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UTILIZING ELECTRONIC MAIL TO PREVENT DRUG TRAFFICKING IN PRISONS

Jessica Warshaw*

I. INTRODUCTION

For years, drug trafficking through the mail has caused serious security problems in prisons. Thousands of drug seizures and positive drug tests of inmates occur in prisons across the nation each year.¹ While drugs such as heroin, cocaine, and marijuana are commonly smuggled into prisons,² inmates now often use K2 as their “drug of choice.”³ Synthetic marijuana, otherwise known as K2 and Spice, is dangerous and affects inmates in different and unpredictable ways. An inmate may dance like a ballerina, scream at guards, attack a correctional officer, fall having a seizure, or have a hallucination.⁴ K2 is also deadly and has caused hundreds of drug overdoses.⁵

Classifying K2 as synthetic marijuana is misleading because, unlike marijuana, K2 can be “exceedingly toxic and potentially deadly.”⁶ K2 was legal until 2011, when the Drug Enforcement Administration

* Case Western Reserve University School of Law and Weatherhead School of Management. I thank Professor Jonathan Entin for his invaluable comments, discussions, and research assistance.

1. Laurie Junkins, *How Common Are Drugs in Prison?*, AVVOSTORIES (Mar. 21, 2011), <https://stories.avvo.com/crime/how-common-are-drugs-in-prison.html>.

2. Seth Ferranti, *Prisoners on the Eight Rules of Dealing Drugs Behind Bars*, DAILY BEAST (Sept. 11, 2016, 12:00 AM), <https://www.thedailybeast.com/prisoners-on-the-eight-rules-of-dealing-drugs-behind-bars?refroll>.

3. Mitch McCoy, *Arkansas Prisoner: K2 is 'Drug of Choice Right Now'*, KARK, <https://www.kark.com/news/local-news/arkansas-prisoner-k2-is-drug-of-choice-right-now/848602751> (last updated Oct. 31, 2017, 10:47 PM); Mike Ward, *'K2 is the new drug of choice' in Texas prisons, official says*, HOUS. CHRONICLE, <https://www.houstonchronicle.com/news/houston-texas/houston/article/K2-is-the-new-drug-of-choice-in-Texas-prisons-11276360.php> (last updated July 10, 2017, 11:30 AM).

4. Seth Ferranti, *The Federal Bureau of Prisons Has a Synthetic Marijuana Problem*, THE FIX (Apr. 19, 2017), <https://www.thefix.com/federal-bureau-prisons-has-synthetic-marijuana-problem>.

5. Tim Lammers, *Prisons around the country face a growing K2 problem*, FOX 61 (Sept. 25, 2018, 5:32 PM), <https://fox61.com/2018/09/25/prisons-around-the-country-face-a-growing-k2-problem/>.

6. Jacob Rosenberg, *K2 in prison: widely available, difficult to detect and potentially deadly*, ARK. TIMES (Oct. 5, 2017, 8:00 AM), <https://www.arktimes.com/arkansas/k2-in-prison-widely-available-difficult-to-detect-and-potentially-deadly/Content?oid=10162095>.

(DEA) banned K2 and the five chemicals used to make it.⁷ But this nationwide ban has been ineffective because the amount of synthetic marijuana appears to have actually increased.⁸

This Article explores the growing problem of K2 entering prisons through the mail and argues for electronic mail as the solution. Part I describes the dangerous impact of K2 on prison inmates and staff and explains why K2 is so difficult to detect in the mail, making it a popular drug to traffic into prisons. Part II focuses on prisoners' mail rights and how the Supreme Court determined what standard of review to apply to prisoners' rights cases. Understanding this standard of review is important, because if my proposed solution were implemented, it would have to satisfy this legal test. Part III discusses how other prisons have attempted to prevent K2 from entering their institutions. Part IV criticizes the approaches introduced in Part III because they are too costly to inmates and their families or they do not cover all types of inmate mail. Finally, I then propose my solution of requiring all inmates' mail to be sent to prisons electronically, whether it be non-legal mail, publications, or legal mail. My solution would logically satisfy the legal standard set out in Part III and would significantly reduce the amount of K2 and other drugs entering prisons. This solution would also result in additional benefits, including the increased efficiency of prison security.

I. THE IMPACT OF K2

For inmates, K2 is a highly sought-after drug, and the number of reported K2 incidents has increased significantly in the last few years.⁹ K2 is popular to traffic into prisons because it is inexpensive and difficult to detect.¹⁰ Unlike other narcotics, K2 does not show up in drug tests, such as urinalysis.¹¹ And even if prisons are able to detect when an inmate uses K2, the punishment is much less severe than the punishment for the use of other narcotics.¹² Inmates are doing whatever is

7. Katie Moisse, *DEA Bans Sale of K2, Synthetic Marijuana, and Five Chemicals Used to Make it*, ABC NEWS (Mar. 1, 2011, 8:55 AM), <https://abcnews.go.com/Health/Wellness/k2-crack-down-drug-enforcement-administration-bans-fake-pot/story?id=13027548>.

8. *Symptoms, Signs & Effects of K2 & Spice (Synthetic Marijuana) Addiction*, VERMILION BEHAV. HEALTH SYS., <https://www.acdiavermilion.com/addiction/synthetic-marijuana/withdrawals-signs-symptoms/> (last visited Aug. 20, 2019) [hereinafter VERMILION BEHAVIORAL HEALTH SYSTEMS].

9. Rosenberg, *supra* note 6. For instance, in Arkansas prisons, the number of K2 incidents increased from 46 incidents in 2014 to 707 incidents by October of 2017. *Id.*

10. *Id.*

11. Ferranti, *supra* note 4.

12. *Id.*

necessary to attain the drug.¹³ K2, however, is extremely dangerous to prison inmates and staff. The toxic chemicals of K2, added together with the difficulty of detection, create a drug that is a growing threat to prison security.¹⁴

A. *The Physical Effects of K2 on Prison Inmates and Staff*

K2 is referred to as synthetic marijuana because the compounds of K2 affect the same cell receptors in the brain as THC, or tetrahydrocannabinol,¹⁵ the primary psychoactive element of marijuana.¹⁶ But K2 is thought to bind more strongly to the brain's cell receptors, which can lead to more powerful reactions by users of the drug.¹⁷ Unlike marijuana, users react differently and unpredictably to the drug because K2 is created using formulations of various, unknown chemicals in inconsistent ways.¹⁸ K2 can cause delusions, violent behavior, anxiety, confusion, rapid heart rate, nausea, vomiting, seizures, paranoia, hallucinations, suicidal thoughts,¹⁹ coma, or sudden death.²⁰ Scientific studies describe the effects of K2 as "psychosis, seizures, [and] dependence."²¹ The Centers for Disease Control and Prevention (CDC) has conducted studies showing that K2 can become addictive over time.²²

Drug overdoses in prisons have "skyrocketed,"²³ and many young inmates have died.²⁴ Especially in recent years, states have been struggling with the serious and fatal effects of K2. In Arkansas prisons, K2

13. *Id.*

14. Tess Owen, *Inmates across the country are dying from K2 overdoses*, VICE NEWS (Sept. 7, 2018, 10:09 AM), <https://www.vice.com/en/article/wjkw9/inmates-across-the-country-are-dying-from-k2-overdoses>; see also Lammers, *supra* note 5.

15. *How harmful is K2/Spice (synthetic marijuana or synthetic cannabinoids)?*, CDC, <https://www.cdc.gov/marijuana/faqs/how-harmful-is-k2-spice.html> (last updated Mar. 7, 2018).

16. VERMILION BEHAVIORAL HEALTH SYSTEMS, *supra* note 8.

17. *Id.*

18. *Id.*

19. Sam Ruland, *What you need to know about K2 – the synthetic marijuana that triggered Pa. prison lockdown*, YORK DAILY REC. (Sept. 5, 2018, 11:08 AM), <https://www.ydr.com/story/news/2018/09/05/k-2-synthetic-marijuana-. . . aused-pennsylvania-prison-lockdown-what-you-need-know/1192337002/>.

20. VERMILION BEHAVIORAL HEALTH SYSTEMS, *supra* note 8; see also *What is K2 (Synthetic Marijuana) & Why is it Dangerous?*, SUNRISE HOUSE, <https://sunrisehouse.com/k2-drug-abuse/> (last updated Sept. 6, 2019).

21. Rosenberg, *supra* note 6.

22. Sarah Blaskey, *This drug is turning Florida inmates into 'zombies.' It's fueling a record death toll*, MIAMI HERALD (Aug. 21, 2018, 7:00 AM), <https://www.miamiherald.com/news/specialreports/floridaprison/article215642855.html>.

23. Lammers, *supra* note 5.

24. Blaskey, *supra* note 22.

is believed to be the cause of dozens of deaths.²⁵ In Florida, the total inmate deaths are expected to exceed 500, a threshold previously thought unimaginable.²⁶ Connecticut had more than 100 overdoses in two days.²⁷ Texas experienced an increase in overdoses from K2, having at least one overdose a day, even after state lawmakers outlawed K2 in 2015.²⁸

K2 is also dangerous because those who use K2 may behave violently toward correctional officers, guards, and other inmates around them. For instance, in Pennsylvania, the president of the Pennsylvania State Corrections Officers Association has found increased aggression to be inmates' main reaction to K2.²⁹ Pennsylvania Governor Tom Wolf's administration found that in the first half of 2018, K2 contributed to a four percent increase in assaults between inmates and between inmates and staff.³⁰ Further, prisons across the nation are understaffed,³¹ making it more challenging for correctional officers to keep inmates from using K2 or to subdue inmates who are high on K2. After behaving violently, inmates sometimes cannot even remember what happened.³²

K2 can also directly harm prison staff.³³ In Pennsylvania, there was a statewide prison lockdown following an outbreak of at least fifty-seven staff members becoming sick from K2.³⁴ In many cases, K2

25. Rosenberg, *supra* note 6; *K2 drug kills 39 Arkansas inmates, latest smuggle busted*, FOX16 (Sept. 12, 2019), <https://www.fox16.com/news/local-news/k2-drug-kills-39-arkansas-inmates-latest-smuggle-busted/>.

26. Blaskey, *supra* note 22.

27. Lammers, *supra* note 5.

28. Ward, *supra* note 3; Jason Walker, *Prison-assisted drug overdoses: Deadly K2 epidemic is spreading in Texas and many other state and federal prisons*, S.F. BAY VIEW (Sept. 23, 2018), <https://sfbayview.com/2018/09/prison-assisted-drug-overdoses-deadly-k2-epidemic-is-spreading-in-texas-and-many-other-state-and-federal-prisons/>.

29. Steve Esack, *Increased assaults in Pa. prisons linked to smuggled K2*, PITTSBURGH POST-GAZETTE (Aug. 22, 2018, 5:05 PM), <http://www.post-gazette.com/news/state/2018/08/22/K2-synthetic-marijuana-Pennsylvania-state-prisons-assaults/stories/201808220182>.

30. Steve Esack, *Smuggled K2 drug turning Pa. inmates violent*, CORRECTIONS1 (Aug. 23, 2018), <https://www.correctionsone.com/drug-issues/articles/479481187-Smuggled-K2-drug-turning-Pa-inmates-violent/>.

31. Anthony Gangi, *Understaffed prisons and jails are now a national concern*, CORRECTIONS1 (June 14, 2016), <https://www.correctionsone.com/careers/articles/190285187-Understaffed-prisons-and-jails-are-now-a-national-concern/>.

32. Esack, *supra* note 30.

33. Sam Ruland, *What we know and don't know about the Pennsylvania prison lockdown*, YORK DAILY REC. (Sept. 4, 2018, 2:36 PM), <https://www.ydr.com/story/news/2018/09/04/pennsylvania-prison-lockdown-what-we-know/1189365002/>.

34. *Id.*

came through the prison's mail room.³⁵ Staff members "complained of dizziness, lightheadedness, nausea and skin tingling."³⁶ Most were taken to the hospital and had to be administered naloxone, which is used to reverse drug overdoses.³⁷ During the statewide prison lockdown, the Pennsylvania Department of Corrections shut down all in-prison visitations and non-legal mail services until further notice.³⁸

B. The Difficulty of Detecting K2 in the Mail

K2 is made up of dozens of chemicals, making it more like a combination of drugs instead of just one.³⁹ Manufacturers of K2 can drug-soak paper and "make the drugs almost undetectable to modern testing and security measures."⁴⁰ The testing available for the detection of K2 cannot keep up with the constant changes that are being made to its chemical composition.⁴¹ Once scientists or the police have figured out how to detect one strand of K2, manufacturers simply create a new chemical composition of the drug.⁴² Neither drug-sniffing dogs nor drug tests are effective at detecting K2.⁴³

When K2 is laced on paper, it is sprayed on the paper in its liquid form.⁴⁴ The liquid form of K2 may be "no bigger than a dime . . . [on] a piece of paper and ingested."⁴⁵ For detection to be possible, there needs to be some kind of visible stain on the paper, or the paper needs to be wrinkled or crisp in some unusual way.⁴⁶ On white paper, the stain may only be a slightly yellow mark.⁴⁷ And, on photos, the drug can be almost impossible to detect.⁴⁸ Since this makes K2 easier to

35. Jossie Carbonare, *New Camp Hill State Prison electronic mail system helping to eliminate contraband issues*, FOX43 (Oct. 12, 2018, 10:41 PM), <https://fox43.com/2018/10/12/new-camp-hill-state-prison-electronic-mail-system-helping-to-eliminate-contraband-issues/>.

36. Ruland, *supra* note 33.

37. *Id.*

38. *Id.*

39. Rosenberg, *supra* note 6.

40. Ferranti, *supra* note 4.

41. Rosenberg, *supra* note 6.

42. *Id.*

43. Associated Press, *Prison letters banned over drug*, J. GAZETTE (May 3, 2017, 1:00 AM), <http://www.journalgazette.net/news/local/indiana/20170503/prison-letters-banned-over-drug>.

44. Ferranti, *supra* note 4.

45. Esack, *supra* note 29.

46. Associated Press, *supra* note 43.

47. Tom Jackman, *Jail inmates now getting drug-soaked paper through mail, jails moving to stop it*, WASH. POST (Mar. 10, 2016, 1:06 PM), https://www.washingtonpost.com/news/true-crime/wp/2016/03/10/jail-inmates-now-getting-drug-soaked-paper-through-mail-jails-moving-to-stop-it/?utm_term=.96489806abf3.

48. *Id.*

transport than other drugs,⁴⁹ it has become a “near-perfect drug of choice to smuggle into prisons.”⁵⁰

II. PRISONERS’ MAIL RIGHTS

While it is known that K2 is entering prisons through the mail and that the drug is dangerous and hard to detect, prisons face the challenge of regulating mail without impinging on inmates’ First Amendment rights. In addition to protecting an individual’s right to free speech, the First Amendment protects an individual’s right to receive information.⁵¹ In some cases, the right has been used to “prevent the government from placing barriers between speakers and listeners of constitutionally protected speech[.]”⁵² With regard to mail, this means that the government must not burden an individual’s access to his or her mail.⁵³

Until the early 1970s, inmates were not thought to share the same constitutional rights as law-abiding citizens and were thought of as merely “slave[s] of the state.”⁵⁴ Prisons “possess[ed] nearly all the powers of an absolute censor.”⁵⁵ Prisons determined with whom inmates could correspond, determined what subjects could be discussed in the mail, and inspected all mail, even when it was between inmates and government officials, courts, or attorneys.⁵⁶ Prison officials would go “to great lengths to enforce inspection and censorship rules.”⁵⁷ Judicial review of prison mail regulations was limited.⁵⁸ Courts took a “hands-off” approach to cases involving prison administration, believ-

49. Kathleen J. Davis, *What Is K2? The Synthetic Cannabinoid Causing Illnesses at Prisons*, WKSU (Sept. 5, 2018), <http://www.wksu.org/post/what-k2-synthetic-cannabinoid-causing-illnesses-prisons#stream/0>.

50. Lammers, *supra* note 5.

51. Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 789–90 (2005). See Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (The First Amendment “embraces the right to distribute literature, . . . and necessarily protects the right to receive it.”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“[T]he right to receive publications is such a fundamental right.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (referring to the “right to ‘receive information and ideas,’ and that freedom of speech ‘necessarily protects the right to receive’” (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972))).

52. Kennedy, *supra* note 51, at 791.

53. *Id.* at 797.

54. Michael Knight, *Censorship of Inmate Mail and the First Amendment: The Way of the Circuits*, 19 TEX. TECH L. REV. 1057, 1059 (1988).

55. Robert S. Raymar, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 87 (1971).

56. *Id.* at 88–89.

57. *Id.* at 90.

58. *Id.*

ing that they should decline jurisdiction in deference to the expertise of prison administrators and assuming that inmates do not possess the same constitutional rights as free citizens.⁵⁹ The courts recognized that prison administrators are responsible for maintaining order and discipline within the prisons and that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”⁶⁰ Even when courts did not summarily dismiss prisoners’ mail rights cases, the scope of review was limited by the assumption that inmates did not have a “right” to use mail, and therefore, prison mail regulations could not violate the First Amendment.⁶¹

In *Cruz v. Beto*, the Supreme Court began to steer away from the “blanket deference afforded prison officials.”⁶² The Court asserted that “[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons,’ including prisoners.”⁶³ So, while federal courts had traditionally taken a hands-off approach to problems of prison administration, when a prison regulation impinges on a fundamental guarantee of the Constitution, the federal courts *will* step in.⁶⁴ The Court, however, did not specify to what extent prisoners’ constitutional rights are protected, stating that “simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations.”⁶⁵ The following cases, involving constitutional challenges to prison mail regulations of *non-legal mail* and *publications*, show how the Court eventually determined the limitations of inmates’ First Amendment mail rights and what standard of review is appropriate in determining the constitutionality of a prison’s mail regulations.

In *Procunier v. Martinez*, the Court first began to discuss how a prison’s mail regulations can constitutionally limit inmates’ First Amendment rights. Inmates brought a class action challenging regulations of mail issued by the Director of the California Department of Corrections.⁶⁶ The regulations prohibited inmates from writing letters that “‘unduly complain’ or ‘magnify grievances[;]’ . . . express[] inflammatory political, racial, religious or other views or beliefs”; relate to criminal activity; contain foreign matter; or are otherwise lewd, ob-

59. *Id.* at 90–91.

60. *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974).

61. *Raymar*, *supra* note 55, at 92.

62. *Knight*, *supra* note 54, at 1069.

63. *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

64. *Procunier*, 416 U.S. at 404–05.

65. *Bell v. Wolfish*, 441 U.S. 520, 545–46 (1979).

66. *Procunier*, 416 U.S. at 398.

scene, defamatory, or inappropriate.⁶⁷ If a prison employee found a letter objectionable, the employee had limited options of what to do with the letter, including refusing to mail or deliver it and returning it to the inmate.⁶⁸ In deciding whether the mail regulations were justified, the Court first determined that since the regulations focused on inmates' outgoing mail to those who were not prisoners, the latter's constitutional rights were also restricted by the regulations.⁶⁹ Therefore, the Court declined to resolve the issue as a "prisoners' rights" case, but instead viewed the issue generally as a restriction of First Amendment liberties in furtherance of legitimate governmental objectives.⁷⁰

In resolving the issue, the *Procunier* Court looked at whether the regulations "further[ed] an important or substantial governmental interest unrelated to the suppression of expression."⁷¹ Prison officials cannot regulate inmate mail to eliminate opinions they do not like or inaccurate statements.⁷² Rather, the prison must show that the mail regulations further at least one of the substantial governmental interests, including "security, order, and rehabilitation."⁷³ The Court next determined that the limitation of First Amendment freedoms must be narrowly drawn so that it is "no greater than is necessary or essential to the protection of the particular governmental interest involved."⁷⁴ The Court added that the regulations "must be generally necessary to protect one or more of the legitimate governmental interests identified above."⁷⁵

Applying this standard of review, the Court found that the regulations were invalid.⁷⁶ The overly broad regulations allowed prison officials to apply their own personal judgments as standards for mail censorship and were not necessary to the furtherance of a governmental interest unrelated to the suppression of expression.⁷⁷ The prison failed to show how the regulations' restrictions on outgoing mail could improve prison security or order, or how they could help rehabilitate the inmates.⁷⁸ Moreover, the Court determined that to protect in-

67. *Id.* at 399-400.

68. *Id.* at 400.

69. *Id.* at 409.

70. *Id.*

71. *Id.* at 413.

72. *Procunier*, 416 U.S. at 413.

73. *Id.*

74. *Id.*

75. *Id.* at 414.

76. *Id.* at 415.

77. *Procunier*, 416 U.S. at 415.

78. *Id.* at 416.

mates' First Amendment rights from arbitrary governmental interference, a prison official's "decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards."⁷⁹ In this case, the Court approved certain procedural safeguards, including that the inmate be notified of a rejected letter, that the inmate be given an opportunity to protest the rejection, and that complaints be referred to a prison official other than the one who rejected the letter.⁸⁰ *Procunier* focused on inmates' *outgoing* mail to non-prisoners. The case, however, left unclear what standard of review was appropriate for regulations of incoming mail, letters sent between inmates, or mass mailings, such as publications.⁸¹

In *Bell v. Wolfish*, the Court began to specify the factors that should be considered in determining the constitutionality of prison mail regulations.⁸² Inmates brought a class action challenging various regulations at the Metropolitan Correctional Center in New York, including those that placed restrictions on the purchase and receipt of books.⁸³ The regulations allowed softbound books and magazines to be sent to inmates from any source, but hardback books could only be sent from publishers, bookstores, or book clubs.⁸⁴ Hardback books had caused serious security problems by concealing drugs, money, weapons, and other contraband, especially when these books were sent to inmates by unidentified sources outside the facility.⁸⁵ Prison officials had to remove the covers of hardback books and inspect every page to ensure that there was no contraband.⁸⁶ After considering the following factors, the Court concluded that the regulation did not violate inmates' First Amendment rights.⁸⁷ "[The] limited restriction [on hardback books] is a rational response by prison officials to an obvious security problem" of contraband being smuggled into the prison.⁸⁸ The prison officials did not exaggerate in their response to the security problem, as the alternative of having officials carefully inspect each hardback book is simply too difficult and time-consuming.⁸⁹ Lastly, the rule is neutral, without regard to the content of expression, and there are alternative means for inmates to receive the reading mate-

79. *Id.* at 417–18.

80. *Id.* at 418–19.

81. Knight, *supra* note 54, at 1071.

82. 441 U.S. 520, 550–51 (1979).

83. *Id.* at 526–27.

84. *Id.* at 552.

85. *Id.* at 549.

86. *Id.*

87. *Id.* at 550.

88. *Bell*, 441 U.S. at 550.

89. *Id.* at 551.

rial.⁹⁰ Even though *Bell* set out various factors to consider in a prisoners' mail rights case, a definitive standard of review was still not clear.⁹¹

In *Turner v. Safley*, the Court finally established the standard of review that should be applied and the factors that should be considered in prisoners' rights cases regarding regulation of inmates' mail.⁹² Inmates brought a class action challenging a correspondence regulation that was in effect at all prisons within the Missouri Division of Corrections.⁹³ The regulation permitted correspondence between inmates at different institutions if they were immediate family members or if the correspondence concerned legal matters.⁹⁴ Otherwise, if inmates wanted to correspond with other inmates, each inmate's classification/treatment team had to determine whether this correspondence was in the best interests of the inmates involved.⁹⁵ In effect, the rule did not allow inmates to correspond with non-familial inmates.⁹⁶

In determining whether the regulation was valid, the Court clarified the degree of scrutiny to apply in a prisoners' rights case, which *Bell* had left unstated.⁹⁷ According to the Court, the appropriate degree of scrutiny is whether the prison regulation that burdens fundamental rights "is reasonably related to legitimate penological interests."⁹⁸ This reasonable standard of review is necessary to ensure that prison administrators are able to make day-to-day judgments of institutional operations without courts being the ultimate decision-makers of prison administration (as they might be under a strict scrutiny standard of review).⁹⁹ The Court also explained the four factors that should be considered in determining the reasonableness of a prison regulation.¹⁰⁰ "First, there must be a 'valid, rational connection' between the prison regulation" and a legitimate governmental interest.¹⁰¹ The governmental interest must be legitimate and neutral, without regard to the content of expression.¹⁰² Second, the prison regulation is more likely to be reasonable if prison inmates have alterna-

90. *Id.*

91. Knight, *supra* note 54, at 1074.

92. *Turner v. Safley*, 482 U.S. 78, 81, 89 (1987).

93. *Id.* at 81.

94. *Id.*

95. *Id.* at 81-82.

96. *Id.* at 82.

97. Knight, *supra* note 54, at 1076.

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

99. *Id.*

100. *Id.* at 89-90.

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

102. *Id.* at 90.

tive means of exercising the right that is being restricted by the regulation.¹⁰³ Third, there must be consideration of what the impact would be on guards, inmates, and prison resources if the asserted constitutional right was upheld and the regulation was found invalid.¹⁰⁴ Lastly, the prison regulation may not be reasonable if there are “obvious, easy alternatives” to the regulation, indicating that it is an “exaggerated response” to the claimed legitimate governmental interest.¹⁰⁵ If an inmate can identify “an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests,” this may indicate that the regulation is not reasonable.¹⁰⁶

Using the reasonable standard of review and the four factors for consideration, the Court concluded that the Missouri regulation was reasonably related to legitimate security interests and was valid.¹⁰⁷ First, communication between inmates of different institutions could potentially lead to criminal behavior, such as organized escape plans, assaults, and gang activities, so it is logical for the prisons to limit this communication to further the legitimate governmental interest of security.¹⁰⁸ Second, the regulation “does not deprive prisoners of all means of expression” with other inmates, as they are permitted to correspond with inmates at different institutions if they are immediate family members or if the correspondence concerns legal matters.¹⁰⁹ Third, if the prisons allowed all correspondence between inmates at different institutions, this could affect the safety of both the inmates and staff at multiple prison facilities.¹¹⁰ Lastly, there are no clear, easy alternatives to the regulation.¹¹¹ The alternative of having prison officials closely monitor all correspondence between inmates would be more than a *de minimis* cost to security interests.¹¹² Other prison systems, including the Federal Bureau of Prisons, have deemed similar regulations necessary.¹¹³

In *Thornburgh v. Abbott*, the Court clarified that the standard of review set out in *Turner* applied not only to regulations of inmates’ personal correspondence, but to regulations of publications as well.¹¹⁴

103. *Turner*, 482 U.S. at 90.

104. *Id.*

105. *Id.*

106. *Id.* at 91.

107. *Id.*

108. *Turner*, 482 U.S. at 91.

109. *Id.* at 92.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Turner*, 482 U.S. at 93.

114. 490 U.S. 401, 413 (1989).

In *Thornburgh*, the regulation at issue allowed prison officials to reject inmates' incoming publications if they were "found to be detrimental to institutional security."¹¹⁵ After applying the standard of review from *Turner*, the Court concluded that the regulation was facially valid.¹¹⁶

A prison's ability to regulate *legal mail*, including attorney-client communications, is more restricted. Legal mail is "entitled to greater confidentiality and freedom from censorship."¹¹⁷ In *Wolff v. McDonnell*, the Court explained what type of inspection of legal mail is appropriate. Prison officials may open an inmate's legal mail to inspect it for contraband, as long as this is done in the inmate's presence and the prison officials do not read the mail.¹¹⁸ Moreover, the prison officials do not have to check that every legal communication is actually from an attorney before opening it for inspection.¹¹⁹ Instead, the state or prison authorities can simply require that these legal communications be specially marked as being sent from an attorney, along with the attorney's contact information or identification to prison officials.¹²⁰

Overall, prison officials have been able to open and inspect inmates' incoming mail and impinge on their constitutional rights for the purpose of prison security. Physically inspecting inmates' mail, however, is not fully effective at preventing drugs from entering prisons and is especially ineffective when it comes to K2. Consequently, some prisons have started using even stricter mail regulations, such as requiring inmates' non-legal mail to be sent to prisons electronically.

III. HOW PRISONS HAVE ATTEMPTED TO PREVENT K2

Some prisons have begun combatting the problem of K2 by banning inmates' incoming mail unless it is sent on white paper. For instance, Indiana prisons banned "colored paper of any kind and photocopies of white paper" and allowed only "[l]ined white paper in white envelopes and legal documents" to be sent to the prisons through the mail.¹²¹ While it is supposed to be easier to detect K2 on white paper, this approach is not foolproof. As explained above, only a small

115. *Id.* at 403.

116. *Id.* at 404, 414–19.

117. *Know Your Rights: Privileged and Non-Privileged Mail*, ACLU OKLA., <https://www.acluok.org/sites/default/files/wp/wp-content/uploads/2011/04/Know-Your-Rights-Privileged-and-Non-Privileged-Mail.pdf> (last updated May 2011).

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

119. *Id.* at 576.

120. *Id.* at 576–77.

121. Associated Press, *supra* note 43.

amount of K2 is needed to lace the paper, making it still very hard to detect. Therefore, some prisons use an even stricter, costlier approach.

More than half of all state prison systems have begun using electronic services to deliver messages to inmates.¹²² Prisons do not set up the electronic messaging services themselves.¹²³ Instead, the prisons use privately owned companies that facilitate electronic messaging.¹²⁴ Some companies that provide electronic messaging include JPay, Advanced Technologies Group, Smart Jail Mail, and ICSolutions.¹²⁵ The prisons do not have to pay anything to use these resources because the electronic messaging companies cover the costs of installing the electronic messaging systems.¹²⁶ The companies generate revenue by charging fees to inmates and their families and friends for every message they send.¹²⁷ Messages usually cost about fifty cents, but they can range from five cents to \$1.25 for a text-only message.¹²⁸ Some services include strict limits on how many characters can be used in a single message.¹²⁹ Electronic messaging could be a promising way to connect inmates with their families, while also allowing for more effective security of the prisons.¹³⁰ But the potential of these electronic services is “tempered by a relentless focus on turning incarcerated people and their families into revenue streams . . .”¹³¹ Prisons receive an agreed-upon percentage of the profits generated from electronic messaging services, which is “essentially a kickback.”¹³² While people who are not incarcerated can send messages to each other through free email accounts, families of inmates are burdened with a fee for every message they send to their incarcerated loved one.¹³³

122. *About JPay*, JPAY, <https://www.jpayers.com/AboutUs.aspx> (last visited Nov. 18, 2020).

123. Sean Stewart, *Electronic Messaging in Jails*, NAT'L INST. FOR JAIL OPERATIONS, <https://jailtraining.org/electronic-messaging-in-jails/> (last visited Oct. 16, 2020).

124. *Id.*

125. Derek Gilna, *Prison Systems Increasingly Provide Email – For a Price*, PRISON LEGAL NEWS (Nov. 8, 2014), <https://www.prisonlegalnews.org/news/2014/nov/8/prison-systems-increasingly-provide-email-price/>.

126. Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send An Email*, WIRED (Aug. 3, 2018, 7:00 AM), <https://www.wired.com/story/jpay-securus-prison-email-charging-millions/>.

127. Max Lewontin, *US prisons now offer inmates 'electronic messaging,' but it's not really e-mail*, THE CHRISTIAN SCI. MONITOR (Jan. 22, 2016), <https://www.csmonitor.com/Technology/2016/0122/US-prisons-now-offer-inmates-electronic-messaging-but-it-s-not-really-e-mail>.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* See also Dina Gusovsky, *The big business of selling apps to prison inmates*, CNBC (Oct. 1, 2014, 12:21 PM), <https://www.cnbc.com/2014/10/01/the-big-business-of-selling-apps-to-prison-inmates.html>.

133. Law, *supra* note 126.

One of the most popular electronic messaging companies for prisons is JPay.¹³⁴ JPay's services are used in more than thirty-five states,¹³⁵ and the services include both inbound and outbound messages and short video messages.¹³⁶ JPay provides prisons with kiosks for electronic messaging but may also provide tablets, which allow inmates to skip the lines for kiosks.¹³⁷ JPay charges inmates and their families for each "stamp" (about one page of information) that they send at a minimum of thirty-five cents.¹³⁸ If the message includes a video or photo, the message will be charged as at least three stamps.¹³⁹ Besides the fee that is charged for every message that is sent, even more frustrating and burdensome to inmates and their families is that JPay's fees for sending messages fluctuate with no explanation.¹⁴⁰ Due to the costly fees JPay charges per message and its growing popularity among prisons, JPay earns a large amount of revenue from which prisons can reap the benefits.¹⁴¹ For instance, in 2011, JPay reported \$30.4 million in revenue, and, three years later, its revenue increased to \$70.4 million.¹⁴² While prisons have made a slight profit by selling envelopes and stamps through prison commissaries, prisons that use JPay and collect a commission from its services could obtain \$710,000 on electronic messages alone.¹⁴³

JPay and other electronic messaging companies are taking advantage of inmates and their families based on the assumption that, "[w]hatever it costs to send a message, prisoners and their loved ones will find a way to pay it."¹⁴⁴ Because prisons are not spending any money, the prisons are encouraged to increase the use of these costly electronic messaging services.¹⁴⁵ But prisons are ignoring the burden that they are placing on inmates' families and hindering the families' ability to send electronic messages whenever they want or need to. For example, a mother wanted to send her incarcerated son some photos from a Mardi Gras family barbeque, but the mother already

134. Stephen Rahe, *The multi-million dollar market of sending money to an incarcerated loved one*, PRISON POL'Y INITIATIVE (Jan. 18, 2017), <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/>.

135. JPAY, *supra* note 122.

136. Lewontin, *supra* note 127.

137. Law, *supra* note 126.

138. Ed Shull, *JPay: Predatory Profits from Prisoners*, FILTHY LUCRE (Aug. 14, 2018), <https://filthylucre.com/jpay-profit-from-prisoners/>.

139. *Id.*

140. *Id.*; Law, *supra* note 126.

141. Rahe, *supra* note 134; *see also* Lewontin, *supra* note 127.

142. Law, *supra* note 126.

143. *Id.*

144. *Id.*

145. *Id.*

was paying \$40 a month on JPay stamps and could not afford to send her son all of the photos.¹⁴⁶ As Stephen Raher, a pro bono legal analyst for the Prison Policy Initiative says, “Once again, it seems that the prison phone giants are providing more of the same old exploitation rather than providing true innovation[.]”¹⁴⁷

Another approach to preventing K2, which is much less costly for inmates and their families, has been implemented recently by the Pennsylvania Department of Corrections. In response to the outbreak of sick staff members caused by K2, Pennsylvania has turned to a new electronic mailing system for inmates.¹⁴⁸ All non-legal mail is now sent to a company in Florida, called Smart Communications.¹⁴⁹ Smart Communications scans the mail and processes the scanned mail into a searchable electronic document that is organized by inmate.¹⁵⁰ Within twenty-four hours, the scanned mail is then sent to the appropriate correctional facility where staff can approve, deny, or forward the mail.¹⁵¹ Approved mail will be printed and delivered by hand to the inmates.¹⁵² The state of Pennsylvania is paying Smart Communications for its services¹⁵³ and the process comes at no charge to inmates for up to eight one-ounce letters each month.¹⁵⁴ All legal mail will be sent directly to the appropriate correctional facility.¹⁵⁵ To be classified as legal mail for this purpose, the mailing must display a Pennsylvania Department of Corrections issued Attorney Control Number with a secondary authentication number, or it must contain a Court Control Number.¹⁵⁶ Consequently, any attorney, court, or non-attorney/court entity who wants to send legal mail has to fill out a control number request form.¹⁵⁷ However, for attorneys who do not represent

146. *Id.*

147. Lewontin, *supra* note 127 (internal quotation marks omitted); Bernadette Rabuy, *Report asks if electronic messaging in prisons and jails is innovation or exploitation?*, PRISON POL’Y INITIATIVE (Jan. 21, 2016), https://www.prisonpolicy.org/blog/2016/01/21/new_report_electronic_messaging/.

148. Carbonare, *supra* note 35.

149. *Mail*, PA. DEP’T OF CORR., <https://www.cor.pa.gov/Pages/Mail.aspx> (last visited Oct. 16, 2020).

150. *Id.*

151. *Id.*

152. *Id.* All original mail will be retained for 45 days, and after this period, it will be destroyed. *Id.*

153. Raven Rakia, *Pennsylvania Prisons Hired a Private Company to Intercept and Store Prisoners’ Mail*, THE APPEAL (Sept. 24, 2018), <https://theappeal.org/pennsylvania-prisons-hired-a-private-company-to-intercept-and-store-prisoners-mail/>.

154. *How to Send Mail*, PA. DEP’T OF CORR., <https://www.cor.pa.gov/family-and-friends/Pages/Mailing-Addresses.aspx> (last visited Oct. 16, 2020).

155. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 149.

156. *Id.*

157. *Id.*

inmates or for court/court entities that cannot be verified, they have to send all correspondence through Smart Communications.¹⁵⁸ Publications, including books and magazines, have to be sent directly to the Pennsylvania Department of Corrections' Security Processing Center.¹⁵⁹ At the Security Processing Center, staff will conduct security screening of the incoming publications before delivering them to the inmates.¹⁶⁰ Families and friends cannot send publications directly to the inmates, but instead must work with the original source book vendors.¹⁶¹ Furthermore, with the use of tablets, inmates are able to order eBooks.¹⁶² Tablets also allow inmates access to music, games, and Connect Network, an electronic messaging service similar to JPay where every message is charged a fee.¹⁶³ Inmates or their families have to pay for the tablets themselves at a price of \$147 plus tax.¹⁶⁴

Since the implementation of the new system, Pennsylvania has had positive results. William Niclow, with the Bureau of Investigation and Intelligence at Camp Hill State Prison, explained that “[h]aving the mail come in as a copy so the inmates aren’t receiving the original source of the mail, it’s cut down dramatically on the synthetic cannabinoids that we’re seeing throughout the facility and buprenorphine.”¹⁶⁵

IV. ELECTRONIC MAIL AS A SOLUTION TO PREVENTING K2 AND OTHER DRUGS

Uniform electronic mail requirements across prisons would significantly reduce the amount of K2 entering prisons, creating a safer environment for inmates and prison staff. Since inmates’ incoming mail is one of the main ways that drugs enter prisons, requiring all inmates’ mail to be electronic would eliminate mail as an avenue for drugs. Many prisons have recognized electronic mail as a possible solution to preventing K2 and other drugs from reaching inmates, but the current systems of electronic mail being used are too costly for inmates and

158. *Id.*

159. *Id.*

160. Shelly Stallsmith, *You can't read that: Which books are banned from Pennsylvania's state prisons?*, YORK DAILY REC. (Dec. 20, 2019, 8:26 AM), <https://www.ydr.com/story/news/watchdog/2019/12/20/pa-state-prisons-banned-books/2703350001/>.

161. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 149.

162. *Tablets*, PA. DEP'T OF CORR., <https://www.cor.pa.gov/Inmates/Pages/Tablets.aspx> (last visited Oct. 16, 2020).

163. *Id.*; *see also Messaging*, CONNECTNETWORK, <https://web.connectnetwork.com/communications/messaging/> (last visited Oct. 16, 2020).

164. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 162.

165. Carbonare, *supra* note 35.

their families or are not secure enough to completely eliminate the drug problem.¹⁶⁶

A. *The Inadequacy of Current Systems of Electronic Mail*

The current electronic messaging companies being used, such as JPay, are objectionable for a couple of reasons. First, the electronic messaging services are too expensive because they charge inmates and their loved ones for each electronic message they send.¹⁶⁷ Families and friends of inmates should be able to send electronic messages directly to prisons without having to go through any costly, intermediate server. Second, the electronic messaging services will arguably make it more difficult for families and friends to send mail to inmates, perhaps even preventing them from doing so. For example, families and friends who want to send written letters or children's drawings would have to scan this mail themselves in order to attach the scan to a JPay message and send it to the prison.¹⁶⁸ In addition, elderly people may not know how to use electronic mail or how to scan documents, or they may not even own a computer.¹⁶⁹

While Pennsylvania utilizes an electronic messaging service similar to JPay, Pennsylvania has also established a system of preventing K2 through postal mail that comes at no extra cost to inmates or their loved ones.¹⁷⁰ All original non-legal mail is simply sent to a third party, Smart Communications, which is responsible for scanning the original mail and sending the electronic copy to prisons.¹⁷¹ This method allows families and friends of inmates, including elderly people, to send mail without worrying about using electronic services themselves. Pennsylvania's approach effectively prevents K2 and other drugs from entering prisons through non-legal mail. But the downfall of this approach is that a similar method is not used for publications and legal mail. Publications are screened at a Security Processing Center before reaching the inmates, but as discussed ear-

166. *Department Of Corrections Announces Book, Publications Policy*, PA. PRESSROOM (Nov. 1, 2018), https://www.media.pa.gov/pages/corrections_details.aspx?newsid=363. See also PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 149; Rosenberg, *supra* note 6; Lewontin, *supra* note 127.

167. *Id.*

168. Law, *supra* note 126. See also *Adding Attachments*, JPAY, <https://www.jpays.com/jpayhelp/Content/products%20and%20services/Email/Adding%20attachments.htm> (last visited Oct. 16, 2020).

169. Law, *supra* note 126.

170. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 154. See also PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 162; CONNECTNETWORK, *supra* note 163.

171. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 149.

lier, security screening is not sufficient at detecting K2.¹⁷² Pennsylvania's approach also allows the original legal mail to be sent directly to the prison, but this could make nearby inmates and staff sick if it is laced with toxic drugs like K2.¹⁷³

B. Requiring Electronic Mail for Non-Legal Mail, Publications, and Legal Mail to Prevent K2 and Other Drugs from Entering Prisons

In order to completely prevent K2 and other drugs from entering prisons, all prisons should be required to allow only electronic mail for inmates' incoming mail, whether it be non-legal mail, publications, or legal mail. My recommendation for a system of electronic mail should come at the cost of state prisons or the federal government, not at the cost of inmates or their families and friends.

All incoming non-legal mail should be sent to a third party, such as (or similar to) Smart Communications, where the mail can be inspected and scanned within twenty-four hours of receipt. The third party should then electronically send the scanned copies to the appropriate prisons, where prison staff can approve or deny the non-legal mail. Approved mail should be printed and delivered to inmates. If prison staff denies the mail, a staff member should inform the sender and explain why the mail was not delivered to the inmate. Inmates and their families should also have the option of sending non-legal mail electronically through tablets. This electronic system would be similar to JPay, where families and friends are able to send electronic messages, photos, and videos, but they would not have to pay for the electronic services themselves.

All prisons should be required to allow inmates access to tablets so that they can receive not only non-legal mail, but legal mail and publications electronically. Legal mail should be sent electronically to prisons where prison staff can check the email address and verify that it is from a court or attorney. The content of the legal mail should be encrypted or hidden, and it should be accessible by a password that is known only by the inmate and the court or attorney. This way, prison staff would not be able to read the legal mail. Prison staff should then forward the verified legal mail to a tablet, where the inmates can login and access their legal mail with their password. If the inmate wants a copy of the legal mail, he or she should be able to print a copy and

172. *Id.*; PENNSYLVANIA PRESSROOM, *supra* note 166; Rosenberg, *supra* note 6.

173. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *supra* note 149.

accompany prison staff to pick up the printed copy to ensure that the copy is not read.

For publications, many prisons already allow inmates to order eBooks, but now prisons should require all publications to be ordered electronically. To check the content of publications, prison staff should be required to approve the inmate's order of the publication before the order is finalized. Since families and friends may also want to order electronic publications for inmates, prison staff should approve these orders as well. For inmates who do not want to read publications online, they would still have access to prison libraries.

If this proposed solution to preventing drug trafficking in prisons was ever challenged for unconstitutionality, it would pass *Turner's* reasonable standard of review and be found constitutional. As explained earlier, the Supreme Court in *Turner* described the four factors that should be considered in determining the reasonableness of a prison's mail regulation. First, there must be a "valid, rational connection" between the prison regulation and a legitimate governmental interest.¹⁷⁴ The governmental interest must be legitimate and neutral, without regard to the content of expression.¹⁷⁵ The second factor to consider is whether prison inmates have alternative means of exercising the right that is being restricted by the regulation.¹⁷⁶ The third factor focuses on determining what the impact would be on guards, inmates, and prison resources if the asserted constitutional right was upheld and the regulation was found invalid.¹⁷⁷ Fourth, the prison regulation may not be reasonable if there are "obvious, easy alternatives" to the regulation, indicating that it is an "exaggerated response" to the claimed legitimate governmental interest.¹⁷⁸

My solution meets the first factor because there is a valid and rational connection between the prison regulation and the legitimate governmental interest of security. The security problem is drugs entering prisons through inmates' mail, and the rational solution is to allow only electronic mail, which cannot be laced with drugs. The regulation is also both legitimate and neutral and does not incorporate the content of expression. Allowing only electronic mail has nothing to do with the content of expression in the mail, but only relates to the means of sending mail.

174. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

175. *Id.* at 90.

176. *Id.*

177. *Id.*

178. *Id.*

This solution would satisfy the second factor of the *Turner* analysis because inmates would still be able to receive their mail by alternative means. Inmates would receive a paper copy of both their non-legal and legal mail, and they would have electronic access to non-legal mail, publications, and legal mail. Additionally, inmates could make use of prison libraries.

The third factor of the *Turner* analysis is also met. If prisons were forced to accommodate the potential asserted right that inmates have a right to original, paper copies of all of their incoming mail, this could have detrimental effects on prison staff and security. K2 is extremely difficult to detect, making it an easy drug to smuggle into prisons and a drug of choice for inmates.¹⁷⁹ K2 dangerously affects inmates and staff and could potentially lead to thousands of more overdoses.¹⁸⁰ If this proposed solution is not implemented, prisons will then have to allocate their resources to finding other ways of combatting K2. This could take much more time and would cost a substantial amount of money, because it would involve discovering new drug detection technologies that can keep up with the frequently changing chemical compositions of K2. This significant impact of accommodating the potential asserted right supports my proposed solution as the better option.

Finally, there are no obvious or easy alternatives to my proposed solution, satisfying the fourth factor of the *Turner* analysis. One potential alternative could be to require electronic mail only for the form of mail through which drugs enter prisons the most. The problem with this is that drugs can enter prisons through any type of mail, whether it be non-legal mail, publications, or legal mail. Even if most drugs came in through one of the forms of mail and that form of mail was required to be electronic, drug smugglers would simply lace the other forms of mail with drugs. The only way to completely eliminate the problem of drugs entering prisons through inmates' mail is to require all forms of mail to be sent to prisons electronically. Another potential alternative could be to increase the sanctions for inmates who use K2. But this would not significantly lessen the amount of K2 coming in through the mail, especially since K2 is so difficult to detect. Neither of these alternatives "fully accommodates the *prisoner's rights at de minimis* cost to valid penological interests."¹⁸¹ The effectiveness of prison security would still suffer under these alternatives.

179. Davis, *supra* note 49. See also Lammers, *supra* note 5; Rosenberg, *supra* note 6.

180. Ruland, *supra* note 33. See also Lammers, *supra* note 5.

181. *Turner*, 482 U.S. at 91.

In addition to being constitutional, my solution to drug trafficking through the mail would benefit inmates, inmates' families and friends, and prison staff in the following ways. For inmates, this solution would allow all inmates access to technology, such as tablets, so they can communicate by electronic means. This helps to prepare inmates for society, especially in today's increasingly digitally connected world.¹⁸² This solution could also help inmates who are addicted to drugs, since they would have significantly less access to drugs, and rehabilitation services could consequently be more effective.¹⁸³ Families and friends of inmates would be assured of the safety of their incarcerated loved ones because drugs would be 100% prevented from entering prisons through the mail. Also, unlike electronic messaging services provided by companies like JPay, families and friends could choose whether to send non-legal mail by postal mail or electronic means, and they could send electronic mail at no extra cost. Lastly, prison staff would benefit from the assurance of not having to worry about being exposed to drug-laced mail. Prison staff would also not have to spend time physically inspecting every piece of inmates' mail.¹⁸⁴ Without having to worry about security problems with the mail on a daily basis, prison staff may be able to spend more time on rehabilitating inmates.

The main disadvantage of my solution is that it may be costly for state prisons or the federal government. Costs may include the services of the third party scanning all the non-legal mail, providing tablets for inmates, and funding a system that would be used to monitor incoming electronic mail. While there would be costs, these do not even compare to the benefits of increased security that would be achieved. Prisons would have a dramatic decrease in drug overdoses and drug-related incidents. Staff would not need to worry about getting sick from handling the mail since they would be printing copies of the mail that they touch. Improving prison security is a "penological

182. Gilna, *supra* note 125.

183. See *Online only: Report finds most U.S. inmates suffer from substance abuse or addiction*, THE NATION'S HEALTH (Apr. 2010), <http://thenationshealth.aphapublications.org/content/40/3/E11> (According to a report by the National Center on Addiction and Substance Abuse in 2010, about 85 percent of the U.S. prison population had drug addiction problems, had history of substance abuse, or were incarcerated for an incident involving drugs.). See also *Addiction Recovery In Inmate Populations: Helping To Break The Cycle*, VERTAVA HEALTH (2020), <https://vertavahealth.com/addiction-resources/recovery-for-inmates/>.

184. For instance, a prison in Maryland that had a population of about 387 inmates received 80 pieces of mail a day, adding up to about 400 pieces of mail a week. Prison staff had to inspect each piece of mail carefully for contraband before distributing it to the inmates. See Erika Butler, *Strict mail inspection process aims to keep contraband, particularly drugs, out of Harford jail*, BALTIMORE SUN (Apr. 11, 2018), <https://www.baltimoresun.com/news/maryland/harford/aegis/ph-ag-harford-jail-mail-0411-story.html>.

interest” of the government, and since this interest would be greatly improved by my solution, its implementation should outweigh any costs. Another disadvantage of this solution is that families and friends may be upset that inmates are not receiving original copies of their letters or photographs, or that they can only send publications in electronic form. But the knowledge that their imprisoned loved ones are in a much safer and secure environment should outweigh any frustration families and friends may have with the new system.

To implement my solution, there should be a federal law requiring federal prisons to allow inmates’ incoming mail only if it is sent electronically. The federal law could specify the system of electronic mail that I have suggested. In order to implement this solution into state prisons, Congress could either preempt state law or use conditional funding. While Congress has previously considered passing laws that would preempt state law regarding the criminal justice system,¹⁸⁵ it is questionable whether Congress would preempt state law with regard to regulations of electronic mail in prisons.¹⁸⁶ Congress may be more likely to encourage states to initiate similar electronic mail requirements through conditional funding. In *South Dakota v. Dole*, the Supreme Court stated that “Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and ad-

185. *Preemption Monitor: Volume VI, Issue II*, NAT’L CONF. ST. LEGISLATURES (July 2010), <http://www.ncsl.org/ncsl-in-dc/standing-committees/law-criminal-justice-and-public-safety/preemption-monitor-volume-6-issue-2.aspx>.

186. According to the Supreme Court:

A fundamental principle of the Constitution is that Congress has the power to preempt state law . . . Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to “occupy the field,” state law in that area is preempted . . . And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute . . . We will find preemption where it is impossible for a private party to comply with both state and federal law . . . and where “under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372–73, (2000). Even though Congress has preempted state law in specific areas of the criminal justice system, Congress has not enacted statutes specifically regulating electronic mail in prisons. Therefore, it is unknown whether Congress has intended federal law to occupy the field of electronic mail in prisons. And since state laws regarding prison mail regulations vary from state to state, not every state’s laws will clearly conflict with my proposed federal statute. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 185.

ministrative directives.”¹⁸⁷ The Court then went on to explain the four limitations on conditional spending. First, conditional spending must be exercised with the goal of pursuing the “general welfare.”¹⁸⁸ The satisfaction of this limitation should be substantially deferred to the judgment of Congress.¹⁸⁹ Second, Congress’s conditional spending must be done “unambiguously” so that states understand how to receive the conditional funds and the consequences of not doing so.¹⁹⁰ Third, to be found legitimate, the conditional spending should be related to federal interests.¹⁹¹ Lastly, even if the conditional spending satisfies the other three limitations, there may be a constitutional provision that bars the grant of federal funds.¹⁹²

To implement my solution in state prisons, the federal government could offer to increase the grants that are already given to states to improve their criminal justice systems,¹⁹³ or could offer new funding specifically for the costs of implementing electronic mail, on the condition that the states establish electronic mail requirements that model the proposed federal law. The federal government could also take away a portion of the grants already being given to the states unless the states meet the electronic mail requirements.¹⁹⁴ However, the federal government could not withhold all of the funding for grants from a state that chose not to meet the condition, as this could be considered coercive and constitute undue influence.¹⁹⁵ Conditional funding would satisfy the four limitations set out in *South Dakota*. First, the conditional funding would be in pursuit of the general welfare. Drugs have entered prisons across the nation for years, causing dangerous situations for inmates and staff, and causing numerous inmates to lose their lives behind bars. The conditional spending would be for the purpose of protecting the wellbeing of inmates and staff at state prisons, like they would be protected at federal prisons. Even if there was any doubt about whether this limitation was met, the satisfaction of this

187. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

188. *Id.* at 207.

189. *Id.*

190. *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

191. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

192. *South Dakota*, 483 U.S. at 208.

193. Anna Bailey, *Federal Government Should Fully Fund Grants That Help States Improve Corrections*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 13, 2017, 9:15 AM), <https://www.cbpp.org/blog/federal-government-should-fully-fund-grants-that-help-states-improve-corrections> (“Justice Department grants [include] . . . the Second Chance Act, the Justice Reinvestment Initiative, and the Justice and Mental Health Collaboration Program.”).

194. *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81 (2012).

195. *Id.* at 585, 577–78.

limitation would be substantially deferred to the judgment of Congress.¹⁹⁶ The second factor could easily be met as long as Congress clearly expresses the conditions for which the states would receive funds. Third, since the federal government gives grants to states to “help states reduce recidivism and improve the corrections system,” it appears that there is a federal interest related to both public safety and the wellbeing of inmates in state prisons.¹⁹⁷ The more funds are invested in improving the wellbeing of inmates, the safer inmates will be in society if they are ever released from prison.¹⁹⁸ As indicated earlier, if inmates do not have any access to drugs, then rehabilitation programs are likely to be more effective, and rehabilitated inmates are less likely to repeat their crimes.¹⁹⁹ Finally, while Congress may not be able to directly regulate state prisons, “the ‘independent constitutional bar’ limitation on the spending power is not . . . a prohibition on the *indirect* achievement of objectives which Congress is not empowered to achieve directly.”²⁰⁰ Therefore, Congress has the ability to indirectly encourage states to impose prison regulations that model the proposed federal law, requiring all inmates’ incoming mail to be electronic.

CONCLUSION

While prisons have always had to deal with security problems caused by drug trafficking, the need for a dramatic change of requiring all inmates’ incoming mail to be sent electronically is because of K2. This drug endangers the lives of inmates and prison staff, has caused hundreds of drug overdoses, and often results in inmates behaving aggressively and unpredictably.²⁰¹ K2 can enter prisons much more easily than other drugs because in its liquid form, it can be sprayed on white paper and become effectively undetectable by drug detection technologies. K2 is a growing problem in prisons across the country and will only continue to increase unless steps are taken to prevent it. Regulating inmates’ mail has been found constitutional by the Supreme Court and my recommendation would protect inmates’

196. *South Dakota*, 483 U.S. at 207.

197. Bailey, *supra* note 193.

198. *Prison Reform: Reducing Recidivism By Strengthening The Federal Bureau Of Prisons*, DOJ, <https://www.justice.gov/archives/prison-reform> (last updated Mar. 6, 2017).

199. VERTAVA HEALTH, *supra* note 183; see also *Inmate Drug Abuse Treatment Slows Prison’s Revolving Door*, AM. PSYCH. ASS’N (March 23, 2004), <https://www.apa.org/research/action/aftercare>.

200. *South Dakota*, 483 U.S. at 210 (emphasis added).

201. Ruland, *supra* note 33. See also Lammers, *supra* note 5; VERMILION BEHAVIORAL HEALTH SYSTEMS, *supra* note 8; Blaskey, *supra* note 22.

First Amendment right to receive information, as they would still be receiving all of their incoming mail, even if it is not the original source. The current methods being used by prisons to prevent K2 and other drugs are inadequate. Electronic messaging services are too costly to inmates and their families, and Pennsylvania's approach does not fully protect against drugs entering prisons through all types of mail. By initiating my proposed solution of allowing inmates' mail to enter prisons only through electronic means, K2 and other drugs will have no alternative way of entering prisons through the mail. Additionally, prison staff would not have to spend time physically inspecting every piece of inmates' mail, inmates and their families would not be charged for their communications to each other, and security for both inmates and staff would be greatly improved. Electronic mail requirements at all prisons for inmates' incoming mail should become effective as soon as possible to prevent any further drug overdoses or staff sicknesses, and to ensure a safer and more secure environment at every prison.

