



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

July 11, 2014

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Dear Mr. Brewster:

Thank you for agreeing to consider this letter regarding the policy of the New Mexico Corrections Department (NMCD) barring inmate access to the Internet through third parties. The Electronic Frontier Foundation is a non-profit legal and advocacy organization that promotes free speech and other civil liberties in the digital realm. We are joined in this letter by the American Civil Liberties Union of New Mexico and the Human Rights Defense Center, publisher of *Prison Legal News*.

In examining the case of Inmate Eric Aldaz (#76942) and the underlying policy that resulted in sanctions, we have identified several areas of concern. The policy (#CD-044005-M) is not rationally related to any legitimate penological interest and is so vague that we do not believe it can be applied in a just and constitutional manner. Through our review of the records we received from NMCD, we have determined that NMCD has not articulated what type of activity is covered by the policy nor has it constructed an enforcement process. The records do not indicate whether inmates are actually informed of this policy. Even the corrections staff who adjudicated Inmate Aldaz' case were unsure of which policy was applicable. Further, NMCD is doing little to document its communications with online service providers such as Facebook that result in the censorship of the speech of not only inmates but also of free citizens outside NMCD's authority. Finally, the sanctions facing Aldaz—90 days in punitive, solitary segregation—are disproportionate, considering the nonviolent nature of the “offense,” which we would argue was no offense at all.

In the digital age, this policy places an undue burden on free speech of prisoners, and their family and friends.

An Ambiguous Policy

NMCD policy #CD-044005-M states:

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“Offenders in the custody or supervision of the Department are not permitted access to the Internet, nor are they permitted to obtain access to the Internet through third parties.”

Currently, NMCD does not define “access to the Internet.” As written, the policy could apply to inmates who ask family members to access their online bank accounts or conduct medical or legal research on the Internet. It could also apply to online news sites seeking to publish “letters to the editor” from inmates. Further, the language does not differentiate between incarcerated inmates and inmates on probation or parole.

In a telephone conversation with NMCD Public Affair Director Alexandria Tomlin, she stated that, in practice, this policy is applied only to inmate profiles on social networks. However, putting aside the question of whether that policy is constitutional, the lack of clear articulation and publication of a detailed policy creates a chilling effect in which inmates and their associates would avoid any kind of speech for fear of extreme punitive measures, such as months in solitary confinement.

It is worth noting that substantially similar language codified into Arizona law was struck down 10 years ago by a judge.¹ In his ruling, Judge Earl H. Carroll wrote that the rules “are not rationally related to legitimate penological objectives and are therefore unconstitutional.”²

Free Speech and Social Media

When an individual posts something on the Internet about an inmate, there are two free-speech interests potentially at play—the speech of the inmate, but also the speech of the person publishing the inmate’s speech. Inmates do not have the ability to access the Internet, so while they may be able to influence what is posted on the Internet (or deleted), the speech may also be solely or primarily that of the individual who posted it regardless of the name of the online profile where the speech appears. It is unfair to punish an inmate for constitutionally protected behavior outside of his or her direct control.

With social media profiles, however, there is also a third interest: the speech rights of anyone who has commented on the social media profile. With the example of Facebook in mind, if you deactivate a profile, then all of the comments made by other people on the profile also cease to be visible. By pressuring Facebook to take down Aldaz’ Facebook page, NMCD effectively censored the speech of many more people than just the inmate.

¹ Dannenberg, John. “Arizona Internet Ban Permanently Enjoined.” *Prison Legal News*. May 15, 2007. <https://www.prisonlegalnews.org/news/2007/may/15/arizona-internet-ban-permanently-enjoined/>

² *Canadian Coalition Against the Death Penalty v. Ryan*. Order: May 19, 2003. http://www.leagle.com/decision/20031468269FSupp2d1199_11344

A Facebook page may also contain speech posted by the inmate long before the inmate committed a crime or entered a NMCD facility. A conviction does not give the state the authority to erase an offender's prior speech from the Internet or censor speech unrelated to the crime.

Social Media and Inmates

In a phone conversation, Tomlin explained that NMCD's position on social media is that it does not help inmates create "meaningful connections" with people on the outside.

There is much evidence to the contrary, not the least of which is that Facebook records 1.28 billion monthly users, 802 million of which log on daily.³ Numerous studies have been conducted on this issue; one analysis released in February 2014 by Facebook and Carnegie Mellon University looked at 3,648 users (and their 26,134 friends) and found that "on average relationships improve when people use Facebook to communicate with each other."⁴ It further found that social networks are a "meaningful component in a portfolio of communication channels between friends." Social movements have been started and enhanced by social media, including on issues of incarceration, such as prison rape and excessive telephone fees.

An inmate may benefit from receiving print-outs of well-wishing and other personal news posted his or her wall. What is perhaps a great consideration is how social media allows inmates to maintain a presence in the lives of friends and family by simply showing up in their news feeds, who may then engage in dialogue amongst themselves in the comment sections of posts. This is of particular significance in New Mexico, where geographical distances create barriers for families to communicate with each other and with inmates. These sites are often useful to researchers, journalists and lawyers seeking to contact inmates or their family members. Reports—including those by the Vera Institute, Western Criminology Review and Corrections Today⁵—have consistently found that prisoners who maintain close contact with family members have lower recidivism rates.

³ Facebook. Company Info page. Retrieved July 10, 2014.

<http://newsroom.fb.com/company-info/>

⁴ Burke, Moira and Kraut, Robert. "Growing Closer on Facebook: Changes in Tie Strength Through Social Network Site Use." February 26, 2014.

<https://www.facebook.com/notes/facebook-data-science/growing-closer-on-facebook/10152086044728859>

⁵ Friedmann, Alex. "Lowering Recidivism through Family Communication." *Prison Legal News*. April 15, 2014.

<https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/>

Social networks are increasingly serving functions beyond mediation of relationships. It is well-established that inmates benefit when they have a representative on the outside managing their affairs. Many social networks now offer services such as email and allow integration of other services, such as mobile banking. One's Facebook, Twitter or Google+ login can also serve as the primary credentials for accessing other websites. Shutting down a profile may block an inmates' family member from accessing other services on the inmate's behalf, including sites in which financial transactions occur.

NMCD Lack of Documentation

We are especially concerned with NMCD's lack of documentation concerning its enforcement of this policy. The department acknowledges it has engaged in numerous telephone conversations with online services to have inmate profiles removed, including Aldaz', but there were no records responsive to our public records request. Considering the severe ramifications for the First Amendment, NMCD should have created a written record each time it requests an inmate cease engaging on social media and it should have also conducted its discussions with online providers in writing. Without these written records, the public cannot determine whether actions by public officials were conducted legally, constitutionally and ethically.

An Acceptable Policy

As a corrections institution, NMCD's authority extends only to inmates and staff. It is inappropriate to threaten an inmate with punishment in order to leverage speech-related action by a citizen outside the custody of the prison system. Similarly, an inmate should not be punished for speech outside his or her control, regardless of whether he may influence that speech.

We concede that a corrections department may have good cause to limit an inmate's unsupervised, direct access to the Internet. We can also understand why staff should not serve as intermediaries, since that could sow inappropriate personal relationships between personnel and their wards. However, the policy should clearly delineate between incarcerated offenders, and those on supervised release.

Therefore we would recommend the following language:

“Incarcerated offenders in the custody or supervision of the Department are not permitted direct, unsupervised access to the Internet. Department personnel and contractors are not permitted to access the Internet on behalf of an inmate without permission from Department supervisors.”

This portion of the policy should be provided to inmates as part of the intake process. NMCD should craft a more detailed policy outlining the process for enforcing this rule, including creating a written record of all actions taken.

Inmate Aldaz

The process for sanctioning Inmate Aldaz was constitutionally flawed. The disciplinary proceedings seemed to be driven not by penological concern, but in response to negative publicity. It can be no coincidence that charges were brought against him on the same day that KRQE aired a story about his profile.⁶

It is unclear whether the policy was ever disclosed to Aldaz. It is certainly understandable for an individual to resist complying with an order that, on its face, appeared to be a civil-rights violation. During the hearing there was confusion on behalf of the NMCD officer whether there was even an applicable policy. While Aldaz seems to have encouraged family members to adjust the page to include a response to the criticism, encouraging speech is not the same as generating the speech. Further, since KRQE did not include comment from Aldaz in the story, it is certainly appropriate for Aldaz to ask his family to publicly respond, regardless of the platform.

The last year has seen significant criticism of NMCD disciplinary segregation, including Secretary Gregg Marcantel expressing need for reform after spending 48 hours in the unit.⁷ Ninety days in solitary confinement is excessive for a non-violent infraction.

Conclusion

We are eager to discuss this issue more with you at your convenience. In the interim, we ask that you halt enforcement of the policy and reverse the disciplinary actions taken against Aldaz regarding the Facebook page maintained in his name.

No one should serve 90 days, or even a single day, in solitary confinement for simply having a Facebook page.

Sincerely,

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David Greene

⁶ Miller, Cole. "Inmate violates social media ban." KRQE. March 11, 2014.
<http://krqe.com/2014/03/11/social-networking-behind-bars/>

⁷ Linthicum, Leslie. "New Mexico prison boss does solitary." Albuquerque Journal. June 8, 2014. <http://www.abqjournal.com/412516/news/new-mexico-prison-boss-does-solitary.html>

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