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# First Amendment Rights for Publishers and the Distribution of Unsolicited Magazines to Inmates

Samantha Halpern\*

## I. Introduction

When Ray Hrdlicka decided to begin a magazine that focuses on distributing information about the criminal justice system, he asked himself, “What was the best mechanism for the information and how would it be delivered? The answer was obvious,” he said, “although not so simple.”<sup>1</sup> He wanted to produce a magazine that was delivered to the people “who need it the most, when they need it the most, [and] where they need it the most.”<sup>2</sup> Thus, his target audience was jail inmates and other people involved in the criminal justice system, including attorneys, law enforcement officials, court personnel, and friends and family on both sides of the law.

The first edition of *Crime, Justice and America* (“CJA”) came out in May 2002 and by 2011, it was distributed in over seventy county jails across thirteen states.<sup>3</sup>

CJA’s business model is fairly simple. It lures advertisers—usually bail bondsmen and lawyers—with the promise of a captive audience of thousands of inmates in immediate need of their services[,] . . . then . . . pressur[es] jail administrators to choose either leaving stacks of CJA in common areas or allowing individual

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\* J.D., Pace Law School, 2013; B.A., The University of North Carolina at Chapel Hill, 2010. The author wishes to thank her grandmother, Judge Rosalie B. Cooper, for being a constant source of inspiration and guidance. She also thanks her family and friends for their continuous support.

1. *Distribution of Crime, Justice & America Magazine*, CRIME, JUST. & AM. (Feb. 27, 2011) [hereinafter *Distribution of Crime*], available at <http://crimejusticeandamerica.com/distribution-of-crime-justice-america-magazine>.

2. *Id.*

3. *Id.*

copies . . . to be mailed directly to inmates off of an inmate roster. Either way, every seven days enough copies [of the magazine] arrive at the targeted jails to ensure that at least one out of every ten inmates gets one.<sup>4</sup>

While many jails allowed the direct distribution method,<sup>5</sup> and some even praised it,<sup>6</sup> the Sacramento County Jails and the Butte County Jails refused to facilitate the direct distribution scheme and only allowed CJA to be distributed to those inmates who requested it.<sup>7</sup> The jails claimed that they refused to disseminate extra copies of the magazine to inmates who did not ask for them in an effort to minimize the risk of smuggled contraband and to reduce the amount of excess paper inmates could use to do things such as start fires or clog toilets.<sup>8</sup> As a result, Hrdlicka filed suit pursuant to 42 U.S.C. § 1983 claiming his First Amendment rights were violated by the mail policies at the jails that refused to distribute unsolicited copies to inmates.<sup>9</sup>

This Article discusses whether inmates have a First Amendment interest in receiving unsolicited publications, and whether a publisher has a First Amendment interest in distributing unsolicited publications. Part II will discuss the history of prisoners' First Amendment rights, specifically in relation to publications and communications, and how the standard for First Amendment violations of prisoner rights has evolved over time. Part III will focus on the Supreme Court case *Turner v. Safley*<sup>10</sup> and how the test articulated in *Turner* applied to cases that followed.<sup>11</sup> Part IV will address whether the *Turner* standard was the appropriate test to apply to whether publishers, and not inmates, have a First Amendment interest in distributing unsolicited publications,

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4. Hrdlicka v. Reniff, 656 F.3d 942, 944 (9th Cir. 2011), *reh'g denied en banc*, 631 F.3d 1044 (9th Cir. 2010).

5. This method involves leaving small stacks of the magazine in common areas of the jail. *Distribution of Crime*, *supra* note 1.

6. *Id.* ("Fresno County jail . . . wrote an email praising the 'direct distribution' method.").

7. *See Hrdlicka*, 631 F.3d at 1047-48.

8. *Id.* at 1051.

9. *Id.* at 1048.

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

11. *See Tanya Kessler, Purgatory Cannot Be Worse Than Hell: The First Amendment Rights of Civilly Committed Sex Offenders*, 12 N.Y. CITY L. REV. 283, 296 (2009).

specifically in reference to the Ninth Circuit case *Hrdlicka v. Reniff*.<sup>12</sup> The Supreme Court specifically stated that the *Turner* test was created “to formulate a standard of review for prisoners’ constitutional claims . . . .”<sup>13</sup> In *Hrdlicka*, the publishers of *CJA*, and not the prisoners, commenced the action, and thus the *Turner* test should not apply. Furthermore, a substantial issue of material fact does not exist in *Hrdlicka*, and the Ninth Circuit should have affirmed summary judgment. The last section of Part IV will discuss the standard that should have been applied in *Hrdlicka*.

## II. Standards Applied by the Court Regarding Prisoners’ First Amendment Rights

Criminal convictions and lawful imprisonment deprive citizens of their freedom and many other constitutional rights, but prisoners do retain some constitutional rights . . . . However, federal courts are [often] reluctant to interfere with the internal administration of prisons, and the judiciary accords wide-ranging deference to the “expert judgment” of prison officials.<sup>14</sup>

The Supreme Court has stated that “prison administrators[,] . . . and not the courts, [are] to make the difficult judgments concerning institutional operations . . . .”<sup>15</sup> Furthermore, “[p]rison management decisions ‘are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.’”<sup>16</sup>

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12. 631 F.3d 1044.

13. *Turner*, 482 U.S. at 85.

14. *Substantive Rights Retained By Prisoners*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 948, 947 (2007) (footnotes omitted).

15. *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 128 (1977).

16. Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 89 (2010) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

Courts' approaches to prisoners' constitutional rights can be classified into three phases.<sup>17</sup> Beginning in the 1930s, federal courts mainly adhered to the "hands-off" doctrine, "refusing to protect prisoners from constitutional violations, partly on the basis of federalism."<sup>18</sup> Lower federal courts supported the hands-off doctrine due to "judges' lack of familiarity with prison life and . . . time consuming, frivolous . . . filings [that] clog[ged] the court."<sup>19</sup> "Between 1967 and 1977[,] the federal judiciary underwent a [dramatic] transformation" wherein it "abandoned the hands-off doctrine" and greatly expanded constitutional protections to many aspects of incarceration, including First Amendment rights and living conditions.<sup>20</sup> Under *Procunier v. Martinez*,<sup>21</sup> the standard for First Amendment violations of prisoner rights was that the regulation in question had to "further an important or substantial governmental interest unrelated to the suppression of expression," and the limitation could be "no greater than is necessary" to protect the interest involved.<sup>22</sup> This decision, however, was short lived.

The shift from the protective stance toward prisoners in *Martinez* to more judicial deference to prison administrators was evident in *Pell v. Procunier*.<sup>23</sup> The Court held that a prison regulation that did not allow media representatives to interview particular inmates and did not allow prisoners to initiate interviews did not unconstitutionally infringe on prisoners' First Amendment rights, and the regulation did not amount to unconstitutional state interference with free press.<sup>24</sup> The Court noted that "[a]lthough they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison . . . ."<sup>25</sup> Thus, the judiciary began to provide prison administrators with more leeway in the way they ran the prisons.

Through the 1970s, the judiciary continually applied extreme deferential prison standards toward prisoners' constitutional rights, particularly their First Amendment rights. In the 1977 case *Jones v.*

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17. Kessler, *supra* note 11, at 295.

18. *Id.* (citing James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 99 (2006)).

19. Robertson, *supra* note 18.

20. *Id.* at 100.

21. 416 U.S. 396 (1974).

22. *Id.* at 413. This standard was similar to strict scrutiny.

23. 417 U.S. 817 (1974).

24. *See id.* at 834.

25. *Id.* at 827.

*North Carolina Prisoners' Labor Union, Inc.*, the Court noted that "First Amendment associational rights . . . must give way to the reasonable considerations of penal management."<sup>26</sup> Two years later, the Court held that "a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores does not violate the First Amendment rights of . . . inmates."<sup>27</sup> The restriction, the Court said, was a response to an obvious security problem—smuggling contraband, such as money, drugs, and weapons, in the bindings of hardcover books.<sup>28</sup> The Court cemented this shift away from the high-level scrutiny courts previously applied to infringements on prisoners' constitutional rights with the 1987 *Turner v. Safley*<sup>29</sup> decision, which established extreme judicial deference to prison administrators for prisoners' First Amendment rights.<sup>30</sup>

As evident from subsequent cases, the Court has moved to a more deferential standard when assessing prisoners' rights. With regard to First Amendment rights, specifically the distribution of mail and books in prison, the Court is particularly concerned with safety issues. As such, over time, the Court has increasingly deferred to prison administrators to regulate and manage prisoners' First Amendment rights.

### III. *Turner v. Safley*<sup>31</sup>

*Turner* remains one of the most influential prisoners' rights cases. The district court swayed from the standard set forth in *Wolfish* and "employed heightened scrutiny in finding unconstitutional prison regulations largely forbidding correspondence between inmates and barring inmate marriages."<sup>32</sup> The district court deemed inmate correspondence and marriage as fundamental rights<sup>33</sup> and "barred

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26. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977). In *Jones*, where a prison inmates "labor union" brought suit challenging a prison regulation that prohibited delivery of packets of union publications mailed in bulk to prisoners for redistribution among other prisoners, the Court held that the possible detrimental effects of organizational activities of the union were sufficiently weighty to prevail against the prisoners' First Amendment rights. *Id.*

27. *Bell v. Wolfish*, 441 U.S. 520, 550 (1979).

28. *Id.* at 551.

29. 482 U.S. 78 (1987).

30. See *Kessler*, *supra* note 11, at 295.

31. 482 U.S. 78.

32. *Robertson*, *supra* note 18, at 103 (citing *Turner*, 482 U.S. at 82-83).

33. *Turner v. Safley*, 586 F. Supp. 589, 594-96 (W.D. Mo. 1984); *Robertson*, *supra*

limitations on their exercise unless they constituted the least-restrictive method to achieving penal goals.<sup>34</sup> The court of appeals used the same test and affirmed.<sup>35</sup> Writing for the majority when the case reached the Supreme Court, Justice O'Connor stated, "a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules[.]"<sup>36</sup> and thus rejected the strict scrutiny analysis applied by the lower courts.

In place of heightened scrutiny, the *Turner* Court advanced a reasonableness standard.<sup>37</sup> Thus, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid [only] if it is reasonably related to legitimate penological interests."<sup>38</sup> To determine whether a regulation is reasonable, the court in *Turner* articulated a four-factor test: first, whether the regulation is rationally related to a legitimate and neutral governmental objective;<sup>39</sup> second, whether there are alternative avenues that remain open to exercise the right;<sup>40</sup> third, "the impact [that] accommodat[ing] . . . the asserted . . . right will have on guards and other inmates, and on the allocation of prison resources;<sup>41</sup> and fourth, whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.<sup>42</sup> The Court applied each of these factors to the two regulations and found that the prohibition on inmate-to-inmate mail was constitutional, as the regulation limited the potential to form escape plans and promote gang communication.<sup>43</sup> Furthermore, the regulation passed the four factors articulated by the test, and the regulation did not unconstitutionally restrict inmates' First Amendment rights.<sup>44</sup>

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note 18, at 103 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) ("[T]he very essence of a scheme of ordered liberty.")).

34. Robertson, *supra* note 18, at 104 (citing *Turner*, 586 F. Supp. at 594, 596).

35. *Safley v. Turner*, 777 F.2d 1307, 1316 (8th Cir. 1985).

36. *Turner*, 482 U.S. at 81.

37. *Id.* at 89.

38. *Id.*

39. *Id.*

40. *Id.* at 90.

41. *Id.*

42. *Id.*

43. *See id.* at 91.

44. *See id.* at 91-93.

A. *Analysis of Turner Factors*

The test in *Turner* is clearly deferential toward prison administrators' regulations. The Supreme Court, however, did not provide sufficient guidance as to how the *Turner* test should be applied.<sup>45</sup> The first factor states that there must be a "'rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."<sup>46</sup> The "governmental objective must be a legitimate and neutral one[.]"<sup>47</sup> which is a relatively "easy factor for prison officials to meet."<sup>48</sup> "The government's interests in rehabilitating prisoners, prison security, [fire safety,] and even budgetary concerns" are a number of ways in which the government could satisfy this standard.<sup>49</sup> As such, the first factor in the *Turner* test is generally easy for the government to satisfy.

The second factor of the *Turner* test states: "[w]here 'other avenues' remain available for the exercise of the asserted right . . . courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'"<sup>50</sup> This prong, however, is vague, as it seems that "[a] court need not seek an alternative to the specific right, but may seek an alternative to the general right."<sup>51</sup> "Thus, a court may defer to prison administrators even where no alternative to the specific right exists."<sup>52</sup> Therefore, it appears there is some leeway in satisfying this factor of the test.

The third factor of the test focuses on "the impact accommodation of the asserted constitutional right will have on guards and other inmates."<sup>53</sup> In addition, it also looks at the impact the asserted right will have on the allocation of resources in the prison.<sup>54</sup> "When

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45. Melissa Rivero, *Melting in the Hands of the Court: M&M's, Art, and a Prisoner's Right to Freedom of Expression*, 73 BROOK. L. REV. 811, 828 (2008). See generally 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 5:2, at 595-99 (3d ed. 2002) (providing additional information on the *Turner* case).

46. *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

47. *Id.* at 90.

48. Rivero, *supra* note 45, at 828.

49. *Id.*

50. *Turner*, 482 U.S. at 90 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

51. Rivero, *supra* note 45, at 828-29.

52. *Id.* at 829.

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

54. *Id.*



accommodation of an asserted right will have a significant ‘ripple effect,’ . . . courts . . . [are advised to] be particularly deferential to the informed discretion of corrections officials.”<sup>55</sup> Despite the similarity in the reasonableness analysis between the first and third factors, the third prong focuses on the regulation’s reasonableness with regard to “the plaintiff’s proposed alternative for operating the prison.”<sup>56</sup>

Lastly, the fourth factor considers whether the prison regulation is unreasonable and “an ‘exaggerated response’ to prison concerns.”<sup>57</sup> “The plaintiff bears the burden of suggesting an alternative[;]”<sup>58</sup> the alternative, however, need not be the least restrictive avenue.<sup>59</sup> “An inmate must show that an obvious, easy alternative exists and th[us], . . . the regulation is an overreaction to prison administrators’ concern.”<sup>60</sup> Moreover, if the proposed alternative is likely to create a “ripple effect” and thus, creates negative repercussions in other areas of prison administration, then the alternative is unlikely to withstand judicial scrutiny.<sup>61</sup> With the introduction of the *Turner* test, courts became more deferential to prison administrators. The prongs of the test were somewhat vague, but future cases provided some interpretation of the four-prong test. Nonetheless, it was clear the court was shifting toward a more lenient approach as to how jail administrators regulated their prisons.

#### B. *Turner Test Applied to Distribution of Literature*

“[M]embers of the *Turner* majority envisaged a test governing all rights implicated by prison regulations.”<sup>62</sup> Quickly following the *Turner* ruling, “the Court applied the . . . test to prison regulations addressing two other aspects of the First Amendment:”<sup>63</sup> religious practices<sup>64</sup> and receipt of books.<sup>65</sup> The Court in *Thornburgh v. Abbott*<sup>66</sup> reviewed the

55. *Id.*

56. Rivero, *supra* note 45, at 829 (citing MUSHLIN, *supra* note 45, at 36).

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

58. Rivero, *supra* note 45, at 829 (citing *Turner*, 482 U.S. at 90-91).

59. *See Turner*, 482 U.S. at 90-91.

60. Rivero, *supra* note 45, at 829 (citing *Turner*, 482 U.S. at 90-91).

61. *Id.* (citing MUSHLIN, *supra* note 45, at 35-36).

62. Robertson, *supra* note 18, at 105.

63. *Id.*

64. *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); Robertson, *supra* note 18, at 105.

65. *Thornburgh v. Abbott*, 490 U.S. 401 (1989); Robertson, *supra* note 18, at 105.

Federal Bureau of Prisons regulations that governed the censorship of publications sent to inmates; inmates can generally receive materials, but the warden may reject material according to specific criteria.<sup>67</sup> Using the reasonableness standard from *Turner*, the Court in *Abbott* held that wardens may reject publications sent to inmates if they are deemed “detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.”<sup>68</sup> The difference between the *Turner* and *Abbott* cases is that in *Turner* the inmate correspondence regulation implicated only the rights of prisoners and did not affect non-prisoners. In *Abbott*, however, the regulation implicated the rights of nonprisoners, specifically publishers who wished to communicate with inmates. Thus, although the *Turner* test was not immediately applied to prisoners’ rights, it provided a standard to address prisoners’ religious practices and the receipt of books.

### C. *The Ninth Circuit*

Federal courts have repeatedly applied the *Turner* test to prisoners’ First Amendment rights. The Ninth Circuit, in particular, “ha[s] applied the *Turner* test [to] four cases involving the distribution of literature to inmates.”<sup>69</sup> In each case, the Ninth Circuit held that “prison policies[, which] placed restrictions on the distribution of gift and solicited publications[,]” were unconstitutional.<sup>70</sup> In *Crofton v. Roe*,<sup>71</sup> the Ninth Circuit “struck down a regulation that prohibited a prisoner from receiving a book that [was] ordered for him by his stepfather.”<sup>72</sup> The Court stated that the state failed to offer any justification for a blanket ban on the receipt of all gift publications.<sup>73</sup> A few years later, the Ninth Circuit struck down a ban on bulk-rate mail as applied to non-profit publications.<sup>74</sup> The court noted that “the receipt of such unobjectionable mail [does not] implicate penological interests.”<sup>75</sup> In *Morrison v. Hall*,<sup>76</sup>

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66. 490 U.S. 401.

67. See Stacey A. Miness, *Pornography Behind Bars*, 85 CORNELL L. REV. 1702, 1714-15 (2000) (quoting *Abbott*, 490 U.S. at 403).

68. *Abbott*, 490 US at 404.

69. *Hrdlicka v. Reniff*, 631 F.3d 1044, 1050 (9th Cir. 2011).

70. *Id.*

71. 170 F.3d 957, 960 (9th Cir. 1999).

72. *Hrdlicka*, 631 F.3d at 1050 (citing *Crofton*, 170 F.3d at 960-61).

73. *Crofton*, 170 F.3d at 960.

74. See *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001).

75. *Hrdlicka*, 631 F.3d at 1050 (quoting *Prison Legal News*, 238 F.3d at 1149).

the Ninth Circuit struck down a regulation applied to “pre-paid, for-profit, subscription publications,” and noted that the government did not provide any evidence regarding how the impact of processing the publications would impact prison resources.<sup>77</sup> Lastly, the Ninth Circuit cut down a prison ban on “non-subscription bulk mail” in the 2005 case *Prison Legal News v. Lehman*.<sup>78</sup> As evident from precedent, the Ninth Circuit has continuously applied the *Turner* test to prisoners’ rights, and in doing so, has expanded prisoners’ First Amendment rights, particularly regarding the distribution of publications.

#### IV. *Hrdlicka v. Reniff*<sup>79</sup>

The Ninth Circuit notoriously interferes with the administration of prisons.<sup>80</sup> Thus, it did not come as a surprise when the Ninth Circuit held that county jail prisoners have the right to receive unsolicited copies of CJA.<sup>81</sup> The quarterly magazine informs, explains, entertains, interprets, uncovers, and questions relevant issues in the criminal justice system, and between 2002 and 2011, fourteen editions of the magazine were published, totaling over one million copies.<sup>82</sup> When Sacramento County and Butte County sheriffs refused to distribute the magazine at their county jails,<sup>83</sup> Ray Hrdlicka, the publisher of CJA, and CJA filed federal lawsuits against them.<sup>84</sup> The sheriffs countered that an increase in the number of publications and papers in their jails led to security concerns.<sup>85</sup>

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76. 261 F.3d 896 (9th Cir. 2001).

77. *Id.* at 898.

78. 397 F.3d 692 (9th Cir. 2005) (involving publications that inmates requested but for which they do not pay).

79. 631 F.3d 1044.

80. *See Hrdlicka v. Reniff*, 656 F.3d 942 (9th Cir. 2011), 9TH CIR. WATCH (Oct. 13, 2011, 8:22 PM), <http://blog.the9thcircuitwatch.com/search?q=hrdlicka> [hereinafter 9TH CIRCUIT WATCH].

81. *Hrdlicka*, 631 F.3d at 1055.

82. *See id.* at 1046-47.

83. *Id.* at 1048. Both jails had policies that limited the amount of written materials inmates can keep in their cells. *Id.* at 1047-48. In Sacramento jails, an inmate may keep up to one newspaper, five periodicals, and five soft-covered books in his cell at any given time. *Id.* at 1047.

84. *Id.* at 1046.

85. *Id.* at 1051-52.

Prison officials from the two counties filed summary judgment motions.<sup>86</sup> The district court granted summary judgment to both Sheriff McGuinness and Sheriff Reniff under the *Turner* test.<sup>87</sup> Hrdlicka timely appealed and the court of appeals reviewed the order de novo.<sup>88</sup> Viewing the evidence in the light most favorable to Hrdlicka and CJA, a divided three-judge panel of the Ninth Circuit Court of Appeals reversed the order for summary judgment and held “publishers and inmates have a First Amendment interest in communicating with each other.”<sup>89</sup> Furthermore, the majority held that “[a] First Amendment interest in distributing and receiving information does not depend on a recipient’s prior request for that information.”<sup>90</sup> The majority applied the *Turner* test and found the jails’ response to the distribution of the unsolicited magazine may have been exaggerated.<sup>91</sup> When “[a] judge of the court called for a vote on the petitions for rehearing en banc[,] . . . [a single] question [was] presented . . . : Does the four-factor test of *Turner* . . . apply to distribution of a magazine to county jail inmates who have not requested it?”<sup>92</sup> “A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing[;]”<sup>93</sup> however, eight judges dissented.<sup>94</sup> Concurring in the denial of rehearing en banc, Justices Reinhardt and Fletcher stressed that just because “the publication was unsolicited does not make the *Turner* test inapplicable.”<sup>95</sup> In fact, the Justices noted that the Ninth Circuit previously “applied *Turner* to evaluate a regulation banning [the] distribution of requested but ‘non-subscription bulk mail.’”<sup>96</sup> As such, the denial of an en banc hearing meant summary judgment was reversed.

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86. *Id.* at 1047.

87. *Id.* at 1047-48.

88. *Id.* at 1048.

89. *Id.* at 1049.

90. *Id.*

91. *Id.* at 1054-55.

92. Hrdlicka v. Reniff, 656 F.3d 942, 942-43 (9th Cir. 2011), *reh’g denied en banc*, 631 F.3d 1044.

93. *Id.*

94. *See id.* at 943.

95. *Id.*

96. *Id.* (citing Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005)).

### A. *Majority*

The majority in *Hrdlicka v. Reniff*<sup>97</sup> repeatedly emphasized that the *Turner* test was the proper standard by which to assess whether the prisoners' constitutional rights were violated.<sup>98</sup> The majority held that neither defendant was entitled to summary judgment, and thus reversed the district courts' orders granting summary judgment.<sup>99</sup> In reaching their decision, the majority first analyzed whether any First Amendment interest was implicated.<sup>100</sup> After concluding First Amendment interests were present, it applied the four-factor *Turner* test to determine whether the jails' policies violated the prisoners' First Amendment rights.<sup>101</sup> The court determined that the defendants did not justify banning the unsolicited distribution of CJA to county jail inmates.<sup>102</sup>

#### 1. First Amendment Interest

The first step in the majority's analysis was to determine whether any First Amendment right was implicated.<sup>103</sup> If such rights were implicated, the court would then apply the four-factor *Turner* test. The court in *Thornburgh v. Abbott*<sup>104</sup> applied the same two-step analysis and held that with regard to First Amendment rights, "publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."<sup>105</sup> The majority in *Hrdlicka* noted that the Ninth Circuit has "repeatedly recognized that publishers and inmates have a First Amendment interest in communicating with each other."<sup>106</sup> Furthermore, the majority stated that "[a] First Amendment interest in distributing and receiving information does not depend on a recipient's prior request for that information"<sup>107</sup> and pointed to the holding in *Martin v. City of*

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97. 631 F.3d 1044 (9th Cir. 2011).

98. *See id.* at 1051-55.

99. *Id.* at 1055.

100. *Id.* at 1048.

101. *See id.* at 1049-56.

102. *Id.* at 1055.

103. *Id.* at 1048.

104. 490 U.S. 401 (1989).

105. *Id.* at 408.

106. *Hrdlicka*, 631 F.3d at 1049; *see, e.g.*, *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005); *accord Thornburgh*, 490 U.S. at 408.

107. *Hrdlicka*, 631 F.3d at 1049.

*Struthers*,<sup>108</sup> which held that “a municipal ordinance that made it unlawful to go door to door distributing handbills, circulars, or advertisements” was unconstitutional.<sup>109</sup> Thus, the majority in *Hrdlicka* found that “publisher[s] ha[ve] a First Amendment interest in distributing[] and inmates have a First Amendment interest in receiving[] unsolicited publications” of CJA.<sup>110</sup>

## 2. *Turner* Application

Following the determination that both inmates and publishers have First Amendment interests in the distribution and collection of CJA, the majority applied the four-step *Turner* test to evaluate the reasonableness of the prison regulation and decide whether it violated constitutional rights.<sup>111</sup> The majority maintains that the Supreme Court and Ninth Circuit “have consistently applied the *Turner* test to determine whether various forms of written communication with inmates are protected by the First Amendment.”<sup>112</sup> The *Turner* test has been applied to “individual challenges to prison or jail regulations forbidding various forms of written communications[,]”<sup>113</sup> and the majority found that “the fact that the publication [in *Hrdlicka*] was unsolicited does not make the *Turner* test inapplicable.”<sup>114</sup> Thus, the majority held that the *Turner* test was the proper standard by which to evaluate whether First Amendment rights were violated.

The first step of the *Turner* test is to determine whether the prison regulation is rationally related to a legitimate penological objective.<sup>115</sup> Should “the prison fail[] to show . . . the regulation is rationally related to a legitimate penological objective, [the court] do[es] not consider the other factors[;]”<sup>116</sup> however, if the regulation is rationally related, the court assesses the three other prongs.<sup>117</sup> Officers at the Sacramento and Butte County Jails asserted various reasons for the prison regulations: jail

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108. 319 U.S. 141, 143 (1943).

109. *Hrdlicka*, 631 F.3d at 1049 (citing *Martin*, 319 U.S. at 143).

110. *Id.*

111. *Id.*

112. *Id.* at 1050.

113. *Id.* at 1051.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

security, staff resources, slippery slope, and interference with existing advertising.<sup>118</sup>

Officers at the jails were concerned with the effect an influx of publications would have on jail security.<sup>119</sup> By refusing to allow unsolicited copies of CJA, the officers maintained it would “reduc[e] the likelihood of contraband entering the jail, . . . reduc[e] the risk of fires[,] and enable[e] efficient cell searches.”<sup>120</sup> Furthermore, they also asserted that the policies promoted security because unsolicited publications were more likely to be used for “‘nefarious purposes’ such as blocking lights or clogging toilets.”<sup>121</sup> Thus, the officers argued the policies were reasonable to protect the security interests of inmates and general regulation within the jail.

The majority was unconvinced that by permitting unsolicited copies of CJA, there would be heightened security concerns at the jail.<sup>122</sup> The Sacramento County jail previously received unsolicited copies of the *Sacramento Bee* and *USA Today* but halted delivery of both publications for reasons other than security concerns.<sup>123</sup> Furthermore, “Lieutenant Bryan Flicker of the Butte County jail stated in his declaration that inmates at th[e] jail already have access to paper that they use for improper purposes[,]”<sup>124</sup> and he failed to point out how and “whether distribution of CJA was likely to increase the rate of such use of paper by inmates.”<sup>125</sup> As such, the majority concluded that the jails failed to establish whether distribution of CJA in the jails “would produce additional clutter in inmates [sic] cells or otherwise adversely affect jail security.”<sup>126</sup>

Jail officers gave other reasons to justify their policies. First, officers expressed concern that by allowing delivery of unsolicited copies of CJA, additional staff and time would be required to sort through the mail publications.<sup>127</sup> Officer Fox of the Sacramento County Jail stated “[a] total of twenty-four . . . personnel hours are used per day

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118. *Id.* at 1051-53.

119. *Id.* at 1051.

120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.*

124. *Id.* at 1052.

125. *Id.*

126. *Id.*

127. *Id.*

on mail related duties at the [j]ail.”<sup>128</sup> The majority found, however, that “[n]either jail . . . suggested that unsolicited publications are more difficult to inspect and deliver than solicited publications[.]”<sup>129</sup> and each failed to show how many additional hours would be required if unsolicited copies of CJA were delivered.<sup>130</sup> Thus, the majority was unconvinced with this argument.

The next argument the officers presented to prove the regulations were rationally related to a legitimate penological objective was that should the jails accept unsolicited publications of CJA, there would be an influx of other unsolicited publications.<sup>131</sup> Furthermore, the Butte County Jail, in particular, wanted to “maintain control over advertising of bail in the jail” and distributing unsolicited copies of CJA would be inconsistent with existing advertising contracts.<sup>132</sup> The majority, however, was unimpressed with both arguments. As per the slippery slope, the majority stated that the jail “did not present any evidence about other requests to distribute unsolicited mail.”<sup>133</sup> Additionally, as per interference with existing advertising, the majority held that a jail does not have “a legitimate penological interest . . . in protecting a profit made by impinging on inmates’ First Amendment rights.”<sup>134</sup> Since the prisons did not fail to show the regulation are not rationally related to legitimate penological factors, the majority assessed the remaining three factors in the *Turner* test.<sup>135</sup>

The second element of the *Turner* test is whether there are other avenues available to exercise the asserted right.<sup>136</sup> The “[d]efendants argue that CJA has alternative avenues to communicate with inmates because the jails will distribute CJA to inmates who request it.”<sup>137</sup> The majority conceded, however, that there is a question of fact as to whether CJA publishers can effectively reach inmates if they can only reach them

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128. *Id.*

129. *Id.* at 1053.

130. *Id.* at 1052-53.

131. *Id.* at 1053.

132. *Id.*

133. *Id.*

134. *Id.* (“Butte County jail has a contract with Partners for a Safer America, Inc. (‘PSA’), under which PSA operates bulletin boards in the jail on which bail bond agents are allowed to post advertisements. PSA pays the jail a percentage of its profits from its sale of advertising space on the bulletin boards.”).

135. *Id.* at 1053-55.

136. *Id.* (quoting *Turner v. Safely*, 482 U.S. 78, 90 (1987)).

137. *Id.* at 1053-54.



upon request.<sup>138</sup> In addition, although inmates have access to the yellow pages and television, many inmates leave the jail before they learn that CJA exists, have time to request it, and then ultimately receive it.<sup>139</sup> Thus, the majority concluded there is a material issue of fact as to whether there are other avenues available.<sup>140</sup>

The third element of the *Turner* test is the “impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”<sup>141</sup> “When accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”<sup>142</sup> Plaintiffs stated they are willing to work with the jail officials to make the distributions easy and efficient, but there are issues as to the degree to which the jails would need to expend additional resources to accommodate the publishers. Officers, however, did not explain how mail inspectors would distinguish between unsolicited and requested copies of CJA, and thus, a ban on unsolicited copies could actually consume more prison resources than otherwise.<sup>143</sup> Therefore, a question of material fact exists to the impact of accommodating the right to distribute the unsolicited copies of CJA.

The fourth and final element of the *Turner* test is

whether the existence of easy and *obvious* alternatives indicates that the regulation is an exaggerated response by prison officials. This is not a “least restrictive alternative” test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint. “[A]n alternative that fully accommodates the [asserted] rights at de minimis cost to valid penological interests suggests that the regulation does not satisfy the reasonable relationship standard.”<sup>144</sup>

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138. *Id.* at 1054.

139. *Id.*

140. *Id.* at 1053-54.

141. *Id.* at 1054 (quoting *Turner*, 482 U.S. at 90).

142. *Id.* (quoting *Turner*, 482 U.S. at 90).

143. *Id.*

144. *Id.* at 1054-55 (citations omitted).

“The undisputed fact that CJA is . . . distributed in more than [sixty] counties throughout [thirteen] states . . . suggests that the [jails’] responses . . . may be exaggerated.”<sup>145</sup> Furthermore, the jail has not pointed to any procedures by which they can mitigate the drain on jail resources.<sup>146</sup> Thus, taking all four *Turner* factors into consideration with the fact that First Amendment interests are implicated in the case, the majority held that neither defendant is entitled to summary judgment.<sup>147</sup>

#### B. *Dissent*

The dissent in *Hrdlicka* found that there is not an issue of material fact and would uphold the district court’s order granting summary judgment to the defendants.<sup>148</sup> The dissent focuses on one important aspect: there have been no prisoner requests for access to CJA.<sup>149</sup> The dissent concedes that the Ninth Circuit has found that the First Amendment guarantees Hrdlicka access to prisoners who have requested the magazine, but none have requested it.<sup>150</sup> Furthermore, the dissent argues that “there is no precedent suggesting that the First Amendment guarantees Hrdlicka the special right to sue any sheriff[, jail, or officer] who refuses to be a de facto distribut[or] . . . of the CJA.”<sup>151</sup>

“Prisons are not public fora.”<sup>152</sup> Instead, the court points out, prisons are one of the few “public institutions which do not perform speech-related functions at all . . . [where] the government is free to exclude even peaceful speech and assembly which interferes in any way with the functioning of those organizations.”<sup>153</sup> Prisons are built for security purposes and to punish and deter criminal activity.<sup>154</sup> Since prisons are not public fora, and speech can be suppressed in certain instances, the dissent argues that prisons should be able to restrict the distribution of unsolicited copies of CJA.

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145. *Id.* at 1055.

146. *See id.*

147. *Id.*

148. *See id.* at 1055-58 (Smith, J., dissenting).

149. *Id.* at 1055-56.

150. *Id.*

151. *Id.* at 1056.

152. *Id.* (citing *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978)).

153. *Id.*

154. *Id.*

The dissent states that “[t]he majority’s [proposition] that ‘*Turner* addresses’ any ‘concerns’ regarding the difference between public fora and prisons[] is unavailing.”<sup>155</sup> The Supreme Court in *Turner* stated that the Court’s task was to “formulate a standard of review for prisoners’ constitutional claims . . . .”<sup>156</sup> The dissent argues that since the publishers are the aggrieved party, and no prisoner has brought a claim alleging his or her constitutional rights have been violated, there are no First Amendment rights implicated.<sup>157</sup> As such, since there are no prisoners’ constitutional claims, the *Turner* test should not be applied.<sup>158</sup>

Lastly, the dissent argues that the media has “no constitutional right of access to prisons or their inmates beyond that afforded the general public.”<sup>159</sup> “Just as the press has no [constitutional] right of access to prison[ers,]” publishers distributing their magazines to inmates do not have a constitutional right of access.<sup>160</sup> “Hrdlicka has no special right to demand a sheriff accept one of his chosen methods of distribution, especially given that a prison is not a public forum.”<sup>161</sup> Hrdlicka can use other avenues to distribute and advertise his magazine and inform inmates about his publication.<sup>162</sup> Thus, prisons should be able to restrict the distribution of unsolicited copies of CJA, and summary judgment awarded to the defendants should be affirmed.<sup>163</sup>

### C. *Improper Outcome and Turner Application*

The Ninth Circuit has continuously interfered with the administration of prisons.<sup>164</sup> As such, “The Supreme Court has repeatedly reversed [Nin]th Circuit expansion of prison inmates substantive rights beyond their scope . . . .”<sup>165</sup> In *Hrdlicka v. Reniff*, the Ninth Circuit continued its trend in interfering with the administration of prisons and held that the prisons did not justify banning the unsolicited

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155. *Id.* (citations omitted).

156. *Id.* (alteration in original) (quoting *Turner v. Safley*, 482 U.S. 78, 85 (1987)).

157. *Id.*

158. *See id.* at 1057.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. *Id.* at 1058.

164. 9TH CIRCUIT WATCH, *supra* note 80.

165. *Id.*

copies of CJA to county jail members.<sup>166</sup> Furthermore, it held prisoners have a right to receive such unsolicited copies, and Hrdlicka, the publisher, has a right to send them.<sup>167</sup> The Ninth Circuit, however, applied the *Turner* test, which was the incorrect standard. Not only does the holding from the *Turner* Court specifically apply to prisoners' constitutional claims, and not publishers claims, but it is also material that prisons are not public fora.<sup>168</sup> In addition, the Supreme Court has continually deferred prison administration issues to the prisons,<sup>169</sup> and the press does not have a constitutional right of access to prisons and prison inmates.<sup>170</sup> As such, summary judgment in favor of the prisons should not have been reversed, and the *Turner* test should not have been applied.

### 1. *Turner* Test Is Incorrect Standard

The *Turner* test is the incorrect standard to apply as to whether Hrdlicka has a right to distribute non-solicited copies of CJA to inmates. In *Turner*, a class action was brought by “persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri correctional facilities.”<sup>171</sup> Furthermore, the Court in *Turner* specifically stated that their task was to “formulate a standard of review for *prisoners*' constitutional claims that is responsive both to the ‘policy of judicial restraint regarding *prisoner* complaints and [to] the need to protect constitutional rights.’”<sup>172</sup> As such, the *Turner* Court held that regulations within the jail relating to inmate marriages were unconstitutional, while regulations regarding inmate-to-inmate correspondence were constitutional since they related to legitimate security concerns.<sup>173</sup> Most importantly, however, is that fact

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166. *Hrdlicka*, 631 F.3d at 1046.

167. *Id.* at 1049.

168. *Id.* at 1056 (Smith, J., dissenting) (citing *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978)).

169. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (“[P]rison administrators[,] . . . and not the courts, [are] to make the difficult judgments concerning institutional operations . . .”).

170. *Hrdlicka*, 631 F.3d at 1057 (Smith J., dissenting) (citing *Pell v. Procunier*, 417 U.S. 817 (1974)).

171. *Turner v. Safley*, 482 U.S. 78, 82 (1987).

172. *Id.* at 85 (alteration in original) (emphasis added) (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1987)).

173. *Id.* at 99.

that the holding referred to *prisons'* constitutional claims and judicial restraint concerning *prisoners'* complaints.

In *Hrdlicka*, Ray Hrdlicka, the publisher of CJA, brought claims asserting he and the publication have a First Amendment right to distribute unsolicited copies of CJA to prison inmates.<sup>174</sup> Hrdlicka is not a prison inmate. CJA is also not a prison inmate. No prison inmates brought claims asserting *their* First Amendment rights were violated when the prisons refused to distribute unsolicited copies of CJA. As such, it is evident that *Turner* is not the proper test to apply since the issue and holding in *Turner* pertained solely to prisoners' constitutional claims and complaints. Since there are no prisoner constitutional claims at issue in *Hrdlicka*, the Ninth Circuit should not have applied the four-step *Turner* test.

## 2. Prisons Are Not Public Fora

Prisons are not public fora.<sup>175</sup> A public forum is an area where the government cannot regulate speech-related conduct except in narrow, non-discriminatory ways shown to be essential in serving significant governmental interests.<sup>176</sup> At one end of the spectrum and most protected from any form of regulation are areas such as public streets and parks.<sup>177</sup> At the other and least shielded from regulation, however, are places such as hospitals, military bases, and prisons. In such places as those least shielded from regulation, the government is free to exclude even peaceful speech and assembly, which interferes with the functioning of that particular institution.<sup>178</sup>

Butte and Sacramento prisons, the defendants in *Hrdlicka*, are within the category of places that are least shielded from speech regulations. Jails can exclude speech that interferes with the functioning of the prison. Since an influx of CJA will create security concerns within the jails,<sup>179</sup> prisons should be permitted to restrict it. Furthermore, as jails

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174. *Hrdlicka*, 631 F.3d at 1046.

175. *Id.* at 1056 (Smith, J., dissenting) (citing *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978)).

176. *Douglass*, 579 F.2d at 548; see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 688-93 (1978); Harry Kalven Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

177. *Douglass*, 579 F.2d at 549.

178. *Id.*

179. *But see Hrdlicka*, 631 F.3d at 1052 (holding jails failed to establish whether distribution of CJA in the jails "would produce additional clutter in inmates [sic] cells or

are not public fora, it should be within the prisons' discretion as to whether CJA should be allowed.

### 3. Deference to Prisons

The courts should be deferential to prison administrators and prison regulations. “[B]ecause the ‘problems of prisons in America are complex and intractable,’ and because courts are . . . ‘ill equipped’ to deal with these problems, [the Supreme Court] generally ha[s] deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.”<sup>180</sup> “[U]nder *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management.”<sup>181</sup> In *Shaw v. Murphy*, the Supreme Court held that “[s]eeking to avoid ‘unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration, [the Court] reject[s] an alteration of the *Turner* analysis that would entail additional federal-court oversight.”<sup>182</sup> As such, the court should defer to decisions of prison officials when deciding whether unsolicited copies of CJA can be distributed.

By reversing summary judgment and disallowing prison officials to uphold their regulations, the Ninth Circuit is violating the separation of powers doctrine.

Prisons are creatures of the legislative and executive branches [of government], . . . so deference should be afforded [to the prisons] out of respect for the separation of powers. Where state prisons are involved, federal courts should defer for reasons of federalism. Or when push comes to shove, managing prisons is simply not the court's job.<sup>183</sup>

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otherwise adversely affect jail security”).

180. *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)).

181. *Id.* at 230 (citing *Turner v. Safley*, 482 U.S. 78 (1987)).

182. *Id.* at 230-31 (quoting *Turner*, 482 U.S. at 89). “If courts were permitted to enhance constitutional protection based on their assessments of the content of the particular communications, courts would be in a position to assume a greater role in decisions affecting prison administration.” *Id.*

183. Caplan, *supra* note 16, at 90-91 (footnotes omitted).

Nonetheless, it is evident that prison administration should be left to prisons and the officials who work there. As such, the regulations in Butte and Sacramento jails disallowing the distribution of unsolicited publications of CJA to inmates violates the separation of powers doctrine, and the courts should defer to prison officials.

#### 4. The Press Has No Constitutional Right to Access Prisons

The First Amendment prohibits the making of any law that abridges the freedom of speech and infringes on the right of the press.<sup>184</sup> These rights, however, are not absolute, and limitations exist. One such limitation is the right of the press to access prison inmates.

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . [T]he press is regularly [denied access to] grand jury proceedings, [court] conferences, [and] the meetings of other official bodies gathering in executive session . . . . [Furthermore, the press] ha[s] no constitutional right of access to the scenes of crime or disaster when the general public is excluded.<sup>185</sup>

Thus, it is evident that the Constitution can limit such rights of the press, and there is no constitutional duty to make available to journalists sources of information not available to the members of the public generally.

Just as the press has no special right of access to prisons, Hrdlicka has no special right of access to demand that unsolicited publications of CJA be distributed to inmates. As discussed earlier, a prison is not a public forum.<sup>186</sup> Thus, a content neutral method for sheriffs to ensure efficient administration of their facilities is allowed. Furthermore, Hrdlicka has other avenues by which he can distribute CJA.<sup>187</sup> First, he “can advertise . . . in . . . the jail in an effort to convince inmates . . . to

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184. U.S. CONST. amend. I.

185. *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)).

186. *See supra* text accompanying notes 175-79.

187. *Hrdlicka v. Reniff*, 631 F.3d 1044, 1057 (2011) (Smith, J., dissenting).

request his publication.<sup>188</sup> Second, if he advertises in the jail, it is likely that prisoners will begin to discuss the magazine, and as a result, more prisoners will become aware of the publication and also request it. Although advertising is more costly than sending undistributed copies of CJA to prisons, “in the context of prisons, losing ‘cost advantages does not fundamentally implicate free speech values.’”<sup>189</sup> As such, *Hrdlicka* cannot use the First Amendment to demand access to the prison inmates, and even though that may be the most cost effective procedure for the publication, cost advantages does not implicate free speech and press values.<sup>190</sup>

As discussed, the *Turner* test was the improper standard to apply to the question of whether or not publishers have a First Amendment right to distribute unsolicited copies of CJA to prison inmates. In *Hrdlicka*, there were no *prisoners’* claims regarding violations of *their* constitutional rights. Therefore, the *Turner* test should not have been applied. In addition, summary judgment should have been affirmed in favor of the defendants. Since prisons are not public forums, there is no constitutional right of access to prisoners, and courts should be deferential to prison administrators and regulations.

#### D. *Test that Should Be Applied*

Since the *Turner* test was the incorrect test to apply in *Hrdlicka*, a different standard should be set forth. The test to decide whether a prison regulation violates a publisher’s First Amendment rights should be: 1) does the prison regulation serve an important government objective; and 2) is the regulation narrowly tailored? This is somewhat similar to the time, place, and manner restrictions, which have been upheld by the Supreme Court as constitutional restrictions on free speech. Since prisons are not public fora, however, the test is more stringent and does not include the “alternate channels of communication” and “content neutral” prongs. Furthermore, the test does not include the “content neutral” prong because it is necessary for prisons to censure certain topical publications that are sent to prisoners. Such topics include descriptions of how to build and use weapons, or how to escape from prisons.

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188. *Id.*

189. *Id.* at 1057 (quoting *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 130-31 (1977)).

190. *See id.*



The aforementioned test includes only the two listed factors because the courts should be deferential to prison administrators. As discussed earlier, prisons are created and governed by the legislative and executive branches.<sup>191</sup> Courts should be deferential to their regulations. In addition, prison administrators are familiar with the problems that arise in their facilities, particularly the issues that exist when there are influxes of paper and publications floating around prisons. Therefore, prison officials should be the individuals who decide how best to regulate inmates and prisons. The two-part test places some restrictions on the amount of power such prison officials can exercise; the test, however, does lean in favor of prison administrators.

Accordingly, courts should use the aforementioned test to determine whether a prison regulation violates a publisher's First Amendment rights. If the test had been applied in *Hrdlicka*, the regulation would have passed constitutional muster since the defendants stated several important government objectives for disallowing unsolicited copies of CJA to be distributed to inmates, and the regulation is narrowly tailored to only disallow unsolicited copies of the publication to be distributed. As such, summary judgment in favor of the prison defendants should have been affirmed.

## V. Conclusion

“The constitutional guarantee of a free press ‘assures the maintenance of our political system and an open society.’”<sup>192</sup> Furthermore, “the First and Fourteenth Amendments also protect the right of the public to receive such information . . . as . . . published.”<sup>193</sup> While prisoners are still afforded constitutional rights such as the right to receive information, they are not afforded the same liberties and freedoms as other members of the public. As such, there are restrictions on their constitutional rights. As evident in *Thornburgh v. Abbott*, one such limitation is the right to receive certain publications.<sup>194</sup> If the publications are deemed to be “detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity,” the

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191. *See supra* text accompanying note 180-83.

192. *Pell v. Procunier*, 427 U.S. 817, 832 (1974) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)).

193. *Id.* (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

194. 490 U.S. 401 (1989).

warden may reject it.<sup>195</sup> Another limitation imposed upon prisoners is that a warden is permitted to reject publications that involve discussions of certain topics such as descriptions as to how a person can “construct[] or use . . . weapons, ammunition, [or] bombs.”<sup>196</sup> The warden may also censor publications that “depict[], encourage[] or [explain how to] escape from [a] correctional facilit[y], or [if it] contains blueprints, drawings or similar descriptions of” correctional facilities.<sup>197</sup> Therefore, it is evident that although prisoners still retain constitutional rights, those rights are subject to restrictions.

In *Hrdlicka v. Reniff*, the Ninth Circuit Court of Appeals applied the four-factor *Turner* test to determine whether publishers and inmates have a First Amendment right to receive and distribute unsolicited copies of CJA.<sup>198</sup> The *Turner* test has been used in several previous cases to determine whether prisoners’ constitutional rights were violated; however, the *Turner* test, should not have been applied in *Hrdlicka*. The *Turner* Court stated that their task was to “formulate a standard of review for *prisoners*’ constitutional claims that is responsive both to the ‘policy of judicial restraint regarding *prisoner* complaints and [to] the need to protect constitutional rights.’”<sup>199</sup> The test refers to *prisoners*’ claims and complaints, and the need to protect *their* rights. Since *Hrdlicka* brought the claim on behalf of himself, the publisher, and CJA, the publication, and there were no prisoners’ claims or complaints, the *Turner* test should not have been applied.

In addition to the inapplicability of the *Turner* test, summary judgment in favor of the defendants should have been affirmed. As discussed earlier, prisons are not public fora, and thus are areas in which the government can restrict and regulate speech-related conduct. The distribution of CJA is one such example of speech-related conduct that the government should be able to regulate. Also, since prisons problems are often “complex and intractable,” courts should be deferential to prison administrators since they are the ones familiar and experienced with the intricacies of such issues and how best to deal with them.<sup>200</sup>

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195. *Id.* at 403 n.5 (quoting 28 C.F.R. § 540.71(b) (2012)).

196. 28 C.F.R. § 540.71(b)(1).

197. *Id.* § 540.71(b)(2).

198. 631 F.3d 1044, 1049-50 (9th Cir. 2011).

199. *Turner v. Safley*, 482 U.S. 78, 85 (1987) (emphasis added) (quoting *Proconier v. Martinez*, 416 U.S. 396, 406 (1974)).

200. *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (quoting *Proconier v. Martinez*, 416 U.S. 396, 404-05 (1974)).

Furthermore, since prisons are creatures of the legislative and executive branches of the government, the courts should respect the separation of powers and afford even more deference to prisons. Finally, the press does not have a constitutional right to access prisons. Although the First Amendment affords freedom to the press, there are restrictions, and one such limitation is access to prison inmates. Accordingly, the prison defendants in *Hrdlicka* should be awarded the right to regulate their prisons in the manner they wish, and the Ninth Circuit should have been deferential to prison policies.

The test to determine whether a publisher's First Amendment rights are violated by a prison regulation should be a two-part test: 1) does the regulation serve an important government objective; and 2) is the regulation narrowly tailored. The test should be limited to these two prongs because regulating a prison is a difficult job and one in which involves intricacies and complexities. Therefore, the courts should be deferential to prison administrators, and the test should reflect this deferential attitude. If the courts were to apply the aforementioned test, summary judgment should have been affirmed, as the prison stated several reasons for the regulation, such as security concerns, and the regulation is narrowly tailored as it only referred to unsolicited copies of the publication. Regardless of the test, however, *Hrdlicka* should not be allowed to distribute unsolicited copies of CJA to prison inmates, and summary judgment should have been affirmed.