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### Freedom of Speech and Internet Access in Prisons

Free speech is a necessary component of any truly democratic society. It provides a level of influence to each citizen, which fuels the democratic process. A government is to derive its authority from the consent of the governed, and representation through the ability to affect governmental decisions is the distinctive feature of a free society. The ability to access the internet has become closely intertwined with the ability to express oneself and participate in public discourse in modern society. This has an unequal impact on different people within a society, presenting a troubling limitation on the freedom of expression for people who are incarcerated. Allowing incarcerated inmates monitored internet access affords them the First Amendment rights they are entitled to, providing a substantial benefit to society, with little meaningful safety risks.

First amendment rights are universally essential, extending beyond free adults. The United States Supreme Court recognized this in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) holding that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” This strongly resembles a case decided just five years later, in which the court held that “a prisoner does not shed such basic First Amendment rights at the prison gate” when referring to prisoners sending and receiving mail *Procunier v. Martinez*, 416 U.S. 396 (1974). These cases properly affirm First Amendment rights in different contexts where people’s rights have historically been restricted. There of course is a difference between the rights of students and those of prisoners, but a constant fact remains that First Amendment rights should not be stripped from anyone, absent an extremely compelling governmental interest. However, the *Procunier* ruling has been overturned in a litany of supreme court cases, most notably in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), when the court held that First Amendment restrictions in prisons are “valid if [they are] reasonably related to legitimate penological interests.” This overly broad and restrictive stance

allows the court to escape the general strict scrutiny analysis, and restrict numerous First Amendment freedoms of prisoners, including the ability to access the internet.

Free speech is not only beneficial as a means to democratic participation, but also as a good in itself, furthering both a person's autonomy and liberty. This is an equally, if not more, pertinent consideration in prisons, where autonomy and liberty are so heavily restricted. Incarceration isn't supposed to be a baseless and complete removal of rights, there rather must be a clear reason and specific societal good that it furthers. 18 U.S.C. (United States Code) § 3553 enumerates four factors to consider for sentencing: punishment (retribution), deterrence, incapacitation, and rehabilitation. The punishment component is the most vague of these and fails to demonstrate any clear societal benefit outside of deterrence, aside from satisfying humans' natural inclination toward revenge. However, none of these are grounds for a blanket removal of rights. Clearly, there must be some effect on incarcerated people's rights to promote safety, which justifies the partial removal of inmates' fourth amendment rights against unreasonable searches, their second amendment right to bear arms, among others. But the Supreme Court has determined that diminishing rights must advance governmental "interests of the highest order, and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (2003). ~~Nebraska~~ state has banned phone usage in prisons, justifying it as a means to the incapacitation portion of a criminal sentence, reasoning that if inmates were able to communicate with the outside world it would pose a threat to public safety. While this is a legitimate governmental interest, the restriction of internet access is not narrowly tailored to this end. Inmates are already able to make phone calls with the outside world, and this is considered to be sufficiently controlled since they are recorded. There's no reason that allowing for internet access would allow for communications that are any more secretive, on a device that is well-monitored. There would be a permanent log of anything posted or any message sent, which would combine with terms of usage and disciplinary guidelines to partially restore inmates' First Amendment rights.

There is a clear incentive for the government to take the initiative to protect people's freedom of speech that goes beyond a person's general interests in autonomy and liberty. A proper democracy requires input from everyone who wishes to have input; voting rights and free speech are a means to achieve this. People who are incarcerated already lack the right to vote, meaning that they currently have no say in the laws that they are being punished for breaking.

When their right to vote is suspended, the only remedy to a lack of societal involvement is free speech. If there's a ballot proposition that addresses prison conditions or the effect of a conviction on future employment, inmates should at minimum have the ability to explain their point of view to the public in an attempt to participate in democracy. Not all information or speech coming out of prisons would be positive, but that is beside the point. So long as it isn't inciting a crime, libelous, containing a true threat, or including some other explicitly prohibited speech under the First Amendment, it shouldn't be prohibited. The supreme court in *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) recognized the First Amendment "as the guardian of our democracy." It "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office." If there was an unjust law that solely affected prisoners, it would be extremely difficult for them to contact a local representative or effectuate change. Speech is the necessary minimum for all citizens in a democratic society. Even if it's human nature to want to punish someone for committing a crime, and entirely exclude them from society, the First Amendment should require more than this emotional instinct. If people's speech is to be restricted, it must be a last resort, the final and only option to remedy a substantial problem. Such an unsolvable problem isn't present in today's prisons, providing no compelling justification for removing millions of people's political voices.

This also has broader positive impacts on society. A 2020 U.S. Department of Health and Human Services study found that recidivism rates are significantly lower when an inmate has instrumental family support. When someone's family isn't local or isn't able to answer a phone call at a particular time during the day, access to the internet provides them with the means necessary to keep in contact with them. In the 2016 study *Recidivism and Time Served in Prison*, published in *The Journal of Criminal Law and Criminology*, the authors determined that the lack of opportunities someone has after a long period of incarceration makes re-offense a more preferable alternative. Workforce opportunities in today's society are limited when one has little to no knowledge of the developments in technology. If someone is being released from a lengthy prison sentence, the transition back into society would be significantly less difficult if they had an understanding of and experience using the internet. Although obstacles may arise, the Supreme Court and the importance of the bedrock principle of free speech require that we do anything in our power to restore these fundamental rights, especially when there is little to no

legitimate interest in restricting them. If we don't want inmates contacting certain people, this can be resolved in the way it usually is, through a no-contact order. Restricting free speech, through restricting internet access, should be the last option. America spends over 81 billion dollars per year on mass incarceration, and adding computers or installing tracking technology on an inmate's smartphone is by no means an unreasonable expense. It's what our government should be spending money on, ensuring the liberties of all citizens, absent a compelling and contrasting government interest. People may not like what some prisoners would be posting online, but the entire purpose of the First Amendment is to allow for opinions or things that might be unpleasant. A self-governing society has no place restricting the voice of others. The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988).

However, when no such opportunity exists, the burden is on the rest of society to act as a mouthpiece for voiceless inmates. People must look to the journalists or other information sources to educate themselves on legislative issues related to prisons. Lawmakers are passing significant prison-related legislation on a regular basis, whether that be about sentencing, mental-health diversion programs, or a three-strike system. This affects society in its totality, not just free citizens, and thus, the interests of everyone must be considered. It's imperative to provide the opportunities to incarcerated individuals that prison doesn't provide on its own: communication and freedom of expression, knowledge that will help when entering the workforce, and a connection to the rest of society. And our lawmakers should follow the Supreme Court precedent, and only take away one's First Amendment rights when there is a specific and overwhelmingly compelling governmental interest. A per se rule against prison free speech is not the solution. Unless someone has incited a crime or committed a speech-related offense, they should not be stripped of their First Amendment rights due to an unrelated crime. Loss of rights must be specific and intentional, and losing certain rights through incarceration shouldn't mean all rights are limited. There must be ample internet access in prison, to ensure that incarcerated people can express themselves; anything else is contrary to the essence of the First Amendment.