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INTRODUCTION

The Bill of Rights exists to protect all of us, including those imprisoned for crimes.[1] Some have argued that scrupulous application of the Bill of Rights to those accused of crimes, even after conviction, serves the greater purpose of protecting the rest of us whom are either not accused or wrongfully accused.[2] The principle of judicial review includes the right and obligation of our courts to review the actions of the legislative and executive branches to ensure that the law of the land, including the Bill of Rights, is followed.[3] Even those imprisoned—rightly or wrongly—are protected by the Bill of Rights, albeit to a lesser extent, and the courts provide judicial review to make sure those rights are respected.[4] Generally, the Supreme Court has made it clear that to be imprisoned lawfully is to have your privileges and rights reduced.[5] This

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1. *See* Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

2. *See* Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401, 412–15 (2003).

3. *See* Procunier v. Martinez, 416 U.S. 396, 405–06 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

4. Some, however, have questioned the existence of a coherent rationale for such review. *See, e.g.*, *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 126, 263 (2006). This point is underscored by the Supreme Court's most recent decision on point, in which two justices said the only limit on the conduct of prison officials is the Eighth Amendment, Beard v. Banks, 548 U.S. 521, 536 (2006) (Thomas & Scalia, JJ., concurring in the judgment), and the plurality arguably approved of the tautological approach that denying the inmate the exercise of a constitutional right in effect gives the inmate an incentive to rehabilitate himself. *Id.* at 531 (plurality opinion).

5. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[L]awful incarceration brings about the

"retraction," as the Court has called it, is justified by the same considerations that underlie our penal systems.[6]

We have long understood the constitutional rights of prisoners to be diminished from those of non-prisoners. The Supreme Court has a well-established approach that is designed to protect inmates' rights, but only in the context of "deference to the appropriate prison authorities" and in accordance with a perceived need to respect (as a matter of separation of powers) the task that has been committed to another branch. All of this "counsels a policy of self restraint."[7] As one would expect, where an inmate challenges prison officials' conduct, the burden is on the challenger to show the unconstitutionality of the rules, policies, or actions.[8] The courts must presume that all rules and policies are constitutional until the challenger can show otherwise.[9]

As it relates to communications to and from prisoners, especially mail, and including "legal" mail in particular, however, there has been an ambiguously defined right for prisoners that has been applied just as ambiguously. The Supreme Court recently chose not to examine some legal mail issues in denying a petition for certiorari review of a decision of the U.S. Court of Appeals for the Eleventh Circuit, Al-Amin v. Smith.[10] There, Al-Amin alleged that prison officials repeatedly opened his privileged legal mail outside his presence and thus violated his constitutional rights of access to the courts and free speech. The defendants moved for summary judgment on qualified immunity grounds. The district court denied the motion, and the Eleventh Circuit reversed on the access to courts claim and affirmed on the free speech claim, leaving the latter for trial.[11] The decision was heavily dependent on the facts in the record.[12]

We have fifty state-prison systems, with fifty sets of rules, fifty sets

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necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.") (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)) (internal quotation marks omitted).

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

7. *Turner*, 482 U.S. at 85. *Turner* involved inmate to inmate correspondence and inmate marriages, not legal mail, but *Turner* is viewed as setting a broader standard in the inmate communications context. As the Eleventh Circuit noted in *Al-Amin v. Smith*, although *Turner*'s subject matter was different, "*Turner* is important because it held that when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 511 F.3d 1317, 1327 (11th Cir. 2008) (internal quotation marks omitted).

8. *See, e.g.*, Overton v. Bazetta, 539 U.S. 126, 132 (2003).

9. *See* Bruce J. Winick, *The Right To Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 93–95 (1989).

10. 511 F.3d 1317.

11. *Id.* at 1320.

12. *See, e.g., id.* at 1320–23.

of goals, and fifty approaches to achieving those goals while serving those rules.[13] Those rules and goals are afforded substantial deference, but nonetheless a person does not surrender all of his[14] rights simply by virtue of entering a prison as a convicted felon. In particular, he retains First and Fourteenth Amendment rights, and so prison rules or practices that infringe on those rights are subject to judicial review and potential invalidation.[15]

Our thesis is that virtually all of the decisions in this area are driven by the facts, not the law, and that *pro se* litigants, the lawyers representing them, and the lawyers for the prosecution are well-advised to focus not on the philosophical and semantic analysis of Supreme Court decisions and opinions, but rather on the factual matters in the case at hand.

The typically stated concern for inspecting mail is that contraband such as drugs or illicit items such as hacksaws or other tools might be delivered to prisoners under the auspices of private correspondence.[16] "The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters."[17] This means that incoming mail, even apparently legal mail, may be opened and inspected, but not read. In the Eleventh Circuit, the law is well established that all mail, including legal mail, may be inspected by prison officials, but that incoming legal mail from an inmates' attorneys, at least where properly marked as such, "may be opened only in the presence of the inmate. This inspection is limited to

13. For example, some institutions require inmates to pay for all postage, while some do not, and some inspect all outgoing mail, which some do not, and a few read every letter, some skim every letter, and others simply "spot-check" letters, while yet others only look for contraband. And who does what changes over time. Heath C. Hoffmann et al., *Communication Policy Changes in State Adult Correctional Facilities from 1971 to 2005*, 32 CRIM. JUST. REV. 47, 52–53 (2007).

14. According to the Bureau of Justice findings for 2007, there were 1,598,316 prisoners in federal or state prisons, with only 114,420 of them being female (i.e., roughly 5%). *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS BULLETIN (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf. For brevity's sake, and in awareness of this fact, we refer to 'he' instead of "he or she" herein.

15. *See* Winick, *supra* note 9, at 13 (describing how, in the case of New York Socialist Benjamin Gitlow, the Supreme Court recognized that "[f]or present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

16. *See, e.g.*, United States v. Young, 146 F. App'x 824, 826 (6th Cir. 2005) ("[T]hree [inmates] decided on smuggling in a hacksaw blade concealed in a legal pad under the guise of legal mail.").

17. Wolff v. McDonnell, 418 U.S. 539, 577 (1974). In *State v. Steffes*, 659 N.W.2d 445, 449 (Wis. Ct. App. 2003), marijuana was flattened by the inmate's unincarcerated brother and placed between sheets of papers in an envelope marked "legal papers," and purporting to be from the public defender's office.

locating contraband."[18] The Fifth Circuit clarified that this means that "freedom from censorship is not equivalent to freedom from inspection or perusal."[19]

Many things have changed in the prison system over the past century, but one thing has not: the ingenuity of prisoners. Speaking of smuggling "dope" into Sing Sing prison, one author noted the use of books, magazines, and letters to conceal the drugs and concluded the "ingenuity of man was exhausted in finding new ways" to beat the system.[20] What has changed is the set of tools available to prisoners. Now they find that they can sometimes beat the system by faking legal mail.[21]

In particular as to mail, the Court has consistently confirmed the constitutional rights of the inmate to the sanctity of their mail, but just as consistently (and some would say more so) given a broad deference to prison officials: so long as there remain channels of communication that are "reasonable and effective," and so long as there is no discrimination in terms of content, the prison officials are to be given "latitude."[22] The unanswered question though, is exactly what "reasonable," "effective," "discrimination," and "latitude" truly mean. On the other hand, there is just as explicit an obligation that the State affirmatively preserve those remaining channel(s) of communication.[23]

The courts, however (including the Supreme Court), have struggled with defining just what rights are retained, to what extent, in what context, and what kind of framework should be used to determine whether those rights have been infringed upon. This lack of any clear listing of these rights might be surprising, but in light of a parallel trend in these

18. Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976). In *Bonner v. City of Prichard*, "the first case to be heard by the United States Court of Appeals for the Eleventh Circuit, the court held "that the decisions of the United States Court of Appeals for the Fifth Circuit (the 'former Fifth' or the 'old Fifth'), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in this circuit." 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

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

20. THOMAS MOTT OSBORNE, PRISONS AND COMMON SENSE 86, 87 (1924).

21. *See, e.g.*, Felton v. Lincoln, 429 F. Supp. 2d 226, 234 (D. Mass. 2006) (hate mail was disguised as attorney-client communications).

22. Pell v. Procunier, 417 U.S. 817, 826 (1974) ("So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, 'prison officials must be accorded latitude.'") (quoting Cruz v. Beto, 405 U.S. 319, 321 (1972)).

23. *See, e.g.*, Winick, *supra* note 9, at 40 ("Courts have recognized that even convicted prisoners have a first amendment right to communicate outside the institution. Moreover, the public enjoys first amendment protection against unjustified governmental interference with communications from prisoners . . . ."); William J. Simonitsch, Comment, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI L. REV. 665, 670 (2000) ("[I]ncarceration is not a wall between the convict and the Constitution.").

decisions we can make better sense of it. If the Court were primarily concerned with the rights as an abstract issue, they would likely be motivated to enunciate them clearly. However, that is not the case: in most or all of these cases, the determinative issue has not been the philosophy, but rather the facts, or at least the alleged or disputed issues of fact. While there are those who say the Supreme Court has been changing the rules to narrow the inmate's rights, analysis of the decisions, including the most recent decisions in the Eleventh Circuit, indicates that the critical factor is not the legal standard but, depending on the stage of the case, the alleged facts or facts or issues of fact in the record, as applied to the legal standard.

It might seem absurd to discuss whether someone's rights have been violated without clearly enumerating those rights. One might say that for a court to determine whether a person's constitutional right has been infringed, one should know what that constitutional right is, as the standards applicable to determining infringements of those rights may differ depending on the right at issue.[24] Both of these points are correct, but nonetheless, the courts have neglected to engage in that analysis clearly and uniformly. As it relates to mail, or at least "legal" mail, one could argue that the courts have simply been all over the place, with no unified or even consistent approach. Thus, in a very recent decision, the Eleventh Circuit acknowledged that one constitutional right, the "right of access to the courts," is "grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."[25] If, as many courts say, the reason for recognizing a right of access to the courts—a right not enumerated in any provision of or amendment to the Constitution[26]—is to permit the

24. Jonathan R. Rosenn, *The Constitutionality of Statutes Prohibiting and Permitting Physician-Assisted Suicide*, 51 U. MIAMI L. REV. 875, 896–97 (1997) ("The standard of review the U.S. Supreme Court has developed for statutes . . . . varies. First, statutes that classify on the basis of a suspect class, i.e., race and alienage, trigger strict scrutiny. Thus, in order for a statute containing a racial classification to withstand constitutional scrutiny, the statute must serve a compelling state interest and the classification must be narrowly tailored to serve that interest. Second, statutes impinging upon fundamental rights also trigger strict scrutiny. Again, the statute's disparate treatment of one group of people must serve a compelling state interest, and the classification must be closely tailored to the purpose of the statute. Third, gender-based classifications trigger intermediate scrutiny, and, therefore, must be substantially related to an important governmental interest to pass constitutional muster. Finally, laws that neither impinge upon fundamental rights, nor classify on the basis of a suspect or quasi-suspect class, must be only rationally related to a legitimate state interest.") (internal citations omitted).

25. Al-Amin v. Smith, 511 F.3d 1317, 1325 n.17 (11th Cir. 2008) (internal quotation marks omitted).

26. As recently as 1977, Chief Justice Burger noted in a dissent that the Court had not yet identified the source of any right of access to the courts, nor the location in the law of any requirement that the states pay for that access. Bounds v. Smith, 430 U.S. 817, 833–34 (1977) (Burger, C.J., dissenting). Then Associate Justice Rehnquist added that the majority had

prisoner to have the tools he needs to take action in courts to attack his sentence or the conditions of his confinement,[27] one might have thought the Sixth Amendment would be on that laundry list that forms the penumbra out of which the right of access arises, but it was not.[28] One court in this Circuit has characterized the issue as, whether opening legal mail outside the inmate's presence or returning it to him unsent, resulted in "specific facts demonstrating how he was denied effective representation by counsel."[29] The Eleventh Circuit also stated, as has the Third Circuit, that there is a First Amendment freedom of speech right implicated by prison officials' opening of legal mail.[30] That is the law for now in this Circuit, and it provides the only basis for an action without actual injury. Yet, at the same time, at least two courts have questioned how, when that attorney mail is merely opened but not read, a speech right of the recipient of the letter is affected.[31] Put more abstractly, they have wondered how speech can be affected when it is neither suppressed nor restricted in content.

If this question of prisoners' legal mail is about access to the courts or freedom of speech, we can look to the broader analysis of those par-

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proceeded "to enunciate a fundamental constitutional right of access to the courts . . . which is found nowhere in the Constitution." *Id.* at 839 (Rehnquist, J., dissenting). The concept, as it applies to inmates, appears to have arisen in *Bounds*, which in turn relied upon *Ex Parte Hull*, 312 U.S. 546 (1941), a habeas corpus case that included no analysis for the proposition, much less an analysis that would provide a rationale for the context in which it is now being used.

27. *See, e.g.*, Hall v. Sec'y for the Dep't of Corr., No. 07-15376, 2008 WL 5377741, at *1 (11th Cir. Dec. 24, 2008) ("The Fourteenth Amendment gives prisoners a right of access to the courts. Inmates are not, however, guaranteed 'the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims,' but are only assured '[t]he tools . . . need[ed] in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.' 'The limited types of legal claims protected by the access-to-courts right [are] nonfrivolous appeals from a conviction, habeas petitions, or civil rights suits.'") (internal citations omitted); Lewis v. Cook County Bd. of Comm'rs, 6 F. App'x 428, 430 (7th Cir. 2001) ("[H]e does not describe a single legal case or claim that was in any thwarted because the mail room staff opened his legal mail.").

28. The Eleventh Circuit has also held the right arises from the Fourteenth Amendment. *Hall*, 2008 WL 5377741, at *1 ("The Fourteenth Amendment gives prisoners a right of access to the courts.") (citing Wilson v. Blankenship, 163 F.3d 1284, 1290 (11th Cir. 1998)).

29. Rix v. Wells, No. 8:08-CV-1728-T-30MAP, 2008 WL 4279661, at *3 (M.D. Fla. Sept. 16, 2008).

30. *See* Al-Amin v. Smith, 511 F.3d 1317, 1334 (11th Cir. 2008); Jones v. Brown, 461 F.3d 353, 359 (3d Cir. 2006) (a prison's practice of opening attorney mail interferes with protected communications and strips them of their confidentiality and "accordingly, impinges upon the inmate's right to freedom of speech").

31. *See* Hall v. Chester, No. 08-3235-SAC, 2008 WL 4657279, at *4 (D. Kan. Oct. 20, 2008) ("[T]he right to receive unopened legal mail is not, in other words, entitled to independent First Amendment protection.") (quoting West v. Endicott, No. 06-C-763, 2008 WL 906225 (E.D. Wis. Mar. 31, 2008)).

ticular rights for more information. Access-to-court claims clearly require an actual injury, as opposed to the mere violation of those rights.[32] In turn, actual injury requires proof that prison officials' actions actually impeded "the inmate's pursuit of nonfrivolous [sic], post-conviction claim or civil rights action."[33] On the other hand, First Amendment freedom of speech claims do not have this need to show "actual injury."[34] The implications of this distinction—that the very nature of allegations by the prisoner is different under different origins of the right—are both readily apparent, and clearly significant.

The problem, though, has been and continues to be just what those rights entail for prisoners when balanced against the legitimate needs of prison officials to operate the prisons, or at least when balanced in the factual context the courts are presented with individual lawsuits.

While there are those who attack the Supreme Court for exhibiting too much deference to prison officials,[35] reasonable analysis shows that what is normally determinative is the facts, not the legal standard. This suggests that rather than merely rubber-stamping the requests of prison officials, courts are actually engaging in the sort of factual balancing-test imagined by such concepts of deference. The current test was established in *Turner v. Safley*,[36] and while some describe it as a four-part test, it actually is a simple one-part test with four "factors" to use in applying the test: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[37] The four factors are: (1) a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it,[38] (2) consideration of alternative forms of expression available to the inmate,[39] (3) the burden on guards, prison officials, and other inmates if the prison is required to provide the freedom claimed by the inmate,[40] and (4) consideration of

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

33. A prisoner raising this claim "must show actual injury in the pursuit of specific types of nonfrivolous cases: direct or collateral attacks on sentences and challenges to conditions of confinement. 'Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.'" Wilson v. Blankenship, 163 F.3d 1284, 1290 (11th Cir. 1998) (internal citation and footnote omitted).

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

35. *See, e.g.*, Beard v. Banks, 548 U.S. 521, 542–53 (2006) (Stevens & Ginsburg, JJ., dissenting); *id.* at 553–56 (Ginsburg, J., dissenting); *see also* Jennifer N. Wimsatt, Note, *Rendering* Turner *Toothless: The Supreme Court's Decision in* Beard v. Banks, 57 DUKE L.J. 1209 (2008); *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 4, at 263.

36. 482 U.S. 78 (1987).

37. *Id.* at 89.

38. *Id.*

39. *Id.* at 90.

40. *Id.*

the existence of less restrictive alternatives that might satisfy the governmental interest.[41]

Thus, in *Turner*, the Court turned to the record and the evidence offered to justify that prison's prohibition on correspondence between institutions. As a preliminary matter, they looked at the interest to justify it, where the Court found the testimony offered to the effect that restricting communications among gang members and similar communications between felons was a legitimate security interest. There was clearly a connection between prohibiting correspondence and that interest. Having found the connection, the Court then considered the four factors, but only briefly. First, given that the regulation prohibited all written communications, and oral communications were not available, the Court could say only that it was a limited amount of speech that was being affected.[42] The Court acknowledged that a true prohibition was one that left the inmates with no way of communicating with each other, but said not all communications were being prevented here.

In *Beard v. Banks*,[43] some see the Court as, in effect, reducing the four factors to one, at least where the regulation is to further the prisoner's rehabilitation (an interest not present in *Turner* and the other major decisions on point). However, the *Beard* decision can also be seen to be more a product of its unusual or even unique factual scenario than an attempt to narrow the rights of prisoners.

In *Beard*, Banks—the inmate suing—was one of the forty most dangerous and recalcitrant inmates in the Pennsylvania system. Normal restrictions on activities, including communications such as legal mail, were, according to the prison officials, not enough for prisoners such as he. Thus, the issue for the Court was whether the Pennsylvania rule prohibiting all access to newspapers, magazines, and personal photographs (but permitting legal mail, personal correspondence, and library books, among other things) violated Banks's constitutional rights in his rather unique circumstances.[44] Banks was represented by counsel at all stages, something the Court made note of,[45] and the Court immediately focused not on the *Turner* standards, but on the state of the record as it related to the propriety of the summary judgment granted to the defendants. For example, the Court noted that Banks's counsel did not file any opposition to the defendants' motion for summary judgment, did not

41. *Id.* at 90–91.

42. *Id.* at 92 ("[T]he correspondence regulation does not deprive prisoners of all means of expression. Rather, it bars communication only with a limited class of other people with whom prison officials have particular cause to be concerned . . . .").

43. 548 U.S. 521 (2006).

44. *Id.* at 524–25.

45. *Id.* at 527.

seek to "place any significant fact in dispute," and failed "specifically to challenge the facts identified in the defendant's statement undisputed of facts," meaning "Banks is deemed to have admitted the validity of the facts contained in the Secretary's statement."[46] The Court's decision proceeded for several pages to discuss the lawsuit in terms of the facts and factual issues, or lack thereof, in the record, and only then did it proceed to address the *Turner* standard. When it ultimately applied the standard, the Court relied heavily on what it perceived to be the record at the time the trial court entered summary judgment for the defendant. The Court then found, on that factual record, that the *Turner* standard had been met.[47] Finally, the Court noted that it was not trying to foreclose inmates' claims, but simply deciding on the facts before it: "Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to specific facts in the record that could lead a rational trier of fact to find in his favor."[48] To be fair, the dissent challenged the Court's view of the record, but that discussion, too, was based on the facts as much as the alleged change of the legal standard.[49]

Eleventh Circuit decisions (especially district court decisions) as well as decisions from other circuits seem to bear out the recognition that the facts, not the legal standard, are what is critical. In *Al-Amin*, for example, the allegations were that prison officials had repeatedly opened privileged legal mail outside of Al-Amin's presence, in violation of his constitutional rights. The defendants' motion for summary judgment was denied, and they appealed. The Eleventh Circuit's decision was premised on the facts, and not any legal dispute. Thus, with regard to the access-to-courts claim—the one emanating from a penumbra of enumerated rights in the Constitution and the Bill of Rights—the decision was based on the absence of any facts upon which actual injury can be shown.

On the other hand, with regard to the First Amendment claim, the Eleventh Circuit ruled for Al-Amin because of those same facts. Thus, on the qualified immunity argument, the Court ruled that based on the "exact factual identity between prior case law and defendants' factual conduct," the qualified immunity defense failed, at least at the summary judgment stage. As the Court noted in a footnote reminiscent of the Supreme Court's decision in *Banks*, the defendants raised legal arguments based on alleged facts that were not argued below on summary

46. *Id.*

47. *Id.* at 531.

48. *Id.* at 536 (internal quotation marks omitted).

49. *Id.* at 544–47 (Stevens & Ginsburg, JJ., dissenting).

judgment, and thus could not be used in rendering the appellate court's decision.[50]

Even more recent decisions emphasize the critical nature of the facts. In *Corker v. Cannon*, a pro se action, Corker alleged unconstitutional interference with his legal mail, but the facts he alleged in support of his claim were insufficient, so the complaint was dismissed with leave to amend those facts, if he was able.[51]

Yet, despite this apparent reluctance to actually discuss the constitutional basis for the rights of access-to-courts, the courts continue to rely upon such rights, and find them in the penumbra.[52] Similarly, in *Pro v. Bandy*, the inmate's complaint was dismissed not because of a new standard, but because the facts he alleged did not meet existing standards.[53] On the other hand, in an earlier post-*Banks* decision by the same district judge, *Daker v. Ferrero*,[54] on cross-motions for summary judgment, the court held genuine issues of fact existed with regard to portions of the inmate's claim that required a trial. In a lengthy decision, the court analyzed the facts or factual issues in the record, and ruled based on that. Thus, in a section entitled "Materials Upon Which Defendants Have Failed To Proffer Any Legitimate Reason For a Content-Based Denial," where the court found genuine issues of fact, Daker prevailed; where it did not, he lost.[55]

Some decisions from other circuits are also instructive. For example, three district judges faced the similar issue of whether they should enjoin Pennsylvania prison officials from opening legal and court mail outside the inmates' presence. Two refused, while in *Fontroy v. Beard*[56] a third entered the injunction and refused to stay its order while the officials appealed, despite *Beard v. Banks*. The court noted that *Beard* does not stand for the proposition that more deference is owed to prison officials, or that prison officials after *Beard* but not after *Turner* need not provide as much factual support to justify the restrictions on inmates

50. Al-Amin v. Smith, 511 F.3d 1317, 1336 n.38 (11th Cir. 2008).

51. No. 8:08-CV-564-T-27TBM, 2008 WL 1847304, at *2–3 (M.D. Fla. Apr. 24, 2008).

52. Barbara Arco, Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 616–17 (1998) ("The right of access to courts and the right to petition the government for redress of grievances spring from the First Amendment's free speech and right-to-petition clauses. However, the right of access to courts is actually a discrete fundamental right, derived from various constitutional sources. In part, it derives from the due process clause, and the privileges and immunities clause, as well as from the First Amendment itself.").

53. No. 2:08-CV-0175-RWS, 2008 WL 4445080, at *3 (N.D. Ga. Sept. 25, 2008).

54. 506 F. Supp. 2d 1295 (N.D. Ga. 2007).

55. *Id.* at 1314–18. In another case, in which a former inmate sued, the district court engaged in extensive analysis on a motion for summary judgment, as required by *Beard*. Green v. Roberts, No. 2:06-CV-667-WKW, 2008 WL 4767471, at *1–10 (M.D. Ala. Oct. 29, 2008).

56. Fontroy v. Beard, No. 02-2949, 2007 WL 1810690 (E.D. Pa. June 21, 2007).

communications.[57] Instead, as the court stated,

> [u]nlike in this case, in *Banks*, the prison administration provided factual support for the rational connection between the challenged prison regulation and the state's interest. Specifically, the prison officials provided a statement of undisputed facts setting forth the bases for the regulation. The statement of facts referred to depositions, policy manuals and pleadings. The plaintiff did not challenge any of these facts, which were deemed admitted.[58]

Distinguishing the two district courts who went the other way, the judge in *Fontroy* noted that "[t]he *Harper* and *Robinson* courts undoubtedly gave thoughtful and well reasoned consideration of the issue and the facts presented. However, they did not have the benefit of a record developed and analyzed by counsel. The plaintiffs in the other cases acted *pro se*."[59]

CONCLUSION

The lesson of this analysis is that, while there is undoubtedly a valid debate about the constitutional origin of the rights accorded to inmates' communications, the Supreme Court has not focused on this area of discussion. Instead, in each case, it has confirmed the principle that what those rights protect is fact-based, with the level of deference accorded to prison officials being specific to each individual case.

57. *Id.* at *3.
58. *Id.*
59. *Id.* at *2.