmates from circulating "mass protest" petitions if they provided alternate ways of communicating grievances.

However, in Wolfel v. Bates, 707 F. 2d 932 (6th Cir. 1983), the court stated the prison could not punish a prisoner for merely passing around a petition. The court ruled that absent any false or malicious statements in the petition, punishing the prisoner for peacefully circulating the petition was a violation of his constitutionally protected right.

Conclusion

The rights and issues discussed in this bulletin frequently arise within the prison system. For the most part, prisons can place restrictions on speech, visitation, and association rights as long as the regulations can pass the Turner test. Unless the policies fail to satisfy the reasonableness standard, courts will most likely leave the regulations up to the discretion of the appropriate prison officials.