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Are Prisoners' Rights to Legal Mail Lost Within the Prison Gates?

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ARE PRISONERS' RIGHTS TO LEGAL MAIL LOST WITHIN THE PRISON GATES?

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I. INTRODUCTION

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[1] Although prisoners lose aspects of their rights to liberty and privacy, incarceration does not eliminate all constitutional rights.[2] The Supreme Court has recognized that when a prison regulation or practice infringes upon a fundamental right, courts will protect prisoners' constitutional rights.[3] "'[C]ourts have learned from repeated investigation and bitter experience that judicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons.'"[4]

"The basic prisoner interest is in uninhibited communication with attorneys, courts, prosecuting attorneys, and probation or parole officers."[5] Since a prisoner's means of communication with these parties is "restricted sharply by the fact of incarceration, the essential role of postal communications cannot be ignored."[6] The Supreme Court has determined that prisoners have a right to receive and send mail.[7] Particularly, a prisoner has a right not to have his legal mail read.[8] "[T]he denial of free and unfettered communication between inmates and courts and attorneys may constitute a denial of federal constitutional rights."[9] Such a denial would cause the prisoner to

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1. Turner v. Safley, 482 U.S. 78, 84 (1987). "Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all of the requirements of due process." Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Douglas, J., concurring).

2. Bieregu v. Reno, 59 F.3d 1445, 1449 (3d Cir. 1995); *see* Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

3. *Procunier*, 416 U.S. at 405–06 (citing Johnson v. Avery, 393 U.S. 483, 486 (1969)).

4. Peterkin v. Jeffes, 855 F.2d 1021, 1033 (3d Cir. 1988) (quoting Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring)). However, the judicial system is reluctant to interfere with prison administration because "'courts are ill equipped to deal with'" its complex nature. *Turner*, 482 U.S. at 84–85 (quoting *Procunier*, 416 U.S. at 405–06).

5. Taylor v. Sterrett, 532 F.2d 462, 475 (Former 5th Cir. 1976).

6. *Id.*

7. *See* Thornburgh v. Abbot, 490 U.S. 401, 403–04 (1989); *Procunier*, 416 U.S. at 413–14.

8. *See* Wolff v. McDonnell, 418 U.S. 539, 575 (1974).

9. Barlow v. Amiss, 477 F.2d 896, 898 (Former 5th Cir. 1973).

become a victim of the prison's unconstitutional regulations.[10] However, there is a split among jurisdictions regarding whether the mere opening, but not reading, of legal mail outside the presence of an inmate violates a prisoner's constitutional rights.[11]

Part II of this paper will provide an overview of prisoners' rights to legal mail. Part III will describe the sources of prisoners' particular rights associated with legal mail and the scope of those rights. Part IV will describe the split among United States Circuit Courts of Appeals regarding prisoners' rights to receive unopened and unread legal mail. Finally, Part V of this paper will conclude that prisoners have a constitutionally protected right to have their legal mail opened in their presence.

II. HISTORICAL VIEW ON THE DEVELOPMENT OF PRISONERS' LEGAL MAIL CLAIMS

A. Wolff v. McDonnell

The Court in *Wolff v. McDonnell*[12] addressed whether prison officials could open a prisoner's legal mail in a prisoner's presence or whether the legal mail had to "be delivered unopened if normal detection techniques fail to indicate contraband."[13] Prisoners filed a class action suit challenging the constitutionality of the prison regulations to inspect all incoming and outgoing mail.[14] Prisoners claimed that their rights under the First, Sixth, and Fourteenth Amendments would be violated if prison regulations permitted the opening of their legal mail.[15] The prison officials retreated from the prison policy of opening and reading all of the prisoners' legal mail.[16] The prison officials determined that prisoners have a right not to have their legal mail opened and read.[17] They contended that prisoners' legal mail may be opened

10. Al-Amin v. Smith, 511 F.3d 1317, 1331 (11th Cir. 2008).

11. *See id.* at 1328–30. Some jurisdictions have held that opening legal mail outside of a prisoner's presence is a constitutional violation. *Id.* at 1329. Others claim that prisoners do not have a constitutional right to have legal mail opened in their presence. *Id.* at 1328–29.

12. 418 U.S. 539 (1974).

13. *Id.* at 575.

14. *Id.* at 553, 574. There was no exception for prisoners' legal mail. *Id.* at 574.

15. *Id.* at 575. However, the Court did not address the Sixth Amendment claim because the Sixth Amendment only protects "the attorney-client relationship from intrusion in the criminal setting, while the claim here would insulate all mail from inspection, whether related to civil or criminal matters." *Wolff*, 418 U.S. at 576 (citations omitted).

16. *Id.* at 575.

17. *Id.*

"as long as it is done in the presence of the prisoners."[18] The Court added that the legal mail should be properly marked as such, so that the prisons do not have to inspect and sort out those letters that are legal mail.[19]

The Court determined that opening legal mail in the presence of prisoners does not constitute censorship, since it insures that legal mail will not be read.[20] "Neither could it chill such communications, since the inmate's presence insures that prison officials will not read the mail."[21] Additionally, the opening of legal mail insures that contraband will not enter the prison.[22] Thus, the Court determined that "by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, [the prisons] have done all, and perhaps even more, than the Constitution requires."[23]

B. Taylor v. Sterrett

After *Wolff*, the Fifth Circuit clarified in *Taylor v. Sterrett*[24] the "constitutional bases for the restrictions placed on opening, inspecting, and reading of an inmate's correspondence with attorneys, various public officials, and the press."[25] In *Taylor*, prison officials challenged the district court's restriction, forbidding opening a prisoner's legal mail, except in that prisoner's presence.[26] The court in *Taylor* concluded that opening legal mail in the prisoner's presence supports the prisoner's constitutional "right of access to

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18. *Id.* The prison officials conceded that they could not open and read prisoners' legal mail. *Id.*

19. *Wolff*, 418 U.S. at 576. Requiring attorneys to identify themselves as attorneys will allow the prisons to determine that they are members of the bar and would further security and efficiency. *Id.* at 576–77.

20. *Id.* at 577. The Court emphasized that "freedom from censorship is not equivalent to freedom from inspection or perusal." *Id.* at 576.

21. *Id.* at 577.

22. *Wolff*, 418 U.S. at 577. Contraband may be placed inside legal mail and would compromise prison safety. *See id.* The Court also determined that a "flexible test" permitting opening legal mail only "in 'appropriate circumstances'" is unworkable. *Id.*

23. *Id.* The Court did not classify the constitutional basis for opening prisoners' legal mail in their presence. *See id.* at 575–76. The Court broadly stated that none of their rights were violated by opening legal mail in their presence. *Wolff*, 418 U.S. at 576. The Court did not reach the issue whether such a process was constitutionally required. *See id.* at 575–76.

24. 532 F.2d 462 (Former 5th Cir. 1976).

25. *Id.* at 465.

26. *Id.* at 464.

> The sheriff is directed not to open mail transmitted between inmates of the jail and the following persons: courts, prosecuting attorney, probation and parole officers, governmental agencies, lawyers and the press. If, however, there is a reasonable [probability] that contraband is included in the mail, it may be opened, but only in the presence of the inmates.

Id. However, the reasonable probability restriction was removed. *Id.* at 469, 475.

the courts."[27] In reaching this result, the court in *Taylor* "weigh[ed] the burden on the prisoner's access to the courts against the legitimate governmental interest of prison security."[28] Before a prisoner can succeed with a right to access claim, "it must be clear that the state's substantial interests cannot be protected by less restrictive means."[29] The government interest was "jail security as affected by the introduction of contraband into the jail and by the communication of escape plans or other" criminal activities.[30] "The basic prisoner interest is in uninhibited communication with attorneys."[31]

Inspection of legal mail is limited to locating contraband and the contents of the mail are not to be read.[32] Prohibiting reading of legal mail promotes the prisoner's interests in "uninhibited communication" between attorneys and prisoners and ensuring that "judicial proceedings" involving prisoners are "conducted fairly."[33] Given these interests, simply prohibiting prison officials from reading legal mail still inhibits a prisoner's attorney-client relationship.[34] "[T]he fact that prison officials are entirely trustworthy is irrelevant. The controlling factor is that attorneys or prisoners may fear that prison employees who read inmate correspondence will abuse the sensitive information to which they have access."[35]

The court in *Taylor* determined that by opening prisoners' legal mail in their presence, a compromise is established between the interests of both the

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27. *Taylor*, 532 F.2d at 475.

28. *Id.* at 472.

29. *Id.* "Jail security alone is unquestionably a substantial or compelling governmental interest. Whenever a jail practice or procedure furthers the interest of jail security in a manner that is necessary or essential to that interest, there is no constitutional violation." *Id.* at 472 n.14. The court in *Taylor* "[took] the terms 'necessary' or 'essential' to mean that there [was] no alternative means of protecting jail security that [was] reasonably available to prison officials. This is the least that should be required when a fundamental interest such as access to the courts is at stake." *Id.*

30. *Taylor*, 532 F.2d at 473.

31. *Id.* at 475.

32. *Id.*

33. *Id.*

> The basic prisoner interest is in uninhibited communication with attorneys, courts, prosecuting attorneys, and probation or parole officers. Both pre-trial detainees and convicted prisoners have a vital need to communicate effectively with these correspondents. This is to insure ultimately that the judicial proceedings brought against or initiated by prisoners are conducted fairly. Since the prisoner's means of communicati[on] with these parties are restricted sharply by the fact of incarceration, the essential role of postal communications cannot be ignored.

Id.

34. *Taylor*, 532 F.2d at 475–76. "The inhibitory effect remains because the medium through which sensitive legal communications are to be transmitted is unshielded." *Id.* at 476.

35. *Id.* (citing Smith v. Robbins, 454 F.2d 696, 697 (1st Cir. 1972)). The prisoners may fear that their sensitive information will be "exposed to third party interception." *Id.*

prison administration and the prisoners.[36] "Prisoners are not inhibited in using this traditional communication medium to pursue their defense or to present their legal grievance. And jail officials are not denied the use of any mail procedure shown to be essential to jail security."[37] Thus, the prisoner's presence ensures that legal mail will be unread and prison officials are assured that no contraband enters the prison.[38] In *Taylor*, the prison officials failed to satisfy their burden that reading legal mail is essential in order to prevent a security breach.[39] Therefore, consistent with the regulations in *Wolff*, the court in *Taylor* recognized a prisoner's right not to have his or her legal mail read, and therefore implemented prison regulations requiring that opening legal mail must be done in the prisoner's presence.[40]

C. Turner v. Safley

The Court in *Turner v. Safley*[41] drastically changed a prisoner's ability to persevere in his or her constitutional claims.[42] *Turner* established that a prison regulation restricting prisoners' constitutional rights is valid if the regulation "is reasonably related to legitimate penological interests."[43] The *Turner* Court established four factors to determine the reasonableness of a prison regulation:

> [1)] a "valid, rational connection"[44] between the prison regulation and the legitimate governmental interest;
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> . . .

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36. *Id.* at 477.

37. *Taylor*, 532 F.2d at 477.

38. *Id.* The head of the jail, Chief Rowland, believes that censorship of mail minimally affects jail security. *Id.* (quoting Taylor v. Sterrett, 344 F. Supp. 411, 414 (N.D. Tex. 1972)).

39. *Id.* The court in *Taylor* determined that prison officials

> have not made a persuasive showing that abuses of incoming mail pose a realistic threat to jail security or any other legitimate governmental interest that is cured by reading this mail or having the ability to do so. The actual abuses cited in the appellants' briefs involve contraband, not information contained in letters that can be discovered only by reading them. Thus, the abuses allegedly cured by the reading, perhaps selectively, of inmate mail are hypothetical.

Id.

40. *Taylor*, 532 F.2d at 475; Wolff v. McDonnell, 418 U.S. 539, 575 (1974); *see also* Guajardo v. Estelle, 580 F.2d 748, 758 (Former 5th Cir. 1978) (following *Taylor's* holding that "incoming [legal] mail could be opened only to inspect for contraband and in the presence of the inmate recipient").

41. 482 U.S. 78 (1987).

42. *See id.* at 89.

43. *Id.*

44. *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

> [2)] whether there are alternative means of exercising the right that remain open to prison inmates;
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> . . .
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> [3)] the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;
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> . . .
>
> [4)] the absence of ready alternatives . . . [to the] prison regulation.[45]

Two years later, in *Thornburgh v. Abbott*,[46] the Court held that incoming prisoner mail regulations shall be analyzed under *Turner's* "reasonably related" test.[47]

III. RIGHTS INVOLVED IN PRISONERS' LEGAL MAIL CLAIMS

A. *Right of Access to the Courts*

The United States Supreme Court has held "that prisoners have a constitutional right of access to the courts."[48] An inmate's right to "'unfettered access to the courts is as fundamental a right as any other he may hold. . . . All other rights of an inmate are illusory without it . . . .'"[49] Prison regulations may not interfere with prisoners' access to the courts.[50] A prisoner's interests in access to the courts are "to challenge their convictions, advance the timing and terms of their release from confinement, reform prison conditions, or conduct or assist in the preparation of their defense."[51]

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45. *Id.* at 89–90.

46. 490 U.S. 401 (1989).

47. *Id.* at 404 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). In *Thornburgh*, the Court applied *Turner's* reasonably related test to a prison regulation of incoming publications. *Id.* at 403–04.

48. Bounds v. Smith, 430 U.S. 817, 821 (1977); *see* Wolff v. McDonnell, 418 U.S. 539, 578 (1974) (citing Johnson v. Avery, 393 U.S. 483, 485 (1969)); *see also Johnson*, 393 U.S. at 489; *Ex parte* Hull, 312 U.S. 546, 549 (1941).

49. McCray v. Sullivan, 509 F.2d 1332, 1337 (Former 5th Cir. 1975) (quoting Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973)).

50. Taylor v. Sterrett, 532 F.2d 462, 471 (Former 5th Cir. 1976); *see also McCray*, 509 F.2d at 1337.

51. *Taylor*, 532 F.2d at 470.

1. Source of the Right

Notions of prisoners possessing a right to access the courts began in 1941.[52] In *Ex parte Hull*,[53] prison officials read prisoners' legal mail that was addressed to the courts.[54] Prison officials would only mail the contents to the courts, if in their opinion, it was worthy of being sent.[55] As a result, prisoners' legal mail was intercepted thereby interfering with their ability to communicate with the courts and their right of access to the courts was hindered.[56] The Court determined that the regulation was invalid stating that prison officials may not interfere with a prisoner's right of access to the courts for a writ of habeas corpus.[57]

In *Bounds v. Smith*,[58] the Court established "that prisoners have a constitutional[ly] [protected] right of access to the courts."[59] *Bounds* never purported to explain the exact constitutional source.[60] Recently, courts have determined that the right of access arises under the Sixth Amendment,[61] First Amendment, Equal Protection Clause, Due Process Clause of the Fourteenth Amendment, Article IV Privileges and Immunities Clause, and Fifth Amendment.[62]

a. *Right to Petition*

In the colonial era, citizens primarily used their right to petition by petitioning their legislatures.[63] In modern times, the United States Supreme Court determined that the Petition Clause includes the right to access the

52. *See Hull*, 312 U.S. at 549. The Supreme Court recognized that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.*

53. *Id.* at 546.

54. *Id.* at 548.

55. *Id.* at 548–49.

56. *See Hull*, 312 U.S. at 549.

57. *Id.*

58. 430 U.S. 817 (1977).

59. *Id.* at 821; *see also* Wolff v. McDonnell, 418 U.S. 539, 577–78 (1974); Johnson v. Avery, 393 U.S. 483, 489 (1969); *Hull*, 312 U.S. at 549.

60. *Bounds*, 430 U.S. at 833–34 (Burger, C.J., dissenting). The only reference to the constitutional source was the prisoners' complaint, which stated that their inability to have meaningful access violated the Fourteenth Amendment. *Id.* at 818 (majority opinion).

61. *See Wolff*, 418 U.S. at 576.

62. Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003) (per curiam) (citing Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002)).

63. Bieregu v. Reno, 59 F.3d 1445, 1453 (3d Cir. 1995), *abrogated in part by* Lewis v. Casey, 518 U.S. 343, 349 (1996).

courts.[64] The United States Supreme Court has dealt with the right to petition as encompassed within the First Amendment.[65] Thus, the First Amendment right to petition is where the right of access to the courts originated.[66]

b. *Right to Counsel*

The attorney-client privilege cannot be restricted in a manner that hinders a prisoner's ability to access the courts.[67] The Sixth Amendment guarantees individuals, in criminal proceedings, effective assistance of counsel.[68] A prison regulation that infringes upon a prisoner's First and Sixth Amendment rights does not need to be considered independently.[69] Therefore, any intrusion upon a prisoner's right to effective counsel by reading his or her legal mail is integrated within a parallel abridgement of the right to access the courts.[70]

c. *Due Process*

The Due Process Clause of the Fourteenth Amendment includes the right of access to the courts.[71] "The constitutional guarantee of due process

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64. *Id.* at 1453. Right of access encompasses both the legislative branch and the courts. *Id.*

65. *Id.*; *see also* McDonald v. Smith, 472 U.S. 479, 482 (1985) (stating that the right to petition guarantees freedom of expression). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

66. *Bieregu*, 59 F.3d at 1453.

67. Taylor v. Sterrett, 532 F.2d 462, 473 (Former 5th Cir. 1976).

68. *See Bieregu*, 59 F.3d at 1453–54 n.4; *see also* Wolff v. McDonnell, 418 U.S. 539, 576 (1974) ("As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from intrusion in the criminal setting.").

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

69. *Taylor*, 532 F.2d at 472.

70. *Id.*

71. *Bieregu*, 59 F.3d at 1454.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights."[72] Prisoners are required to be given reasonable opportunity to search and obtain attorney assistance.[73] Prisoners' interest in having their legal mail unread is a "liberty" interest under the Fourteenth Amendment.[74] Thus, prisoners' right to their legal mail is protected from arbitrary prison regulation.[75] Prison regulations that interfere with the availability of attorney representation or obstruct other aspects of a prisoner's ability to access the courts are unconstitutional.[76]

2. Scope of the Right

A prisoner's access to the courts must be "adequate, effective, and meaningful" to be constitutionally valid.[77] The degree to which each of these elements must be met remains obscure.[78] The Supreme Court extended the right of access to encompass only the preparation and transmission of legal documents to the courts.[79] The prison regulation must reasonably provide prisoners with an "adequate opportunity" to present violations of their constitutional right of access to the courts.[80] All prisoners must be given the opportunity to adequately present their legal claims fairly.[81] This is achieved by "meaningful access" to the courts.[82]

A prisoner must be "actually denied" access to the courts in order for his or her claim to succeed.[83] Specifically, the prisoner must show proof of actual injury.[84] Initially, courts followed a demarcation between ancillary

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U.S. CONST. amend. XIV, § 1.

72. Procunier v. Martinez, 416 U.S. 396, 419 (1974).

73. *Id.*

74. *Id.* at 418.

75. *Id.*

76. *Id.* at 419.

77. Bounds v. Smith, 430 U.S. 817, 822 (1977).

78. Brewer v. Wilkinson, 3 F.3d 816, 821 (5th Cir. 1993).

79. *Id.*; *see* Wolff v. McDonnell, 418 U.S. 539, 576 (1974).

80. *Bounds*, 430 U.S. at 825.

81. *Id.* at 823 (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)).

82. *Id.* (citing *Ross*, 417 U.S. at 612).

83. Bieregu v. Reno, 59 F.3d 1445, 1454–55 (3d Cir. 1995) (quoting Hudson v. Robinson, 678 F.2d 462, 466 (3d Cir. 1982), *superseded by* Lewis v. Casey, 518 U.S. 343, 349 (1996)).

84. *Lewis*, 518 U.S. at 349. The actual injury requirement is derived from the constitutional principle of standing. *Id.* The doctrine of standing ensures that the courts do not interfere with coordinate branches of the government. *Id.*

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the polit-

aspects of access to the courts, which merely impact convenience or comfort without depriving access to the courts, from prison regulations that are central to a prisoner's right of access to the courts.[85] Regulations that are central to a prisoner's access to the courts do not require actual injury, but ancillary claims do require proof of actual injury.[86] Repeatedly violating the confidentiality of a prisoner's legal mail is central to the right of access to the courts, and thus it is unnecessary to show actual injury for the prisoner to establish an infringement of that right.[87]

Therefore, "the only way to ensure that mail is not read when opened, and thus to vindicate the right to access, is to require that it be done in the presence of the inmate to whom it is addressed."[88] Interfering with a prisoner's legal mail threatens the principle, often exclusive, means that a prisoner can implement his or her constitutional right.[89] Prisoners must be assured that their legal mail is kept confidential and secure in order for access to the courts to "be effective, adequate, and meaningful."[90]

However, the demarcations between ancillary and central affects to the right of court access were dismissed.[91] In *Lewis v. Casey*,[92] the Supreme Court held that all prisoners' claims based on a denial of the right to court access must show proof of actual injury.[93] Thus, both ancillary and central effects require proof of actual injury.[94] Actions by prison officials that hinder a prisoner's pursuit of a non-frivolous claim satisfy the requirement of proof of actual injury.[95] Therefore, the prisoner must exhibit that his or her

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ical branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

Id.

85. *Bieregu*, 59 F.3d at 1455 (citing Peterkin v. Jeffes, 855 F.2d 1021, 1041 (3d Cir. 1988)).

86. *Id.* (citing *Peterkin*, 855 F.2d at 1041–42).

87. *Id.*

88. *Id.* at 1456 (citing Wolff v. McDonnell, 418 U.S. 539, 576–77 (1974)).

89. *Id.*

90. *Bieregu*, 59 F.3d at 1455.

91. Oliver v. Fauver, 118 F.3d 175, 177–78 (3d Cir. 1997).

92. 518 U.S. 343 (1996).

93. *Id.* at 349. *Lewis* superseded the *Bieregu* ruling. *See generally id; Bieregu*, 59 F.3d 1445. However, it only superseded the holding regarding access to the courts and not the First Amendment free speech claim. Jones v. Brown, 461 F.3d 353, 358–59, n.6 (3d Cir. 2006). Actual injury need not be shown in First Amendment free speech claims. *Id.* at n.6. However, proof of actual injury must be shown for access to the courts claims. *Oliver*, 118 F.3d at 177–78.

94. *Oliver*, 118 F.3d at 177. Due to the decision in *Lewis*, "even claims involving so-called central aspects of the right to court access require a showing of actual injury." *Id.* at 177–78.

95. *Jones*, 461 F.3d at 359 (citing *Lewis*, 518 U.S. at 349–53).

ability "to secure judicial relief" through access to the courts has been infringed or frustrated "in some consequential way."[96]

B. *Right to Free Speech*

1. Source of the Right

"'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.'"[97] The First Amendment prohibits the states from "abridging the freedom of speech."[98] The mail provides a medium for the exercise of free speech, and the sending and receiving of mail is a First Amendment right.[99] A prisoner's First Amendment rights are not lost when he or she enters the prison.[100] The Supreme Court has determined that interference with prisoners' legal mail implicates the First Amendment right to free speech.[101]

2. Scope of the Right

The Supreme Court has held that censorship of prisoner mail is justified if the following criterion is met: "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[102]

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96. *Id.*

97. *Bieregu*, 59 F.3d at 1451 (quoting United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)), *abrogated by Lewis*, 518 U.S. at 349.

98. U.S. CONST. amend. I.

99. Al-Amin v. Smith, 511 F.3d 1317, 1333 (11th Cir. 2008).

100. Turner v. Safley, 482 U.S. 78, 95 (1987) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)). For example, prisoners' First Amendment rights are violated when prison officials decline to deliver prisoners' incoming mail because it is in a foreign language. *Bieregu*, 59 F.3d at 1452 (citing Ramos v. Lamm, 639 F.2d 559, 581 (10th Cir. 1980)).

101. *See Pell*, 417 U.S. at 822.

102. Procunier v. Martinez, 416 U.S. 396, 413 (1974). "[A] prison inmate 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." *Pell*, 417 U.S. at 822. Prison officials "must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation." *Procunier*, 416 U.S. at 413.

Repeatedly opening prisoners' incoming legal mail outside their presence infringes upon communication with the courts—a free speech right protected by the First Amendment.[103] The confidentiality of prisoners' legal mail is breached when opened outside of their presence.[104] "Such a practice chills protected expression and may inhibit the inmate's ability to speak, protest, and complain openly, directly, and without reservation with the court."[105] Regardless of the prison official's assurances that prisoners' legal mail will not be read, prisoners' freedom of expression is still ultimately sacrificed.[106] Thus, the single way to guarantee that a prisoner's legal mail will remain unread when opened requires that their mail be opened in the presence of the prisoner to whom the mail is addressed.[107]

Unlike access to court claims, the actual injury requirement does not pertain to First Amendment freedom of speech claims.[108] In *Lewis*, the Supreme Court stated that to succeed in a claim for interfering with access to the courts, the prisoners must show they were actually injured.[109] However, nothing was stated in *Lewis* that would indicate that a prisoner claiming that their legal mail was opened outside of his or her "presence and thereby violat[ing] his First Amendment rights need allege any consequential injury stemming from that violation, aside from the violation itself."[110] Thus, "protection of an inmate's freedom to engage in protected communications is a constitutional end in itself."[111]

C. *Right to Privacy*

Reading prisoners' legal mail outside their presence may infringe upon prisoners' rights to privacy.[112] An individual's right to privacy is not lost due to incarceration.[113] If prisoners lose their right to private communication,

103. *Bieregu*, 59 F.3d at 1451. In *Bieregu*, the prisoner complained that his legal mail was opened fifteen times outside his presence. *Id.* at 1452.

104. Jones v. Brown, 461 F.3d 353, 359 (3d Cir. 2006).

105. *Bieregu*, 59 F.3d at 1452.

106. *Jones*, 461 F.3d at 359.

107. Wolff v. McDonnell, 418 U.S. 539, 577 (1974).

108. *See Jones*, 461 F.3d at 359.

109. Lewis v. Casey, 518 U.S. 343, 349 (1996).

110. *Jones*, 461 F.3d at 359.

111. *Id.* at 360.

112. Bieregu v. Reno, 59 F.3d 1445, 1456 n.5 (3d Cir. 1995), *abrogated by Lewis*, 518 U.S. at 349; Stevenson v. Koskey, 877 F.2d 1435, 1443 n.2 (9th Cir. 1989) (Reinhardt, J., dissenting).

113. *Bieregu*, 59 F.3d at 1456 n.5 (citing Turner v. Safley, 482 U.S. 78, 95–99 (1987)). In *Turner*, a prisoner's right to marry was not lost due to incarceration. *See Turner*, 482 U.S. at 98.

then recidivism is fostered rather than rehabilitation.[114] "[P]ersonal information in the hands of prison officials may result in ridicule, harassment, and [even] retaliation."[115]

IV. SPLIT OF AUTHORITY IN THE CIRCUIT COURTS

The United States Circuit Courts of Appeals are split regarding the issue of whether prisoners have a constitutionally protected right to receive their legal mail unread and opened only in their presence.[116] There is not an absolute determination of whether a prisoner automatically deserves such rights.[117] Instead, the Supreme Court in *Turner* initiated a reasonableness test to determine whether a prison regulation infringes upon a prisoner's constitutional rights.[118] A prison regulation that impinges upon a prisoner's constitutional rights will be valid if it is determined to be reasonably related to a legitimate penological interest.[119] Post-*Turner*, there has been a split among the United States Circuit Courts of Appeals regarding whether the mere opening, but not reading, of legal mail outside the presence of an inmate violates a prisoner's constitutional rights.[120]

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114. *Bieregu*, 59 F.3d at 1456 n.5.

115. *Id.*

116. Al-Amin v. Smith, 511 F.3d 1317, 1328–29 (11th Cir. 2008).

117. *See id.* at 1327.

118. *Turner*, 482 U.S. at 89.

119. *Id.* The *Turner* Court established four factors to determine the reasonableness of a prison regulation:

> [1)] a "valid, rational connection" between the prison regulation and the legitimate governmental interest;
>
> . . .
>
> [2)] whether there are alternative means of exercising the right that remain open to prison inmates;
>
> . . .
>
> [3)] the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;
>
> . . .
>
> [4)] the absence of ready alternatives . . . [to the] prison regulation.

Id. at 89–90 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

120. *Al-Amin*, 511 F.3d at 1328–29.

A. *Circuits That Recognize Prisoners' Constitutional Rights to Receive Legal Mail Unread and Opened in Their Presence*

1. Eleventh Circuit

In 2008, the Eleventh Circuit Court of Appeals in *Al-Amin v. Smith*,[121] discussed a prisoner's constitutional rights to legal mail.[122] Thirteen envelopes that were all specifically marked as "legal mail" from an attorney were repeatedly opened before they reached the prisoner.[123] The prisoner alleged that "his constitutional rights to access . . . the courts and free speech" were violated by the repeated opening of his legal mail outside of his presence by prison officials.[124] The prison policy regarding prisoner mail was that correspondence between prisoners and their attorneys was privileged mail.[125] Specifically, the prison policy forbade prison officials from opening a prisoner's legal mail, and its contents could only be opened in the prisoner's presence.[126] The prison regulations authorized only external inspection of the legal mail, and even if the mail was opened in the prisoner's presence, prison officials still could not read the mail.[127]

The court in *Al-Amin* relied on *Taylor* and *Guajardo v. Estelle*[128] as binding precedent in assessing prisoners' constitutional rights to legal mail.[129] The Supreme Court in *Wolff* established that a prisoner has a consti-

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121. *Id.* at 1317.

122. *Id.* at 1325.

123. *Id.* at 1322. The prisoner filed grievances because his mail was opened outside of his presence. *Id.* at 1321. In response to the grievances, the warden was notified to treat the prisoner's legal mail as privileged and that the mail must be opened in his presence. *Al-Amin*, 511 F.3d at 1321. Despite the grievance ruling, prison officials continued to open the prisoner's legal mail even though he filed multiple grievances regarding the unauthorized opening of his legal mail. *Id.* at 1322.

124. *Id.* at 1320.

125. *Id.* A prisoner's "attorney includes 'any attorney with whom the inmate has had, or is attempting to establish, an attorney client relationship' and who is licensed to practice in state or federal courts." *Id.*

> The district court noted that for mail to be treated as privileged legal mail, the state may require: (1) that legal mail be specially marked as originating from an attorney with the attorney's name and address; and (2) that an attorney desiring to communicate with a prisoner first identify herself and her client to prison officials to assure that letters marked privileged are actually from members of the bar.

Al-Amin, 511 F.3d at 1324 n.15; *see also* Wolff v. McDonnell, 418 U.S. 539, 576–77 (1974).

126. *Al-Amin*, 511 F.3d at 1320.

127. *Id.* The external inspection is done by using a fluoroscope, manually inspecting the mail for contraband, or by using a metal detecting device. *Id.*

128. 580 F.2d 748 (Former 5th Cir. 1978).

129. *Al-Amin*, 511 F.3d at 1325–27. The United States Court of Appeals for the Eleventh Circuit "adopted as binding precedent all decisions of the former Fifth Circuit handed down

tutional right to receive unopened and unread legal mail.[130] The court in *Taylor* relied on the Supreme Court's decision in *Wolff*, that opening legal mail in the presence of prisoners ensures that their legal mail will remain unread.[131] The court in *Al-Amin*, followed the rulings in *Taylor* and *Guajardo*, holding that "a prisoner's constitutional right of access to the courts requires that incoming legal mail from his attorneys, properly marked as such, may be opened only in the inmate's presence and only to inspect for contraband."[132]

However, the prison officials claimed that the holdings of *Taylor* and *Guajardo* were no longer viable because of the intervening decision by the Supreme Court in *Turner*.[133] The court in *Al-Amin* applied *Turner's* reasonableness factors to determine whether the prison official's regulations were reasonably related to a legitimate prison interest.[134] As to *Turner's* first factor, the court in *Al-Amin* recognized that the government has an interest in keeping prisons secure.[135] Though, it is unlikely that attorneys pose a security risk of sending contraband.[136]

Additionally, the prison officials never stated "a legitimate security interest" for opening a prisoner's properly marked legal mail outside of the prisoner's presence.[137] Prison officials can inspect for contraband if legal mail is opened in the prisoner's presence, and the prison's own policy requires a prisoner's legal mail to be opened in the prisoner's presence.[138] "Assuring the inmate of the confidentiality of inmate-attorney mail by opening such mail only in the inmate's presence actually advances the state's interest in promoting institutional order and security."[139] Thus, *Turner's* first factor failed because there was no rational connection between the practice in the prison and a legitimate prison interest.[140]

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prior to close of business on September 30, 1981." *Id.* at 1326 n.18 (citing Bonner v. City of Prichard, 661 F.2d 1206, 1207, 1209 (11th Cir. 1981) (en banc)).

130. *See Wolff*, 418 U.S. at 577.

131. *See* Taylor v. Sterrett, 532 F.2d 462, 475 (Former 5th Cir. 1976); *Al-Amin*, 511 F.3d at 1327 n.20.

132. *Al-Amin*, 511 F.3d at 1325; *see* Guajardo v. Estelle, 580 F.2d 748, 758 (Former 5th Cir. 1978); *Taylor*, 532 F.2d at 475.

133. *Al-Amin*, 511 F.3d at 1326.

134. *Id.* at 1327–28 (citing Turner v. Safley, 482 U.S. 78, 89–90 (1987)).

135. *Id.* at 1331.

136. *Id.*

137. *Id.*

138. *Al-Amin*, 511 F.3d at 1331.

139. *Id.* (citing Bieregu v. Reno, 59 F.3d 1445, 1457 (3d Cir. 1995)).

140. *Id.*

As to *Turner's* second factor, Al-Amin did not have another means of exercising his right of access to the courts.[141] Al-Amin's ability to access the courts required that his communications with his attorneys remain confidential.[142] Regardless, if prison officials promise "to open but not read" legal mail, courts have observed that prisoners lack trust in that promise and are fearful that their legal mail will be read.[143] "Opening attorney mail only in the inmate's presence ensures that the inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials."[144]

As to *Turner's* third factor, the court found that there was no proof that opening legal mail in a prisoner's presence burdens guards, inmates, or the distribution of prison resources.[145] The prison policy instituted had already required that all legal mail be opened in the prisoner's presence.[146] "While opening all prison mail in an inmate's presence would pose an impermissible burden, [the court in *Al-Amin* concluded that] properly marked attorney mail does not."[147] Thus, opening a prisoner's legal mail in the prisoner's presence does not impose an impermissibly large burden on the prison.[148] As to *Turner's* "fourth factor, opening an inmate's attorney mail in his presence itself is the easy alternative; it 'fully accommodates the prisoner's right at *de minimis* cost to valid penological interests.'"[149] Thus, the court in *Al-Amin* determined that *Taylor* and *Guajardo* are not undermined by *Turner* and remain "valid, well-established law."[150] As such, in the Eleventh Circuit Court of Appeals, prisoners "have a constitutionally protected right to have their properly marked attorney mail opened in their presence."[151]

Al-Amin would have succeeded in his right to access the courts claim but for the actual injury requirement instituted by the United States Supreme Court in *Lewis*.[152] Al-Amin only made conclusory allegations that the

141. *Id. Turner's* second factor "is whether there are alternative means of exercising the right that remain open to prison inmates." Turner v. Safley, 482 U.S. 78, 90 (1987).

142. *Al-Amin*, 511 F.3d at 1331.

143. *Id.*

144. *Id.* (citing Taylor v. Sterrett, 532 F.2d 462, 476 (Former 5th Cir. 1976)).

145. *Id.*

146. *Id.*

147. *Al-Amin*, 511 F.3d at 1331.

148. *Id.*

149. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 91 (1987)).

150. *Id.*

151. *Id.*; *see* Lemon v. Dugger, 931 F.2d 1465, 1467–68 (11th Cir. 1991); Guajardo v. Estelle, 580 F.2d 748, 758 (Former 5th Cir. 1978); Taylor v. Sterrett, 532 F.2d 462, 475 (Former 5th Cir. 1976).

152. *Al-Amin*, 511 F.3d at 1332; Lewis v. Casey, 518 U.S. 343, 349 (1996).

opening of his legal mail compromised his case.[153] Furthermore, Al-Amin did not specifically demonstrate how any of his legal matters were damaged.[154] As such, the court concluded that Al-Amin did not successfully show the indispensable actual injury requirement to succeed in his access to the courts claim.[155]

However, the court in *Al-Amin* determined that his First Amendment right to free speech was violated by the prison officials' continued practice of opening his legal mail outside his presence.[156] The court in *Al-Amin* determined that the right to access claims and the right to free speech claims are independent of one another.[157] A prisoner's presence in a prison does not strip that prisoner of his First Amendment right to free speech.[158] Al-Amin's ability to use the mail is a medium for him to express his right to free speech.[159] "[G]iven their incarceration and often distance from their attorneys, prisoners' use of the mail to communicate with their attorneys about their criminal cases may frequently be a more important free speech right than the use of their tongues."[160]

Furthermore, the court in *Al-Amin* relied on the Third Circuit Court of Appeals' holding in *Jones v. Brown*,[161] which determined "that a state prison's 'pattern and practice' of opening attorney mail outside the inmate's presence 'interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech.'"[162] The court in *Al-Amin* determined that to maintain a constitutional claim for violation of a prisoner's free speech rights, a separate showing of actual injury is not required beyond the violation itself.[163] Specifically, the court in *Al-Amin* agreed with the Third Circuit's conclusion that a separate showing of actual injury is not required for claims of free speech violations.[164] Thus, "Al-Amin has a First

153. *Al-Amin*, 511 F.3d at 1333.

154. *Id.* There was nothing provided by Al-Amin that showed "specific cases or claims being pursued, nor any deadlines missed, nor any effect on Al-Amin's legal claims." *Id.*

155. *Id.*

156. *Id.*

157. *See Al-Amin*, 511 F.3d at 1334.

158. *See id.* at 1333. "[I]t is well established that a prison inmate '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.'" *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

159. *Id.*

160. *Id.* at 1333–34.

161. 461 F.3d 353 (3d Cir. 2006).

162. *Al-Amin*, 511 F.3d at 1334 (quoting *Jones*, 461 F.3d at 359).

163. *Id.* at 1333.

164. *Id.* at 1334.

Amendment free speech right to communicate with his attorneys by mail, separate and apart from his constitutional right to access to the courts."[165] Additionally, the court in *Al-Amin* relied on *Lemon v. Dugger*,[166] which stressed that a prisoner's basic interest is unconstrained and effective communication with his or her attorney.[167]

2. Third Circuit Court of Appeals

"Of all communications, attorney mail is the most sacrosanct."[168] The main decisions in the Third Circuit Court of Appeals that discuss prisoners' rights to legal mail are *Bieregu v. Reno*[169] and *Jones*.[170] The earlier decision, *Bieregu*, involved a prisoner's claim that prison officials violated his rights by repetitively opening his properly marked legal mail outside his presence.[171] The court in *Bieregu* reviewed numerous courts of appeals decisions that determined that opening legal mail outside of a prisoner's presence violates the Constitution.[172] The Third Circuit determined that the source of a prisoner's right to receive his or her legal mail unread and opened in his or her presence derived from both the First Amendment right to freedom of speech and the right to access the courts.[173] The Third Circuit noted a potential source in the right to privacy.[174]

In *Bieregu*, the court stated that the right of court access is included within the Due Process Clause of the Fourteenth Amendment and under the First Amendment right to petition clause.[175] The court in *Bieregu* failed to recognize the decision in *Hudson v. Robinson*,[176] which required that a prisoner be "'actually denied' access to the courts" to claim his right to access the courts had been violated.[177] Alternatively, *Bieregu* followed the Third Circuit's later decision in *Peterkin v. Jeffes*,[178] which imposed a demarcation between ancillary aspects of access to the courts, which merely

165. *Id.*
166. 931 F.2d 1465 (11th Cir. 1991).
167. *See Al-Amin*, 511 F.3d at 1331–32 (quoting *Lemon*, 931 F.2d at 1467).
168. Bieregu v. Reno, 59 F.3d 1445, 1456 (3d Cir. 1995), *abrogated in part by* Lewis v. Casey, 518 U.S. 343, 349 (1996).
169. *Id.* at 1445.
170. Jones v. Brown, 461 F.3d 353, 355–56 (3d Cir. 2006).
171. *Bieregu*, 59 F.3d at 1448.
172. *Id.* at 1450.
173. *Id.* at 1456–58.
174. *See id.* at 1456 n.5.
175. *See id.* at 1453–54.
176. 678 F.2d 462 (3d Cir. 1982).
177. *Bieregu*, 59 F.3d at 1454–55 (quoting *Hudson*, 678 F.2d at 466).
178. 855 F.2d 1021 (3d Cir. 1988).

impact convenience or comfort without depriving access to the courts, from prison regulations that are central to a prisoner's right of access to the courts.[179] Regulations that are central to a prisoner's access to the courts do not require actual injury, but ancillary claims require proof of actual injury.[180]

The court in *Bieregu* determined that repeatedly violating the confidentiality of a prisoner's legal mail are central to the right of access to the courts.[181] Therefore, *Bieregu* concluded that prison officials repetitive reading of a prisoner's legal mail does not require the prisoner to show proof of actual injury in order for the prisoner to establish an infringement of that right.[182] Similar to the former Fifth Circuit's *Taylor* decision, the court in *Bieregu* determined that "the only way to ensure that mail is not read when opened, and thus to vindicate the right of access, is to require that it be done in the presence of the inmate to whom it is addressed."[183]

The recent 2006 decision in *Jones* assessed the constitutional validity of a new prison policy requiring the opening of prisoners' legal mail outside their presence.[184] The state enacted this new policy to safely secure its prisons from the threat of anthrax attacks fueled by the September 11, 2001 terrorist attacks.[185] Prior to this change in policy, all legal mail was required to be opened in the prisoner's presence.[186] The court in *Jones* analyzed the vitality of *Bieregu* in relation to *Lewis*.[187] *Jones* determined that *Lewis* had no effect on Bieregu's First Amendment free speech claims.[188] *Bieregu*'s

179. *Bieregu*, 59 F.3d at 1455 (quoting *Peterkin*, 855 F.2d at 1041).

180. *Id.* (citing *Peterkin*, 855 F.2d at 1041–42).

181. *Id.*

182. *Id.*

183. *Id.* at 1456 (citing Wolff v. McDonnell, 418 U.S. 539, 576–77 (1974)); *see* Guajardo v. Estelle, 580 F.2d 748, 758 (Former 5th Cir. 1978); Taylor v. Sterrett, 532 F.2d 462, 475 (Former 5th Cir. 1976). Reading prisoners' legal mail would likely violate the right of court access "even more than simply opening and inspecting it." *Bieregu*, 59 F.3d at 1456. "[I]nterference with attorney mail probably infringes the right of court access even more than interference with court mail, whether the correspondence relates to a criminal conviction, a subsequent collateral proceeding, or a civil suit to protect an inmate's constitutional rights." *Id.*

184. *See* Jones v. Brown, 461 F.3d 353, 355–56 (3d Cir. 2006).

185. *See id.* at 356.

186. *Id.*

187. *See id.* at 359.

188. *Id. Jones* reaffirmed *Bieregu*'s holding that

> [a] state pattern and practice, or, as is the case here, explicit policy, of opening legal mail outside the presence of the addressee inmate interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech. The practice deprives the expression of confidentiality and chills the inmates' protected expression, regardless of the state's good-faith protestations that it does not, and will not, read the content of the communications. This is so because "the

ruling that no proof of actual injury needs to be shown for First Amendment free speech claims remains well established law.[189]

Following *Lewis*, the Third Circuit in *Oliver v. Fauver*[190] ruled that in order to sustain a claim for denial of access to the courts the prisoner must show evidence of actual injury.[191] Thus, in doing so, it is clear that *Bieregu* was "effectively overruled."[192] The particular evidence necessary to satisfy the actual injury requirement was not elaborated on in *Jones* beyond the broad statement that the prisoner must have been "hindered in an effort to pursue a nonfrivolous legal claim."[193]

The court in *Jones* determined that "while the health and safety of inmates and staff are legitimate penological interests, if there is no information suggesting a significant risk of an anthrax attack, there is no reasonable connection between those interests and the policy of opening legal mail in the absence of the inmate addressee."[194] Therefore, the prison officials failed to meet their burden under *Turner's* first step.[195] Thus, in *Bieregu* and *Jones*, the Third Circuit Court of Appeals held that a prisoner has a constitutional right to receive his or her legal mail unread and opened in his or her presence.[196] Such prisoners' rights are grounded in both the right to access the courts and the right to free speech.[197]

3. Sixth Circuit Court of Appeals

Recently, the Sixth Circuit Court of Appeals in *Sallier v. Brooks*[198] determined that a prisoner's interest in communicating confidentially with an

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only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed."

Jones, 461 F.3d at 359 (quoting *Bieregu*, 59 F.3d at 1456).

189. *Id.*

190. 118 F.3d 175 (3d Cir. 1997).

191. *Jones*, 461 F.3d at 359 (citing *Oliver*, 118 F.3d at 177–78).

192. *Id.* at 359 (quoting *Oliver*, 118 F.3d at 178). However, *Bieregu*'s First Amendment free speech ruling is still good law. *Id.*

193. *Id.* "[T]he inmate must show that his or her exercise of the right at issue, the right of accessing the courts to secure judicial relief, has been infringed in some consequential way." *Id.* (citing Lewis v. Casey 518 U.S. 343, 349 (1996)).

194. *Jones*, 461 F.3d at 364.

195. *Id.* The regulations were not "'reasonably related to legitimate penological interests.'" *Id.* at 360 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

196. *See id.* at 359; Bieregu v. Reno, 59 F.3d 1445, 1456 (3d Cir. 1995), *abrogated in part by* Lewis v. Casey, 518 U.S. 343, 349 (1996).

197. *Jones*, 461 F.3d at 359; *Bieregu*, 59 F.3d at 1456.

198. 343 F.3d 868 (6th Cir. 2003).

attorney is a primary element of the judicial process.[199] Therefore, legal mail, as a matter of law, implicates a prisoner's constitutionally protected right to receive mail from an attorney.[200] "There is no penological interest or security concern that justifies opening such mail outside of the prisoner's presence when the prisoner has specifically requested otherwise."[201] As such, it is widely held throughout the Sixth Circuit Court of Appeals that prisoners have a constitutionally protected right to receive legal mail unread and opened in their presence.[202]

4. Other United States Circuit Courts of Appeals

Numerous other United States Circuit Courts of Appeals, including the First, Second, Seventh, Eighth, Ninth, and Tenth, have all held that a prisoner has a constitutional right to receive his or her legal mail opened in his or her presence.[203] In *Smith v. Robbins*,[204] the First Circuit determined that legal mail from attorneys may not be opened outside the prisoner's presence because the prisoner's presence ensures that the legal mail will remain unread.[205] The First Circuit further noted that otherwise, prisoners will fear that their legal mail will be read.[206] The Second Circuit determined in *Davis v. Goord*[207] that interfering with a prisoner's legal mail implicates a prisoner's right to access the courts.[208]

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199. *Id.* at 877; *see* Knop v. Johnson, 977 F.2d 996, 1012 (6th Cir. 1992) (stating that "[a] prisoner's right to receive mail is protected by the First Amendment").

200. *Sallier*, 343 F.3d at 877; *see* Kensu v. Haigh, 87 F.3d 172, 175 (6th Cir. 1996) (holding that "prison officials should have treated the legal materials delivered to [the prisoner] as 'legal mail' and, therefore, should not have examined the contents outside [the prisoner's] presence").

201. *Sallier*, 343 F.3d at 877–88; *see* Muhammad v. Pitcher, 35 F.3d 1081,1085–86 (6th Cir. 1994) (holding that the prison policy of opening mail from the state attorney outside of a prisoner's presence is unconstitutional because the practice "is not reasonably related to [a] penological interest"); *Knop*, 977 F.2d at 1011 ("[T]he court ordered implementation of a system-wide policy insuring that legal mail will be opened only in the presence of the addressee if that is the addressee's wish.").

202. *Sallier*, 343 F.3d at 877–78; *Kensu*, 87 F.3d at 175; *Muhammad*, 35 F.3d at 1085–86; *Knop*, 977 F.2d at 1011.

203. *See* Al-Amin v. Smith, 511 F.3d 1317, 1329 (11th Cir. 2008); Bieregu v. Reno, 59 F.3d 1445, 1456 (3d Cir. 1995), *abrogated in part by* Lewis v. Casey, 518 U.S. 343, 349 (1996).

204. 454 F.2d 696 (1st Cir. 1972).

205. *See id.* at 697.

206. *See id.*

207. 320 F.3d 346 (2d Cir. 2003).

208. *Id.* at 351. However, the Second Circuit also concluded that only two incidents of prison officials interfering with legal mail "are insufficient to state a claim for denial of access

Additionally, the Seventh Circuit, in *Kaufman v. McCaughtry*,[209] determined that when prison officials open a prisoner's properly marked legal mail outside his or her presence, it potentially violates the prisoner's rights.[210] The Seventh Circuit further determined in *Castillo v. Cook County Mail Room Department*[211] that opening the prisoner's legal mail on three occasions outside the prisoner's presence implicates a "colorable claim" violation of the prisoner's constitutional rights.[212] Furthermore, the Eighth Circuit in *Powells v. Minnehaha County Sheriff Department*[213] concluded that there is a cause of action for a constitutional violation when prison officials open prisoners' legal mail outside their presence.[214] The Eighth Circuit in *Jensen v. Klecker*[215] determined that prison officials' repeated opening of a prisoner's legal mail outside the prisoner's presence violated the prisoner's rights.[216] In addition, the Tenth Circuit, in *Ramos v. Lamm*,[217] determined that opening prisoners' legal mail outside their presence violates their First and Fourteenth Amendment rights.[218] Lastly, the Ninth Circuit in *Stevenson v. Koskey*[219] stated in its dissenting opinion that reading prisoners' legal mail may infringe upon prisoners' rights to privacy.[220]

B. *A Circuit That Fails to Recognize Prisoners' Constitutional Rights to Receive Legal Mail Unread and Opened in Their Presence*

1. Fifth Circuit Court of Appeals' *Brewer v. Wilkinson* Ruling

Post-*Turner*, the Fifth Circuit, in *Brewer v. Wilkinson*,[221] reassessed the *Taylor* and *Guajardo* holdings.[222] In *Brewer*, the prisoners claimed that the prison officials' practice of opening prisoners' legal mail violated their con-

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to the courts because [the prisoner] has not alleged that the interference with his mail either constituted an ongoing practice of unjustified censorship or caused him to miss court deadlines or in any way prejudiced his legal actions." *Id.* at 352.

209. 419 F.3d 678 (7th Cir. 2005).
210. *Id.* at 686.
211. 990 F.2d 304 (7th Cir. 1993) (per curiam).
212. *See id.* at 305, 307.
213. 198 F.3d 711 (8th Cir. 1999) (per curiam).
214. *Id.* at 712.
215. 648 F.2d 1179 (8th Cir. 1981) (per curiam).
216. *Id.* at 1182–83.
217. 639 F.2d 559 (10th Cir. 1980).
218. *Id.* at 582.
219. 877 F.2d 1435 (9th Cir. 1989).
220. *Id.* at 1443 n.2 (Reinhardt, J., dissenting).
221. 3 F.3d 816 (5th Cir. 1993).
222. *Id.* at 822–23, 825.

stitutional rights.[223] Specifically, the prisoners claimed that the prison officials' practice infringed upon their access to the courts and their First Amendment rights.[224] The Fifth Circuit acknowledged that prisoners' rights of access to the courts are constitutionally protected rights.[225] However, *Brewer* "acknowledge[d] that what we once recognized in [*Taylor*] as being 'compelled' by prisoners' constitutional rights—i.e., that a prisoner's incoming legal mail be opened and inspected only in the prisoner's presence—is no longer the case in light of *Turner*."[226] Accordingly, *Brewer* held "that the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights."[227]

Brewer affirmed the district court's decision that summary judgment was proper because appellants had failed to make out "a cognizable constitutional claim."[228] Therefore, the Fifth Circuit failed to recognize the distinction between free speech and access to courts claims.[229] Specifically, the Fifth Circuit failed to recognize the actual injury requirement differences between free speech and access to the courts claims.[230] The court in *Brewer* noted that the prisoners' pleadings were deficient for numerous reasons.[231] *Brewer* mentioned that the prisoners alleged that their legal mail was opened and inspected.[232] But, they did not allege that the mail was read.[233] Additionally, they did not allege "that their ability to prepare or transmit a necessary legal document ha[d] been affected by this opening and inspection."[234] Furthermore, they did not allege that their legal mail had been censored.[235] Lastly, the prisoners acknowledged the prison's "'legitimate penological objective' of prison security."[236]

Despite *Brewer*'s acknowledgment of the prisoners' deficient pleadings, the Fifth Circuit, nevertheless, overruled *Taylor*.[237] *Brewer* held that the prisoners "have not stated a cognizable constitutional claim either for a deni-

223. *Id.* at 817–18.
224. *Id.* at 818.
225. *Id.* at 820.
226. *Brewer*, 3 F.3d at 825.
227. *Id.*
228. *Id.*
229. *See id.*
230. *Id.* at 825.
231. *See Brewer*, 3 F.3d at 825.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Brewer*, F.3d at 825.
237. *Id.*

al of access to the courts or for a denial of their right to free speech by alleging that their incoming legal mail was opened and inspected for contraband outside their presence."[238] The Fifth Circuit's decision in *Brewer* is an anomaly.[239] *Bieregu* acknowledged that its holding was different than *Brewer's*.[240] Most importantly, *Bieregu* stated that its holding "comports with the results reached by the majority of courts of appeals to consider these precise or similar issues, not to mention the results reached by our own district courts."[241] The majority of circuit courts have held that prisoners have a constitutionally protected right to have their legal mail opened in their presence.[242] Therefore, *Brewer* is inconsistent with the majority of courts.[243]

V. CONCLUSION

Legal mail is sacred.[244] Prisoners may lose certain legal rights upon entrance into prison; however, prisoners still retain many constitutional rights that "free citizens" receive and enjoy.[245] Mail is a prisoner's primary form of communication.[246] Interfering with a prisoner's legal mail threatens the main avenue, often the only avenue, that a prisoner has to implement his or her constitutional rights.[247] Prisoners' constitutional rights to access the courts and free speech are violated by prison officials opening their legal mail outside their presence.[248] So, to assuage such fears that his or her mail will be read, circuit courts have required that legal mail be opened in a prisoner's presence.[249] This practice balances both the need for prison security and the prisoner's need for uninhibited communication with attorneys.[250] Most importantly, requiring legal mail to be opened in the prisoner's presence ensures that prisoners will not fall victim to unconstitutional prison regula-

238. *Id.*
239. *See* Bieregu v. Reno, 59 F.3d 1445, 1458 (3d Cir. 1995); *see also* Al-Amin v. Smith, 511 F.3d 1317, 1328–30 (11th Cir. 2008).
240. *Bieregu*, 59 F.3d at 1458.
241. *Id.*
242. *Id.*; *see also Al-Amin*, 511 F.3d at 1329.
243. *Bieregu*, 59 F.3d at 1458.
244. *See id.* at 1456.
245. *See id.* at 1449.
246. *See id.* at 1455.
247. *Id.*
248. Al-Amin v. Smith, 511 F.3d 1317, 1325–34 (11th Cir. 2008).
249. *See id.* at 1331.
250. Taylor v. Sterrett, 532 F.2d 462, 477 (Former 5th Cir. 1976).

tions.[251] This process is neither burdensome nor interferes with prison security.[252]

The majority of United States Circuit Courts of Appeals have determined that prisoners have a right to receive their legal mail unread.[253] Courts have further elaborated that such a right requires the mail to be opened in the prisoner's presence to ensure that its contents remain untainted.[254] Only one of the United States Circuit Courts of Appeals found it constitutional to censor a prisoner's legal mail and even managed to overturn a binding precedent in its circuit.[255] However, its holding remains an anomaly among United States Circuit Courts of Appeals.[256] The majority of United States Circuit Courts of Appeals have determined that there is no "rational connection" between the prison practice of opening a prisoner's legal mail outside his or her presence and a legitimate government interest.[257] Such a practice hinders their constitutional rights of access to the courts and free speech.[258] As such, prisoners have a constitutionally protected right to have their legal mail opened in their presence.[259] Therefore, a prisoner's right to legal mail is not shed upon entrance into the prison gates.[260]

251. *Bieregu*, 59 F.3d at 1455.
252. *Taylor*, 532 F.2d at 477.
253. *See Bieregu*, 59 F.3d at 1458.
254. *See Al-Amin*, 511 F.3d at 1331.
255. *See* Brewer v. Wilkinson, 3 F.3d 816, 825 (5th Cir. 1993).
256. *Bieregu*, 59 F.3d at 1458; *see also Al-Amin*, 511 F.3d at 1328–30.
257. *Al-Amin*, 511 F.3d at 1331.
258. *Id.* at 1325–34.
259. *Id.*
260. *See Bieregu*, 59 F.3d at 1449.