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JAILHOUSE INFORMANTS: A LESSON IN E-SNITCHING

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I. INTRODUCTION

Informants have been falsifying confessions in the United States since at least 1819. That year, Vermont authorities could not solve an alleged homicide since the victim was missing, and brought in a known perjurer for help. The perjurer elicited a "confession" from a suspect, who received the death penalty. Days before the hanging was to take to place, the supposed murder victim returned to town, alive.[1] Today, jailhouse informants, many of whom are pathological liars, who tell prosecutors about suspects' alleged confessions, will receive leniency or other perks. Problems stemming from this prompted a grand jury investigation in Los Angeles in 1990[2] and contributed to the commutation of all Illinois death sentences in 2003.[3]

What would happen if it were even easier for informants to get information about fellow inmates? Would there be more informants, or would prosecutors and the criminal justice system finally decide that informants are untrustworthy and that they do more harm than good? With

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1. Sean Gardiner, *'Insider' Trading; Jailhouse Snitches Have Long History of Deals With DAs*, NEWSDAY, Dec. 9, 2003, at A08.

2. Ted Rohrlich, *Perjurer Sentenced to 3 Years*, L.A. TIMES, May 20, 1992, Part B, at 1.

3. Gardiner, *supra* note 1.

the advent of the Internet, which promises unencumbered access to information, that time may already be upon us. This Article considers the effect that Internet access, either direct or through third-party providers, has on jailhouse informants.

Part II provides a primer on the use of jailhouse informants in the criminal justice system, showing how they trade lies for prosecutorial leniency. Part III demonstrates how informants, or those acting on their behalf, can exploit the Internet to generate a false confession, using the case of Kurt Sonnenfeld as an example. Part IV considers whether states can and should limit prisoners' access to the Internet. Part IV(A) argues that state laws limiting prisoners' access to Internet-generated materials are unconstitutional because they are not sufficiently related to a legitimate government interest. Part IV(B) argues that practical considerations mandate that prisoners be allowed at least limited access to the Internet. Ultimately, the paper concludes that prosecutors, in light of informants' increased access to information, should consider severely curtailing, if not discontinuing, the use of jailhouse informants.

II. A PRIMER ON JAILHOUSE INFORMANTS

At one point in history, jailhouse informants served a good purpose. They helped authorities monitor dangerous organizations, such as the Ku Klux Klan and the Nazis.[4] As time progressed, however, jailhouse informants began to obfuscate the truth more than they advanced it. Jailhouse informants are willing to say anything about anyone if they think it will help them. As a veteran investigator commented, "It's like bait being thrown out to fish. Whatever it takes, they'll say it."[5]

Jailhouse informants provide prosecutors with information about suspects' alleged involvement in various crimes, helping prosecutors win convictions. The informants, however, admit to pervasive lying. As one informant told the *Los Angeles Times*, "Me and every other [informant] I've talked to have the same policy. The guy's guilty. Who gives a damn?"[6] In one of the more outrageous stories, Laurel Huffman, a habitual

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4. Edwin Chen, *Prosecutor's Tool; Snitches — New Story is Emerging*, L.A. TIMES, Nov. 22, 1988, Part 1, at 1 (quoting Alan Dershowitz, "Informants serve a good purpose, too, like when a good organization is trying to monitor the Klan or the Nazis. And the civil rights movement was helped enormously by the use of informants during the 1960s.").

5. Jen McCaffery, *Spurt of Acquittals Raises Concerns*, ROANOKE TIMES & WORLD NEWS, Apr. 18, 2004, at B1 (quoting James Bradley).

6. Ted Rohrlich, *Authorities Go Fishing For Jailhouse Confessions*, L.A. TIMES, July 10, 1990, Part A, at 1.

jailhouse informant, told New York City police that he could help them find the body of a missing woman. From jail, he arranged to have bones stolen from a mausoleum and planted on the side of a road.[7] Huffman, who elicited confessions by posing as a jailhouse lawyer and then repeating whatever information his "clients" told him, stated that he made "literally hundreds of false reports over 20 years."[8]

Informants are more typically used in high-profile cases. For example, detectives investigating the murder of Ennis Cosby, actor Bill Cosby's son, relied on letters an informant gave them to focus their investigation. The letters, allegedly from a suspect confessing to the crime, were ultimately found to have been forged by the informant himself.[9]

The damage jailhouse informants inflict is enormous, and the ease with which they can obtain information to do so is frightening. Consider the following examples of informants' methods, ranging from high-level deception to the mundane. On the more extreme end, notorious informant Leslie Vernon White, of the Los Angeles penal system, would go so far as calling police detectives and medical examiners from prison to obtain information about his fellow inmates. When White publicly claimed he could infiltrate the criminal justice system, prosecutors dismissed his claims until he showed the nation what he could do on a broadcast of *60 Minutes*.[10]

Other informants obtain information from material easily available to them in prison, such as making phone calls home and reading newspapers. When informants hear of crimes in their neighborhoods, they "beg jailers for extra time on pay phones, apparently to call friends who c[an] plug them into gossip about the crimes."[11] Similarly, by reading newspapers in the prison library, informants keep up-to-date on criminal investigations and then use the information they obtain to claim credibly that a cellmate, or another inmate housed in the same prison, confessed to the crime.[12] For example, Willie Williams, another informant, admitted that he read a newspaper article about a series of slayings on the South Side

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7. Sean Gardiner, *Catching Onto the Conman; Pathological Informer Took Justice System on Long Ride*, NEWSDAY, Dec. 7, 2003, at A07.

8. *Id.*

9. Ted Rohrlich & Steve Berry, *Judge Deals Blow to Use of Jailhouse Informants*, L.A. TIMES, Apr. 9, 1999, Metro, at 1.

10. *60 Minutes: Leslie Vernon White, Career Criminal and Jailhouse Snitch* (CBS News Television Broadcast, June 17, 1990) (transcript on file with Lexis-Nexis).

11. Rohrlich, *supra* note 6.

12. Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches; Trading Lies for Freedom*, L.A. TIMES, Apr. 16, 1989, Part 1, at 1.

neighborhood of Chicago and then told police that a friend had confessed the crime to him.[13]

Most simply, informants fabricate confessions by asking a cellmate why he is in prison. When the inmate tells the informant about the crime of which police have accused him, the informant repeats the story to police as a confession, conveniently omitting claims of innocence.[14] Because the informants parrot back the police department's theory of the crime, police view these confessions as corroborated. They contain information only the perpetrator would know.[15]

There is good reason for informants to fabricate testimony: they often get a break from prosecutors in the form of sentence reductions. They also lie for "simple comforts, such as milk and cookies, that otherwise would be out of reach in jail."[16] Prosecutors vehemently deny that they trade confessions for sentence reductions, but their use of repeat-informants suggests otherwise. Recall the case of Laurel Huffman.[17] District Attorneys in New York used Huffman repeatedly, despite his history as a jailhouse informant. They claimed that they had no knowledge whatsoever that Huffman was a habitual informant in Pennsylvania and Arizona, but they never called the district attorneys in either state to find out. *Newsday*, on the other hand tracked his past through readily accessible public records.[18] As a public defender commented, "Anytime you got one guy going around and claiming to have gotten seven confessions from seven different murder defendants, clearly he's on a mission to get his sentence reduced."[19]

There is also evidence that sheriffs, with prosecutors' blessings, have placed high-profile suspects in cells with known informants.[20] Certain prosecutor's offices, such as the Los Angeles District Attorney's Office, have recognized the problem and have created centralized databases to track informants.[21] Others, such as the district attorneys prosecuting in the

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13. Steve Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at 1.

14. Ted Rohrlich, *Jail Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, Part A, at 1.

15. Rohrlich, *supra* note 6.

16. *Id.*

17. *Supra* text accompanying note 8.

18. Gardiner, *supra* note 7.

19. Janan Hanna, *Informant Gets His Sentence Cut by Implicating 7 Murder Suspects*, CHI. TRIB., Sept. 15, 2000, Metro, at 6.

20. Ted Rohrlich, *Grand Jury Criticizes D.A. on Informants*, L.A. TIMES, July 10, 1990, Part A, at 1.

21. Mills & Armstrong, *supra* note 13.

five boroughs of New York City, do not utilize any kind of centralized tracking system.[22]

In most jurisdictions, prosecutors use the "wink and a nod"[23] method to guarantee informants leniency without making any explicit promises.[24] Some prosecutors, however, are not so subtle. In a Freudian slip, a prosecutor in Santa Clara County, California responded to an informant's request for help beating a three strikes conviction with "Look, that's, that's your price, and er, I won't say that's your price, but that's what you want."[25]

Prosecutorial use of jailhouse informants is dangerous for two reasons: first, it is a substantial contributor to convictions of the innocent, and second, it releases a host of unsavory characters back into society. With respect to convicting the innocent, a study by the Center for Wrongful Convictions at Northwestern University showed that of 97 innocent people exonerated between 1972 and 2002, 16 lost their freedom at least partially because of a jailhouse informant.[26] With respect to endangering society, once snitches — called "outright conscienceless sociopaths" by a veteran prosecutor — get out of prison, they do not exactly lead model lives.[27] On the contrary, they tend to be repeat, and sometimes violent, offenders. Consider the following three examples. First, falsified confessions kept repeat-felon Leslie Vernon White, who was convicted of over 30 offenses, including kidnapping, drug dealing, burglary, auto theft, and armed robbery, out of prison.[28] Second, snitching earned convicted murderer Marion Pruitt his release. When he was later arrested in connection with a series of bank robberies and murders, Pruitt admitted not only that he had falsified the confession that led to his release, but that he had committed the original murder himself.[29] Lastly, habitual rapist Stephen Jesse Cisneros was released as a result of his false testimony in at least five

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22. Gardiner, *supra* note 1.

23. Rohrlich, *supra* note 2. The "wink and a nod" label has been used by defense attorneys and Douglas Dalton, who served as special counsel to the Los Angeles Grand Jury investigating the problem of jailhouse informants.

24. *See also* Robert Stewart & Ted Rohrlich, *Jailhouse Informants Benefit By Testifying*, L.A. TIMES, Jan. 25, 1989, Part 2, at 1 (quoting Gigi Gordon, who coordinated a defense-attorney inquiry into the use of jailhouse informants, "I call it the wink and the nod . . . The informant feels free to testify he has been promised nothing, while he understands that he will get it (his reward) later.").

25. Shannon Lafferty, *A Snitch's Story*, 4 THE RECORDER 7 (2003).

26. Gardiner, *supra* note 1.

27. Chen, *supra* note 4.

28. Leslie Vernon White, *supra* note 10.

29. James B. Durkin, *Examining Prosecutorial Misconduct in Illinois*, 149 CHI. DAILY L. BULL. 82, at 5 (2003).

murder cases. Upon release, he would prey on illegal immigrants, telling them he was an immigration officer, handcuffing them, and then raping them in tunnels leading to the Los Angeles River.[30]

Unrestricted use of jailhouse informant testimony does not serve justice. At best, it substitutes one set of guilty prisoners for another; and, at worst, it imprisons an innocent person and frees a guilty one. Society should be wary of anything that increases informants' access to information about their fellow inmates, including the Internet. The following sections discuss whether or not inmates should be able to access Internet-generated materials and the potential effects of that access on society at large and on the snitching problem.

III. A LESSON IN E-SNITCHING

The Internet boom of the mid- to late-1990s drastically increased access to information. In 1999, 85 million people in the United States and Canada had internet access and nearly one third of U.S. households used the Internet on a regular basis.[31] Commentators have gone so far as to compare the birth of the Internet to "the Enlightenment's knowledge revolution and its attendant creation of virtual communities."[32] The Internet has become so essential to our society that the digital divide — the gap between the technological haves and have-nots — has put students in poorer communities at a significant disadvantage.[33]

Before the Internet, there was no single, easily accessible clearinghouse for information. On the contrary, if an inmate wanted information about another's case, he had three choices: (1) ask the other inmate directly; (2) painstakingly look through the newspapers at the prison library for information; or (3) obtain the information from someone on the outside who knew about the crime personally or had looked through various news sources on the inmate's behalf. There were no easy indices that accumulated all of the stories about a particular defendant in one place. With the introduction of the Internet, all of that has changed, at least with

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30. Cisneros is currently serving a seventy-year sentence. Ted Rorhlich, *Deals Won Jailhouse Informant Freedom to Attack Again*, L.A. TIMES, Dec. 11, 1989, Part A, at 1.

31. Christopher Paul Boam, *When Cyberspace Meets Main Street: A Primer for Internet Business Modeling in an Evolving Legal Environment*, 22 HASTINGS COMM. & ENT. L.J. 97 (1999).

32. *See, e.g.*, Darrin M. McMahon, *Conspiracies So Vast*, BOSTON GLOBE, Feb. 1, 2004, at H2.

33. Ilene Olson, *Children Without a Computer at a Disadvantage*, WYO. TRIB.-EAGLE, Sept. 10, 2001, at A1.

respect to high-profile crimes worthy of news reports, where most snitching takes place.

A simple search provides any curious party with an abundance of information about a particular crime at a low cost, or no cost at all.[34] Consider the media frenzy surrounding the Laci Peterson case.[35] Typing "Scott Peterson" into Google yields approximately 819,000 hits.[36] Narrowing the search to include only news reports generates about 10,100 hits.[37] The information found on the Internet is more than sufficient to allow a snitch to concoct a believable confession without much effort.

For example, consider how easy it would have been to use the Internet to falsify a confession in the case of Kurt Sonnenfeld, in which the prosecution plans to use two jailhouse informants.[38] Sonnenfeld was originally arrested on murder charges after his wife was shot in the head on New Year's Eve 2002. The prosecution dropped the charges because of insufficient evidence later that year. Sonnenfeld subsequently moved to Argentina, where he remarried. He has since been extradited to the United States and recharged for murder in connection with his wife's death because, a month after the charges were dropped, two informants, one of whom was Sonnenfeld's cellmate, told prosecutors that he had confessed.[39] The informants claim that Sonnenfeld told them something similar to the following "confession," which I wrote:

> On New Year's Eve of 2002, Kurt and his wife, Nancy, had just gotten back from a party. They were fighting, which was pretty

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34. Some news sites, such as www.cnn.com and most local newspapers, archive their stories and allow users to access them free of charge. Others, such as www.chicagotribune.com, provide access to most stories free of charge but require a fee for accessing some older stories. Lastly, sites like www.nytimes.com provide free access to stories less than a week old, and charge a nominal fee — sometimes as little as $1.05 — for archived stories.

35. Lacy Peterson, a pregnant woman, disappeared on December 24, 2002. Her body was found and identified in the San Francisco Bay Area in April 2003. Mike Brooks, *Laci Peterson's Remains Identified; Husband Arrested*, CNN.COM, Apr. 18, 2003, *available at* http://www.cnn.com/2003/US/West/04/18/remains.found/index.html (last visited May 24, 2005). Her husband, Scott Peterson, was found guilty and given the death sentence by a jury in December 2004. Rusty Dornin, *Jury Recommends Death for Peterson*, CNN.COM, Dec. 13, 2004, *available at* http://www.cnn.com/2004/LAW/12/13/peterson.case.2021/index.html (last visited May 24, 2005).

36. Standard search run Dec. 7, 2004 (on file with author).

37. News search run Dec. 7, 2004 (on file with author).

38. Sonnenfeld was arrested in August 2004. His trial has not yet begun. Sue Lindsay, *Dismissed Murder Charges Filed Again*, ROCKY MOUNTAIN NEWS, Sept. 3, 2004, at 4A.

39. Kirk Mitchell, *Photographer Held in '02 Denver Killing*, DENVER POST, Sept. 3, 2004, at B-01.

> typical of the two of them since a trip they took to Thailand. On the trip, Nancy had caught Kurt doing heroin and sleeping with prostitutes. Nancy had some problems with depression, and it was even worse the night she died because she had been fighting with Kurt and had actually given him until the next day to move out of their house. Kurt was pretty drunk and could not take the fact that she was kicking him out. In the heat of an argument, he grabbed a gun that they had kept in the house. He wrapped plastic wrap around his arms and he shot her in head while laying behind her and used her fingers to pull the trigger because that's the way that the assassins do it. Kurt says that it's better that his wife is dead because he couldn't have lived without her. Really, he just regrets that he didn't place the gun lower in her hand because the way the bullet entered her head made police suspicious.

As written, the confession does not seem unrealistic or far-fetched. However, consider the confession in a different light.

The entire story, with the exception of Sonnenfeld's editorial commentary and uncorroborated statements about how the victim was shot, appeared in the *Denver Post* and *Rocky Mountain News* before informants told prosecutors about the confession. The only portions of the confession that were not contained, or hinted at, in the local press are italicized in the following:

On New Year's Eve of 2002, Kurt and his wife, Nancy, had just gotten back from a party.[40] They were fighting,[41] which was pretty typical of the two of them since a trip they took to Thailand. On the trip, Nancy had caught Kurt doing heroin and sleeping with prostitutes.[42] Nancy had some problems with depression,[43] and *it was even worse the night she died* because she had been fighting with Kurt and had actually given him until

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40. Sue Lindsay, *Accused of Wife's Murder, Man Free*, ROCKY MOUNTAIN NEWS, June 15, 2002, at 1B.

41. Hector Gutierrez, *Sonnenfeld's Wife Filed for Separation in November; Husband Ordered Held in Murder Probe*, ROCKY MOUNTAIN NEWS, Jan. 3, 2002, at 5A (noting that Sonnenfeld had admitted to police that he and his wife must have been fighting because he had injuries to his face, although he did not remember the argument); Sue Lindsay, *Denver Man Faces Trial in Wife's Death; He says she Killed Herself on New Year's*, ROCKY MOUNTAIN NEWS, Feb. 22, 2002; at 4A (noting that there was evidence of a struggle in the bedroom); John Ingold, *Slay Suspect Barred Police From Home*, DENVER POST, Jan. 3, 2002, at B-01 (stating that Kurt and Nancy had been fighting about his alcohol problem on New Year's Eve).

42. Lindsay, *supra* note 40.

43. *Id.*

the next day to move out of their house.[44] Kurt was pretty drunk[45] and *could not take the fact that she was kicking him out.* In the heat of an argument, he grabbed a gun that they had kept in the house. *He wrapped plastic wrap around his arms*[46] and he shot her in head[47] *while laying behind her and used her fingers to pull the trigger*[48] *because that is the way that the assassins do it.* Kurt *says that it is better that his wife is dead because he could not have lived without her.*[49] Really, *he just regrets that he did not place the gun lower in her hand*[50] because the way the bullet entered her head made police suspicious.[51]

Regardless of whether Sonnenfeld actually confessed to the informants, his case shows how easy it is to use the Internet to gather enough information to fabricate a confession. Taking half an hour and using little more than Google, I was able to obtain enough legitimate information on Sonnenfeld's case — all published before the informants came forward — to fabricate a believable confession. An informant, or friends acting on his behalf, could obtain a valuable, albeit patently false, confession in under an hour. Because the informant would provide prosecutors with legitimate, accurate information about the suspect's case, much like what prosecutors would expect to hear in a real confession, prosecutors cannot likely distinguish legitimate jailhouse confessions from falsified ones. The following sections consider whether restricting inmates' access to Internet-generated material is a viable solution to the informant problem.

IV. CAN STATES PREVENT PRISONERS' ACCESS TO INTERNET-GENERATED MATERIALS?

To prevent inmates from using the Internet for illicit purposes, many states and prisons have enacted laws limiting prisoners' access to the

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44. Kirk Mitchell, *Charges Dropped in Woman's Death*, DENVER POST, June 14, 2002, at B-01.

45. *See* Lindsay, *supra* note 41.

46. One informant claims that Sonnenfeld used plastic wrap while another says he wore gloves. *Compare* Lindsay, *supra* note 38, *with* Mitchell, *supra* note 39.

47. Lindsay, *supra* note 41.

48. Mitchell, *supra* note 39. There was only a small amount of gunpowder residue on Nancy's hands and none on Sonnenfeld's hands, which were covered in blood. Mitchell, *supra*, note 44.

49. Lindsay, *supra* note 38.

50. *Id.*; *see also* Mitchell, *supra* note 44. This article states that gunpowder residue was found on Nancy Sonnenfeld's hands.

51. Lindsay, *supra* notes 38, 40.

Internet.[52] In fact, some states — including Kansas, Wisconsin, Arizona, and California — have enacted laws or regulations that not only prevent Internet access from within the prisons, but also prevent prisoners from employing third parties to access the Internet on their behalf.[53] The laws prohibit inmates from receiving Internet-generated communications through the prison mail unless web site providers send content to them directly, meaning that neither family members nor commercial web-hosting operations can send prisoners printouts of their email through the prison mail.

These laws pose a problem for two reasons. First, to the extent that they prevent third-party Internet access, they are likely unconstitutional because they are insufficiently related to a legitimate state interest. Second, as a practical matter, the actual benefits of granting inmates access to Internet-generated materials, such as increased opportunities for legal services and limited contact with the outside world, outweigh the negative consequences.

A. *Constitutional Considerations*

Prisoners have challenged restrictions on third party access to the Internet by claiming they violate prisoners' First Amendment rights.[54] Laws regulating a prisoner's receipt of reading materials are governed by a reasonableness standard.[55] Under *Turner v. Saffley*,[56] to determine whether a law limiting prisoners' rights to receive reading material is reasonable, courts must consider: (1) whether there is "a 'valid, rational

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52. States that have prohibited Internet access typically reference contraband such as firearms or illegal drugs. They have not considered the effect of the Internet on the informant problem.

53. There are many commercial ventures that cater to prisoners, offering them web space for a nominal monthly fee. The prisoner tells the web site operator what to place on the prisoner's personal page, and the company places that information on the web. Internet users can send the prisoner an email, which the host site prints and mails, or can write the prisoner directly, as the web sites also post prisoners' traditional mailing addresses. Other prisoners, such as Charles Manson, have a family member or a friend maintain their web sites. *Equal Time: Internet Access Privileges for Prisoners; Trying Violent Teen-Age Offenders as Adults; Escaped Prisoners Who Turn Themselves In* (CNBC Television Broadcast, Apr. 8, 1997) (transcript on file with Lexis-Nexis).

54. To date, no prisoner has challenged laws preventing inmates from directly accessing the Internet from within prison walls. There is little question that allowing inmates unfettered access to the Internet and all it entails — pornography, white power sites, sites selling illegal materials, etc. — would threaten prison order.

55. Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (holding that "regulations affecting the sending of a 'publication' . . . to a prisoner must be analyzed under the *Turner* reasonableness standard").

56. 482 U.S. 78 (1987).

connection' between the prison regulation and the legitimate governmental interest put forward to justify [the law]"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) the "impact accommodation of the asserted constitutional right will have on guards and other inmates"; and finally, (4) "the absence of ready alternatives" that serve the same interests as the challenged regulation.[57]

These laws have met a mixed fate in the courts. The Ninth Circuit struck down California's law as unconstitutional,[58] while the Seventh Circuit, in an unpublished opinion, upheld a similar law in Wisconsin.[59] On the district court level, a judge in the District of Arizona found Arizona's law unconstitutional,[60] a judge in the Western District of Wisconsin hinted that Wisconsin's law was unconstitutional without deciding the issue,[61] and a judge in the District of Kansas upheld Kansas's law.[62]

These cases have presented nearly identical arguments. Prisoners claim that laws denying them access to Internet-generated materials violate their First Amendment rights, while prison officials claim the laws are necessary to maintain order in the prison system. Prison officials' main argument is that permitting inmates to receive Internet-generated material through the prison mail would increase the risk of contraband within the prison system. Officials in Wisconsin argued that Internet material was more susceptible to embedded, forbidden information than other materials.[63] California officials similarly argued that their law served to "keep out coded messages, narcotics, weapons, and other contraband."[64] Lastly, officials in Arizona claimed that limiting access to Internet-generated materials was "useful in preventing contraband from entering prisons, in preventing inmates from committing crimes while inside the prison, [and] preventing prisoners from contacting past or future crime

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57. *Id.* at 89-90.

58. Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1150 (9th Cir. 2004) (per curiam).

59. Rogers v. Morris, 34 Fed. Appx. 481, 483 (7th Cir. 2002).

60. Canadian Coalition Against the Death Penalty v. Ryan, 269 F. Supp. 2d 1199, 1203 (2003).

61. West v. Frank, 2004 U.S. Dist LEXIS 6813 (W.D. Wis. 2004).

62. Waterman v. Commandant, 337 F. Supp. 2d 1237, 1243 (D. Kan. 2004).

63. *Rogers*, 34 Fed. Appx. at 482; *see also Waterman*, 337 F. Supp. 2d at 1241 (arguing that Internet-generated correspondence "increases the risk of sensitive information entering the prison unnoticed: senders can easily use 'computer technologies' such as 'cutting and pasting' to embed information in downloaded photographs and articles before printing them, and such alterations are difficult for mailroom personnel to detect").

64. *In re* Collins, 86 Cal. App. 4th 1176, 1180 (2001).

victims."[65] As a secondary argument, prison officials claim that permitting prisoners to receive Internet-generated material would increase the volume of prison mail so drastically that they would not be able to monitor effectively prisoners' communication.[66]

In response, some courts have upheld the laws, essentially parroting the states' concerns and giving the issues a cursory analysis. For example, a judge in the District of Kansas upheld Kansas's law in *Waterman v. Commandant*[67] without much independent analysis. Rather, he relied on the Seventh Circuit's unpublished decision in *Roy Rogers v. Alan Morris*.[68] The judge's analysis of the first *Turner* factor, which considers whether there is a rational relationship between a law and a legitimate state interest, was limited to the following:

> As argued in *Rogers*, [the State] in this case contends that allowing Internet material and material from a person or source other than directly from the publisher increases the risk of sensitive information entering the prison unnoticed: senders can easily use "computer technologies," such as cutting and pasting to embed information in downloaded photographs and articles before printing them, and such alterations are difficult for mailroom personnel to detect. . . . The court determines that the policy disallowing non-original source material is rationally related to legitimate penal objectives.[69]

He did not consider whether Internet printouts and the accompanying computer technologies, such as cutting and pasting, were *actually* more dangerous than their hand-written or word-processed counterparts but instead accepted the State's claims at face value.

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65. Karen J. Hartman, *Legislative Review: Prison Walls and Firewalls H.B. 2376 — Arizona Denies Inmates Access to the Internet*, 32 ARIZ. ST. L.J. 1423, 1426-27 (2000).

66. *See, e.g.*, Canadian Coalition Against the Death Penalty v. Ryan, 269 F. Supp. 2d 1199, 1202 (2003).

67. *Waterman*, 337 F. Supp. at 1243.

68. *Id.* at 1241; *Rogers*, 34 Fed. Appx. at 481.

69. *Waterman*, 337 F. Supp. 2d at 1241 (internal quotations and citations omitted).

The judge also credited the State's volume reduction argument under the third factor[70] of the *Turner* test — effect on state resources — noting that allowing prisoners to receive Internet-generated communication would "drastically undermine the effectiveness of any existing screening procedures and greatly increase the risk of missing dangerous messages."[71] With respect to the fourth factor of the *Turner* test — the existence of easy alternatives to the state law that serve the same interests — the judge found that there was no such alternative.[72]

Courts that have struck down these laws have been much more skeptical of the states' claims that Internet-generated mail is more dangerous than other types of mail and that restricting access to it is the only way to ensure that prison mail is monitored effectively. For example, in *Clement v. California Department of Corrections*,[73] affirmed by the Ninth Circuit,[74] the judge in the Northern District of California noted that California's law failed the first part of the *Turner* test because there was no rational relationship between the law and a legitimate penological interest. The judge wrote that the State

> failed to articulate any reason to believe that Internet-produced materials are more likely to contain coded, criminal correspondence than photocopied or handwritten materials. . . . There is no dispute . . . that the same information can be sent to prisoners at Pelican Bay if it is photocopied from a book, transcribed by hand, scanned, or produced in word-processed form. Defendants have failed to explain why criminal communications are less likely to be included through these permissible forms of correspondence.[75]

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70. *Id.* at 1241-42. The judge did not address the second *Turner* factor, which considers whether there are alternative means through which the plaintiff can exercise his constitutional rights, because the plaintiff did not raise the issue. He noted, however, that the prison "regulations permit inmates to obtain a wide variety of publications, as long as those publications are obtained from an original source." *Id.* at 1242. The judge did not consider whether it is actually possible to obtain copies of web sites from their creators.

71. *Id.* at 1242.

72. *Id.*

73. 220 F. Supp. 2d 1098 (2002).

74. Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1153-54 (9th Cir. 2004) (per curiam).

75. *Clement*, 220 F. Supp. 2d at 1111. One should note that California's law, unlike the Kansas policy discussed in *Waterman*, only prohibited inmates from receiving Internet-generated material. *Id.* at 1103. It did not prohibit prisoners from receiving information copied from books or magazines. The distinction is not important because both laws treated mechanically produced mail, whether copied or printed from the Internet, differently than handwritten or word-processed materials, which are also susceptible to hidden communications.

Moreover, as the judge in the Western District of Wisconsin noted in dicta, these laws may fail the second prong of the *Turner* test because they leave prisoners without any way to access certain material. Acording to the judge, "[I]t is unlikely that there are many internet site operators that 'sell' copies of their web pages in paper form. . . . Thus, . . . [these regulations have] the potential to completely foreclose an inmate's ability to access any information found on the internet."[76]

Lastly, the more critical courts have found that these laws also fail the third and fourth of the *Turner* factors because there is a ready alternative to an Internet-material ban that will not negatively impact guards and other inmates. States can simply restrict the number of pages any prisoner can receive through the mail to limit volume, rather than singling out Internet-generated correspondence.[77]

These judges' arguments *actually consider* the merits of the states' arguments in light of technological realities, instead of taking the states' claims as facially valid. Although electronically accessed e-mail would pose a danger to order in the prison system because of the ability to embed hidden messages; as printed material, email poses no more danger and contains no more hidden messages than any other two-dimensional, paper correspondence. Similarly, whereas an inmate can obtain printed material from an alternative source if prisons prevent inmates from receiving copies of books or magazines, there is no analogous ability in the Internet world. As other appellate courts tackle this issue in published opinions, thorough analysis of technological considerations mandates that courts strike down such laws as unconstitutional.

As expected, the courts have focused on the constitutional issues presented by blocking inmate access to the Internet and Internet-generated materials. There is, however, a raging public debate about whether allowing inmates to access the Internet makes sense from a practical standpoint. The next section presents that debate.

B. *Practical Considerations*

Regardless of how the courts ultimately resolve the constitutional issues raised when states block inmates' access to Internet-generated materials, inmates should be permitted at least third party access to the Internet because the positive, practical consequences of allowing access

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76. West v. Frank, 2004 U.S. Dist. LEXIS 6813 at *6-*7 (W.D. Wisc. 2004).

77. *See, e.g., Clement*, 364 F.3d at 1152 ("Prohibiting all internet-generated mail is an arbitrary way to achieve a reduction in volume." (internal citations omitted)).

outweigh any negative ramifications. Consider both sides of the issue.[78] Those in favor of letting inmates use the Internet claim that access would give inmates a voice and would enable them to seek legal help and to research legal issues themselves.[79] For the innocent among the prison population, the Internet provides access to a much larger community than could be reached through traditional letters: "It provides the opportunity to access millions beyond our field of vision. We're not going to encounter these people in line at the supermarket, but they're real and they have opinions."[80] Also, as a practical matter, allowing inmates access to the Internet is good common sense since most of them will return to society one day.[81] As one proponent of inmate access has stated about the death row community in particular, "They were sentenced to death; they weren't sentenced to silence."[82]

On the other side of the argument, opponents argue that allowing inmates to access the Internet — either themselves or through a third party — would put the public at risk and insult victims' families.[83] First, opponents worry that inmates would use the Internet to "fleece innocent victims out of tens of thousands of dollars by asking for donations to their defense fund on Web sites and [to] seduce lonely women through personal ads."[84] Furthermore, prisoners using the Internet as such a dating service often leave out fatal details, particularly with respect to their crimes and sentences.[85] With respect to victims' families, opponents argue that inmate access to the Internet sanctions revisionist history, where guilty people claim their innocence and demean the victim.[86]

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78. Neither side has considered the effect of Internet access on jailhouse informants.

79. For more information, see James Esposito, *Virtual Freedom — Physical Confinement: An Analysis of Prisoner Use of the Internet*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39 (2000).

80. Allan Turner, *Like It or Not, Inmates Using Web as Soapbox*, HOUS. CHRON., May 24, 2004, at A1 (quoting Ray Hill).

81. Douglas Belkin, *Looking For Love From the Lockup*, BOSTON GLOBE, Feb. 12, 2004, at 1.

82. Susy Buchanan, *Dead Men Talking: The ACLU is Fighting a State Law that Keeps Death Row Inmates Off the Web*, PHOENIX NEW TIMES, Sept. 12, 2002.

83. Others also note a simple unfairness in giving inmates access to the Internet. Curtis Silwa, founder of Guardian Angels, stated "But can you imagine allowing them onto the World Wide Web, even if they finance it themselves? Is this looney kazooney or what? We have school systems that are not even wired and on the Internet and have Internet capability." Wendland, *supra* note 53.

84. Buchanan, *supra* note 82.

85. Daniel Teffer, *From Prison Cell, Peeler Sends Out a Plea for a Pen Pal*, CONN. POST, Dec. 13, 2003.

86. Dirk Johnson, *Using Internet Links From Behind Bars*, N.Y. TIMES, Apr. 1, 2000, at A10 (quoting the sponsor of an Arizona bill that limited inmate access to the Internet, "Have you ever

In reality, there is some truth to arguments on both sides. On one hand, there are examples of inmates using the Internet to prey on vulnerable members of the opposite sex. A convicted child rapist, using the Internet to find a girlfriend, admitted, in a letter to the *Boston Globe*, that many of the women who contact him have been "physically and emotionally abused by someone who claimed that they loved them."[87] In another case, a "romantic" inmate neglected to tell potential mates that he was in prison for killing six women.[88] Similarly, in Oklahoma, female prisoners used the Internet to solicit money from lonely men.[89]

On the other hand, there are plenty of prisoners who use the Internet to seek help with legal claims. Web sites such as www.survivingthesystem.org and www.writeaprisoner.com give prisoners an opportunity to place their legal documents online so that pro bono lawyers can review them.[90] Inmates have also used the Internet to post proclamations of innocence and requests for counsel. For example, Theresa Torricelas, imprisoned for second-degree murder in California, wrote "GOT SKILL? Wrongfully convicted prisoner seeks legal assistance in pending federal habeas action, based on involuntary guilty plea resulting from IAC (ineffective assistance of counsel), and resting in significant part on prejudicial fraud and misconduct by state agents involved in the investigation and prosecution of the criminal case."[91] Similarly, Chris Johnson, also imprisoned in California for murder, wrote "My conviction was on circumstantial evidence; no body, no weapon, no eyewitness. It was a (6) week trial; a hung jury for 6½ days. . . . The blood 'flake' tested type 'A'; the man missing is type 'O'. We were not allowed to run our own DNA test."[92]

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run into a criminal who says, 'Yeah, I did it'? . . . Well, the Internet allows these people to distort history. It's a way of further victimizing the victim.").

87. Belkin, *supra* note 81.

88. Titia A. Holtz, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 861 n.35 (2002).

89. *Id.* at 862.

90. *See, e.g.*, Surviving the System, Tony Cioffi Web Page, *at* http://www.survivingthesystem.org/cioffi_tony.htm (last visited May 24, 2005); Writeaprison.com Web Site, *at* http://writeaprisoner.com/template.asp?i=z-37593053-3 (last visited May 24, 2005); Friends Beyond the Wall, Jaime A. Davidson Web Page, *at* http://www.friendsbeyondthewall.com/ppbtw/ads-male/d/davidson_jaime_37593.html (legal documents of inmate Jaime Davidson, who was convicted of killing a police officer) (last visited May 24, 2005).

91. Real Prison Pen Pals Seeking Friends & Legal Help, *available at* http://writeaprisoner.com (last visited Oct. 18, 2005).

92. WriteAPrisoner.com Introduces Chris Johnson, *at* http://writeaprisoner.com/template.asp?i=z-e80415 (last visited May 24, 2005); *see also* http://writeaprisoner.com/template.asp?i= z-769352 (link no longer available, see http://writeaprisoner. com) ("I am an actually innocent Texas

There is also an issue that neither side of the traditional debate considers: the effect of the Internet on jailhouse informants. Any law or policy affecting inmates' access to the Internet may also affect the informant problem. As the Sonnenfeld example shows, the Internet makes fabricating confessions an almost effortless and undetectable endeavor. If prisons were to permit inmates to access the Internet directly, informants would be able to produce confessions themselves by simply running a search on a search engine, such as Google. To combat this problem, prisons that decide to provide Internet access could use filtering software[93] or human monitoring. However, in all likelihood, neither method would be sufficient to prevent informants from obtaining information about other inmates because informants do not seek traditionally illicit materials but rather the local news, which would not likely raise a red flag.

If prisons follow the example of California and Arizona, which permit only third party access to the Internet, informants would still have access to enough information to concoct a false confession. They could enlist the aid of family and friends on the outside to do their dirty work and then use the information for their own benefit without discovery.[94] As explained above, because informants would be receiving mostly local news reports, which seem innocuous at face value, they would not likely raise a red flag with guards monitoring mail. In fact, even harsher laws (of questionable constitutionality) that penalize third-party access would not stifle informants. Although informants would be unable to receive Internet printouts about other cases through the prison mail or during monitored phone calls, they would still be able to receive such information during visitation, where conversations are not as closely monitored.

States will not successfully prevent informants from accessing Internet-generated information unless they carefully read and consider the relevance of every piece of mail, listen to every phone call, and monitor

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prisoner, wrongfully convicted of murder December, 1996 in violation of my due process constitutional rights. . . . [On] August 11, 1996, Eddie Royce Shaw, Sr., my husband, shot himself in our home under the influence of alcohol and prescription Vicodin. . . . The Angelina County district attorney passed on the case. The assistant D.A., son of the District Judge, prosecuted. My first husband (who I divorced after 12 years of sadistic abuse), is life long friends with the trial judge, ruling out impartiality. . . . The state failed to disclose material evidence, such that there is a reasonable probability the outcome of the trial would have been different if the jury had heard and considered it."

93. Filtering software enables people to block access to harmful material, such as pornography. *See, e.g.*, CyberPatrol Web Site, *at* http://www.cyberpatrol.com/ (last visited May 24, 2005).

94. Someone like Leslie Vernon White — who has been in prison more than thirty times — could even stockpile information on inmates while on the outside to use to his benefit on the inside.

every conversation during visitation — an unrealistic expenditure of state resources. Thus, the informant problem does not mandate that states prevent inmates from accessing Internet-generated materials because informants will be able to obtain the information they need regardless of state policy. Also, informants represent only a small segment of the prison population. It is unfair to deny the majority access to beneficial information because a small minority will abuse that access.

When the informant problem is removed from the equation, it appears that the benefits of allowing inmates some access to Internet-generated material — at the very least through a third party — outweigh the potential costs. For example, even indirect use of the Internet would provide prisoners with a host of benefits, ranging from legal services and information to help with assimilating into to the outside world upon release.[95] The risks of allowing inmates, some of the most dangerous people in our society, to access the Internet are real and serious. However, with the exception of the informant problem, which cannot be prevented by limiting Internet access, most problems can be prevented without completely excluding all inmates from the Internet. If inmates are only allowed access to Internet-generated information but not to the Internet itself, states could prevent inmates from endangering society simply by monitoring their paper mail, as they already do. The states could impose page limits to insure that the volume of mail does not prevent the guards from doing their jobs. If inmates are allowed computer access, states could use a combination of filtering software and human monitoring to prevent inmates from accessing illicit material, such as pornographic or drug-related web sites.

V. CONCLUSION

The evidence shows that many jailhouse informants consider the truth irrelevant. The Internet only increases their access to information and makes fabricating confessions easier. Even the most restrictive laws cannot prevent informants from exploiting this increase in information. If informants cannot access the Internet directly, they can have someone else access it on their behalf. If that person cannot mail the Internet-generated materials to the informant, the informant can get the information in other ways — handwritten letters, carelessly monitored phone calls, and visits. The answer to the jailhouse informant problem, therefore, lies not in

95. The argument that inmates will "fleece" the public by requesting money for their defense funds runs contrary to the American ideal that *everybody* deserves a defense.

restricting the informants' information sources, but in restricting the informants themselves. To protect the integrity of the criminal justice system while recognizing the future of information technology tools, prosecutors should severely curtail, if not end, the use of jailhouse informant testimony.