

Dialing While Incarcerated: Calling for Uniformity Among Prison Telephone Regulations

Nicholas H. Weil*

INTRODUCTION

The freedom of speech is fundamental, but federal circuits disagree on whether the First Amendment applies to prisoners’¹ phone calls. This disagreement is not over whether prisons can justifiably *restrict* speech, but over whether prisoners’ phone calls are “speech” at all under the First Amendment. What should be an obvious presumption remains an unsettled issue.

A prison’s typical phone rule falls into one of three categories: those that limit calls to a finite list of recipients,² those that limit the

* J.D. (2005), Washington University School of Law; B.A. *cum laude*, (2000), Harvard College.

1. I use the terms “prisoner” and “inmate” interchangeably. Unless otherwise specified, either term denotes a convicted person living in a correctional facility (“prison” or “jail,” used interchangeably), as opposed to a pretrial detainee. Detainees that have not yet been convicted almost always receive some greater freedom. *See, e.g.*, *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1160 (9th Cir. 2003); *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002) (“Pretrial detainees have a substantive due process right against restrictions that amount to punishment.” (citing *United States v. Salerno*, 481 U.S. 739, 746–47 (1987))); *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991) (suggesting that pretrial detainee prevented from calling his lawyer for four days may have right under First and Fourteenth Amendments to be free from unreasonable phone restrictions); Rex Bossert, *Arrestee’s Right to Phone Calls Is Upheld in 9th Circuit Ruling*, L.A. DAILY J., Jan. 24, 1997, at 5; S.F. Sheriff’s Dep’t, Jail Information, <http://www.sfsheriff.com/jailinfo.htm> (last visited Sept. 21, 2005) (“Each holding cell has a telephone. This phone is available for arrestees to make [free local] calls to arrange bail, inform family of their circumstances, or to reach the Public Defender.”). *But see* Weld County (Colo.) Sheriff’s Office, Weld County Jail, http://www.weldsheriff.com/wc_jail/wc_jail.html (last visited Oct. 15, 2005) (making no distinction between pre- and post-trial “inmates” and allowing only collect, non-international calls limited to fifteen minutes).

2. 28 C.F.R. § 540.101(a)–(b) (2005) (providing that in the Federal prison system, the “list ordinarily may contain up to 30 numbers” and inmates may amend their lists at least quarterly); *see also, e.g.*, L.A. ADMIN. CODE tit. 22, pt. I, § 314(E)(l)(c), (f) (2005) (limiting calls to a list of “up to 20 . . . numbers” and providing that “[c]hanges may be made . . . at the discretion of the warden, but no less than once each quarter” and that “[u]pon the request of a telephone subscriber, the institution may block . . . the subscriber from receiving calls from an

frequency or timing of calls,³ and those that limit the choice of billing methods (collect versus direct-dial, or long-distance versus local).⁴

inmate”); 103 MASS. CODE REGS. 482.07(3)(c) (2005) (allowing a list of ten non-attorneys); N.Y. COMP. CODES R. & REGS. tit. 7, §§ 723.2(a), 723.3(d)-(e) (2003) (allowing a list of fifteen, but prohibiting certain categories of people); JORGE ANTONIO RENAUD, *BEHIND THE WALLS* 75 (2002) (describing first-hand the experience of a Texas inmate).

3. 28 C.F.R. § 540.100(b) (2005) (providing that in general, inmates may “make at least one telephone call each month”); *id.* § 540.101(d) (“Ordinarily, an inmate who has sufficient funds is allowed at least three minutes The Warden may limit the maximum length”); LA. ADMIN. CODE tit. 22, pt. I, §§ 314(E)(2)(a), (3)(a) (2005) (providing that for minimum- and medium-security inmates, “access should be available on a relatively non-restricted basis,” that for maximum-security inmates, “[a]ccess may vary by inmate classification,” and that in either case, “[a] time limit should be established”); 103 MASS. CODE REGS. 482.07(3)(e), (3)(h), (4) (2005) (leaving the subject of access to each facility’s discretion and allowing curtailment for disciplinary or security reasons); N.Y. COMP. CODES R. & REGS. tit. 7, §§ 723.3(b), .5(b)(2), (6) (2003) (“Each superintendent will determine suitable time frames. . . . System access should be available to as many inmates as possible, but . . . limited in duration based on facility needs No call shall exceed 30 minutes.”); OR. ADMIN. R. 291-130-0020(3), -0060(1) (1999) (providing that calls may be terminated for illegal activity or plans for illegal activity, or for disruption of facility operation and prohibiting calls between 11pm and 6am); UTAH ADMIN. CODE r. 251-702-3(4) (Supp. 1997) (limiting legal calls to thirty minutes per call); WIS. ADMIN. CODE DOC § 309.39(3), (5) (2000) (allowing at least one call per month limited to six minutes per call, but also providing that more calls are “allowed” and “encouraged” “[w]here resources permit”); *see also* RENAUD, *supra* note 2, at 75 (noting that calls in Texas facilities are scheduled as close as possible to pre-requested time of day, “although many units simply schedule all calls between 6 and 9 P.M.” and that calls are limited to five minutes, except on holidays, when the limit is three minutes); *Madison County Prisoners Lose Phone Privileges*, ST. LOUIS POST-DISPATCH, Jan. 5, 2004, at B2 (noting that sheriff cut off phone privileges to all detainees while the jail searched for the few inmates who were causing problems).

4. 28 C.F.R. § 540.105 (2005) (“(a) . . . Third party billing and electronic transfer of a call to a third party are prohibited. (b) The Warden shall provide at least one collect call each month for an inmate who is without funds. . . . (d) The Warden may direct the government to bear the expense . . . under compelling circumstances”); LA. ADMIN. CODE tit. 22, pt. I, § 314(E)(4)(a) (2005) (providing that routine incoming calls are never allowed); 103 MASS. CODE REGS. 482.07(3)(a) (2005) (allowing only one-way collect calls); N.J. ADMIN. CODE § 10A:18-8.4 (2002) (allowing only collect outgoing calls unless “between incarcerated relatives”); N.Y. COMP. CODES R. & REGS. tit. 7, § 723.3(a) (2003) (requiring calls to be collect unless outside continental United States); OR. ADMIN. R. 291-130-0010(1), -0040(3), (4) (1999) (allowing only collect and prohibiting three-way calls); UTAH ADMIN. CODE r. 251-702-3(6) to -3(7) (Supp. 1997) (allowing only collect calls and prohibiting incoming calls); WIS. ADMIN. CODE DOC § 309.39(4) (2000) (providing that calls must be “collect unless payment from . . . account is approved”); Telephone Interview with Tim Carman, Correction Officer, Middlesex County, Mass. (Nov. 19, 2003) (noting that the jail housing only presentencing persons allows unlimited calling, except late-night and early-morning calls, to anyone on a list of six family and friends, two attorneys, and one clergyperson); *see also* RENAUD, *supra* note 2, at 75 (noting that all calls in Texas facilities must be collect).

Such regulations are subject to exceptions for emergencies and legal counsel. *See* 28 C.F.R. §§ 540.101(e), .103, .105(b)-(d) (2005); ALASKA ADMIN. CODE tit. 22, § 05.530(c) (1993) (“[The] superintendent may limit a prisoner’s access to a telephone, except to call an attorney, if

To justify these restrictions, the prisons point to significant misconduct coordinated through phone usage in corrections facilities including drug conspiracies and white-collar crime.⁵ The courts that have denied a presumptive right of prisoners to use the telephone do not doubt the expressive content of such phone calls; on the contrary, prisons *fear* the expressive content and its capacity for propagating crime and unrest.⁶ When used to connect prisoners to their outside friends and relatives, the telephone is an important instrument for civilizing and rehabilitating inmates;⁷ still, some restrictions are necessary to avoid abuse.⁸

reasonable grounds exist to believe that the prisoner's use of a telephone threatens the security of the facility or the protection of the public."); FLA. ADMIN. CODE ANN. r. 33-602.205(2)(a) (2000) (allowing calls to a limited list of "10 names and numbers" and prohibiting three-way or transferred calls); KAN. ADMIN. REGS. § 44-2-102 (2003) (granting broad discretion to the "principal administrator" except as to monitoring of calls and providing that "[i]nmate initiated calls shall be collect unless approved by the principal administrator for the state to pay for the call or for charge to inmate account"); LA. ADMIN. CODE tit. 22, Pt. I, § 314(E)(2)(c), (3)(c), (4)(c) (2005) (accommodating legal calls); N.J. ADMIN. CODE §§ 10A: 18-8.5 to -8.6 (2005); N.Y. COMP. CODES R. & REGS. tit. 7, § 723.3(a), (g) (2003); 5 N.C. ADMIN. CODE 2G.0206 (1994); OR. ADMIN. R. 291-130-0030 (1999); Wis. ADMIN. CODE DOC § 309.39(2)(d) (2000). *But see* Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986) (holding that if "no critical stage of prosecution" has triggered the right to counsel, the prisoner has no right to call even his attorneys (citing Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 199 (7th Cir. 1985) (barring detainee from phone for ten and one-half hours))).

5. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, CRIMINAL CALLS: A REVIEW OF THE BUREAU OF PRISONS' MANAGEMENT OF INMATE TELEPHONE PRIVILEGES 43 (1999), available at <http://www.usdoj.gov/oig/special/9908> [hereinafter CRIMINAL CALLS].

6. *Id.* at 12-16.

7. In October of 2005, the Federal Bureau of Prisons housed 187,840 federal inmates. Federal Bureau of Prisons, Weekly Population Report, http://bop.gov/news/weekly_report.jsp (last visited Oct. 15, 2005). Out of the sixty-three institutions surveyed by the Treasury Department's Office of the Inspector General, forty-five reported that, on the average, each of their inmates places more than one phone call per day. CRIMINAL CALLS, *supra* note 5, at tbl. 1; see also OFFICE OF PERFORMANCE EVALUATIONS, IDAHO STATE LEGISLATURE, INMATE COLLECT CALL RATES AND TELEPHONE ACCESS: OPPORTUNITIES TO ADDRESS HIGH PHONE RATES 2 & tbl. 1 (2001), available at <http://www.legislature.idaho.gov/ope/publications/reports/r0101.pdf> (noting that inmates made an average of ten phone calls per month and that the duration of calls averaged eighteen minutes). *But see* OFFICE OF TELECOMMS., STATE OF CAL., INMATE PAY TELEPHONE ACCESS 5 (1997) [hereinafter PAY TELEPHONE] (predicting that increased number or availability of telephones would not result in more telephone usage or higher revenues because "inmates are already limiting both the number and length of calls they make on existing telephones"). PAY TELEPHONE's analysis predicts that the price of extra telephones outweighs the cost of extra phone calls, but this conclusion has nothing to do with whether prisoners would talk more if given more phones and more liberal rules.

For an example of prisoners' use of the phone to communicate with clergy, see JOINT COMM'N ON PRISON CONSTR. & OPERATIONS, CAL. LEGISLATURE, PUBL'N NO. 1150-S,

Without definable limits to regulation, either prisons spend tax money litigating and settling lawsuits, such as that in *Washington v. Reno*,⁹ or wardens get away with curtailing speech. Neither scenario is acceptable. Attaching prison calls firmly to the First Amendment and subjecting the institutions to constitutional scrutiny would create clear boundaries. The United States Supreme Court should resolve the circuit split and the tension between liberty and law enforcement by expressly holding that speech is still “free” within prison.

Though the Supreme Court should affirmatively bring prison telephone calls under the protection of the First Amendment, by no means should inmates be able to call anyone at any time. In *Turner v. Safley*,¹⁰ the Court applied a loosened, rational-basis-type standard of scrutiny to the prison context.¹¹ Though *Turner* did not involve telephones, broadening it to cover prison phone calls accords with subsequent case law as well as public policy. A bright line rule would guarantee prisoners a legitimate opportunity to exercise their freedom of speech, while providing that prisons no longer teeter between the extremes of disorder and lawsuit.

This Note considers whether and to what extent the First Amendment grants jail and prison inmates the right to make

PAYPHONES IN PRISON FACILITIES 47 (2001–02) [hereinafter COMM. ON PRISON CONSTR.] (statement of Andrew Robinson-Gaither, pastor, Faith United Methodist Community Church, L.A.). Robinson-Gaither explained the burdens of the California prison system’s high phone rates:

I may get two to three collect calls a week from inmates. One month, my collect calls from prisoners was over \$500 a month.

It’s cheaper to call Africa or Europe Their hardship is enormous. Prisoners and their families live from paycheck to paycheck like many of us. They can least afford these calls, but the calls are necessary for the healing of the inmate and the wellbeing of the family. An inmate who is in touch with family and friends . . . is less likely to return to prison.

To add insult to injury, you cannot connect other family members to the call, because it is prohibited to do two-way calling features on calls from prisons, creating greater financial hardship. In many cases, we are the only link these people have to the outside. We need the cost of these phone calls reduced.

Id.

8. See generally CRIMINAL CALLS, *supra* note 5.

9. *Infra* notes 19–26 and accompanying text.

10. 482 U.S. 78 (1987).

11. *Id.* at 81.

telephone calls. Part I frames the circuit split regarding the issue of whether prisoners have a First Amendment right to use the telephone. Part II discusses the genesis of a lowered standard of scrutiny that applies to constitutional challenges in the prison context. Part III explains the potential harms of a continuing circuit split, urges Supreme Court resolution, and suggests that correction systems can unilaterally allow more telecommunication without compromising either their budgets or the peace and order of their facilities.

BACKGROUND

I. DO PRISONERS HAVE THE RIGHT AT ALL?

Before deciding which standard of constitutional scrutiny is appropriate, a court must first read the First Amendment to protect prison calls.¹² The First, Sixth, Seventh, and Ninth Circuits have answered this question most explicitly; the Sixth and Ninth Circuits have suggested such a right,¹³ while the First and Seventh Circuits have found none.¹⁴

A. Circuits Endorsing a First Amendment Right to Prison Calls

In *Washington v. Reno*,¹⁵ the Sixth Circuit upheld prisoners' constitutional right to use the telephone.¹⁶ The Federal Bureau of Prisons (BOP) had begun converting its collect-call system to an automated debit-system (ITS).¹⁷ Under ITS, federal prisoners were able to call only by debiting their own account of phone minutes,

12. In the *non*-prison context, the question is settled: as to the general population, telephone usage is protected. *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) (holding that the contents of phone conversation, even though obtained illegally, are protected by the First Amendment).

13. See *infra* notes 23, 27, 31 and text accompanying notes 16, 23, 27, and 31.

14. See *infra* notes 37, 40 and text accompanying notes 33, 37, 40, 41, and 43.

15. 35 F.3d 1093 (6th Cir. 1994).

16. *Id.* at 1100 (citing *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984)).

17. *Id.* at 1095; see also Telephone Regulations and Inmate Financial Responsibility, 59 Fed. Reg. 15,812, 15,812 (Apr. 4, 1994) (codified at 28 C.F.R. §§ 540.100–105) (noting that the BOP had begun using collect-call systems “[i]n the late 1970’s . . . to increase telephone access and reduce staff assistance”).

purchased at the commissary.¹⁸ Inmates who had relied on their families and friends to pay for phone calls opposed the switch to debit cards.¹⁹ Even after several inmates filed suit to enjoin the conversion to ITS, the BOP proposed new regulations which would require its exclusive use.²⁰ The district court granted a preliminary injunction against further installation of ITS in federal prisons.²¹ Deciding whether to overrule the injunction, the court of appeals evaluated the plaintiffs' likelihood of success on the merits.²² The court agreed that prisoners enjoy a First Amendment right to use the phone.²³ However, it ultimately overruled the injunction, finding that the amended regulations were much more likely to pass muster.²⁴

18. *Washington*, 35 F.3d at 1095. Furthermore, ITS automatically blocked any call to a number that was not on a list of up to twenty recipients. *Id.*

19. *Id.* at 1096.

20. *Id.*; Telephone Regulations and Inmate Financial Responsibility, 58 Fed. Reg. 39,096, 39,096–97 (proposed July 21, 1993) (to be codified at 28 C.F.R. §§ 540.100–106). The Bureau of Prisons asserted that the proposed rule would “take advantage of the economies offered by the use of a debit billing system . . . and . . . protect the public from possible abuse of inmate telephone calls under the new billing system.” *Id.* at 39,096. An interesting twist: whereas the plaintiffs in *Washington* objected to losing a collect-call system, *Johnson v. State of California*, 207 F.3d 650 (9th Cir. 2000), involved an inmate with the opposite concern. The plaintiff in *Johnson* alleged that phone rates were too *high* because the prison allowed only collect calls—so high as to constitute extortion. *See id.* at 653, 656. Though the inmate did not allege a First Amendment violation, the court stated in dicta that “[a]lthough prisoners have a First Amendment right to telephone access, this right is subject to reasonable limitations arising from the legitimate penological and administrative interests of the prison system.” *Id.* at 656 (citing *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986)); *see also* *Chapdelaine v. Keller*, No. 95–CV–1126, 1998 U.S. Dist. LEXIS 23017 (N.D.N.Y. Apr. 16, 1998), at *28 (holding that higher phone rates alone do not give rise to a constitutional issue); *infra* notes 27, 31 and text accompanying notes 26–31.

21. *Washington*, 35 F.3d at 1097; CRIMINAL CALLS, *supra* note 5, app. 1, at 2.

22. *Washington*, 35 F.3d at 1099–1100.

23. *Id.* at 1100 (“[R]easonable access to the telephone . . . is protected by the *First Amendment*.” (quoting *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984)) (emphasis added)). The plaintiffs had dropped their due process claim upon the promulgation of the amended ITS regulations, *id.* at 1099, so we can infer that the opinion’s subsequent assertion of prisoners’ constitutional rights concerns only free speech.

24. *Id.* at 1097–98, 1103–04 (“Any perceived harm . . . to the plaintiffs’ First Amendment . . . rights has been cured . . .” (citing Telephone Regulations and Inmate Financial Responsibility, 59 Fed. Reg. at 15,812–25)). In particular, the court favorably cited four changes to the rule. First, the call-list would permit thirty numbers instead of twenty, and even more in exigent circumstances. *Id.* at 1097–98 (quoting 59 Fed. Reg. at 15,824). Second, the BOP abandoned the requirement that potential callers complete a form which solicited personal information, instead requiring the inmate to certify that members of the list were amenable to being called, and then warning non-family members on the list that they had been so designated. *Id.* at 1098 (quoting 59 Fed. Reg. at 15,824). Third, the BOP responded “to

Nonetheless, within fifteen months the BOP had mediated with the plaintiffs' counsel and settled the suit.²⁵ That settlement provided, *inter alia*, that for approximately six years, the BOP would not proceed with the installation of ITS.²⁶

The Ninth Circuit has at least implied that prisoners have a First Amendment right to use the telephone.²⁷ In *Johnson v. State of California*,²⁸ a California state prisoner appealed to the Ninth Circuit Court of Appeals from the district court's dismissal of his complaint under the Fifth, Eighth and Fourteenth Amendments.²⁹ He alleged that the state's Department of Corrections had extorted money from him by means of excessive telephone charges.³⁰ The court acknowledged (in dicta) that "prisoners have a First Amendment

concerns . . . regarding potential discrimination against indigent inmates" by allowing at least one collect call per month to "inmates without funds." *Id.* (citing 59 Fed. Reg. at 15,824). Fourth, for those prisoners who participated in the financial responsibility plan, the prison would exclude fifty dollars per month from its assessments against a prisoner's trust fund account, a measure meant to facilitate telephone communication under an ITS regime. *Id.* (quoting 59 Fed. Reg. at 15,825). This exclusion was increased to seventy-five dollars pursuant to a settlement in *Washington*, see *infra* notes 25–26 and accompanying text, and remains at that level today. Telephone Regulations and Inmate Financial Responsibility, 61 Fed. Reg. 90, 90–91 (Jan. 2, 1996) (codified at 28 C.F.R. § 545.11(b)). Non-participants would "be allowed to place no more than one telephone call every month," a slackening of the prior limit of one call every three months. *Washington*, 35 F.3d at 1098 (quoting 28 C.F.R. § 545.11(d)(10)).

25. CRIMINAL CALLS, *supra* note 5, app. 1, at 3.

26. The settlement has expired, and the BOP continues to use the debit billing system, now called "ITS-II." U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT No. 5264.07, at 8 (2002), available at <http://www.bop.gov/policy/progstat/5264-007.pdf>. ITS-II would seem to obviate calling lists, see *supra* text accompanying note 2, because inmates are identified by individual PINs and thus recipients who do not wish to be contacted can easily block incoming calls from that inmate. See *id.* at 12–13.

27. See, e.g., *Galli*, 596 F. Supp. at 138 ("[T]here is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone, and . . . such use is protected by the First Amendment.") (citations omitted). But see *Valdez v. Rosenbaum*, 302 F.3d 1039, 1048 (9th Cir. 2002) ("The genesis of this purported constitutional right to use a telephone is obscure." (citing *Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998))). Note that the plaintiffs in *Galli* and the cases it cites for this issue were pretrial detainees. *Galli*, 596 F. Supp. at 137, 139–40. The court apparently read the First Amendment to protect phone usage mainly in the pretrial context, and only when "the family . . . live[s] so far away . . . as to make personal visitation impractical." See *id.* at 138.

28. 207 F.3d 650 (9th Cir. 2000) (per curiam).

29. *Id.* at 653.

30. *Id.* at 652.

right to telephone access,” though it concluded that the rates were not so high as to deprive prisoners of that right.³¹

B. Circuits Denying the First Amendment Right to Prison Calls

In *Arsberry v. Illinois*,³² the Seventh Circuit Court of Appeals held that prisoners do not have a First Amendment right to telephone access.³³ This case examined the Illinois correction system’s practice of contracting with only one telephone company for each jail or prison and receiving half of the revenues.³⁴ A group of prisoners and their families alleged that the resulting monopolistic and inflexibly high phone rates violated the First Amendment.³⁵ The court agreed that the contractors’ rates were “exorbitant,”³⁶ yet found them at least *constitutionally* innocuous.³⁷ The court distinguished *Minneapolis*

31. *Id.* at 656; *see also* Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (dictum) (“Prisoners have a First Amendment right to telephone access, subject to reasonable security limitations.” (citing Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986))). For examples of similar holdings beyond the Ninth Circuit, *see* Benzell v. Grammer, 869 F.2d 1105, 1108 n.5, 1109 (8th Cir. 1989) (implying that First Amendment covers prison calls); Carty v. Farrelly, 957 F. Supp. 727, 742 (D.V.I. 1997) (“Unreasonable restrictions on telephone access may violate the First and Fourteenth Amendments”) (citations omitted); Hutchings v. Corum, 501 F. Supp. 1276, 1296 (W.D. Mo. 1980) (“[I]nmates have the First Amendment rights to communicate with friends and relatives by means of visits, correspondence and telephone calls.”) (citations omitted); Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978), *supplemented by and final order* at 457 F. Supp. 984 (W.D. Pa. 1978); Murillo v. Page, 690 N.E.2d 1033, 1038 (Ill. App. Ct. 1998).

In *Pope v. Hightower*, the Eleventh Circuit implied that constitutional infringement was at least a *prima facie* possibility where the plaintiff’s prison had limited inmates to a ten-person calling list. 101 F.3d 1382, 1384–85 (11th Cir. 1996). The court nonetheless held that “[c]onsideration of the [*Safley*] factors demonstrates that the . . . calling list . . . bears a reasonable relation to legitimate penological objectives” and the list did not violate the plaintiff’s First Amendment rights. *Id.* at 1385.

In *Oliver v. Thornburgh*, 587 F. Supp. 380 (E.D. Pa. 1984), the Eastern District of Pennsylvania granted summary judgment to the defendant due to factual insufficiency, but suggested in dicta that a prisoner who is actually denied access to a phone has a colorable First Amendment claim. *Id.* at 382–83.

32. 244 F.3d 558 (7th Cir. 2001).

33. *Id.* at 564–65.

34. *Id.* at 561.

35. *Id.* at 561, 564.

36. *Id.* at 565.

37. *Id.* at 564. The court reasoned:

[N]o one before these plaintiffs supposed the telephone excise tax an infringement of free speech. . . . Any regulation direct or indirect of communications can have an effect

Star & Tribune Company v. Minnesota Commissioner of Revenue,³⁸ in which the United States Supreme Court invalidated a tax on newspapers as an illegal abridgement of the First Amendment.³⁹ Without offering any true rationale, the court held that the “primary use” of the phone is not protected speech,⁴⁰ and that it would be “doctrinaire” to fit prison calls into the First Amendment.⁴¹

The First Circuit stated in *United States v. Footman*,⁴² in dicta and without any express reasoning, that “[p]risoners have no per se constitutional right to use a telephone.”⁴³

on the market in ideas and opinions, but that possibility in itself does not raise a constitutional issue. Otherwise the entire tax and regulatory operations of American government would be brought under the rule of the First Amendment.

Id. (citations omitted).

38. 460 U.S. 575 (1983).

39. *Id.* at 592–93.

40. *Arsberry*, 244 F.3d at 564. The Seventh Circuit Court of Appeals argued that “[a]lthough the telephone *can* be used to convey communications that are protected by the First Amendment, that it [sic] is not its primary use and it is extremely rare for inmates and their callers to use the telephone for this purpose.” *Id.*

41. *Id.* at 565. The court opined that a *different* constitutional theory might go further than the First Amendment argument. *Id.* For example, the court suggested that “the constitutional concept of liberty may encompass a limited right” (i.e., a substantive due process right) to family visits, and phone calls “may be the only form of visit that is feasible if the family lives far from the inmate’s prison.” *Id.*

See also *Israel v. Cohn*, No. 00-2105, 2001 U.S. App. LEXIS 5610 (7th Cir. Mar. 27, 2001) (unpublished decision). The Seventh Circuit decided *Israel* only eight days after *Arsberry*. In *Israel*, the Indiana Department of Corrections restricted inmate calls based on a recipient list, *see supra* text accompanying note 2. It “blocked [plaintiff Israel’s] calls because he had not submitted a list for approval.” *Israel*, 2001 U.S. App. LEXIS at **2. *Israel* sued alleging unconstitutional restriction of speech. *Id.* The court quoted and followed its eight-day-old holding in *Arsberry*, stating that “it is extremely rare for inmates and their callers to use the telephone” for First Amendment communication, again offering no further explanation. *Id.* at **5 (quoting *Arsberry*, 244 F.3d at 564). Note that the *Arsberry* court dismissed the inmates’ suit because “they ha[d] failed to exhaust their administrative remedies, as required by the Prison Litigation Reform Act. 42 U.S.C. § 1997e(a).” *Arsberry*, 244 F.3d at 561–62; *cf. Perez v. Wis. Dep’t of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999) (noting that as with a statute of limitations, the defense may waive a § 1997e(a) argument). The plaintiffs argued that they had no recourse within the prison system, but the court followed its own precedent in “reject[ing] a ‘futility’ exception to the requirement of exhaustion.” *Arsberry*, 244 F.3d at 562. Had the prisoners sought money damages that were “beyond the power of the prison authorities to give,” their claim might have given rise to an *exception to the futility exception*. *Id.* However, these prisoners prayed for injunctive relief, and therefore lacked standing to sue prior to exhaustion. *Id.*

42. 215 F.3d 145 (1st Cir. 2000).

43. *Id.* at 155.

In sum, the federal courts of appeals are doctrinally divided as to the First Amendment status of prison calls, but none has applied any decipherable reasoning to this conclusion.

II. CONSTITUTIONAL SCRUTINY BEHIND BARS: THE *SAFLEY* TEST

Even though the Supreme Court should resolve this circuit split to bring prison calls into the sanctuary of the First Amendment, a lower standard of scrutiny reduces the protection accorded telephone calls, whether into or out of a prison. In other words, prison officials need not fear a Pandora's Box of unfavorable litigation under a lowered standard.

In *Procunier v. Martinez*,⁴⁴ the Supreme Court considered the constitutionality of rules censoring the content of both incoming and outgoing mail.⁴⁵ The Court refrained from assigning a particular level of scrutiny to prisoners' suits, applying a strict-scrutiny-like test by default because the regulations considered in that case implicated the rights of *non*-inmates, namely those with whom prisoners exchanged mail.⁴⁶ The Court left open the question of whether prisoners themselves enjoy less constitutional protection.

Thirteen years after *Martinez*, the Court decided *Turner v. Safley*,⁴⁷ which considered a Missouri prison's rule that barred inmates from writing to each other.⁴⁸ While acknowledging generally

44. 416 U.S. 396 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *see also infra* note 46.

45. The rules "directed inmates not to write letters in which they 'unduly complain' or 'magnify grievances;'" prohibited "'letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate;'" and "defined as contraband writings 'expressing inflammatory political, racial, religious or other views or beliefs.'" *Id.* at 399-400 (citations omitted).

46. *Id.* at 409, 413-14. The Court's two-part test stated that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression," and must be narrowly tailored. *See id.* at 413. *Martinez* was decided before *Thornburgh v. Abbott*, 490 U.S. 401 (1989), which extended the standard to non-prisoners as well. *See infra* notes 73-74 and text accompanying note 73.

47. 482 U.S. 78 (1987).

48. *Id.* at 81-82. The regulation exempted correspondence among inmates who were family members. *Id.* at 81. The prison, Renz Correctional Institution in Cedar City, Missouri, permitted correspondence "with immediate family members who [we]re inmates in other correctional institutions," and it permitted correspondence between inmates "concerning legal matters." *Id.* Other correspondence between inmates was permitted only if "the

that the First Amendment protects inmates,⁴⁹ the Supreme Court ruled that a strict scrutiny standard is inappropriate in the prison context because of its chilling effect upon prison wardens' discretion in enforcing order.⁵⁰ In other words, the Constitution does not demand that prisons unreasonably strain their own resources, even for the sake of speech. Rather, the courts should defer to the autonomy of prison systems,⁵¹ and ask whether the suppression of speech is "reasonably related to legitimate penological interests."⁵² The Supreme Court laid down a four-factor test.⁵³ The factors are as follows:

First: Is there a "valid, rational connection" between the regulation and a "legitimate governmental interest"?⁵⁴

classification/treatment team . . . deem[ed] it in the best interest of the parties involved." *Id.* at 82. In practice, "the determination whether to permit inmates to correspond was based on team members' familiarity with . . . [information in] the inmates' files rather than . . . review of each piece of mail." *Id.* The rule "as practiced [wa]s that inmates may not write non-family inmates." *Id.* (citation omitted).

49. *See id.* at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *see also Abbott*, 490 U.S. at 407; *Martinez*, 416 U.S. at 405–06 ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."). Note that neither the facts of this case nor the Court's opinion concerned telephone calls.

50. *Safley*, 482 U.S. at 81, 84, 89. The Supreme Court rejected the strict scrutiny standard applied by both the district court, *Safley v. Turner*, 586 F. Supp. 589, 594 (W.D. Mo. 1984), and the court of appeals, 777 F.2d 1307, 1310 (8th Cir. 1985). Both lower courts had decided that the regulation failed the "less restrictive alternative" prong of the strict scrutiny test. 586 F. Supp. at 594; 777 F.2d at 1313. The Supreme Court disagreed with the lower courts' reasoning, noting that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." 482 U.S. at 89. The Court reasoned that "'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.' . . . '[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.'" *Id.* at 84 (quoting *Martinez*, 416 U.S. at 404–05).

51. *Safley*, 482 U.S. at 84–85.

52. *Id.* at 85, 89, *cited in Abbott*, 490 U.S. at 409 ("Our task, then, as we stated in *Martinez*, is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'").

53. For purposes of clarity, I present the factors in a different order than did the Supreme Court. Hopefully, the Court will eventually clarify the *Safley* standard as it is redundant as originally cast. *See Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 233 (D.C. Cir. 2003) ("The remaining *Safley* factors are largely encompassed by the first . . .").

54. *Safley*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). When evaluating this factor, the Court considers in particular whether the regulation is content-

Second: What impact would “accommodation of the asserted constitutional right . . . have on guards and other inmates, and on . . . prison resources generally”?⁵⁵

Third: Under the regulation being tested, could inmates still use “other avenues” of expression?⁵⁶

Fourth: Is the contested regulation an “exaggerated response” to the prison’s concerns?⁵⁷

Though the *Safley* court did not state that any one factor is mandatory for a regulation to pass muster, in that case the regulation in question satisfied all four.⁵⁸ Note that only the first *Safley* factor—“logical[] connect[ion]”—demands a “yes-or-no” answer.⁵⁹ The latter three factors suggest a sliding scale whereby the more appropriate the regulation is on its face, the more deference is granted to its enforcement.⁶⁰

Applying the test, the *Safley* court first found the restriction on correspondence to be “logically connected” to the facility’s goal of

neutral. *Id.* at 90 (citing *Pell v. Procunier*, 417 U.S. 817, 828 (1974)); *Bell v. Wolfish*, 441 U.S. 520, 551 (1979).

55. *Safley*, 482 U.S. at 90.

56. *Id.* (citing *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 131 (1977)).

57. *Id.* The Court here contradicted the lower courts’ application of the “least restrictive alternative” test:

[P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. at 90–91 (citation omitted).

58. *Id.* at 91–93. The Court also briefly discussed “time, place, or manner” restrictions. *Id.* at 88. A government can impose reasonable, content-neutral limitations on the “time, place, and manner” of otherwise protected speech. *See generally* DANIEL A. FARBER, *THE FIRST AMENDMENT 176–77* (1998). Though such restrictions are presumed permissible, the *Safley* court agreed with *Pell v. Procunier* that the restrictions in that case were not “time, place, or manner” restrictions. *Safley*, 482 U.S. at 88. However, the *Safley* court did note the degree of available alternatives to the constrained means of communication. *Id.* at 93. These two concepts—“time, place, and manner,” and “alternative means”—are related, but whereas the alternatives factor involves a sliding scale, *see id.* at 91, “time, place, and manner” is better described as an all-or-nothing exception—either a restriction is based upon reasonable time, place, and manner criteria and is therefore permissible per se, or it is not. *See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.4 (2d ed. 2002).

59. *See supra* note 54 and accompanying text.

60. *See supra* notes 55–57 and accompanying text.

barring inmates from associating with each other.⁶¹ With respect to the second factor, the Court held that granting the prisoners unfettered mailing privileges would burden others' "liberty and safety" to such an extent that prisons should be left the discretion to refuse that burden.⁶² That inmates could still communicate in other ways with those outside the prison walls satisfied the third factor.⁶³ Finally, the prisons could not undertake monitoring correspondence, a less burdensome solution, without disproportionate cost.⁶⁴ The Court upheld the regulation as constitutional.⁶⁵

A. *The Safley Test Reaches Through the Bars*

In *Thornburgh v. Abbott*,⁶⁶ the Supreme Court followed and broadened the "legitimate penological interest" standard by applying it to non-inmate correspondents.⁶⁷ The BOP had promulgated regulations allowing officials, at a warden's discretion, to choose not to distribute publications found to threaten institutional security.⁶⁸ Furthermore, the BOP would suppress *all* of a publication that contained *any* excludable portion—the "all-or-nothing" rule.⁶⁹ The Court acknowledged that incarceration does not mean the utter loss of

61. *Safley*, 482 U.S. at 91–92 ("Undoubtedly, communication with other felons is a potential spur to criminal behavior . . .").

62. *Id.* at 92–93.

63. *Id.* at 92. Note that after *Abbott*, both non-prisoners and prisoners invoke the same deferential standard of scrutiny. See *supra* text accompanying note 59; *infra* note 73 and text accompanying note 65. As such, if the facts of *Safley* arose today, the option of writing to non-inmates would also be subject to limitation by the facility.

64. *Safley*, 482 U.S. at 93. The prison asserted "that it would be impossible to read every piece of inmate-to-inmate correspondence," and thus dangerous mail would inevitably escape detection. *Id.* Furthermore, prisoners could encode dangerous messages in seemingly benign language. *Id.*

65. *Id.* The Court remanded for consideration of whether the regulation was applied in an "arbitrary and capricious" manner, but otherwise held that "the regulation does not unconstitutionally abridge the First Amendment rights of prison inmates." *Id.* at 93, 100.

66. 490 U.S. 401 (1989).

67. *Id.* at 413.

68. *Id.* at 403 & n.1, 404–06 & n.3 (citing Control, Custody, Care, Treatment, and Instruction of Inmates, 44 Fed. Reg. 38,254 (June 29, 1979) (codified as amended at 28 C.F.R. § 540.71(b) (2005))). Note that this regulation is content-based, in contrast to virtually all telephone regulations, which do not consider the actual content of conversations. In fact, the regulation considered in *Abbott* expressly required consideration of the content of each publication as grounds for rejection. See *id.* at 405 (citing 28 C.F.R. § 540.71(c) (2005)).

69. *Id.* at 406 n.8.

constitutional protection, but reasoned that courts must also consider the unique difficulty of prison administration.⁷⁰ The Court agreed with the BOP that unchecked distribution of certain publications would create the potential for disorder.⁷¹ Overruling *Martinez*, the *Abbott* court rejected the arguments of the plaintiff-respondents (“a class of inmates and . . . publishers”⁷²) that, because non-inmates were implicated, a stricter standard was appropriate.⁷³ Instead, the Court applied the *Safley* test.⁷⁴

First, the *Abbott* court concluded that the concerns advanced by the BOP were legitimate⁷⁵ and logically connected to the constraints that the prison desired to impose.⁷⁶ The Court also reasoned that what

70. See *id.* at 407, 413 (citing *Safley*, 482 U.S. at 84–85, 89) (“In the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder.”). The Court determined that even outsiders “have potentially significant implications for the order and security of the prison.” *Id.* at 407.

71. *Id.* at 412–13. The Court reasoned that problems do not arise only from individual subscribers, but also out of informal re-circulation once the publication has penetrated the prison walls: publications “reasonably may be expected to circulate among prisoners, with the concomitant potential for *coordinated* disruptive conduct.” *Id.* at 412 (emphasis added). The Court also implied that prison regulations may and should protect inmates from retaliatory or prejudice-based conduct. *Id.* at 413 (“[P]ossession of homosexually explicit material may identify the possessor as homosexual and target him for assault.” (citing PRISONERS AND THE LAW 3–14 (Ira P. Robbins ed., 1988))).

72. *Id.* at 403.

73. See *id.* at 413–14 (noting that to apply different standards to prisoners and non-prisoners would violate the “reasonableness” standard established by *Bell*, *Jones*, and *Pell*); Jennifer A. Manna, Note, *The Proper Approach to Prison Mail Regulation*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 209, 218 (1998) (noting that some circuits find different standards for inside and outside inappropriate).

74. *Abbott*, 490 U.S. at 414.

75. *Id.* at 414–15 (noting that “beyond question,” “protecting prison security” is a legitimate penological objective).

76. *Id.* at 416. When considering the “logically connected” prong, the Court first invoked the “neutrality” sub-factor that it had emphasized in *Safley*. *Id.* at 415–16 (citing *Safley*, 482 U.S. at 90). The Court held that the regulations were technically content-neutral—though they facially permitted prison officials to consider the actual message conveyed by a publication, the ultimate decision to suppress was to be based on the likelihood that the message would cause disorder, rather than on the message itself. *Id.* The Court here contrasted regulations that censor particular sets of words either because officials consider their message inappropriate (an impermissible criterion), or because officials feel that their message threatens institutional security (permissible if the other factors are satisfied). *Id.* at 415. To illuminate this hairline distinction, the Court compared the challenged regulations in *Martinez*, which apparently targeted the extremity of the writing rather than its likelihood of causing disruption, *id.* at 416 n.14 (citing *Procnier v. Martinez*, 416 U.S. 396, 415 (1974)); to the challenged regulations in *Jones*, which upheld a policy suppressing materials from prisoners’ union while allowing materials from the Jaycees and Alcoholics Anonymous, because the latter “were seen as serving

Safley called a “ripple effect”⁷⁷ would apply in *Abbott* as well—that is, permitting the indiscriminate circulation of publications would bring comparable costs to others’ “liberty and safety.”⁷⁸ As to the third factor, the Court applied the concept of freedom of speech “expansively,” once more giving great deference to prison officials because the contested regulations still “permit[ted] a broad range of publications to be sent, received, and read.”⁷⁹

a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators, and . . . had been determined not to pose any threat to the order or security of the institution.” *Id.* at 415 n.13 (quoting *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 131 n.8, 134 (1977)).

Having established that the regulation was technically content-neutral, the Court added two additional subfactors to its “logically connected” inquiry. First, but for the lessened standard of scrutiny, some publications might slip through the cracks and “exacerbate tensions,” even if not directly causing “disorder.” *See id.* at 416 (citations omitted). Second, publications are reviewed individually, on a case-by-case basis, by the warden; that is, publications are neither delegated nor censored *en masse* according to a list. *See id.* at 416–17. Note that this “individualized” review does not mean that wardens are invited “to apply their own personal prejudices and opinions as standards for prisoner mail censorship.” *Id.* at 416 n.14 (quoting *Martinez*, 416 U.S. at 415). Rather, “[a] publication which fits within one of the ‘criteria’ for exclusion *may* be rejected, but only if it is determined to meet that standard under the conditions prevailing at the institution at the time.” *Id.* at 416–17 (construing 28 C.F.R. §§ 540.70(b), 540.71(b) (2005)). Still, the Court permits broad discretion. “We agree that it is rational for the Bureau to exclude materials that, although not necessarily ‘likely’ to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time.” *Id.* at 417. Acknowledging an apparent contradiction whereby an objective standard is applied by an individual, interested, human arbiter, the Court argued that achieving more uniformity would require more censorship across the board, thereby compromising inmates’ “‘alternative means of exercising the right’ in question,” the third *Safley* factor. *See id.* at 417 n.15 (quoting *Safley*, 482 U.S. at 90).

77. *Safley*, 482 U.S. at 90 (noting that the “‘ripple effect’ on fellow inmates or on prison staff” triggers particular deference).

78. *Abbott*, 490 U.S. at 418 (quoting *Safley*, 482 U.S. at 92); *cf.* Brief of Respondents at 47 & n.43, *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (No. 87-1344) (“[D]iscarding an entire book or publication when only a small portion is objectionable represents the constitutional equivalent of ‘throwing out the baby with the bathwater.’ . . . [T]here is no ‘significant ripple’ effect on fellow inmates or staff in allowing the inmate to receive the rest of the publication.”).

79. *See Abbott*, 490 U.S. at 417–18. Though the Court did not go into detail in applying the facts of the instant case, it followed *Safley* and *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), by implication. *Abbott*, 490 U.S. at 417–18. The Court noted that the *Safley* court held “that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available.” *Id.* (referencing *Safley*, 482 U.S. at 92). The Court also noted approvingly the *O’Lone* court’s holding that the inmates’ opportunity to fulfill *other* Muslim tenets was sufficient, even if they could not leave outdoor work detail to observe Jumu’ah (Friday afternoon prayer compelled by the Koran). *Id.* at 417–18 (referencing *O’Lone*, 482 U.S. at 351); *see also Safley*, 482 U.S. at 352 (holding that prison policies permitted prayer during non-working hours and accommodated Muslim diets and

Applying the fourth *Safley* factor, the *Abbott* Court held that there was “no obvious, easy alternative” to the challenged censorship practices.⁸⁰ The respondents had urged that abolishing the all-or-nothing rule would provide an “alternative.”⁸¹ The petitioners’ brief countered that to give prisoners magazines with pages ripped out would create even more “discontent” than the all-or-nothing rule.⁸² The Court, rejecting the *Martinez* standard, agreed that the all-or-nothing rule was not an “exaggerated response.” Because of this, and because of the time and labor required to remove objectionable material, the Court concluded that the fourth factor was satisfied, and that the regulations passed muster under *Safley*.⁸³

B. The Safley Test Has Persisted, and Can Apply to Phone Calls

The “legitimate penological interest” standard has withstood the eighteen years since *Safley*.⁸⁴ For example, under facts similar to those of *Arsberry*, the District Court for the Southern District of Ohio in *McGuire v. Ameritech Services, Inc.*⁸⁵ recently rejected a motion to dismiss the claim of “family members, friends, attorneys, and bailbondsmen of inmates” that the prohibition on pre-paid calling

special needs during Ramadan). Following this broad precedent, the *Abbott* court concluded that because the regulation allowed “a broad range of publications to be sent, received, and read,” the prison had cleared the alternative-means hurdle. *Abbott*, 490 U.S. at 418.

80. *Abbott*, 490 U.S. at 418.

81. Brief of Respondents, *supra* note 78, at 47 n.43 (“[T]here is a ‘ready alternative’ . . . at *de minimis* cost, . . . namely, deleting the objectionable portion and providing the rest to the prisoner.”).

82. *Abbott*, 490 U.S. at 431 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

83. *Id.* at 419 (citing *Bell v. Wolfish*, 441 U.S. 520, 549 (1979)).

84. See *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Shaw v. Murphy*, 532 U.S. 223 (2001); Abigail E. Robinson, Comment, *Treating the Sex Offender at Any Cost: Fifth Amendment Privilege Against Compelled Self-Incrimination in the Prison Context*, 42 WASHBURN L.J. 725, 737–38 (2003).

The Seventh Circuit does not require prison systems to assert a defense as to why speech restrictions are reasonable, as long as justifications are “self-evident,” even if prophylactic. *Israel v. Cohn*, No. 00-2105, 2001 U.S. App. LEXIS 5610, at **5–**6 (7th Cir. Mar. 27, 2001) (unpublished decision); cf. *Shimer v. Washington*, 100 F.3d 506, 509–10 (7th Cir. 1996) (holding that where connection between guard’s “tangentially help[ing] an inmate” and “corruption and coercion” was not obvious, “[t]he prison administration must proffer some evidence to support its restriction of prison guards’ constitutional rights”) (citations omitted).

85. 253 F. Supp. 2d 988 (S.D. Ohio 2003).

cards violated their (the non-inmates') freedom of speech.⁸⁶ The plaintiffs argued that, even though prisoners themselves fall within an exception to the strict scrutiny test, restricting the prisoners' telephone access nonetheless abridges the rights of those friends and family members who would otherwise be able to communicate with prisoners.⁸⁷ The court agreed with the prisons' view that people who talk to inmates are similarly situated as the inmates.⁸⁸ In other words, outsiders put themselves in the shoes of the inmates when they choose to call or to be called by those inmates, and cannot rely on the strict scrutiny test to override the lowered *Safley* standard.⁸⁹

In *Benzel v. Grammer*,⁹⁰ the Eighth Circuit Court of Appeals reversed an injunction against a Nebraska penitentiary's calling-list policy.⁹¹ The court stated that it followed the *Safley* precedent, though it did not explicitly apply any of its factors except to imply that mail and visitation served as "alternatives" to telephone speech.⁹² Though *Benzel* involved a plaintiff at a high security level,⁹³ it shows that in at least one circuit court, *Safley* has reached out and touched telephone calls.⁹⁴

III. A PROPER COURSE OF ACTION GIVEN THE CURRENT LAW

The Supreme Court has declared that a lower threshold of constitutional scrutiny applies to prisoners and to those with whom they communicate. Though *Safley* and *Abbott* considered media other

86. *Id.* at 992, 1021.

87. *See id.* at 999–1000. As the petitioner was in a state prison system, he sued under the Fourteenth Amendment's Equal Protection Clause, but the court asserted that this distinction was "purist," and that analysis through the First Amendment was appropriate. *Id.*

88. *Id.* at 1001.

89. *See id.* at 999, 1001.

90. 869 F.2d 1105 (8th Cir. 1989).

91. *Id.* at 1109. The inmate-plaintiff had been segregated into a heightened-security unit. *Id.* at 1107. The challenged policy limited his calls to a list of up to three recipients, none of whom could be a "nonattorney, non-family male." *Id.*

92. *See id.* at 1108–09.

93. *See supra* note 87.

94. *See also* *Lewis v. Casey*, 518 U.S. 343, 389–90 (1996) (Thomas, J., concurring) (implying that telephone restrictions should be analyzed under *Safley*); *Smith v. Bradley*, No. 94-5351, 1995 WL 241996, at **3 (6th Cir. Apr. 25, 1995) (dictum) (unpublished decision); *Azania v. Bayh*, No. 93-2094, 1994 U.S. App. LEXIS 8422, at **5 (7th Cir. Apr. 20, 1994) (unpublished decision) (leaving the issue of telephone usage unclear).

than telephones,⁹⁵ some federal courts of appeals have applied *Safley* and *Abbott* to phone calls,⁹⁶ and the Supreme Court should make that connection universal. Despite their apprehension,⁹⁷ prison officials do not face actual loss of control should the Supreme Court read the First Amendment to cover prison calls. On the contrary, officials would be able to enforce telephone regulations with even more confidence than they do now.⁹⁸

*A. The Majority of Circuits Is Correct: The First Amendment
Protects Prison Phone Calls*

In order to apply the *Safley* test, or any other constitutional standard of scrutiny, to prison telephone policies, the Supreme Court will first need to resolve the circuit split by holding that prison phone conversations receive First Amendment protection.⁹⁹ Though the *Safley* standard defers tremendously to prisons, the freedom of speech remains a bedrock safeguard for even the most recalcitrant felon.¹⁰⁰ So far, the Supreme Court has interpreted the First Amendment to embrace prisoners' use of mail and the internet,¹⁰¹ but not phone calls. This dichotomy is improper.

95. See *supra* notes 39, 41 and accompanying text.

96. See also *United States v. Reid*, 369 F.3d 619, 622, 626 (1st Cir. 2004); *United States v. Felipe*, 148 F.3d 101, 110–12 (2nd Cir. 1998). In *Reid*, the First Circuit Court of Appeals implied that the *Abbott* standard would apply to Special Administrative Measures applied against would-be shoe-bomber Richard Reid; however, in the case at bar, Reid challenged mail restrictions rather than phone restrictions. 369 F.3d at 622, 626.

97. CRIMINAL CALLS, *supra* note 5, at 120–21.

98. In addition to the types of prison regulations discussed in this Note, see *supra* notes 5–7 and accompanying text, there are other regulations against abuse of phone calls that are already recognized as consistent with the First Amendment. *Shackelford v. Shirley*, 948 F.2d 935, 937, 941 (5th Cir. 1991) (holding a state statute not unconstitutionally overbroad in stating: “(1) It shall be unlawful . . . (b) to make a telephone call, with intent to terrify, intimidate, or harass, and threaten to inflict injury or physical harm”) (citation omitted); *Gormley v. Conn. State Dep’t of Prob.*, 632 F.2d 938 (2d Cir. 1980); Wayne F. Foster, *Annotation, Validity, Construction, and Application of State Criminal Statute Forbidding Use of Telephone to Annoy or Harass*, 95 A.L.R.3d 411 (2003).

99. In the non-prison context, the Court has read phone usage into the First Amendment. See *supra* note 12.

100. See, e.g., MICHAEL MUSHLIN, 1 RIGHTS OF PRISONERS 213 (2d ed. 1993) (“The ‘Constitution’s most majestic guarantee’ is the free speech clause of the First Amendment.” (citing LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785 (2d ed. 1988))).

101. See Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855 (2002).

The First and Seventh Circuits tacitly conclude that prisoners' phone calls are not speech, but provide no reasoning or citation to authority.¹⁰² Their decisions and the lack of explanation for them are unpersuasive. In fact, the Seventh Circuit's statements in *Arsberry* and in *Israel v. Cohn* that prisoners "rare[ly]" make phone calls of a First Amendment nature¹⁰³ is bizarre—does somebody, merely by being locked up, lose the capacity to speak in a manner deserving protection?¹⁰⁴

That inmates may not wear gang symbols or bear arms is obviously a necessary abridgement of rights; but to *completely* deny inmates' right to a basic conduit of speech admits of no justification, at least none so obvious that the courts need not explain themselves.¹⁰⁵ Of course, some checks upon telephone usage are essential to keep order, but the most appropriate state is an equilibrium between boundless license and arbitrary censorship.¹⁰⁶

B. Prisons Would Not Lose Control Under a Safley Approach

Supreme Court resolution of this issue would benefit not only prisoners and their friends, but also prison facilities. A fear of litigation has contributed to overly permissive prison environments,

102. See *supra* notes 30–37 and accompanying text.

103. See *supra* note 37 and accompanying text.

104. See *Israel v. Cohn*, No. 00-2105, 2001 U.S. App. LEXIS 5610, at **5 (7th Cir. Mar. 27, 2001) (unpublished decision); *Arsberry v. Illinois*, 244 F.3d 558, 564 (7th Cir. 2001).

105. For further discussion of the unique importance of First Amendment rights behind bars, see, for example, *Adams v. Stanley*, 237 F. Supp. 2d 136, 140 (D.N.H. 2002) (magistrate's recommendation), *approved by* 237 F. Supp. 2d 136 (D.N.H. 2003) ("[A] prisoner 'retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'") (citations omitted); EDWIN POWERS, CONSTITUTIONAL RIGHTS OF PRISONERS 7–8 (1983) (noting that First Amendment rights "need little explanation" and "[t]hese are our most precious rights that are available to all persons including prisoners"); Stanley A. Bass, *First Amendment Rights*, in PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION, PRACTICE 67 (Michele G. Hermann & Marilyn G. Haft eds., 1973) (noting that First Amendment rights are "constitutionally 'preferred'"); John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303 (1998). *But see* LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 151 (2002) ("[T]he real question is not whether inmates do or should have constitutional rights, but rather what is the scope of those rights."). Regarding prisoners' quantity of phone usage, see *supra* note 2 and accompanying text.

106. See CRIMINAL CALLS, *supra* note 5, at 93–94.

and while some prison systems preempt too much speech, other systems, including the BOP, leniently enforce even the current restrictions, inviting abuse.¹⁰⁷ Even with definitive First Amendment protection, current regulations could still pass muster; what would improve from the prisons' standpoint is their capacity to enforce their own rules.¹⁰⁸

1. The First *Safley* Factor: "Content-Neutrality"

If tested under *Safley*, current prison phone regulations—whether directing the time of the calls, the cost, or the parties on the other end—would satisfy the first factor, content-neutrality, unless a prisoner's calls are truncated due to the subject being discussed. Even if a prison *does* cut off an inmate's call upon the discussion of illegal activity, that reaction could still qualify as content-neutral because, as the Court explained in *Abbott*, partial censorship is meant to bar the likely result of certain speech, and not the speech itself.¹⁰⁹

2. The Second *Safley* Factor: "Ripple Effect"

Current prison phone regulations should certainly reach the low threshold of the second factor set by the Supreme Court in *Abbott*.¹¹⁰ In that case, the Court apparently relied on no facts, but merely assumed an inverse correlation between the volume of printed matter allowed to circulate, and the "liberty and safety" of others.¹¹¹ The longer and wider the compass of prisoners' speech, the greater the

107. A dramatic trend towards leniency began in the 1970s. *See id.* at 1. According to the DOJ's Office of the Inspector General, unfavorable legal actions such as the settlement reached in *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), *see supra* notes 23–24 and accompanying text, scared the BOP into allowing nearly unchecked phone usage, which may be dangerous in light of prisoners' ability and tendency to abuse the telephone. CRIMINAL CALLS, *supra* note 5, at 94–95. The sheer number of phone calls makes an empirical estimate of abuse difficult, but samplings of data establish that, for example, outside parties help inmates circumvent telephone procedures by relaying a call, either manually or automatically, to an unauthorized number, often long-distance. *Id.* at 28; *see also* LA. ADMIN. CODE tit. 22, pt. I, § 314(E)(6) (2005) (prohibiting and describing the dangers of "Remote Call Forwarding").

108. *See* CRIMINAL CALLS, *supra* note 5, at 94.

109. *See supra* note 68.

110. *See supra* text accompanying note 67.

111. *Id.*

likelihood of misconduct. Thus, limitations on phone privileges should meet *Abbott*'s ethereal criterion.

3. The Third *Safley* Factor: "Alternatives"

Even if a particular court does not readily permit the additional layer of protection of the "time, place, and manner" doctrine,¹¹² the "expansive" definition of "alternatives" under the third factor will nonetheless endorse prison phone regulations as long as other means of communication remain available.¹¹³

4. The Fourth *Safley* Factor: "Exaggerated Response"

Some prisons have clearly *not* satisfied the fourth factor; excessive phone rates *are* an "exaggerated response." While they can certainly curtail speech, the logic of using higher phone rates to lessen criminal activity and disorder is not as apparent as the obvious effect of restrictions on time or recipient-lists. Prisons and jails could take certain steps to improve the fairness of their practices without undue cost and permit as much speech as is consistent with reasonable order and efficiency.

C. Outrageously High Phone Rates Are Unnecessary and Easily Avoided

Rules that allow only collect calls or expensive pre-paid phone cards¹¹⁴ serve no penological interest, let alone a "legitimate penological interest."¹¹⁵ High phone rates serve no interest but the telephone companies'. There is no evidence that prisons allow high phone rates as a legitimate "speed bump," or constraint on the

112. The *Safley* Court refused to apply the doctrine. 482 U.S. 78, 88 (1987).

113. See *Thornburgh v. Abbott*, 490 U.S. 401, 417–18 (1989) (following *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351 (1987), and holding that allowing a Muslim prisoner to attend an "alternate" religious ceremony satisfied the third factor).

114. See *supra* text accompanying note 4.

115. COMM. ON PRISON CONSTR., *supra* note 7, at 29 (statement of Sen. Deborah Bowen) ("I see advertisements for a 20 minute phone call that can be had for 99 cents. [A]nd it makes me wonder why . . . 11 minutes costs [sic] \$4."), 46 (statement of the Reverend Jalani Kafela, pastor, Christian Fellowship, Pomona, Cal.) ("We want all profits above the actual costs . . . redirected to community-based reentry management programs.").

number of calls that are placed.¹¹⁶ Of course, prisons and their contractors face more expenses than normal local phone service providers,¹¹⁷ and to recoup these costs is within the reasonable expectations of prisoners and their families. But to allow only collect calls, which inevitably carry outrageous surcharges, is groundless.¹¹⁸ Worse yet, those surcharges, along with the already inflated minute-to-minute rates, fall upon the families of the inmate, effectively punishing them for their association with a convict.¹¹⁹

High phone rates are an “exaggerated response” so as to weigh against the prison under the fourth *Safley* factor. The prisons have not shown that a hybrid of collect and calling-card options would be too expensive or difficult to administer. Even in *Washington v. Reno*, the plaintiffs, who actually preferred the collect-calling regime, were unusually close to their families and may have disregarded the premium they were paying for calls home.¹²⁰

116. Indeed, the contractor phone companies would certainly not recommend or agree to rates so high as to drive away business.

117. Paul Jennings, President & C.E.O. of Public Communications Services, listed three major sources of the high cost of providing service. First, the billing and collection of the calls, plus the cost of fraud and customers' insolvency, can lead to increased costs. COMM. ON PRISON CONSTR., *supra* note 7, at 2 (statement of Sen. Richard G. Polanco, Chairman, Joint Commission on Prison Construction and Operations) (“[I]f people had to pay for a call up front, this wouldn’t be a problem.”). Second, secure technology costing “\$10,000 per phone,” also increases costs. *See id.* at 28 (statement of Sen. Deborah Bowen) (“[P]art of the cost for prison calls results from costly telecommunications software that . . . prevent[s] inmates from making harassing calls to crime victims, police officers, and the general public.”). Third, the administrative cost of monitoring calls also increases total costs. *Id.* at 7–8. Discussing the need to “find[] that right balance between rates and commissions,” Jennings inferred that state contracts are “heading in the right direction” towards a reasonable balance, including in some cases a “dual system,” though “most people in this room would prefer not to see the state get any commissions.” *Id.* at 8, 10–11.

118. Indeed, the BOP prefers debit (prisoner-funded) billing rather than a collect system, and in fact tried to install an automated billing system in spite of the plaintiffs in *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), filing suit. *See supra* text accompanying note 18. The plaintiffs' position in *Washington* was unusual in that they preferred collect calls because they were women with a particular need to communicate with their spouses and children. CRIMINAL CALLS, *supra* note 5, app. 1, at 1.

119. For a discussion of how these policies burden communication, see COMM. ON PRISON CONSTR., *supra* note 7, at 2, 46 (statement of Reverend Jalani Kafela) (“[T]he families of offenders have committed no crime. Their only crime is being a family member to someone who is incarcerated.”).

120. *See* CRIMINAL CALLS, *supra* note 5, app. 1, at 1 (“[T]he inmates were a very sympathetic group of women concerned about keeping in touch with their spouses and children. They were not, in many respects, ‘typical’ BOP inmates.”); *cf.* *Johnson v. State of California*,

In sum, facilities should invest what little capital may be required to ensure that prisoners have a choice of billing method and a choice of rates.¹²¹ Regulations providing for the disclosure of rates are a positive first step,¹²² but a warning and description of an eventual robbery do not vindicate the robbery itself.

CONCLUSION

The Supreme Court should take the opportunity to mend a circuit split by deciding that telephone calls to or from prison deserve at least some First Amendment protection. Without the problem of different constitutional approaches in different states in different circuits, regulations would be held to one degree of constitutional scrutiny nationwide. Prisoners and their families and friends should be able to call each other as often and as cheaply as is consistent with prisons' unique administrative demands.

As a practical matter, prisons would not need to ease their own enforcement of phone restrictions because the *Safley* line of cases has created a deferential standard of constitutional scrutiny. If anything, prison officials would gain leverage to avoid lawsuits and settlements. But while they enjoy great autonomy, prison officials should nonetheless improve their own practices, at negligible cost, in the interest of fairness. Under the current regime, prisons, jails, and

207 F.3d 650 (9th Cir. 2000) (challenging high rates).

121. See ROBERT E. CEFAL, EVERYTHING YOU NEED TO KNOW ABOUT INMATE PHONES 10 (1993) ("Correctional phone systems are certainly a good source of revenue, but . . . is it worth it if the phones create tension, inmate complaints or service headaches? More tension for administrators, sheriffs and guards? I don't think so."). Of course, competitive bidding should theoretically ensure that the best-value company is selected to offer service, but even within a particular company, a range of rates is usually available. At a 2002 public meeting, California legislators encouraged discussion about the advantages and disadvantages of collect-calling versus direct-dialing. See COMM. ON PRISON CONSTR., *supra* note 7, at 2–3 (statement of Sen. Richard G. Polanco).

122. See, e.g., 47 C.F.R. § 64.710 (2005). This provision states:

- (a) Each provider of inmate operator services shall: (1) Identify itself and disclose . . . to the consumer, at no charge and before connecting any interstate, non-access code operator service call, how to obtain the total cost of the call . . . either, at the option of the provider . . . by dialing no more than two digits or by remaining on the line. . . (2) Permit the consumer to terminate the telephone call at no charge before the call is connected . . .

Id. (emphasis added).

their telephone contractors are taking advantage of a captive audience.