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Big Censorship in the Big House— A Quarter-Century After *Turner v. Safley*: Muting Movies, Music & Books Behind Bars

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ABSTRACT

On the twenty-fifth anniversary of the United States Supreme Court's decision in Turner v. Safley, this Article examines how federal courts across the country are applying the Turner standard today in cases involving the First Amendment free speech rights of inmates. Are courts too quick today to support the censorial proclivities of prison officials? Do judges too readily capitulate in deference to the concerns of those tasked with overseeing the incarcerated? Those are the key questions this Article addresses by analyzing inmate access to magazines, movies, books, and other common forms of media artifacts. This Article's determinations stem from opinions rendered in 2010 and 2011 at both the federal appellate and district court levels.

INTRODUCTION

The United States Supreme Court is currently busy analyzing First Amendment¹ cases affecting individuals' access to supposedly harmful or otherwise offensive media content. For instance, in June 2011, the Court granted a petition for a writ of certiorari² to consider whether the Federal Communications Commission's "current indecency-

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¹ The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

² *FCC v. Fox Television Stations, Inc.*, 613 F.3d 317 (2nd Cir. 2010), *cert. granted*, 131 S.Ct. 3065 (2011) (No. 10-1293).

enforcement regime violates the First or Fifth Amendment³ to the United States Constitution.”⁴ The same day it chose to hear the dispute over broadcast indecency,⁵ the Supreme Court struck down a California law limiting minors’ access to violent video games,⁶ ruling that the state failed to prove the law satisfied the rigorous strict scrutiny⁷ standard of judicial review.⁸ Previously, in *United States v. Stevens*,⁹ the high court declared unconstitutional on overbreadth¹⁰ grounds a federal statute¹¹ criminalizing “the commercial creation, sale, or possession of certain depictions of animal cruelty.”¹²

While such high-profile battles are waged before the Supreme Court,¹³ dozens of First Amendment fights involving the ability of inmates to access media content like

³ The Fifth Amendment to the United States Constitution provides, in pertinent part, that “[n]o person shall be . . . deprived of life, liberty, or property without due process of the law.” U.S. CONST. amend. V.

⁴ *FCC v. Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011).

⁵ The FCC defines indecent content as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” *Guide: Obscenity, Indecency and Profanity*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/guides/obscenity-indecency-and-profanity> (last visited May 8, 2012).

⁶ *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729 (2011); see CAL. CIVIL CODE § 1746 (2010) (defining the key terms of the law, including “violent video game”); CAL. CIVIL CODE § 1746.1 (2010) (providing, in relevant part, that “[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor”); CAL. CIVIL CODE § 1746.2 (2010) (requiring that “[e]ach violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white ‘18’ outlined in black”).

⁷ See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (opining that a content-based regulation of speech “can stand only if it satisfies strict scrutiny,” and explaining that “[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest”); see also Joel Timmer, *Violence as Obscenity: Offensiveness and the First Amendment*, 15 COMM. L. & POL’Y 25, 28 (2010) (explaining that “[l]aws restricting such content generally are subjected to strict scrutiny, the standard typically applied to content-based restrictions on fully protected speech” and that “[u]nder strict scrutiny, the government must show that a restriction is necessary to achieve a compelling government interest and that the restriction is narrowly drawn to achieve that end”).

⁸ *Brown*, 131 S. Ct. at 2738–39 (holding that “California cannot meet that standard” because, in large part, it could not “show a direct causal link between violent video games and harm to minors” and because any effects that could be shown “are both small and indistinguishable from effects produced by other media”).

⁹ 130 S. Ct. 1577 (2010).

¹⁰ See *United States v. Williams*, 553 U.S. 285, 292 (2008) (providing that under “our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech”); see also Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (providing an excellent analysis of overbreadth within the context of criminal statutes); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011) (examining misconceptions and misunderstandings about facial challenges, including overbreadth).

¹¹ After the United States Supreme Court declared the statute in question, 18 U.S.C. § 48 (2009), unconstitutional in *United States v. Stevens*, Congress quickly amended it by adopting the Animal Crush Video Prohibition Act of 2010. See Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177 (2010) (amending 18 USCA § 48 and defining an animal crush video as “any photograph, motion-picture film, video or digital recording, or electronic image that (1) depicts actual conduct in which [one] or more living non-human [animals] is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury . . . and (2) is obscene” violating a criminal prohibition on cruelty to animals under federal law or the law of the state in which the depiction is created, sold, distributed, or offered for sale or distribution).

¹² *Stevens*, 130 S. Ct. at 1582.

¹³ Each of the three cases described in the first paragraph may be considered “high profile” due to the mainstream news media coverage it generated. For instance, when the Supreme Court ruled in *Brown*, the

magazines and movies behind bars flew largely under the mainstream news media's radar in 2011.¹⁴ These cases centered on a myriad of cultural media artifacts, such as: 1) a quarterly magazine called *Crime, Justice & America* distributed to county jail inmates in California;¹⁵ 2) a Japanese-style, comic-book magazine called *Shonen Jump* depicting cartoons children watch on television;¹⁶ 3) a D.H. Lawrence book called *Divas and Lovers—The Erotic Art of Studio Manassé* featuring portraits from the 1920s and 1930s era of cinema and cabaret in Vienna;¹⁷ 4) a prison policy that uses the ubiquitous Motion Picture Association of America's rating system to help determine what movies inmates are allowed to watch;¹⁸ 5) the ability of inmates to play video games on conventional gaming systems including Xbox Elite, Play Station 3, and Wii;¹⁹ 6) the efforts of a free man to mail a prisoner a compact disc set entitled *Dylan Thomas: The Caedmon*

decision was reported on the front pages of major newspapers across the United States. *See, e.g.*, Robert Barnes, *Limits on Video Games Rejected*, WASH. POST, June 28, 2011, at A1 (reporting on *Brown* as “striking down as unconstitutional California’s attempt to ban the sale of violent games to minors”); Joan Biskupic, *Ruling Puts Regulation in Game Designers’ Control*, USA TODAY, June 27, 2011, at 1A (heralding the decision in *Brown* as “groundbreaking” and asserting that it “represents a landmark moment for the gaming industry and lifts a threat to its creative development”); Bob Egelko, *Violent Video Game Ban Doomed by Free Expression Concerns*, S.F. CHRON., June 28, 2011, at A1 (reporting on the *Brown* decision); Adam Liptak, *Minors Can Buy Violent Games, Justices Decide*, N.Y. TIMES, June 28, 2011, at A1 (reporting on the decision and calling it the “latest in a series of rulings protecting free speech, joining ones on funeral protests, videos showing cruelty to animals and political speech by corporations”); David G. Savage, *State’s Law on Video Games Voided*, L.A. TIMES, June 28, 2011, at A1 (reporting that “the Supreme Court ended its term with a vigorous defense of free speech, striking down a California law that banned sales of violent video games to minors and effectively shielding the entertainment industry from any government effort to limit violent content”).

¹⁴ *See infra* Part II (addressing these cases).

¹⁵ *Hrdlicka v. Reniff*, 656 F.3d 942 (9th Cir. 2011). According to its website, the magazine is: a quarterly 40-page mainstream magazine about the criminal justice system [that] is distributed free to the county inmates in nearly 70 counties in 13 states including California, Nevada, Washington State, Arizona, Florida, Illinois and more. Since 2002, we have published 15 different editions and over 1,200,000 copies! *Crime, Justice & America* magazine has provided not just desired, but sorely needed information to the newly arrested in the local criminal justice systems. *About CJA*, CRIME, JUSTICE & AMERICA, <http://crimejusticeandamerica.com/aboutcja> (last visited May 8, 2012).

¹⁶ *Kaden v. Slykhuis*, 651 F.3d 966 (8th Cir. 2011); *see also* WEEKLY SHONEN JUMP ALPHA, <http://shonenjump.viz.com> (last visited May 8, 2012) (providing the website for this popular manga magazine). Manga comic books, which are typically printed in black and white, are read back-to-front and “look more like cheap paperbacks than traditional comics.” Maja Beckstrom, *Manga Mania*, SAINT PAUL PIONEER PRESS, Sept. 24, 2005, at 1E. *See* Matthew Price, *Japanese Graphic Novel Tops Charts in U.S.*, OKLAHOMAN, Mar. 19, 2004, at 16D (describing *Shonen Jump* as “an anthology magazine featuring popular comics aimed primarily at boys and young men”).

¹⁷ *Jordan v. Sosa*, 654 F.3d 1012 (10th Cir. 2011) (discussing D.H. LAWRENCE, *DIVAS AND LOVERS: THE EROTIC ART OF STUDIO MANASSE* (Margot Bettauer Dembo trans. 1998)).

¹⁸ *Avila v. Cate*, No. 1:10-cv-01208, 2011 U.S. Dist. LEXIS 73809 (E.D. Cal. July 8, 2011) (considering the use of the Motion Picture Association of America (MPAA) rating system). The MPAA rating system seeks to provide “basic information to parents about the level of various elements in the film, such as sex, violence and language so that parents can decide what their children can and cannot see,” and adding that “they help protect the freedom of expression of filmmakers and this dynamic American art form.” *What Each Rating Means*, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/ratings/what-each-rating-means> (last visited May 8, 2012).

¹⁹ *Graham v. Sharp*, No. 10-5563, 2011 U.S. Dist. LEXIS 66675 (D. N.J. June 20, 2011).

*Collection*²⁰ featuring “Thomas reading his poetry and prose, and also [a] reading of some of his favorite writers, including W.H. Auden and William Shakespeare”;²¹ and 7) an inmate’s ability to subscribe to “lad magazines”²² including *Maxim*,²³ *Stuff*, and *FHM*.²⁴

Although these disputes may seem petty, trivial or insignificant for the non-incarcerated, the reality is that millions of Americans—particularly minorities²⁵—are affected by the suppression of speech behind bars. The *Baltimore Sun*, for example, noted in an August 2011 editorial that “[t]he United States contains just 5 percent of the world’s population, yet its prisons house nearly a quarter of all the people incarcerated around the globe. We imprison our citizens at a greater rate than any other country.”²⁶ California alone had more than 143,000 inmates in its state system that same month.²⁷

In his recent book, *Texas Tough: The Rise of America’s Prison Empire*, Robert Perkinson writes that one of every thirteen Hispanics in the United States has been incarcerated and, even more dramatically, one of every six African-American males.²⁸ Perkinson adds that “a generation after the triumphs of the civil rights movement, African Americans are incarcerated at seven times the rate of whites, nearly double the disparity

²⁰ North v. Clarke, No. 3:11-cv-211, 2011 U.S. Dist. LEXIS 84917 (E.D. Va. Aug. 2, 2011). In February 2012, United States District Judge James R. Spencer granted inmate Owen North’s motion for summary judgment and concluded that a Virginia Department of Corrections’s policy that prohibited all secular, non-music CDs was not reasonably related to legitimate penological interests and thus violated the First Amendment. North v. Clarke, No. 3:11-cv-211, 2012 U.S. Dist. LEXIS 15204 (E.D. Va. Feb. 7, 2012).

²¹ Dena Potter, *Louisiana Man Sues Virginia Prison System After Denial of Literary CD*, VIRGINIAN-PILOT, Apr. 5, 2011, at B3. A recent article in the *Library Journal* describes the collection in which:

the Welsh poet uses his wonderfully rich and tactile voice to read his poetry, as well as the lovely *A Child’s Christmas in Wales* and a selection of other works. The recordings, the earliest of which was made in 1952, have just enough reverb to evoke turn-of-the-century microphones à la *The King’s Speech*. Part of Caedmon’s remarkable series of poets reading their own work, this collection gathers a number of different recordings that feature Thomas’s extraordinary musical voice.

Neal Wyatt, *The Reader’s Shelf; Story Hour: Authors Read Their Own Works*, LIBRARY J., Sept. 1, 2011, at 139.

²² See Charles McGrath, *How Hef Got His Groove Back*, N.Y. TIMES, Feb. 6, 2011, at MM 24 (observing that “for a while *Playboy* appeared to have been crowded off the newsstands by the so-called lad magazines—*Maxim*, *Stuff*, *FHM* and the like,” and adding that “[o]f the major lad mags, only *Maxim* still stands, and one of its former editors, 36-year-old Jimmy Jellinek, two years ago became editorial director of *Playboy*”).

²³ *Maxim* has been described as featuring a “mixture of scantily clad B-list starlets, college-fraternity humor and useful information on gadgets, clothes and other preoccupations of young, affluent men.” Lorne Manly, *A Lad Mag and a Brand in Las Vegas*, N.Y. TIMES, June 5, 2006, at C1.

²⁴ DePuente-Hudson v. Adams, No. 1:08-cv-01228, 2011 U.S. Dist. LEXIS 16421 (E.D. Cal. Feb. 18, 2011).

²⁵ See *infra* notes 28–29 and accompanying text (presenting data regarding the incarceration of minorities in the United States).

²⁶ Editorial, *Downsizing Maryland’s Prisons*, BALT. SUN, Aug. 14, 2011, at 20A.

²⁷ See Marisa Lagos, *Moving Inmates Won’t Be Enough*, S.F. CHRON., Aug. 6, 2011, at A1 (noting that California “appealed to the U.S. Supreme Court, which ruled in May that California must cut the number of prisoners from 143,500 to 110,000 by 2013”).

²⁸ ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE 2* (2010).

measured before desegregation.”²⁹ George Mason University Professor Roger Lancaster recently observed that:

Starting in the 1970s, lawmakers across the United States enacted punitive “lock ’em up” policies. The prison population more than quadrupled, and the United States became first in the world in both the total number of prisoners (about 2.3 million) and the rate of imprisonment (1 of every 100 adults is behind bars).³⁰

At the end of 2011, the total population of federal inmates was slightly more than 218,000.³¹ This figure has increased steadily over the past dozen years, with the Federal Bureau of Prisons (BOP) having a total inmate population of fewer than 165,000 in fiscal year 2001—a figure that rose to slightly more than 208,000 during fiscal year 2009.³²

While the current economic crisis in the United States may soon force some states to cut their prison budgets and, in turn, their prison populations,³³ that is scant relief for those now incarcerated. In brief, the First Amendment speech rights of about one out of every 100 adults³⁴ are affected by the judiciary’s behind-bars jurisprudence. Ultimately, as David L. Hudson, Jr., of the First Amendment Center writes in profoundly understated fashion, “prisoners—whatever they have done—are still human beings worthy of some level of respect.”³⁵

Are courts too quick today to support the censorial proclivities of prison officials? Do judges too readily capitulate to the concerns of those tasked with overseeing the incarcerated? Those are the key questions this Article addresses on the twenty-fifth anniversary of the United States Supreme Court’s critical ruling in *Turner v. Safley*,³⁶

²⁹ *Id.* at 3.

³⁰ Roger N. Lancaster, Op-Ed., *Sex Offenders: The Last Pariahs*, N.Y. TIMES, Aug. 21, 2011, at SR6.

³¹ *Federal Prison System FY 2013 Budget Request at a Glance*, UNITED STATES DEPT. OF JUSTICE 2, available at <http://www.justice.gov/jmd/2013summary/pdf/fy13-bop-bud-summary.pdf> (last visited Feb. 21, 2012); see also *Inmate Population, Quick Facts About the Bureau of Prisons*, FEDERAL BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp#1> (last visited Dec. 8, 2011). The data made available by the Federal Bureau of Prisons are updated each month; the data reflected in this Article are from the Bureau of Prisons’s figures as of October 29, 2011, that were publicly available on December 8, 2011.

³² Federal Bureau of Prisons, *State of the Bureau 2009: The Bureau’s Core Values*, U.S. DEPT. OF JUSTICE 2, available at <http://www.bop.gov/news/PDFs/sob09.pdf> (last visited Feb. 20, 2012).

³³ See Krissah Thompson, *Group Presses States to Cut Prison Spending*, WASH. POST, Apr. 6, 2011, at A2 (reporting that “[a]dvocates of overhauling the U.S. criminal justice system see a bright spot in the dire financial straits that states are facing: Politicians eager to trim budgets are willing to cut spending on prisons and corrections programs”).

³⁴ Lancaster, *supra* note 30, at Opinion 6.

³⁵ David L. Hudson, Jr., *Why I Care About Prisoner Rights*, FIRST AMENDMENT CENTER (May 25, 2011), <http://www.firstamendmentcenter.org/why-i-care-about-prisoner-rights>. Hudson explains this point by quoting the late Justice Thurgood Marshall for the proposition that “[w]hen the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded.” *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J., concurring)).

³⁶ 482 U.S. 78 (1987).

which largely provides the judicial lens through which restrictions on inmates' speech rights are analyzed.³⁷

Part I provides an overview of the United States Supreme Court's framework for examining First Amendment access-to-speech disputes involving incarcerated individuals.³⁸ Importantly, Part I also reveals a rift among the current justices on the standards that should be applied to inmate cases, with Justices Clarence Thomas and Antonin Scalia subscribing to a novel approach they have twice endorsed in concurring opinions.³⁹

Part II then analyzes eight federal court decisions from 2010 and 2011 affecting inmates' access to popular forms of media content, paying particular attention to the amount of deference (or lack thereof) courts grant to prison officials' reasoning and rationales for behind-bars censorship.⁴⁰ Next, Part III questions and criticizes the assumptions courts seem to make about the harms that certain media products will cause or create within prison environments.⁴¹ It juxtaposes those assumptions with other areas of First Amendment jurisprudence in which a much more rigorous analysis of the causation-of-harm question is mandated. Finally, the Article concludes in Part IV by arguing that the odds are slim to none that a prisoner in an access-to-speech controversy will prevail today under *Turner* without a particularly outrageous and egregious set of facts or without having the fortune of drawing a decidedly pro-free speech jurist.⁴²

I. THE SUPREME COURT'S FRACTURED FIRST AMENDMENT FRAMEWORK FOR EVALUATING THE SPEECH RIGHTS OF INMATES

The last time the United States Supreme Court squarely addressed a case involving the First Amendment right of inmates to access media content was more than five years ago, back in 2006 in *Beard v. Banks*.⁴³ *Beard* centered on a Pennsylvania prison policy that prohibits the most "specially dangerous and recalcitrant inmates"⁴⁴ from accessing any newspapers and magazines.⁴⁵ Under the policy, the only media content these inmates may possess are "legal and personal correspondence, religious and legal materials, two library books, and writing paper."⁴⁶

Justice Stephen Breyer delivered the judgment of the Court in a plurality opinion joined by three justices⁴⁷ and with which another two justices concurred in the result.⁴⁸

³⁷ See *infra* Part I (providing an overview of *Turner* and the other Supreme Court-fashioned frameworks for analyzing restrictions on the constitutional rights of inmates).

³⁸ *Infra* notes 43–112 and accompanying text.

³⁹ *Infra* notes 74–90 and accompanying text.

⁴⁰ *Infra* notes 113–332 and accompanying text.

⁴¹ *Infra* notes 333–347 and accompanying text.

⁴² *Infra* notes 348–359 and accompanying text.

⁴³ 548 U.S. 521 (2006).

⁴⁴ *Id.* at 525.

⁴⁵ See *id.* at 526 (noting that, under the policy at issue for prisoners in Level 2 of Pennsylvania's Long Term Segregation Unit, inmates "have no access to newspapers, magazines, or personal photographs").

⁴⁶ *Id.*

⁴⁷ *Id.* at 524 (noting that Justice Breyer announced the judgment of the Court and delivered an opinion, in which Chief Justice John Roberts and Associate Justices Anthony Kennedy and David Souter joined).

Justice Breyer explained that the basic, substantive principles governing the case were rooted in the Court's 1987 opinion, *Turner v. Safley*,⁴⁹ and its 2003 decision, *Overton v. Bazzetta*.⁵⁰ Drawing from and synthesizing these two prisoner-rights cases, Breyer made clear that: 1) prisoners do possess First Amendment speech rights;⁵¹ 2) those rights, however, are not the same as those possessed by non-incarcerated individuals;⁵² 3) substantial deference must be granted to prison officials when evaluating restrictions on prisoners' rights;⁵³ and 4) the constitutional rights of prisoners may be permissibly abridged if the regulations are reasonably related to legitimate penological concerns.⁵⁴ A fifth point is important here—the burden “is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.”⁵⁵ In brief, the incarcerated face an uphill battle of both burden and deference when attempting to disprove the reasonableness of a restriction on their First Amendment rights.

In determining reasonableness of the alleged penological concerns asserted by prison officials, Justice Breyer reiterated a four-factor test established twenty-five years ago in *Turner*: 1) “there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it;” 2) whether inmates possess alternative means and avenues of exercising the right in question; 3) the affect that accommodating the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources; and 4) whether there are “obvious, easy alternatives” to censorship that can accommodate “the prisoner’s rights at *de minimis* cost to valid penological interests” or, in contrast, whether there is an “absence of ready alternatives.”⁵⁶

The *Turner* test amounts to a very relaxed form of judicial scrutiny⁵⁷—the Court calls it a “reasonableness standard,”⁵⁸ in stark contrast to strict scrutiny.⁵⁹ Professor Giovanna Shay asserts that *Turner* “emphasizes deference to prison officials and the

⁴⁸ See *id.* at 536–42 (Thomas, J., concurring) (setting forth the concurring opinion of Justice Clarence Thomas, which was joined by Justice Antonin Scalia).

⁴⁹ 482 U.S. 78 (1987).

⁵⁰ 539 U.S. 126 (2003).

⁵¹ See *Beard*, 548 U.S. at 528 (explaining that “[t]his Court recognized in *Turner* that imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment”).

⁵² See *id.* (writing that “the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere”).

⁵³ See *id.* (quoting *Overton*, 539 U.S. at 132, for the proposition that “courts owe ‘substantial deference to the professional judgment of prison administrators’”).

⁵⁴ *Id.*

⁵⁵ *Overton*, 539 U.S. at 132.

⁵⁶ *Turner v. Safley*, 482 U.S. 78, 89–90 (1987) (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). The Court made it clear in *Turner* that, on this fourth reasonableness factor, prison officials need not exhaust all possible options, writing that “prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.” *Id.*

⁵⁷ See Matthew D. Rose, *Prisoners and Public Employees: Bridges to a New Future in Prisoners’ Free Speech Retaliation Claims*, 5 SEVENTH CIRCUIT REV. 159, 160 (2009) (observing that *Turner* “established a very deferential rational basis standard of review”).

⁵⁸ *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989).

⁵⁹ See *supra* note 7 and accompanying text (describing the strict scrutiny standard).

relative technical and administrative expertise of corrections authorities.”⁶⁰ Indeed, as Professor Christopher Smith notes, “[p]risoners seldom prevail when judges apply the *Turner* test.”⁶¹

Turner also closely tracks the exceedingly limited press freedom given to public high school students who write for and edit their school-sponsored newspapers.⁶² In brief, both minors on campus and adults behind bars are treated as second-class citizens. As David Hudson points out, the similarity in treatment the two groups receive in First Amendment jurisprudence, just one year after *Turner* was decided, the United States Supreme Court ruled in the student-speech case of *Hazelwood School District v. Kuhlmeier*⁶³ “that school officials could censor student speech if their actions were ‘reasonably related to legitimate pedagogical concerns.’ The Court simply substituted the word ‘pedagogical’ for ‘penological.’ When I lecture on this substitution to student groups, there normally is a collective gasp.”⁶⁴

Justice Sandra Day O’Connor explained in *Turner* the reasons for such slackened review in inmate cases:

Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.⁶⁵

Applying this test in *Beard*, the plurality concluded that prison officials had adequately justified the need for the newspaper and magazine access ban imposed on only the most dangerous and recalcitrant inmates.⁶⁶ In reaching this conclusion, Justice

⁶⁰ Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 341 (2009).

⁶¹ Christopher E. Smith, *Justice Sandra Day O’Connor and Corrections Law*, 32 HAMLIN L. REV. 477, 491 (2009).

⁶² See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*”) (emphasis added); see also Aaron H. Caplan, *Freedom of Speech in School and in Prison*, 85 WASH. L. REV. 71, 73 (2010) (asserting that “judicial opinions about freedom of speech compare schools and prisons without irony, and indeed without hesitation. Courts litter their decisions about prisoner speech with citations to decisions about student speech and vice versa. Many judges treat the analogy as if it were innately persuasive”); Alana M. Sitterly, *Silencing Death Row Inmates: How Hammer v. Ashcroft Needs a Rational Basis for Its Rational Basis*, 21 GEO. MASON U. CIV. RTS. L.J. 323, 327 (2011) (observing that “[f]ree speech restrictions in prisons can also be examined through the lens of similar restrictions in public schools. While free speech rights in public schools do not mirror those within prisons, similar legal considerations underlie both institutions”).

⁶³ 484 U.S. 260 (1988).

⁶⁴ Hudson, *supra* note 35.

⁶⁵ *Turner v. Safley*, 482 U.S. 78, 89 (1987).

⁶⁶ Justice Breyer wrote:

While we do not deny the constitutional importance of the interests in question, we find, on the basis of the record now before us, that prison officials have set forth adequate legal support for the

Breyer noted that Pennsylvania offered several reasons for the prohibition “including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to ensure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire.”⁶⁷ Breyer found that the first of these justifications—providing increased incentives for inmates to rehabilitate their behavior by depriving them of media content—was adequate to support the ban and he went no further into the other interests.⁶⁸ The ostensible incentive for good behavior, under the Pennsylvania policy, is that positive conduct eventually leads to “somewhat less severe restrictions, including the right to receive one newspaper and five magazines.”⁶⁹ Justice Breyer thus reasoned that “[t]he articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones.”⁷⁰

The plurality’s analysis in *Beard* has been criticized for effectively “reducing the four [reasonableness] factors to one.”⁷¹ Indeed, Justice Breyer wrote that “the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor’s basic logical rationale.”⁷² He added that:

The real task in this case is not balancing these factors, but rather determining whether the Secretary [of the Pennsylvania Department of Corrections] shows more than simply a logical relation, that is, whether he shows a *reasonable* relation. We believe the material presented here by the prison officials is sufficient to demonstrate that the Policy is a reasonable one.⁷³

But the Court’s 2006 plurality decision in *Beard v. Banks* also reveals a fissure among the justices regarding the legal standard under which to evaluate deprivation of rights behind bars. Specifically, Justice Clarence Thomas authored a concurring opinion that was joined by Justice Antonin Scalia.⁷⁴ Thomas and Scalia rejected the Breyer plurality’s deployment of the *Turner* test and, instead, endorsed a standard that Justice Thomas had framed in his earlier concurrence in *Overton v. Bazzetta*, calling it “the least perilous approach for resolving challenges to prison regulations, as well as the approach that is most faithful to the Constitution.”⁷⁵

policy. And the plaintiff, a prisoner who attacks the policy, has failed to set forth “specific facts” that, in light of the deference that courts must show to the prison officials, could warrant a determination in his favor.

Beard v. Banks, 548 U.S. 521, 525 (2006).

⁶⁷ *Id.* at 530.

⁶⁸ *Id.*

⁶⁹ *Id.* at 526.

⁷⁰ *Id.* at 531–32.

⁷¹ Sanford L. Bohrer & Matthew S. Bohrer, *Just the Facts, Ma’am—Determining the Constitutional Claims of Inmates to the Sanctity of Their Legal Mail*, 63 U. MIAMI L. REV. 893, 900 (2009).

⁷² *Beard*, 548 U.S. at 532.

⁷³ *Id.* at 533.

⁷⁴ *Id.* at 536–42 (Thomas, J., concurring).

⁷⁵ *Id.* at 537 (Thomas, J., concurring).

In *Overton*, Justice Thomas was again joined by Justice Scalia in an opinion concurring in the judgment.⁷⁶ Justice Thomas wrote that “[s]tates are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment.*”⁷⁷

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,”⁷⁸ and it applies to states through the Fourteenth Amendment Due Process Clause.⁷⁹ The United States Supreme Court recently observed that the Cruel and Unusual Punishments Clause “prohibits the imposition of inherently barbaric punishments under all circumstances”⁸⁰ and represents “the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.”⁸¹

In *Overton*, Justice Thomas wrote that “[t]he only provision of the Constitution that speaks to the scope of criminal punishment is the Cruel and Unusual Punishments Clause of the Eighth Amendment.”⁸² Importantly, and with regard to restrictions imposed on a prisoner once he or she is incarcerated, Justice Thomas reasoned that “[s]entencing a criminal to a term of imprisonment may, under state law, carry with it the *implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated.*”⁸³ He emphasized that “a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State’s prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations.”⁸⁴

For *Beard*’s ban of newspaper and magazine access, Justice Thomas’s standard examined “whether Pennsylvania intended to confer upon respondent and other inmates a right to have unfettered access to newspapers, magazines, and photographs.”⁸⁵ He initially determined that Pennsylvania had impliedly delegated to prison officials, as part of the sentencing process, the ability to enforce “rules and disciplinary measures set forth by the Pennsylvania Department of Corrections.”⁸⁶ Put more simply, such regulations are incorporated into prison sentences.⁸⁷

Justice Thomas’s Eighth Amendment test is even more deferential to prison officials than the *Turner* standard used by Justice Breyer and the plurality in *Beard*. As one commentator observed, the deference granted under Justice Thomas’ standard “exceeds the grant of deference by the plurality and grants absolute deference to states and prison officials to entirely eliminate constitutional rights with only the Eighth

⁷⁶ *Overton v. Bazzetta*, 539 U.S. 126, 138–45 (2003) (Thomas, J., concurring).

⁷⁷ *Id.* at 139 (Thomas, J., concurring).

⁷⁸ U.S. CONST. amend. VIII.

⁷⁹ *See Roper v. Simmons*, 543 U.S. 551, 560 (2005) (noting that the Eighth Amendment “is applicable to the States through the Fourteenth Amendment”).

⁸⁰ *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

⁸¹ *Id.*

⁸² *Overton*, 539 U.S. at 140 (Thomas, J., concurring).

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.*

⁸⁵ *Beard v. Banks*, 548 U.S. 521, 538 (2006) (Thomas, J., concurring).

⁸⁶ *Id.*

⁸⁷ *See id.* (writing that “these regulations are included in the prison sentence”).

Amendment as a limit.”⁸⁸ Thomas’s view may constitute what Professor Christopher Smith dubs a “novel assertion,”⁸⁹ but his view was shared by Justice Scalia, who joined with Thomas in both *Overton* and *Beard*. It is, ultimately as Professor Smith writes elsewhere, “an extraordinarily limited view of prisoners’ rights.”⁹⁰

Beard included two dissents—one authored by Justice John Paul Stevens and joined by Justice Ruth Bader Ginsburg,⁹¹ and one penned by Justice Ginsburg.⁹² These dissents provide some hope for the future of prisoners’ speech rights, despite the fact that Justice Stevens retired and thus is no longer on the Court. As with Justice Breyer’s plurality opinion, Justice Stevens also found that *Turner* provided the correct standard under which to analyze the magazine and newspaper access ban.⁹³ In applying that test, however, Justice Stevens seemed to appreciably ratchet up the level of review,⁹⁴ while adding several healthy doses of dicta that certainly can be considered pro-prisoner rights,⁹⁵ such as characterizing Pennsylvania’s newspaper and magazine ban as coming “perilously close to a state-sponsored effort at mind control.”⁹⁶

Justice Stevens expressed more than a little skepticism at the incentive-through-deprivation rationale—Pennsylvania’s holding back of all newspapers and magazines, with the down-the-road promise of access to them if a prisoner behaves better⁹⁷—that the

⁸⁸ Jennifer N. Wimsatt, Note, *Rendering Turner Toothless: The Supreme Court’s Decision in Beard v. Banks*, 57 DUKE L.J. 1209, 1225–26 (2008).

⁸⁹ Smith, *supra* note 61, at 496.

⁹⁰ Christopher E. Smith, *The Changing Supreme Court and Prisoners’ Rights*, 44 IND. L. REV. 853, 869 (2011).

⁹¹ *Beard*, 548 U.S. at 542–53 (Stevens, J., dissenting).

⁹² *Id.* at 553–56 (Ginsburg, J., dissenting). Justice Ginsburg wrote that while she joined “Justice Stevens’ dissenting opinion in full, I direct this separate writing to the plurality’s apparent misapprehension of the office of summary judgment” *Id.* at 553.

⁹³ *Id.* at 542 (Stevens, J., dissenting) (writing that “[w]hen a prison regulation impinges upon First Amendment freedoms, it is invalid unless ‘it is reasonably related to legitimate penological interests’”) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

⁹⁴ See *infra* notes 97–105 and accompanying text.

⁹⁵ For instance, Justice Stevens opined that “the rule at issue in this case strikes at the core of the First Amendment rights to receive, to read, and to think.” *Beard*, 548 U.S. at 543 (Stevens, J., dissenting). Typically, one might expect to find such language about core First Amendment rights in a case addressing limitations on political speech, not prisoner access to media products. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (holding that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it”).

Justice Stevens reasoned that “the complete prohibition on secular, nonlegal newspapers, newsletters, and magazines prevents prisoners from ‘receiv[ing] suitable access to social, political, esthetic, moral, and other ideas,’ which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment.” *Beard*, 548 U.S. at 552 (Stevens, J., dissenting). Certainly such dictum taps directly into the theory of self-realization and self-fulfillment through expression. See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (writing that speech must be protected not only “as a means to a collective good but because of the value of speech conduct to the individual”); Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 960 (2004) (writing that “free speech is valuable because it promotes and reflects human personality and is an essence of human dignity. Autonomy to think, listen, and speak for oneself is essential to a free and self-determining human being”).

⁹⁶ *Beard*, 548 U.S. at 552 (Stevens, J., dissenting).

⁹⁷ *Supra* notes 67–70 and accompanying text (describing this incentives-based approach).

plurality readily accepted. Justice Stevens explained that Pennsylvania's "deprivation theory of rehabilitation,"⁹⁸ which is premised on the notion that "[a]ny deprivation of something a prisoner desires gives him an added incentive to improve his behavior,"⁹⁹ involves "no limiting principle; if sufficient, it would provide a 'rational basis' for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior."¹⁰⁰ Stevens thus concluded that a reasonable fact finder could find that Pennsylvania's measured an "an exaggerated response"¹⁰¹ to its otherwise legitimate interest in rehabilitation.

Justice Stevens also questioned another of Pennsylvania's justifications, namely that magazines and newspapers constitute flammable material that a prisoner might use to start a fire in his cell.¹⁰² Observing that the prisoners affected by the ban in question already possess a large number of materials in their cells that could be used to start a fire,¹⁰³ Justice Stevens reasoned that "it does not follow, as a matter of logic, that preventing inmates from possessing a single copy of a secular, nonlegal newspaper, newsletter, or magazine will have any measurable effect on the likelihood that inmates will start fires, hide contraband, or engage in other dangerous actions."¹⁰⁴ To buttress this assessment, Justice Stevens pointed to the factual record which actually contradicted this justification, as the deputy superintendent of the Pennsylvania prisons made it clear during a deposition that "inmates could engage in any of the behaviors that worried prison officials without using banned materials."¹⁰⁵

Finally, Justice Ruth Bader Ginsburg penned a dissent seconding Justice Stevens' analysis, writing that "Stevens comprehensively explains why the justifications advanced by the Secretary of Pennsylvania's Department of Corrections do not warrant pretrial dismissal of Ronald Banks's complaint alleging arbitrary deprivation of access to the news of the day."¹⁰⁶ Adding her own examples of the blatant inconsistencies with Pennsylvania's newspaper-deprivation policy—inconsistencies that Justice Ginsburg found made it arbitrary and irrational under *Turner*¹⁰⁷—she noted that "[t]he regulation denies *The Christian Science Monitor* to inmates housed in level 2 of the prison's long-term segregation unit but allows them *The Jewish Daily Forward*, based on the determination of a prison official that the latter qualifies as a religious publication and the

⁹⁸ *Beard*, 548 U.S. at 546 (Stevens, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 552.

¹⁰² *Id.* at 543–44.

¹⁰³ In particular, each inmate is provided with:

a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup.

Id. at 543–44.

¹⁰⁴ *Id.* at 544.

¹⁰⁵ *Id.* at 545.

¹⁰⁶ *Id.* at 553 (Ginsburg, J., dissenting).

¹⁰⁷ *Id.* at 555.

former does not.”¹⁰⁸ She wryly observed that “[p]risoners are allowed to read Harlequin romance novels but not to learn about the war in Iraq or Hurricane Katrina.”¹⁰⁹

Each of the opinions in *Beard* demonstrates the unsettled nature of free-speech rights behind bars: some justices apply *Turner* very deferentially, while others apply it much more rigorously, and still other justices—namely, Clarence Thomas and Antonin Scalia—reject the *Turner* test altogether in favor of an Eighth Amendment standard.¹¹⁰ Further, liberal-leaning Justices Sonia Sotomayor and Elena Kagan had not yet joined the Court when *Beard* was decided, leaving one to wonder if they might join fellow female and liberal-tilting Justice Ginsburg in applying a tighter form of *Turner* review as she did in her *Beard* dissent. Conversely, Justice Samuel Alito, a nominee of President George W. Bush¹¹¹ who has found himself isolated from all of his colleagues on the Court in several recent cases involving controversial forms of expression,¹¹² also was not on the Court that heard *Beard*. Might Alito align himself with fellow conservative and male Republican appointees Justices Thomas and Scalia to endorse an Eighth Amendment approach?

Such differences of opinion within *Beard*, along with a mix of new justices who have yet to express their own views about free speech behind bars while on the high court, leaves lower court judges with many possible directions to turn today when evaluating restrictions on inmates’ access to media content like books, magazines and movies.

II. THE STATE OF FREE SPEECH & MEDIA CONTENT BEHIND BARS: AN ANALYSIS OF FEDERAL COURT DECISIONS FROM 2010 AND 2011

This Part of the Article first examines a quartet of federal appellate court cases from the past two years involving restrictions on common forms of media content behind bars.¹¹³ It then analyzes four federal district court decisions from the same period addressing similar issues.¹¹⁴ In the process, this part demonstrates the often vast deference accorded to prison officials and the steep, uphill battle that inmates must surmount when fighting for their First Amendment rights to access magazines, movies, music, and other popular forms of media materials.

While there were numerous other federal court decisions rendered in 2010 and 2011 involving the free speech rights of inmates,¹¹⁵ the ones scrutinized below were

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Supra* notes 74–90 and accompanying text (describing Justice Thomas’s relevant concurring opinions and his Eighth Amendment standard).

¹¹¹ See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited May 8, 2012) (noting that Alito was nominated to the Court by President George W. Bush).

¹¹² Justice Alito authored solo dissents in the crush-video case of *United States v. Stevens*, 130 S. Ct. 1577 (2010), and in the Westboro Baptist Church funeral-protest case of *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

¹¹³ See subpart II.A.

¹¹⁴ See subpart II.B.

¹¹⁵ More than fifteen other cases were decided by federal courts at both the district court and appellate court levels during this time period. See *infra* Appendix for examples from this list.

chosen for analysis by the authors in part because they cover a wide range of fact patterns and in part because they illustrate differing levels of deference to *Turner* a quarter-century after it was decided by the high court. Eight opinions in total were also selected for purposes of parsimony, lest this article become too lengthy. Readers are encouraged to review for themselves the other 2010 and 2011 decisions not examined in detail here.¹¹⁶ The authors did not examine First Amendment-based claims regarding religious reading materials, which raise additional Free Exercise Clause concerns.

A. Federal Appellate Court Opinions

1. Deprivation of Sexually Explicit Materials

In February 2011, the United States Court of Appeals for the Tenth Circuit in *Sperry v. Werholtz*¹¹⁷ rejected an inmate's First Amendment-based civil rights challenge¹¹⁸ to a Kansas Department of Corrections' (KDOC) policy providing that "[n]o inmate shall have in possession or under control any sexually explicit materials, including drawings, paintings, writing, pictures, items, and devices."¹¹⁹ Sperry, an inmate at the Lansing Correctional Facility who was forced to dispose of ten to twelve adult magazines in order to comply with the regulation,¹²⁰ was initially rebuffed in his free-speech dispute in May 2010 when the trial court granted summary judgment for defendant Roger Werholtz, secretary of the KDOC.¹²¹ Nine months later, following the trial court's lead in applying the *Turner* standard,¹²² the appellate court affirmed summary judgment, largely adopting and often quoting the lower court ruling.¹²³ In doing so, the appellate court engaged in a very deferential form of review.¹²⁴ It accepted Werholtz's affidavit that the blanket ban, which applied to all inmates, not merely those who were sex offenders,¹²⁵ served multiple penological goals.¹²⁶

The goals stated by Werholtz included: 1) protecting institutional security because "[s]exually explicit materials can lead to the open performance of lewd acts"¹²⁷ and because the very act of possessing such content might be used by some inmates to identify gay prisoners who are frequent targets of violent attacks;¹²⁸ 2) helping to treat

¹¹⁶ See *infra* Appendix (listing those opinions and providing a brief parenthetical for each that describes the key underlying facts and the judicial outcome).

¹¹⁷ 413 Fed. Appx. 31 (10th Cir. Feb. 14, 2011).

¹¹⁸ See 42 U.S.C. § 1983 (2010) (providing remedies for "an action at law, suit in equity, or other proper proceeding for redress" for individuals deprived of civil rights by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia").

¹¹⁹ *Sperry*, 413 Fed. Appx. at 34.

¹²⁰ *Id.* at 33.

¹²¹ *Sperry v. Werholtz*, No. 04-3125-CM2010, U.S. Dist. LEXIS 49116 (D. Kan. May 18, 2010).

¹²² *Sperry*, 413 Fed. Appx. at 39–42.

¹²³ *Id.* at 42.

¹²⁴ *Infra* notes 132–137 and accompanying text.

¹²⁵ See *Sperry*, 413 Fed. Appx. at 41 (using the term "blanket ban" to describe the policy).

¹²⁶ See *id.* at 40 (writing that "[w]e agree with the district court that the governmental objectives underlying Kansas Administrative Regulation § 44-12-313 are legitimate and neutral and that the regulation is rationally related to those objections").

¹²⁷ *Id.* at 40.

¹²⁸ *Id.* at 41.

and manage sex offenders because, without a ban applicable to all inmates, non-sex offenders might trade sexually explicit material with sex offenders;¹²⁹ and 3) mitigating possible sexual harassment complaints by prison staff who had previously “complained about being required to view these materials while performing their duties”¹³⁰ and who alleged that inmates had openly compared them to individuals depicted in the sexual content.¹³¹ Collectively, this trio of justifications boils down to *security*, *treatment*, and *fear of litigation*.

The fear-of-litigation justification certainly seems tenuous because it is not a fear of lawsuits filed by inmates but rather lawsuits brought by the very people who are charged with watching them. If censorship of speech can be justified by the possible reaction that government officials—prison security guards—might have to the speech, then censorship is a certain result. This justification has nothing to do with either protecting or treating prisoners but has everything to do with protecting the government from expensive lawsuits.

The Tenth Circuit’s deference to and relaxed application of *Turner* was evident at several points in *Sperry*. For instance, in applying the first of the four *Turner* factors—namely, whether a valid and rational connection exists between the regulation and the asserted legitimate governmental interest—the appellate court wrote that prison officials are not required to prove either that the banned materials previously caused problems or that they are likely to result in future problems.¹³² The Tenth Circuit stressed that “empirical evidence is not necessarily required”¹³³ and that “[t]he only question that we must answer is whether the defendants’ judgment was ‘rational,’ that is, whether the defendants might reasonably have thought that the policy would advance its interests.”¹³⁴ The Tenth Circuit also made it clear that two items are irrelevant in this analysis: 1) whether or not the regulation on sexually explicit material actually advances any of the purported government interests; and 2) whether the court disagrees with the policy itself.¹³⁵

In perhaps the most glaring form of deference, the Tenth Circuit refused to strike the assertions in the affidavit of KDOC Secretary Werholtz despite acknowledging that “paragraphs 5, 6, and 7 of the affidavit are very conclusory in terms of showing a rational connection between the ban on sexually explicit materials and the asserted penological interests of prison security, prevention of sexual harassment, and treatment of sex offenders.”¹³⁶ Rather than strike these paragraphs, the appellate court merely “urge[d] prison officials to be more thorough and specific in future cases.”¹³⁷ Viewed cynically, this seems somewhat akin to a “*we’ll let you get away with it this time, but don’t push us again*” approach that reflects a very relaxed review of governmental justifications for intrusions on the free speech rights of inmates.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 40.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 39 n.4.

¹³⁷ *Id.*

Finally, adding monetary injury to First Amendment insult, the appellate court closed its opinion by reminding Jeffrey Sperry, a pro se plaintiff and appellant, that he needed to continue to make partial payments on his appellate filing fee until it was paid in full.¹³⁸ A dozen adult magazines and filing fees later, Sperry had lost his property and case, with the appellate court seconding the district court's lead in applying a very deferential form of the *Turner* test.

2. Dangerous Fantasies? Dispossessed of Dungeons and Dragons

Gang activity behind bars probably is not the first thing that comes to mind when one thinks of the role-playing game Dungeons and Dragons (D & D),¹³⁹ but that was the concern that animated the dispute in *Singer v. Raemisch*.¹⁴⁰ The United States Court of Appeals for the Seventh Circuit in *Singer* upheld a regulation at Wisconsin's Waupun Correctional Institution that banned possession of D & D materials, such as books and magazines about the game, and prohibited inmates from playing D & D.¹⁴¹ The January 2010 ruling affirmed summary judgment for prison officials¹⁴² and came as a blow to plaintiff Kevin Singer,¹⁴³ whom the appellate court described as a long-time and devoted D & D player.¹⁴⁴

For several years prior to the ban, he had "frequently ordered D & D publications and game materials by mail and had them delivered to his cell."¹⁴⁵ Singer's role-playing fantasy behind bars came to a crashing halt, however, after the prison's disruptive group coordinator received an anonymous letter expressing "concern that Singer and three other inmates were forming a D & D gang and were trying to recruit others to join by passing around their D & D publications and touting the 'rush' they got from playing the game."¹⁴⁶ In what might cynically be considered as the height of overreaction to D & D spawned by an anonymous letter, Bruce Muraski, the facility's expert on gangs, testified in seemingly irony-free fashion that he decided to "*check into this gang before it gets out*

¹³⁸ *Id.* at 42.

¹³⁹ See Leonore Fleischer, *Treasure in the Dungeon*, WASH. POST, Jan. 20, 1980, at Book World 15 (describing D & D as "a role-playing fantasy game that transforms ordinary youngsters into treasure-hunting elves, dwarves, magic-users, halflings and fearless fighters," and adding that it "is just as popular on college campuses where sophisticated advanced players map out game strategies on their math departments' already overloaded computers. Even 10-year-olds use their pocket calculators when playing D&D").

¹⁴⁰ 593 F.3d 529 (7th Cir. 2010).

¹⁴¹ *Id.* at 531 (affirming summary judgment for prison officials).

¹⁴² United States District Judge J. P. Stadtmueller granted summary judgment for the defendants of Singer's First Amendment claims in July 2007. See *Singer v. Frank*, No. 05-C-1040, 2007 U.S. Dist. LEXIS 55663, at *64 (E.D. Wis. July 31, 2007) (concluding that "after applying the *Turner* factors, the plaintiff has failed to demonstrate that there is a genuine issue of material fact as to whether the policy at issue in this case was reasonably related to the legitimate penological interests of maintaining safety and security and curbing gang activity").

¹⁴³ Singer, according to one newspaper report on the case, "is in prison serving a life sentence for bludgeoning and stabbing his sister's boyfriend to death." *Just Because Someone Looks Mostly Dead*, ST. PETERSBURG TIMES (Fla.), Jan. 27, 2010, at 6A.

¹⁴⁴ *Singer*, 593 F.3d at 532.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

of hand.”¹⁴⁷ Apparently for Muraski, D & D players are equivalent to members of the violent, national-level Bloods¹⁴⁸ and Crips¹⁴⁹ gangs.¹⁵⁰ Thus, less than one month after Muraski received the letter, Singer was forced to give up possession of twenty-one books and fourteen magazines about D & D, as well as a ninety-six page, handwritten manuscript about D & D that Singer had penned.¹⁵¹

Just what is D & D? In an article in the *American Journal of Psychotherapy* that explored how D & D was used by a young man with an obsessional, schizoid personality, Dr. Wayne Blackmon explained that D & D is:

an imagination game. Worlds are created and the participants play characters in this imaginary world. Each player’s character is created according to a set of rules that govern abilities and classes of characters. Through complicated series of dice rolls, a character is dealt strength, intelligence, wisdom, dexterity, constitution, and charisma. The types of characters are clerics, dwarves, elves, fighters, halflings, magic users or thieves.¹⁵²

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ An April 2008 report to Congress, prepared by the United States Department of Justice, describes the Bloods as:

an association of structured and unstructured gangs that have adopted a single gang culture. Large, national-level Bloods gangs include Bounty Hunter Bloods and Crenshaw Mafia Gangsters. Bloods membership is estimated to be 5,000 to 20,000; most members are African American males. Bloods gangs are active in 123 cities in 37 states. The main source of income for Bloods gangs is retail-level distribution of cocaine and marijuana. Bloods members also are involved in transporting and distributing methamphetamine, heroin and, to a much lesser extent, PCP (phencyclidine). The gangs also are involved in other criminal activity including assault, auto theft, burglary, carjacking, drive-by shooting, extortion, homicide, identification fraud, and robbery.

Attorney General’s Report to Congress on the Growth of Violent Street Gangs in Suburban Areas, UNITED STATES DEPT. OF JUSTICE (Apr. 2008), <http://www.justice.gov/ndic/pubs27/27612/appendb.htm>.

¹⁴⁹ The Crips are:

a collection of structured and unstructured gangs that have adopted a common gang culture. Crips membership is estimated to be 30,000 to 35,000; most members are African American males from the Los Angeles metropolitan area. Large, national-level Crips gangs include Insane Gangster Crips, Rolling 90s Crips, and Shotgun Crips. Crips gangs operate in 221 cities in 41 states. The main source of income for Crips gangs is the street-level distribution of powder cocaine, crack cocaine, marijuana, and PCP. The gangs also are involved in other criminal activity such as assault, auto theft, burglary, and homicide.

Id.

¹⁵⁰ The Bloods and the Crips are rival gangs whose members often are linked to shootings and murders. *See generally* Tom McGhee, *Gangs Linked to RTD Shooting*, DENVER POST, Aug. 21, 2011, at B-2 (describing a recent shooting incident in Colorado allegedly involving the Crips, and noting that Crips were fighting with possible Bloods gang members); Kelly Smith, *Anguish in Powderhorn After Stabbing Death*, STAR TRIB. (Minneapolis, Minn.), Aug. 21, 2011, at 2B (describing a recent killing in Minneapolis as “the result of a clash between the Bloods and Crips gangs”).

¹⁵¹ *Singer*, 593 F.3d at 532.

¹⁵² Wayne D. Blackmon, *Dungeons and Dragons: The Use of a Fantasy Game in the Psychotherapeutic Treatment of a Young Adult*, 48 AM. J. PSYCHOTHERAPY 624, 626 (1994).

The game certainly has not been without controversy.¹⁵³ In 1985, it was blamed for the suicide of a thirteen-year-old Connecticut boy who regularly played D & D and, as the *New York Times* reported at the time, “[s]everal school boards around the country have banned the game on the ground that impressionable teen-agers cannot handle the violent role playing and occult imagery. Opponents of the game have cited several suicide notes as evidence that the game is responsible for some teen-age suicides.”¹⁵⁴ More recently, an eighteen-year-old man charged with raping and killing a developmentally disabled sixteen-year-old girl claimed “he was at a neighbor’s house playing the Dungeons and Dragons Online video game in an effort to ‘forget’”¹⁵⁵ his gruesome actions earlier that day.

Aside from such incidents, however, the game is generally associated with so-called geeks, not gangs.¹⁵⁶ Comedian Stephen Colbert has stated, “I’m a huge, huge geek. I played Dungeons and Dragons the first week it came out.”¹⁵⁷ What is more, Kevin Singer was not your average jailhouse lawyer; he assembled fifteen affidavits regarding D & D, including three from “role-playing game experts. He contend[ed] that the affidavits demonstrate that there is no connection between D&D and gang activity. Several of Singer’s affiants indeed asserted the opposite: that D&D helps rehabilitate inmates and prevents them from joining gangs and engaging in other undesirable activities.”¹⁵⁸

So why did the appellate court sustain summary judgment against Kevin Singer? First, it applied *Turner*’s reasonably-related-to-legitimate-penological-concerns test and specified that of the four *Turner* factors used to determine reasonableness, “the first one can act as a threshold factor regardless which way it cuts.”¹⁵⁹ Second, in applying this standard, the appellate court readily accepted what even it admitted was the “sole evidence”¹⁶⁰ offered by prison officials to support the ban on D & D materials and the playing of the game—namely, the affidavit of Bruce Muraski, the facility’s gang expert.¹⁶¹ Muraski asserted that the prohibition was necessary, in part, to protect prison security because “cooperative games can mimic the organization of gangs and lead to the actual development thereof.”¹⁶² In addition to prison security, Muraski claimed the ban

¹⁵³ For instance, in 1990, Joseph Pottgen, Jr. of Lake City, Florida, was sentenced to twenty-two months in prison for allegedly digging up the grave of a suicide victim as part of playing D & D. *Man Gets 22 Months for Robbing Grave*, MIAMI HERALD, Nov. 8, 1990, at 2B.

¹⁵⁴ James Brooke, *A Suicide Spurs Town to Debate Nature of a Game*, N.Y. TIMES (Aug. 22, 1985), available at <http://www.nytimes.com/1985/08/22/nyregion/a-suicide-spurs-town-to-debate-nature-of-a-game.html>.

¹⁵⁵ Carly Flandro, *Neighbor Charged in Rape, Killing of Puyallup Teen*, SEATTLE TIMES, Aug. 25, 2010, at B1.

¹⁵⁶ See Frank Ahrens, *‘Rings’ Has Two Targets—Plan Is to Grab the Geeks So the Masses Will Follow*, WASH. POST, Dec. 19, 2001, at E1 (describing D & D as part of “classic geek markets” along with “Star Trek,” “Star Wars,” and “Buffy the Vampire Slayer”); Seth Borenstein, *Obama Hailed for His Geeky Qualities*, CHARLOTTE OBSERVER (N.C.), Dec. 25, 2008, at 7A (reporting that “[g]eeks know and use references from ‘Star Trek,’ ‘Dungeons and Dragons’ and comic books”).

¹⁵⁷ Marc Peyser, *The Truthiness Teller*, NEWSWEEK, Feb. 13, 2006, at 50.

¹⁵⁸ *Singer v. Raemisch*, 593 F.3d 529, 533. (7th Cir. 2010).

¹⁵⁹ *Id.* at 534.

¹⁶⁰ *Id.* at 535.

¹⁶¹ *Supra* note 147 and accompanying text (describing Muraski).

¹⁶² *Singer*, 593 F.3d at 535.

would help with inmate rehabilitation because, as he stated in his affidavit, D & D can “foster an inmate’s obsession with escaping from the real life, correctional environment, fostering hostility, violence and escape behavior.”¹⁶³ In brief, the two interests cited were prison security and inmate rehabilitation.

Singer, in contrast, challenged the existence of a rational relationship between those twin interests and the ban on D & D.¹⁶⁴ The appellate court noted that Singer’s “eleven inmate affiants—who collectively served over 100 years in prison—all testified that they had never heard of any gang-related or other violent activity associated with D & D gameplay or paraphernalia.”¹⁶⁵ Another affidavit, this one from Paul Cardwell, chair and archivist of the Committee for the Advancement of Role-Playing Games, contended that “there are numerous scholarly works establishing that role-playing games can have positive rehabilitative effects on prisoners.”¹⁶⁶

The appellate court, however, was not moved by any of Singer’s affidavits and dismissed them as “lack[ing] the qualifications necessary to determine whether the relationship between the D & D ban and the maintenance of prison security is ‘so remote as to render the policy arbitrary or irrational.’”¹⁶⁷ In other words, the appellate court deferentially treated the lone affidavit submitted by Muraski to justify the prison’s D & D policy while off-handedly dismissing Kevin Singer’s evidence. “[M]any of Singer’s affiants are present or former inmates, but their experiential ‘expertise’ in prison security is from the wrong side of the bars and fails to match Muraski’s perspective,”¹⁶⁸ the appellate court wrote, adding that “[t]he expertise critical here is that relating to prisons, their security, and the prevention of prison gang activity. Singer’s affiants conspicuously lack such expertise.”¹⁶⁹

This judicial analysis puts prisoners who challenge regulations affecting their free-speech rights in a perplexing predicament when it comes to gathering evidence and, in particular, expert testimony. How is an inmate, who lodges a *pro se*¹⁷⁰ complaint—a lawsuit filed without the benefit of a trained attorney—supposed to round-up expert testimony? *Pro se* litigants, as Professor Kevin Smith observes, are “armed in most cases with more determination than legal expertise.”¹⁷¹ In a recent article, Professor Ira Robbins explains that:

Compared with other litigants, *pro se* prisoners are at an inherent disadvantage. They lack many of the resources enjoyed by non-prisoner litigants. They have limited finances and restricted access to libraries,

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 536.

¹⁶⁶ *Id.* at 537.

¹⁶⁷ *Id.* at 536 (quoting *Turner v. Safley*, 482 U.S. 78, 89–90 (1987)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ The term means “on one’s own behalf.” Henry Calloway, *Access to Justice Pro Se: The Growth of Pro Se in Alabama*, 63 ALA. LAW. 363, 363 (2002).

¹⁷¹ Kevin H. Smith, *Justice for All?: The Supreme Court’s Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 383 (1999).

legal materials, computers, the Internet, and even items that the non-incarcerated take for granted—such as paper, pens, and telephones.¹⁷²

And while some pro se prisoner litigation may be frivolous,¹⁷³ certainly a challenge involving the First Amendment right to possess reading materials, even if they are about D & D, is not inconsequential. Ultimately, in *Singer*, the Seventh Circuit concluded that Muraski had “proffered evidence that the policy prohibiting possession of D & D manuals, strategy guides, character novellas, and other related materials is rationally related to the goal of preventing susceptible inmates from embarking upon a dangerous escapist path”¹⁷⁴ and that Kevin Singer’s “affidavits and briefs were unresponsive to this evidence.”¹⁷⁵ The appellate court noted that the Supreme Court’s ruling in *Overton* “mandates deference to the views of prison authorities.”¹⁷⁶

Attorney John G. Browning, a partner in the national law firm of Lewis Brisbois Bisgaard & Smith LLP, responded incredulously to the Seventh Circuit’s ruling:

Seriously? I’ve seen “Oz” and “The Shawshank Redemption,” and I’m pretty sure what goes on in prisons bears no resemblance to a fantasy game played by the geeky kids from your high school. Unlike the judges on the 7th Circuit, I don’t think that in a prison’s sea of rampant violence, drug use, and illiteracy there’s much chance of an inmate standing up to a tattooed white supremacist convict by claiming to be a Level 12 paladin with a magical sword and a spell-resistant cloak.¹⁷⁷

The *New York Times* covered the appellate court’s decision as well, leading its story sarcastically with “[p]risons can restrict the rights of inmates to nerd out.”¹⁷⁸ The *Times*’s story noted that Ilya Somin, an associate professor of law at George Mason University, queried on *The Volokh Conspiracy* legal blog, “[s]hould prisons ban ‘The Count of Monte Cristo’ on the grounds that it might encourage escape attempts?”¹⁷⁹ Somin told the *New York Times* in an interview, “[i]deally, you should really have more evidence that there is a genuine harm before you restrict something.”¹⁸⁰ The decision was so shocking it even drew coverage across the Atlantic Ocean in the infamous English tabloid, the *Sun*.¹⁸¹

¹⁷² Ira Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 273 (2010).

¹⁷³ See generally Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519 (1996) (addressing the topic of pro se prisoner litigation, and observing that “the burden of the vast number of frivolous prisoner suits has created hostility to the entire category of lawsuits—opposition that has the potential of obscuring the few meritorious prisoner lawsuits which are about as scarce as the proverbial needle in the haystack”).

¹⁷⁴ *Singer*, 593 F.3d at 538.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 534.

¹⁷⁷ John G. Browning, *Legally Speaking: Your Tax Dollars at Work*, SOUTHEAST TEX. REC. (Feb. 9, 2010), <http://www.setexasrecord.com/arguments/224636-legally-speaking-your-tax-dollars-at-work>.

¹⁷⁸ John Schwartz, *Court Upholds Prison Ban on Dungeons & Dragons*, N.Y. TIMES, Jan. 27, 2010, at A16.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Murderer, Kevin Singer*, SUN (England), Feb. 3, 2010, at News 12.

Ultimately, although Singer may be a convicted killer for whom little sympathy is due,¹⁸² he was denied the opportunity to read about and partake in a fantasy game that might have allowed him to escape—albeit, only in his mind—the misery of life behind bars.¹⁸³ And to the extent that Singer was forced to give up the ninety-six page manuscript about D & D that he had drafted,¹⁸⁴ the notion of individual self-realization through speech¹⁸⁵—in this case, creative writing about a game—was thwarted.

3. Dangerous Newsletters Behind Bars?

In September 2011, the United States Court of Appeals for the Seventh Circuit¹⁸⁶ applied the Supreme Court’s *Turner* test to affirm a district court’s order¹⁸⁷ allowing the Wisconsin Department of Corrections to censor the distribution behind bars of an erstwhile newsletter called *The New Abolitionist*, which focused on the Wisconsin state prison system. A large part of the dispute in this consolidated case focused on the argument of Frank Van den Bosch, the publisher of *The New Abolitionist* and the member of a group called Wisconsin Prison Watch,¹⁸⁸ that censorship of the March 2007 issue of his newsletter “was not rationally related to security concerns, but rather motivated by a desire to suppress any speech critical of the prison administration and the conditions of confinement within Wisconsin prisons.”¹⁸⁹ In contrast, prison officials contended the “newsletter contain[ed] misleading information, encourage[d] distrust of prison staff, and could potentially undermine the prison’s rehabilitative initiatives.”¹⁹⁰

Three of the articles in that issue which drew the wrath of prison officials were written by inmates, and two of those articles were highly critical of specific aspects of the prison system, including the Wisconsin Parole Commission and Program Review Committee.¹⁹¹ The third inmate-written article dealt with inmate-initiated litigation in the Seventh Circuit, and it “suggested that prisoners erroneously rely upon courts to seek social change, and urged readers to ‘employ any and all means necessary, including mass protests in front of prisons, in order to ‘bring some attention to this madness they call

¹⁸² See *Madison / DD Game Is Still Banned in Prison*, ST. PAUL PIONEER PRESS (Minn.), Jan. 25, 2010, (describing Singer as a “convicted killer” who was “sentenced to life in prison in 2002 after he was convicted of bludgeoning his sister’s boyfriend to death with a sledgehammer”).

¹⁸³ The authors are not asserting here that inmates have the right to live in a happy, fun, or pleasant environment, but rather that speech and expression provide basic mechanisms for mitigating, even if only momentarily, the ills of prison with liberating thoughts and flights of imagination. *Cf.* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (observing that “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought”).

¹⁸⁴ See *supra* note 151 and accompanying text (referencing this manuscript).

¹⁸⁵ See Eberle, *supra* note 95 (addressing the theory of self-realization through speech).

¹⁸⁶ *Van den Bosch v. Raemisch*, 658 F.3d 778, 2011 U.S. App. LEXIS 19031 (7th Cir. Sept. 15, 2011).

¹⁸⁷ *Van den Bosch v. Raemisch*, No. 09-cv-62-bbc, 2009 U.S. Dist. LEXIS 111196 (W.D. Wisc. Dec. 1, 2009).

¹⁸⁸ See George Hesselberg, *Charges on Record for One, Not for Other*, WISC. STATE J., Oct. 5, 2008, at D1 (identifying Van den Bosch as with Wisconsin Prison Watch).

¹⁸⁹ *Van den Bosch*, 2011 U.S. App. LEXIS 19031, at *17.

¹⁹⁰ *Id.* at *23.

¹⁹¹ *Id.* at *4–5.

prison life.”¹⁹² Finally, a fourth article written by Van den Bosch allegedly contained inaccurate information about the availability of inmate jobs at the Wisconsin Secure Program Facility.¹⁹³

As with the *Singer* case described above,¹⁹⁴ all it took for the Seventh Circuit to uphold the censorship was a lone affidavit from a supposed expert prison official. In this case, it was the affidavit of Dan Westfield, security chief of Wisconsin’s Department of Corrections Division of Adult Institutions, that set forth boilerplate reasons justifying the censorship the Seventh Circuit upheld.¹⁹⁵ Despite noting that that Westfield’s affidavit was “arguably vague in certain respects”—much like the Tenth Circuit in *Sperry* openly admitting the affidavit of the pivotal prison official in that case was “very conclusory”¹⁹⁶—the Seventh Circuit wrote that “prisons maintain broad discretion in prohibiting material in prison that potentially endangers institutional security.”¹⁹⁷ Through this deferential lens, it ruled that Westfield’s vague affidavit did “identify several passages in the March 2007 newsletter that may reasonably encourage distrust of prison staff and threaten prison security. Plaintiff’s disagreement with defendant Westfield’s assessment is insufficient to establish that confiscation of the newsletter was not reasonably related to legitimate penological interests.”¹⁹⁸

The phrase “several passages” is emphasized above because it demonstrates how, unlike in the context of obscenity¹⁹⁹ where a work must be considered as a whole before it is deemed to fall outside the scope of constitutional protection,²⁰⁰ courts like the Seventh Circuit support censoring an entire issue of a newsletter merely because “several passages”²⁰¹ allegedly might lead to distrust of prison staff and threaten prison security. This too is indicative of the type of judicial deference accorded to prison officials—deference that deviates from the Supreme Court’s maxim in obscenity law that “the First Amendment requires that redeeming value be judged by considering the work as a whole.”²⁰²

Perhaps even more relevant within the context of the newsletter in *Van den Bosch*, Judge Robert D. Sack notes in the latest edition of his treatise on defamation that “a court will not isolate particular phrases and determine whether, considered alone, they are

¹⁹² *Id.* at *5.

¹⁹³ *Id.* at *4.

¹⁹⁴ Subpart II.A.2.

¹⁹⁵ *Van den Bosch*, 2011 U.S. App. LEXIS 19031, at *21 (observing that the defendants relied “almost exclusively on the affidavit of defendant Westfield”).

¹⁹⁶ *Sperry v. Werholtz*, 413 Fed. Appx. 31, 39 n.4. (10th Cir. 2011); *see also* subpart II.A.1.

¹⁹⁷ *Van den Bosch*, 2011 U.S. App. LEXIS 19031, at *25.

¹⁹⁸ *Id.* (emphasis added).

¹⁹⁹ Obscenity is not protected by the First Amendment’s guarantee of free speech. *See Roth v. United States*, 354 U.S. 476, 485 (1957) (writing that “obscenity is not within the area of constitutionally protected speech or press”).

²⁰⁰ In *Miller v. California*, 413 U.S. 15 (1973), the United States Supreme Court held that when determining whether material is obscene, jurors and judges must consider: 1) whether the average person, applying contemporary community standards, would find that the work, *taken as a whole*, appeals to a prurient interest; 2) whether it depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether, *taken as a whole*, it lacks serious literary, artistic, political or scientific value. *Id.* at 24 (emphasis added).

²⁰¹ *Van den Bosch*, 2011 U.S. App. LEXIS 19031, at *25.

²⁰² *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002).

defamatory. The rule that words are to be read in *the context of the communication as a whole* applies to books and broadcasts, as well as to letters and newspaper and periodical articles and advertisements.²⁰³ When it comes to interpreting works read by inmates, however, such an article-as-a-whole requirement for interpreting a message's meaning in newsletter is jettisoned. Meaning is instead construed from the biased perspective of prison officials based on a few isolated passages.

First Amendment scholars will note that this logic comports with the deference given to public school officials in interpreting meaning in student-written messages. In particular, in its 2007 *Morse v. Frederick*²⁰⁴ opinion, the United States Supreme Court was highly deferential to principal Deborah Morse's interpretation of the meaning of the obtuse declaration "Bong Hits 4 Jesus."²⁰⁵ Although the *Morse* majority acknowledged the phrase was "cryptic"²⁰⁶ and "probably means nothing at all"²⁰⁷ to some people, it nonetheless accepted Deborah Morse's conclusion that "Bong Hits 4 Jesus" would be interpreted by viewers as promoting illegal drug use, calling such an interpretation "plainly a reasonable one."²⁰⁸

In a dissenting opinion joined by Justices David Souter and Ruth Bader Ginsburg, Justice John Paul Stevens blasted the deference provided by the majority on the meaning/interpretation issue. "[I]t is one thing to restrict speech that advocates drug use. It is another thing entirely to prohibit *an obscure message* with a drug theme that a *third party subjectively—and not very reasonably*—thinks is tantamount to express advocacy,"²⁰⁹ Stevens opined. He dubbed the majority's approach to meaning "indefensible,"²¹⁰ criticizing it for "deferring to the principal's 'reasonable' judgment that Frederick's sign qualified as drug advocacy."²¹¹

Ultimately, this deferral to the judgment of government administrators who run prisons and public schools on the question of meaning represents another dimension of the institutional deference that cuts across the penal and educational systems.²¹²

²⁰³ ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2:4.2 (4th ed. 2011) (emphasis added).

²⁰⁴ 551 U.S. 393 (2007).

²⁰⁵ *Id.* at 397 (noting that student Joseph Frederick "and his friends unfurled a 14-foot banner bearing the phrase: 'BONG HiTS 4 JESUS'" as the Olympic Torch Relay passed by Frederick's school, Juneau-Douglas High School, on January 24, 2002).

²⁰⁶ *Id.* at 401.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 439 (Stevens, J., dissenting) (emphasis added).

²¹⁰ *Id.* at 441.

²¹¹ *Id.*

²¹² See *supra* notes 62–64 and accompanying text (noting the similarities between how prisoners and public school students are treated under the law with regard to speech rights); see also Scott Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1639 (2007) (observing that "[c]ourts allow plaintiffs' speech within certain institutions—public schools, workplaces, and prisons—to be heavily restricted because it occurs within that institution," and adding that "in these three contexts, it is courts' extreme institutional tailoring that yields underprotection").

4. Protecting the Right to Receive a Magazine About the Prison System

While the Seventh Circuit spent September 2011 upholding the censorship of a newsletter critical of the Wisconsin penal system in *Van den Bosch*, the Ninth Circuit that same month denied a petition for rehearing en banc in *Hrdlicka v. Reniff*²¹³ involving another prison-centric publication, namely *Crime, Justice & America (CJA)* magazine. *Hrdlicka*, in fact, marks a relatively rare free-speech triumph under the *Turner* standard, as the Ninth Circuit reversed two grants of summary judgment²¹⁴ in favor of the government officials in charge of the jails in both Butte County, California, and Sacramento County, California, who refused to distribute unsolicited copies of *CJA* to inmates.²¹⁵

Just what type of magazine is *CJA* and who is its publisher, Ray Hrdlicka? The magazine boasts on its website that it promises to:

inform, explain, entertain, interpret, uncover, and question the relevant issues in the criminal justice system: local, regional, and nationwide. Specialized demographic sections will reach all people involved in the criminal justice system: new arrestees, attorneys, law enforcement, judiciary, court personnel, sentenced prisoners, survivors and victims, friends and family on both sides of the law.²¹⁶

Publisher Ray Hrdlicka, a Chicago native, holds a private investigator's license and has worked as a repo man,²¹⁷ a bounty hunter, and in the bail-bond business, the last of which reaped \$30 million annually by 2001 for Hrdlicka but later went bankrupt.²¹⁸ According to a 2005 profile in California's *East Bay Express*, Hrdlicka started *CJA* in May 2002 and, by 2005, it was "distributed in 31 California counties, with special editions for large counties like Los Angeles and for regional groups of smaller ones."²¹⁹ In a precursor to the legal disputes that later would come before the Ninth Circuit in *Hrdlicka v. Reniff*, however, jail authorities in Sonoma County, California in February

²¹³ *Hrdlicka v. Reniff*, 631 F.3d 1044 (9th Cir. 2011), *reh'g denied*, 2011 U.S. App. LEXIS 18218 (9th Cir. Sept. 1, 2011).

²¹⁴ *See Crime, Justice & America, Inc. v. Reniff*, 2:08-cv-343-GEB-EFB, 2009 U.S. Dist. LEXIS 21976 (E.D. Cal. Mar. 18, 2009) (involving the refusal to distribute *CJA* to inmates at the Butte County Jail, and granting summary judgment in favor of defendant Perry Reniff, the Butte County sheriff); *Crime, Justice & America, Inc. v. McGuinness*, No. Civ. 08-cv-00394 FCD EFB, 2009 U.S. Dist. LEXIS 67054 (E.D. Cal. Aug. 3, 2009) (involving the refusal to distribute *CJA* to inmates at the Sacramento County Jail and granting summary judgment in favor of defendant John McGuinness, the Sacramento County sheriff and the individual in charge of managing the Sacramento County Jail).

²¹⁵ *Hrdlicka*, 631 F.3d at 1046.

²¹⁶ *Mission Statement*, CRIME, JUSTICE & AMERICA, <http://crimejusticeandamerica.com/mission-statements> (last visited May 8, 2012).

²¹⁷ *See Roman Gokhman, Now Hiring: Ringmaster of Crime, Justice Media*, INSIDE BAY AREA (Cal.), Sept. 6, 2006 (reporting that Hrdlicka "worked as a bounty hunter and for 14 years he ran the largest bail bond business in the country," and that "he began the climb up the ladder of non-government justice at 22 as a repo man working for a private investigator").

²¹⁸ Stefanie Kalem, *Publisher for Perpetrators*, EAST BAY EXPRESS (Cal.) (Sept. 28, 2005), <http://www.eastbayexpress.com/ebx/publisher-for-the-perpetrators/Content?oid=1079167>.

²¹⁹ *Id.*

2004 “refused to distribute the magazine after concluding its articles were too provocative.”²²⁰

Ray Hrdlicka’s 2011 battle before the Ninth Circuit involved his inability to distribute unsolicited copies of *CJA* at the jails in both Butte County and Sacramento County.²²¹ In ruling in favor of Hrdlicka in January 2011, a two-judge majority of the Ninth Circuit initially rejected a rather sweeping, categorical assertion by the defendants—that “the First Amendment does not protect distribution of a publication to inmates who have not requested it.”²²² In doing so, the majority initially held that publishers—not simply inmates—have a First Amendment interest at stake and that this interest “does *not* depend on a recipient’s prior request for that information.”²²³ The majority derived this latter conclusion from cases in non-prison settings that involved restrictions on unsolicited leafleting and handbilling, and it found “no reason why this well-established principle does not apply to a publisher’s interest in distributing, and an inmate’s corresponding interest in receiving, unsolicited literature.”²²⁴

In stark contrast, however, Judge N. Randy Smith filed a lone dissent that accepted the defendants’ blanket assertion that there is no First Amendment right to distribute unsolicited publications of any kind behind bars.²²⁵ “[T]he simpler and saner rule,” Judge Smith opined, “is that Hrdlicka has no special First Amendment right to demand that a prison agree to one of his distribution methods. A prison is not a public forum, and a ban on unrequested publications is a content neutral method for sheriffs to ensure efficient administration of their facilities.”²²⁶ Smith, a former Idaho state judge and a former Idaho chairman of the Republican Party who was appointed to the Ninth Circuit by President George W. Bush,²²⁷ derisively characterized Hrdlicka as “asking the court to create a *special* rule, under the First Amendment”²²⁸ and concluded that “Hrdlicka does not have a *special* First Amendment right to demand distribution in prisons.”²²⁹ The majority rebutted the notion that Ray Hrdlicka was asking for something “special” with regard to unsolicited distribution of his magazine by asserting that Hrdlicka’s First Amendment

²²⁰ *Id.*

²²¹ *Hrdlicka v. Reniff*, 631 F.3d 1044, 1047–48 (9th Cir. 2011), *reh’g denied*, 2011 U.S. App. LEXIS 18218 (9th Cir. Sept. 1, 2011).

²²² *Id.* at 1048.

²²³ *Id.* at 1049.

²²⁴ *Id.*

²²⁵ *Id.* at 1055–58 (Smith, J., dissenting).

²²⁶ *Id.* at 1057–58.

²²⁷ See Peter Blumberg, *Why Aren’t They Asked?*, SACRAMENTO BEE, June 25, 2006, at Forum E1 (writing that “unlike other Bush appointees who have provoked a political firestorm because of their records on touchy issues, nominees Sandra Ikuta and Milan Smith, both Los Angeles lawyers, and Idaho state Judge N. Randy Smith were deemed so uncontroversial that senators didn’t ask them much of anything”); *Judiciary Committee Backs Idahoan for Ninth Circuit, Senator Dianne Feinstein Threatens Filibuster*, METROPOLITAN NEWS ENTERPRISE (Cal.), Sept. 22, 2006 (describing Smith as “a former Idaho chairman of the Republican Party”).

²²⁸ *Hrdlicka*, 631 F.3d at 1056 (emphasis added).

²²⁹ *Id.* at 1058 (emphasis added).

argument should be treated under the traditional *Turner* test and that the unsolicited nature of distribution was simply a factor to be considered under *Turner*.²³⁰

After rejecting the defendants' blanket assertion that there is no First Amendment right to distribute unsolicited publications of any kind behind bars, the two-judge majority turned its attention to the more narrow issue of the constitutionality under *Turner* of the ban on unsolicited copies of *CJA* in the Butte County and Sacramento County jails. The majority called the first of the *Turner* quartet of reasonable factors the *sine qua non*—the essential or critical factor which, if not satisfied, ends the inquiry without the court needing to consider the other three *Turner* factors.²³¹

B. Federal District Court Opinions

1. No “R” Rated Movies for Inmates

In *Avila v. Cate*,²³² a federal district court considered an inmate's First Amendment challenge to a California Department of Corrections and Rehabilitation (CDCR) policy²³³ prohibiting the showing behind bars of any and all movies rated “higher” than PG-13, namely those carrying R²³⁴ and NC-17²³⁵ designations.²³⁶ The policy was implemented

²³⁰ See *id.* at 1051 (opining that “[t]he fact that in this case the publication was unsolicited may, of course, be taken into account in applying the *Turner* test. But the fact that the publication was unsolicited does not make the *Turner* test inapplicable”).

²³¹ *Id.* at 1051.

²³² *Avila v. Cate*, No. 1:10-cv-01208 JLT, 2011 U.S. Dist. LEXIS 73809 (E.D. Cal. July 8, 2011).

²³³ The policy provides, in relevant part:

Only those movies/videos which have been given a rating of “G,” “PG,” or “PG-13” by the Motion Picture Association of America (MPAA) or that have been placed on the department's discretionary showing list may be considered for viewing. Movies/videos which have been given a rating of other than “G,” “PG,” or “PG-13” by the Motion Picture Association of America shall not be approved for general inmate viewing. Regardless of their rating or listing, movies/videos which, in the opinion of the reviewer, glorify violence or sex, or are inflammatory to the climate of the facility shall not be shown.

CAL. CODE REGS. tit. 15, § 3220.4(b) (2011).

²³⁴ The Motion Picture Association of America defines an “R” rated movie as one that: contains some adult material. An R-rated motion picture may include adult themes, adult activity, hard language, intense or persistent violence, sexually-oriented nudity, drug abuse or other elements, so that parents are counseled to take this rating very seriously. Children under 17 are not allowed to attend R-rated motion pictures unaccompanied by a parent or adult guardian. Parents are strongly urged to find out more about R-rated motion pictures in determining their suitability for their children. Generally, it is not appropriate for parents to bring their young children with them to R-rated motion pictures.

What Each Rating Means, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/ratings/what-each-rating-means> (last visited May 8, 2012).

²³⁵ The Motion Picture Association of America defines an “NC-17” rated movie as one that: most parents would consider patently too adult for their children 17 and under. No children will be admitted. NC-17 does not mean “obscene” or “pornographic” in the common or legal meaning of those words, and should not be construed as a negative judgment in any sense. The rating simply signals that the content is appropriate only for an adult audience. An NC-17 rating can be based on violence, sex, aberrational behavior, drug abuse or any other element that most parents would consider too strong and therefore off-limits for viewing by their children.

Id.

for security reasons and intended to prevent the presentation of movies that “glorify sex or violence or inflame the prison population.”²³⁷ To further this interest, the policy adopted the Motion Picture Association of American (MPAA) rating system, which is a voluntary—rather than government imposed—rating system used by the motion picture industry in the United States.²³⁸

Inmate Perry Robert Avila, however, argued that the MPAA rating system was devised to provide “parents with warnings about what movies they should and should not permit their children to see,”²³⁹ not for guiding prison officials’ decisions about content that incarcerated adults may watch. Indeed, the MPAA’s website states that its rating system “endures and evolves as a *useful and valued tool for parents* and an essential guardian of Americans’ freedom of artistic, creative and political expression.”²⁴⁰ Richard Mosk, former chairman of the MPAA’s Classification and Rating Administration, made this point clear in a 1997 article, writing that “[t]he voluntary system of rating motion pictures *for the benefit of American parents* has become a widely used component of the American movie scene.”²⁴¹

Furthermore, it is well established that governmental entities may not adopt voluntary rating systems created by private agencies in order to censor media content.²⁴² Such implementation constitutes an unconstitutional delegation of government authority to a private entity.²⁴³ Attorney Colin Miller emphasized this point in a law journal article, asserting that if courts “allow governmental agencies to rely upon MPAA ratings when censoring films, courts will be giving too much power to the MPAA, a private organization, to inform government censorship decisions based on nebulous standards. This use was not historically intended by the MPAA and is not justified.”²⁴⁴ Inmate Avila

²³⁶ *Avila*, 2011 U.S. Dist. LEXIS 73809, at *14 (writing that “[p]laintiff challenges the complete ban on movies rated ‘higher’ than PG-13”).

²³⁷ *Id.* at *12.

²³⁸ *Id.* at *3–4.

²³⁹ *Id.* at *4.

²⁴⁰ *Ratings History: Safeguarding Artistic Freedom*, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/ratings/ratings-history> (last visited May 8, 2012) (emphasis added).

²⁴¹ Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 CARDOZO ARTS & ENT. L.J. 135, 135 (1997) (emphasis added).

²⁴² See *Entm’t Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1071 (D. Minn. 2006), *aff’d*, 519 F.3d 768 (8th Cir. 2008) (involving the adoption by the state of Minnesota of the voluntary rating system for video games developed by the Entertainment Software Rating Board, and holding that “such a delegation of authority, whether the penalty for violation of the Act be civil or criminal, violates the First and Fourteenth Amendments, and renders the Act unconstitutional”); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1135–36 (E.D. Wisc. 1970) (holding that it was improper for a state to delegate to the MPAA and its rating system the authority to determine whether movies are proper for minors).

²⁴³ As one federal court wrote in considering the adoption by Minnesota of the voluntary rating system for video games developed by the Entertainment Software Rating Board:

The Court finds the Act’s delegation of authority to the ESRB to determine those video games which a child under 17 years of age may rent or purchase is improper. The ESRB rating is determined by a private body with no duty to answer to the public. Indeed, the rating scheme does not provide a method for the public or the State to challenge a rating once it is determined; only video game publishers are given that right.

Hatch, 443 F. Supp. 2d at 1071.

²⁴⁴ Colin Miller, *A Wolf in Sheep’s Clothing: Wolf v. Ashcroft and the Constitutionality of Using the MPAA Ratings to Censor Films in Prison*, 6 VAND. J. ENT. L. & PRAC. 265, 283 (2004).

thus argued both that the CDCR “ceded governmental authority over prisoners’ First Amendment rights to the MPAA”²⁴⁵ and that the policy banning any and all movies rated higher than PG-13 was overbroad.²⁴⁶

Despite these facts and opinions, in July 2011, however, United States Magistrate Judge Jennifer Thurston applied *Turner*²⁴⁷ and concluded that the CDCR’s “reliance on the MPAA system is reasonable even though it may exclude movies that do not further penological goals”²⁴⁸ and that the regulation was “reasonable and, while overbroad in some respects, not unconstitutional. Consequently, Plaintiff fails to state a cognizable First Amendment claim against any of the defendants.”²⁴⁹

Both of the statements quoted immediately above illustrate the vast deference accorded to prison officials: 1) it was perfectly acceptable that the policy excludes some movies that do not further any penological goals; and 2) it was fine that the policy was “overbroad in some respects.”²⁵⁰ Magistrate Thurston acknowledged “that the R- and the NC-17 ratings, may be assigned to movies that contain no violence or sexuality,”²⁵¹ but she concluded that “the breadth of the regulation does not render it constitutionally infirm.”²⁵² Apparently there also is a key difference between the print medium and motion pictures for inmates behind bars. In considering the second *Turner* factor, Magistrate Thurston mixed media, as it were. She asserted that *printed material* featuring the same content that the MPAA might consider to be R or NC-17 rated would be allowed behind bars and constitute an appropriate alternative means for a prisoner to exercise his First Amendment right to receive speech.²⁵³ In brief, written descriptions constitute a suitable substitute for visual images and motion pictures.

Ultimately, Magistrate Thurston’s conclusion in *Avila* is consistent with that of a federal district court in Pennsylvania, which held in 2006 under *Turner* that inmates “do not have a First Amendment right to R-rated movies per se. Instead, Plaintiffs’ First Amendment right, most narrowly defined, is the right to receive information and ideas through a broad range of movies.”²⁵⁴ The decision in *Avila* also comports with a Massachusetts federal district court opinion from 2008 that employed a *Turner* analysis to uphold a ban on movies rated R, X, and NC-17 by the MPAA.²⁵⁵

The bottom line is that when it comes to the right to view movies behind bars, at least three courts now allow prison officials to implement the MPAA rating system, despite its vague nature and the fact that it broadly sweeps up movies, particularly those in the R category, that may not serve any legitimate penological interests in safety, security, or rehabilitation. Furthermore, a policy that was designed to help parents to

²⁴⁵ *Avila*, 2011 U.S. Dist. LEXIS 73809, at *15.

²⁴⁶ *See id.* at *14 (writing that “the focus of Plaintiff[’s] challenge is his claim that the regulation is overbroad”).

²⁴⁷ *See id.* at **9–30 (applying the quartet of *Turner* factors).

²⁴⁸ *Id.* at *24.

²⁴⁹ *Id.* at *30.

²⁵⁰ *Id.*

²⁵¹ *Id.* at *16.

²⁵² *Id.* at *17.

²⁵³ *Id.* at **25–26.

²⁵⁴ *Jewell v. Gonzales*, 420 F. Supp. 2d 406, 438 (W.D. Pa. 2006).

²⁵⁵ *Gaskins v. Clarke*, No. 07-10084-PBS, 2008 U.S. Dist. LEXIS 3150, at **6–7 (D. Mass. Jan. 16, 2008).

protect their children²⁵⁶ has been turned into a tool of censorship to be used and abused by prison officials. It seemingly makes little difference to courts that the delegation of government responsibility to create a rating system to a private entity—the MPAA—conflicts with the doctrine of unconstitutional delegation.²⁵⁷

Finally, it is worth noting the parallel here again between the rights of public school students and prisoners. In particular, a federal district court in 1995 upheld a public school district’s reliance on the MPAA rating system “as a filter of films.”²⁵⁸ In *Borger*, as in *Avila*, movies rated R were considered forbidden fruit,²⁵⁹ with United States District Judge John W. Reynolds reasoning that “[a]n R-rating indicates that reasonable people could determine that high school students should not view the film”²⁶⁰ and concluding that “‘reasonableness’ is all that is necessary in a high school setting. This is a constitutional exercise of school board discretion.”²⁶¹

2. Dangerous Pressure Points of Censorship?

The 2010 federal district court ruling in *Starr v. Moore*²⁶² pivoted on inmate Darren Starr’s desire to read two books about acupuncture and qi,²⁶³ *Fundamentals of Chinese Acupuncture*²⁶⁴ and *The Color Atlas of Acupuncture*, while incarcerated at the Northern New Hampshire Correctional Facility.²⁶⁵ The tomes were mailed to Starr in prison directly from their respective publishers, in compliance with the prison’s media policy.²⁶⁶

²⁵⁶ See *supra* notes 240–241 (describing the original purpose of the MPAA rating system).

²⁵⁷ See *supra* notes 242–244 (addressing the doctrine of unconstitutional delegation of authority).

²⁵⁸ *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wisc. 1995).

²⁵⁹ See *id.* at 101 (noting that “‘R’ ratings are the threshold which the School Board has chosen as movies that will not even be considered”).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Starr v. Moore*, No. 09-cv-440-JL, 2010 U.S. Dist. LEXIS 85426, at **4–5 (D. N.H. July 27, 2010), *approved*, 2010 U.S. Dist. LEXIS 85025 (D. N.H. Aug. 18, 2010).

²⁶³ Qi, according to the court, “is a life force or vital energy believed by some to circulate through the body,” while acupuncture “is based on the principle that the unimpeded and balanced circulation of qi through pathways in the body is essential to good health.” *Id.* at **3–4.

²⁶⁴ ANDREW ELLIS ET AL., *FUNDAMENTALS OF CHINESE ACUPUNCTURE* (Paradigm Publications Rev. Ed. 1991). The publisher of the book describes it as:

one of the most-used acupuncture books in the profession. Perhaps first and foremost it is because the authors have applied a precise method of translation that allows clinical experience to be directly transmitted. As well, they have drawn on both modern and classical clinical sources. Thus the text provides consistent information that can be cross-referenced not only to the several companion works but to any translation that maintains a reliable relation to the Chinese language. The information presented includes all the channels, including the extraordinary channels, the main, internal, branch, divergent, connecting, sinew, and alternate pathways as they are currently understood in the People’s Republic of China.

Fundamentals of Chinese Acupuncture, PARADIGM PUBLICATIONS, <http://www.paradigm-pubs.com/catalog/detail/FunChiAcu> (last visited May 8, 2012).

²⁶⁵ HANS ULRICH-HECKER ET AL., *THE COLOR ATLAS OF ACUPUNCTURE: BODY POINTS—EAR POINTS—TRIGGER POINTS* (2d ed. 2008). According to a description of *The Color Atlas of Acupuncture* on the publisher’s website, the book is “a flexi textbook that contains information on all the major body and ear acupuncture points, as well as an extensive coverage of trigger points. The text is augmented by 126 illustrations pertaining to body acupuncture, 48 illustrations on ear acupuncture, and 114 illustrations on trigger points.” *The Color Atlas of Acupuncture*, THIEME MEDICAL PUBLISHERS,

When the books arrived, a mailroom officer initially approved their delivery to Starr,²⁶⁷ but a corrections officer later questioned their suitability and returned them to the mailroom officer, asking that they be examined by the New Hampshire Department of Corrections's (NHDOC) Library Review Committee (LRC).²⁶⁸ The LRC, which is comprised of NHDOC staff members in the areas of security, education, and mental health, denied delivery because the books allegedly would "encourage physical violence."²⁶⁹

Starr appealed to prison officials, asserting the pair of books actually promote health and healing and "in no way instruct readers in or encourage the use of violence."²⁷⁰ In a preemptive strike against potential LRC arguments about their anatomical content, Starr contended that "the prison already allows inmates to receive books about human anatomy."²⁷¹

The corrections officer responding to Starr's grievance at the first level of review stated that he was not so much worried about the anatomical depictions as he was with the "fact that the book specifically discusses and depicts vital pressure points and nerve bundles in the human body, and that if such information was misused by an inmate, the result could be permanent injury or death to another person."²⁷² Prison officials further asserted "this information could be misused and cause a breach of safety and security within the prison."²⁷³ Put more bluntly, the assumption of officials was that a little bit of knowledge about bodily pressure points is a dangerous thing because prisoners will use and abuse it to kill others. Two other officers affirmed these safety justifications in their respective responses to Starr's second and third grievance filings,²⁷⁴ ultimately sparking the lawsuit.

United States Magistrate Judge Landya B. McCafferty applied the four *Turner* factors.²⁷⁵ In another stunning display of deference to prison officials, Magistrate McCafferty determined that "the prison's concerns are reasonable and legitimate, and as such, may provide the basis for the regulation and restriction of incoming reading materials at the prison."²⁷⁶ She reasoned "the prison took a measured and reasonable approach to the possibility of introducing materials into the prison and found through that process that the information in the books has the potential for enabling serious or deadly consequences if misused."²⁷⁷

Magistrate McCafferty acknowledged the deference she provided prison officials, writing that a "[c]ourt must accord prison administrators significant deference in defining

http://www.thieme.com/index.php?page=shop.product_details&flypage=flypage.tpl&product_id=675&category_id=8&option=com_virtuemart&Itemid=53 (last visited Oct. 22, 2011).

²⁶⁶ *Starr*, 2010 U.S. Dist. LEXIS 85426, at *4.

²⁶⁷ *Id.* at *4.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at *5.

²⁷⁰ *Id.*

²⁷¹ *Id.* at *6.

²⁷² *Id.* at *10.

²⁷³ *Id.*

²⁷⁴ *Id.* at *5.

²⁷⁵ *Id.* at *3.

²⁷⁶ *Id.* at *11.

²⁷⁷ *Id.* at *12.

legitimate goals for the corrections system, and for determining the best means of accomplishing those goals.”²⁷⁸ Notably, the *Starr* opinion is devoid of any factual evidence or testimony that either of the two books ever has been used—whether by people behind bars or otherwise—to cause the types of harms prison officials conjured up. Mere speculation and supposition was all that was needed to suppress two books that neither endorse nor condone violence. Likewise, there was no evidence that either book provided either a roadmap or set of instructions for how to commit violent acts. The *Starr* opinion thus represents the application of a toothless *Turner* test.

3. White Supremacist Magazines & Sexually Graphic Comics

In April 2011, in *Miskam v. McAllister*,²⁷⁹ United States District Judge J. Michael Seabright rejected an inmate’s First Amendment-based challenge to prison officials’ refusal to allow him to possess copies of the white-supremacist magazine *Resistance*²⁸⁰ and the sexually graphic comic book *Satan’s Sodomy Baby*.²⁸¹ While housed at California’s High Desert State Prison (HDSP), Travis George Miskam was denied access to the former publication under a state regulation that prohibits inmates from possessing “[a]ny matter of a character tending to incite murder; arson; riot; or any form of violence or physical harm to any person, or any ethnic, gender, racial, religious, or other group.”²⁸² Access to the latter publication was blocked at HDSP under California regulations prohibiting the possession of both “[o]bscene” content²⁸³ and “[s]exually explicit images that depict frontal nudity in the form of personal photographs, drawings, magazines, or other pictorial format.”²⁸⁴

Inmate Miskam raised an “as-applied challenge that the denial of these publications pursuant to these provisions was not reasonably related to penological interests.”²⁸⁵ Not surprisingly, given its adoption in all of the other recent cases examined in this Article, Judge Seabright applied *Turner* and its quartet of factors to analyze this issue, calling the test a “deferential”²⁸⁶ one under which inmates face a “heavy burden.”²⁸⁷

Indeed, the burden proved too heavy for Miskam to meet, with Judge Seabright finding a logical relationship between censoring the white supremacist magazine

²⁷⁸ *Id.* at **12–13.

²⁷⁹ *Miskam v. McAllister*, No. 2:08-02229 JMS, 2011 U.S. Dist. LEXIS 43146 (E.D. Cal. Apr. 21, 2011).

²⁸⁰ Judge Seabright described *Resistance* as “a magazine directed to white supremacists” that “supports violence against non-white races.” *Id.* at *5. For instance, the judge quoted one article in an issue of the magazine to which inmate Miskam was denied access at HDSP as calling on readers to “[s]top the bullshit, get off your asses, and Unite & Fight! If only one kid wakes up and starts fighting for his race, then I feel it’s worth it.” *Id.* The magazine invoked invectives against both blacks and Jews. *Id.* at *4–5.

²⁸¹ One prison official filed a declaration stating that this comic book “vividly depicts, displays and describes penetration of the anus and contact between the genitals and mouth[, and] that throughout the comic were descriptions of sexual acts and exhibitions of frontal nudity of the male and female breasts and genitals.” *Id.* at *5–6.

²⁸² CAL. CODE REGS. tit. 15, § 3006(c)(1) (2011).

²⁸³ § 3006(c)(15).

²⁸⁴ § 3006(c)(15).

²⁸⁵ *Miskam*, 2011 U.S. Dist. LEXIS 43146, at *14.

²⁸⁶ *Id.* at *15.

²⁸⁷ *Id.*

Resistance and the penological interests in safety and security.²⁸⁸ The judge cited as support for this conclusion the declaration of a prison official that “[i]n the five years prior to the denial of *Resistance*, there were fifteen recorded incidents of lockdown at HDSP as a result of racial tension.”²⁸⁹ The logic adopted by Judge Seabright for how possession of *Resistance* would cause future violence behind bars went as follows:

Given the history of racially motivated violence at HDSP and *Resistance*’s racially inflammatory theme, other prisoners could certainly observe the racially based materials in Plaintiff’s possession, draw conclusions about his beliefs and affiliations, and further the racial tension and violence. Violence, of course, would also jeopardize safety of correctional officers charged with maintaining the peace at HDSP.²⁹⁰

The fact that there was absolutely no evidence demonstrating that possession of *Resistance* had caused any violence behind bars simply was not relevant, according to Judge Seabright.²⁹¹ The judge wrote, “a prison need not show that a banned publication actually caused conflict; the focus is instead on whether the ban is reasonably related to a penological interest.”²⁹²

First Amendment scholars familiar with the realm of student speech issues will quickly recognize the parallel between Judge Seabright’s use of past racial violence in the prison context to justify squelching possession of a white supremacist magazine and school officials’ use of past racial tension and violence in on-campus educational settings to justify squelching the display of the confederate flag.²⁹³ As one federal appellate court recently wrote, “a school may reasonably forecast that the Confederate flag would cause substantial and material disruption of a school when the school had recently experienced

²⁸⁸ *Id.* at **16–17.

²⁸⁹ *Id.* at *17.

²⁹⁰ *Id.* at *19.

²⁹¹ *Id.* at *20.

²⁹² *Id.* at *20.

²⁹³ *See* *A.M. v. Cash*, 585 F.3d 214, 222 (5th Cir. 2009) (noting that “[o]ther circuits, applying *Tinker*, have held that administrators may prohibit the display of the Confederate flag in light of racial hostility and tension at their schools”); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739 (8th Cir. 2009) (writing that “*Tinker* and its progeny allow a school to ‘forecast’ a disruption and take necessary precautions before racial tensions escalate out of hand. As a result of race-related incidents both in and out of the school, the administration reasonably denied the display of the Confederate flag within the school,” and adding that “[o]ur holding is in line with our sister circuits that have addressed this issue”).

The reference in both of the above cases to *Tinker* refers to the United States Supreme Court’s seminal student-speech decision. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (providing First Amendment-based speech protection to public school students who wore black armbands affixed with peace signs to their school in order to make a political statement about the war in Vietnam). *See generally* Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 AM. U. L. REV. 1167 (2009) (providing a relatively recent overview of *Tinker* and its lasting legacy in student-speech cases).

intense racial conflict.”²⁹⁴ This is yet another parallel between the speech rights of public school students and inmates noted earlier in this Article.²⁹⁵

As for *Satan’s Sodomy Baby*, Judge Seabright relied on a long line of precedent from other courts that analyzed and upheld under *Turner* prison rules prohibiting the possession of sexually explicit materials.²⁹⁶ Those cases allow censorship of such materials on the grounds that their suppression is reasonably related to goals of prison security and inmate rehabilitation.²⁹⁷

4. Rebuffing the Censorship of Sexually Themed Literature

As an isolated island of victory encircled by a choppy sea of judicial defeats for prisoners’ First Amendment rights, *Couch v. Jabe*²⁹⁸ merits special attention. In particular, it provides an important lesson to prison officials about the need to both carefully craft speech-based regulations and to enforce them consistently. Furthermore, *Couch* stands out as a case in which a plaintiff-inmate prevailed without attorney assistance²⁹⁹ and in which a judge, although acknowledging the very deferential approach generally taken under *Turner*,³⁰⁰ shredded the specious logic of prison officials and refused to accede to their tortured reasoning.³⁰¹

In *Couch*, a federal district court in 2010 declared unconstitutional a Virginia Department of Corrections (VDOC) policy restricting inmate access to “explicit or graphic depictions or descriptions of sexual acts.”³⁰² The policy, prison officials asserted, was necessary in order “to provide for the efficient, safe, and secure administration of VDOC facilities by limiting materials which might be disruptive in myriad ways” and to help with the rehabilitation process of inmates “by limiting materials which might be counter-productive.”³⁰³ In particular, prison officials claimed that sexual materials: 1) are

²⁹⁴ *Barr v. Lafon*, 538 F.3d 554, 568 (6th Cir. 2008).

²⁹⁵ *Supra* notes 62–64, 204–208, 212, 258–261 and accompanying text (referencing the parallels between the speech rights of students and inmates).

²⁹⁶ *Miskam*, 2011 U.S. Dist. LEXIS 43146, at *22–27.

²⁹⁷ *Id.* at *23.

²⁹⁸ 737 F. Supp. 2d 561 (W.D. Va. 2010).

²⁹⁹ *See id.* at 562 (noting that inmate William Couch was “proceeding *pro se*”); *see also* Peter Vieth, *Senior U.S. District Judge James C. Turk Rules Virginia Prison Censorship Irrational*, VA. LAW. WKLY., Sept. 13, 2010 (noting that the “opinion marks a win for an inmate who argued, without the assistance of a lawyer”).

³⁰⁰ *Couch*, 737 F. Supp. 2d at 566 (observing that “[m]any regulations have been approved because the application of the *Turner* factors has always been a very deferential standard”).

³⁰¹ *See infra* notes 307–333 and accompanying text (setting forth Judge James Turk’s analysis in the case).

³⁰² *Couch*, 737 F. Supp. 2d at 574 (concluding that the policy was “facially unconstitutional”). The provision in question, VDOC Operating Policy 803.2, prohibited the receipt and possession of materials containing “[e]xplicit or graphic depictions or descriptions of sexual acts,” and it defined such materials as including:

- a. Actual sexual intercourse, normal or perverted, anal, or oral;
- b. Secretion or excretion of bodily fluids or substances in the context of sexual activity;
- c. Lewd exhibitions of uncovered genitals in the context of sexual activity;
- d. Bondage, sadistic, masochistic or other violent acts in the context of sexual activity; [and]
- e. Any sexual acts in violation of state or federal law.

Id. at 563.

³⁰³ *Id.* at 564.

so valuable behind bars that their possession “may lead to stealing, fights, assaults and other disruptive activities;” 2) could lead to violence among inmates who are aroused by reading them and seek immediate sexual gratification; and 3) could contribute to the sexual harassment of prison staff and create a hostile working environment.³⁰⁴

William Couch, however, simply wanted to read a couple of books while serving multiple life sentences at the Augusta Correctional Center in Craigsville, Virginia, for committing a series of rapes and thefts in the early 1990s.³⁰⁵ He filed a civil rights claim³⁰⁶ against VDOC officials after two books with what United States District Judge James Turk called a “storied, litigious history”—James Joyce’s *Ulysses* and D. H. Lawrence’s *Lady Chatterley’s Lover*³⁰⁷—were removed from the prison library in 2009.³⁰⁸ Those tomes have long been targets of censorship in the United States due to their sexual content,³⁰⁹ and Judge Turk speculated that Couch might have selected them precisely for that reason.³¹⁰

Analyzing Couch’s claim, Judge Turk initially observed that although inmates have no First Amendment right to “a general purpose reading library,”³¹¹ prison officials who voluntarily establish such facilities must then play by the same First Amendment rules that apply to the removal of books from the shelves of public school libraries.³¹² Once again illustrating the parallel between the rights of prisoners and public school students, Judge Turk wrote, “these two classes of individuals are similarly situated for the purposes of this analysis.”³¹³ For Judge Turk, the case boiled down to how prison officials exercised their discretion when deciding what material to exclude and remove from the

³⁰⁴ *Id.* at 570.

³⁰⁵ See Couch v. Jabe, No. 5:10-cv-00072, 2011 U.S. Dist. LEXIS 43356, at *6 (W.D. Va. Apr. 21, 2011) (involving a lawsuit by Couch that unsuccessfully challenged a prison policy prohibiting him from growing a beard, and “Couch is serving multiple life sentences, plus 37 years, for multiple counts of rape, robbery, and statutory burglary”); Mike Gangloff, *Judge Backs Inmate on Prison Reading Material Policy*, ROANOKE TIMES (Va.), Sept. 2, 2010, at A7 (noting that Couch “is serving multiple life sentences for a string of rapes and thefts in the early 1990s”).

³⁰⁶ 42 U.S.C. § 1983 (2010).

³⁰⁷ Couch, 737 F. Supp. 2d at 563 n.2. See generally EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 7–39, 83–97, 338–341 (1992) (chronicling the controversies surrounding the publishing and censorship of *Ulysses* and of *Lady Chatterley’s Lover*).

³⁰⁸ Couch, 737 F. Supp. 2d at 563.

³⁰⁹ See, e.g., Kingsley Int’l Pictures Corp. v. Regents of Univ. of State of New York, 360 U.S. 684 (1959) (involving the censorship of a motion picture version of *Lady Chatterley’s Lover*); United States v. One Book Entitled *Ulysses* by James Joyce, 72 F.2d 705, 708 (2d Cir. 1934) (involving the government seizure of *Ulysses* due to its sexual content, but concluding “that *Ulysses* is a book of originality and sincerity of treatment and that it has not the effect of promoting lust”); Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 503 (S.D.N.Y. 1959) (involving censorship of an unexpurgated version of *Lady Chatterley’s Lover* by the Postmaster of New York, and concluding the book was “not obscene within the meaning of 18 U.S.C. § 1461, and is entitled to the protections guaranteed to freedoms of speech and press by the First Amendment”).

³¹⁰ See Couch, 737 F. Supp. 2d at 563 n.2 (“These two books were, perhaps, chosen by the plaintiff to serve as the basis for his complaint because of their storied, litigious history.”).

³¹¹ *Id.* at 564.

³¹² *Id.* at 565.

³¹³ *Id.*

library,³¹⁴ with inmate Couch arguing the policy was unconstitutionally overbroad in providing those officials with too much discretion.³¹⁵

In addressing this issue, Judge Turk avoided traditional overbreadth criteria³¹⁶ due to the case's prison setting and, instead, applied *Turner's* reasonably-related-to-legitimate-penological-interests test.³¹⁷ Although noting that courts often uphold regulations banning sexually explicit material under *Turner*,³¹⁸ Judge Turk reached the opposite conclusion in *Couch* and remarked that some regulations simply fall “beyond the limits of even a deferential application of the *Turner* standard.”³¹⁹

In fact, Judge Turner did not need to venture very far into a *Turner* analysis before enjoining enforcement of the policy, writing that “consideration of just the first and fourth *Turner* factors are more than sufficient to indicate the unconstitutional nature”³²⁰ of the VDOC's policy on sexually explicit material. As to the first factor—whether a rational connection exists between the regulation and a legitimate governmental interest—Judge Turk bristled at the fact that VDOC's policy results in the censorship of many great works of literature³²¹ while simultaneously and incongruously permitting access to what he dubbed “soft core”³²² magazines like *Playboy*.

“[I]t is unlikely that a cogent argument could be advanced which would explain how a regulation which forbids James Joyce's *Ulysses*, but permits Hugh Hefner's *Playboy*, has a rational relationship to the above-stated goals. Any such argument would be irrational, if not utterly incomprehensible,”³²³ Judge Turk opined. As for the security, safety and rehabilitation interests that prison officials asserted to support the ban,³²⁴ Judge Turk wrote:

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ See *supra* note 10 (providing background on traditional overbreadth analysis).

³¹⁷ See *Couch*, 737 F. Supp. 2d at 565–73 (applying *Turner* to the facts of the case).

³¹⁸ See *id.* at 566 (“These factors have been applied to prison regulations banning sexually explicit material many times, and courts have often concluded that the challenged regulations are reasonably related to legitimate penological interests.”).

³¹⁹ *Id.*

³²⁰ *Id.* at 567.

³²¹ Judge Turk, flashing his own knowledge of literature, wrote that the following books would be prohibited under the VDOC policy because they include at least one explicit description of a sexual act or intercourse:

Candide by Voltaire; *Brave New World* by Aldous Huxley; *All the Pretty Horses* by Cormac McCarthy; *Droll Stories* by HonorÉ de Balzac; *Howl and Other Poems* by Allen Ginsburg; [*The Naked Lunch* by William S. Burroughs; *Tropic of Cancer* by Henry Miller; *Slaughterhouse Five* by Kurt Vonnegaut; *Sophie's Choice* by William Styron; *Myra Breckenridge* by Gore Vidal; *One Hundred Years of Solitude* by Gabriel Garcia Marquez; *For Whom the Bell Tolls* by Ernest Hemingway; *A Farewell to Arms* by Ernest Hemingway; *Women in Love* by D. H. Lawrence; *As I Lay Dying* by William Faulkner; *The Handmaid's Tale* by Margaret Atwood; *Leaves of Grass* and *Song of Myself* by Walt Whitman, as well as nearly any novel by John Updike.

Id. at 568 n.4

³²² *Id.* at 571 n. 20.

³²³ *Id.* at 567.

³²⁴ See *supra* notes 303–304 and accompanying text (setting forth the reasons asserted by prison officials for explaining the policy).

It strains credulity to believe that limiting a prisoner's access to *Lady Chatterley's Lover* could have any effect on the security, discipline, and good order of the prison. Likewise, it would be patently incredible to assert that reading Joyce's *Ulysses* will somehow threaten the rehabilitation of a prisoner. Certainly, VDOC has not provided any scientific or expert evidence that supports such connections.³²⁵

Judge Turk, in perhaps coming as close as possible to judicial ridicule of a government policy without stepping over the line of professionalism, added:

[I]t is a bizarre interpretation to suggest that an inmate's possession of *Ulysses* would be used for "bartering" or "lead to stealing, fights, assaults and other disruptive activities." Particularly with respect to *Ulysses* it is impossible to even imagine prison inmates fighting for the chance to delve into the incredibly difficult to decipher novel, one metaphor-laden scene of which portrays exhibitionist behavior and masturbation.³²⁶

Given such a scathing critique, it was anything but surprising that Judge Turk concluded that a policy that fails to "discriminate between works such as James Joyce's *Ulysses* and common pornography"³²⁷—a plan "permitting *Playboy* and forbidding *Ulysses*"³²⁸—simply "does not possess the constitutionally required rational connection between regulation and the legitimate governmental objective."³²⁹

Turning to the fourth *Turner* factor—consideration of whether an easy or ready alternative policy would serve the interest(s) asserted by prison officials without intruding as much on First Amendment concerns—Judge Turk suggested that a policy banning only visual depictions of frontal nudity and not prohibiting words would be a reasonable solution.³³⁰ Put differently, an images-versus-words distinction or dichotomy might well remedy the over inclusiveness of the existing policy. In fact, Judge Turk stayed the injunction for sixty days to provide VDOC officials time to amend or revise their policy in such manner to render it constitutional.³³¹

In summary, the VDOC prohibition on sexually explicit content suffered from what Judge Turk dubbed the "fatal flaw of over inclusiveness."³³² The policy's expansive breadth simply undermined the alleged rationales and arguments behind it. Crafting precise policies that are more narrowly tailored in scope thus should become a priority for prison officials if they want to squelch speech in a constitutional fashion and not receive a judicial tongue-lashing.

With the examination of the eight opinions in this Part of the Article in mind, the authors now turn to an issue raised by a very recent United States Supreme Court ruling

³²⁵ *Couch*, 737 F. Supp. 2d at 569–70.

³²⁶ *Id.* at 571.

³²⁷ *Id.* at 572.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 573.

³³¹ *Id.* at 574.

³³² *Id.* at 568.

that arguably could impact the level of proof by which prison officials must demonstrate that a speech-related product will cause harm behind bars.

III. RELAXED STANDARDS OF CAUSATION AND JUDICIAL DEFERENCE: SHOULD *BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION* AFFECT THE ANALYSIS OF CONTENT-BASED, BEHIND-BARS CENSORSHIP?

In June 2011, the United States Supreme Court struck down a California statute designed to shield minors from supposedly dangerous speech, namely violent video games in *Brown v. Entertainment Merchants Association*.³³³ Writing the Opinion of the Court, Justice Antonin Scalia adopted a rigorous standard that requires proof that speech must in fact *cause* harm before it may be censored permissibly.³³⁴ Justice Scalia wrote in *Brown* that “ambiguous proof will not suffice” and neither will a mere positive correlation between speech and harm.³³⁵ As he put it, the studies offered by California in *Brown* “do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning).”³³⁶

Given the consistent parallels drawn between the speech rights of minors in public school settings and the speech rights of adults behind bars,³³⁷ one might reasonably wonder if the ruling in *Brown* should impact the level of proof that prison officials must demonstrate before supposedly harmful speech—books, movies, and magazines—may be censored. For instance, in the case of *Singer v. Raemisch*,³³⁸ should prison officials be required to prove that either reading about or playing the video game “Dungeons and Dragons” causes inmates to act like violent gang members? Further, in the case of *Starr v. Moore*,³³⁹ should prison officials be required to prove that reading books about acupuncture and qi causes inmates to take the knowledge they gain about body pressure points and then use it to commit violent acts against other inmates? It will be recalled, however, from *Miskam v. McAllister* described above³⁴⁰ that the general rule here is that “a prison need not show that a banned publication actually caused conflict; the focus is instead on whether the ban is reasonably related to a penological interest.”³⁴¹

Unfortunately for free speech advocates, it is not likely that *Brown*'s analysis of the proof-of-harm issue will be transported to the realm of prison censorship anytime soon. That is because *Brown* was specifically decided under the strict scrutiny standard of judicial review,³⁴² rather than what closely approximates the rational basis standard of

³³³ 131 S. Ct. 2729, 2742 (2011) (concluding that California’s violent video game law “cannot survive strict scrutiny”).

³³⁴ *Id.* at 2738–39.

³³⁵ *Id.* at 2739. Justice Scalia wrote that the studies offered by California to support its law “show at best some correlation between exposure to violent entertainment and minuscule real-world effects.” *Id.*

³³⁶ *Id.*

³³⁷ *Supra* notes 62–64, 204–208, 212, 258–261 and accompanying text (referencing the parallels between the speech rights of students and inmates).

³³⁸ *Supra* subpart II.A.2.

³³⁹ *Supra* subpart II.B.2.

³⁴⁰ *Supra* subpart II.B.3.

³⁴¹ *Miskam v. McAllister*, No. 2:08-02229 JMS, 2011 U.S. Dist. LEXIS 43146, at *20 (E.D. Cal. Apr. 21, 2011).

³⁴² *See* text accompanying *supra* note 7 (describing strict scrutiny review).

review in Equal Protection cases not involving either suspect classes or fundamental rights³⁴³ and that was embraced under *Turner* in the First Amendment context of inmate speech.³⁴⁴ The two tests are radically different, both inside and outside of the First Amendment context.³⁴⁵ Significantly, even when the United States Supreme Court administers rational basis review in a more demanding, with-teeth fashion, only a correlation is required between classification and purpose.³⁴⁶

Furthermore, under the *Turner* framework, judicial “deference not only lightens the government’s burden of justifying a speech restriction, *but actually shifts the burden back to the speech plaintiff.*”³⁴⁷ On the question of proof of harm allegedly caused by speech, this burden shifting has the rather perverse result of requiring an inmate to demonstrate lack of causation while assuming that the speech prison officials seek to censor causes harm. Put more bluntly, the burden on the plaintiff-inmate is to prove a negative. How a plaintiff behind bars might accomplish this task boggles the mind, even if he or she was a social scientist capable of designing and performing controlled experiments behind bars.

Thus, unless the Supreme Court abandons the *Turner* analysis for a strict scrutiny standard of review when the First Amendment speech rights of inmates are restricted by content-based regulations on what they may read or watch, it is highly doubtful that the causation-of-harm requirements from the 2011 ruling in *Brown* will be applied in the prison context.

³⁴³ Professors John Nowak and Ronald Rotunda describe rational basis review as:

the test used in cases that do not involve a fundamental right and wherein the Court does not find a classification of persons for whom there should be special protection (such as racial, national origin, gender or illegitimacy classifications). The rationality test is easy to state: the classification only has to have a rational relationship to any legitimate government interest in order to comply with the equal protection guarantee.

JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 755 (8th ed. 2010).

³⁴⁴ Other legal commentators have drawn the link between rational basis review and the *Turner* test. *See, e.g.,* Rose, *supra* note 57, at 169–70 (referring to the *Turner* test as “rational basis review”); Ozan O. Varol, *Strict in Theory, But Accommodating in Fact?*, 75 MO. L. REV. 1243, 1284 (2010) (writing that “[u]nder *Turner*, a prison policy that burdened the inmates’ constitutional rights would be upheld if the policy was ‘reasonably related’ to ‘legitimate penological interests’—*similar to rational-basis review*) (emphasis added).

³⁴⁵ As Professor Eva S. Nilsen succinctly explains:

Where other laws invoking mere liberty interests need only be rationally related to any conceivable legitimate government purpose to survive a due process challenge (*rational basis review*), *strict scrutiny* means that once a right is determined to be fundamental, its deprivation must be supported by a compelling state interest, and must be narrowly tailored so that no greater deprivation is inflicted than is necessary to achieve that interest.

Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 170 (2007) (emphasis added).

³⁴⁶ Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 290 (2011) (writing that “in those rationality cases where the U.S. Supreme Court has applied a more demanding standard, it will typically search the record for evidence of a *correlation* between classification and purpose, and it will also insist that there actually be such a *correlation*”) (emphasis added).

³⁴⁷ *See* Moss, *supra* note 212, at 1659 (emphasis added).

IV. CONCLUSION

Dean Erwin Chemerinsky characterizes the United States Supreme Court as affording “tremendous deference”³⁴⁸ to the government in the area of prison administration. Deference, as Professor Paul Horwitz writes, may be defined as “a decisionmaker’s decision to follow a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently.”³⁴⁹ Specifically, in cases involving the free speech rights of prisoners, as with those of students in public school settings, courts engage in what is known as institutional deference.³⁵⁰ In brief, they defer to the supposedly specialized knowledge and expertise of those who operate such government institutions.³⁵¹

The damage wrought to free speech rights by such institutional deference is compounded by real-world fears and cultural pressures. In particular, just as fears of future Columbine-like violence have left high school students swimming in a sea of censorship as judges provide massive deference to school administrators,³⁵² fears of violence and disruption of security within prisons largely fuel the deference granted to prison officials by lower court judges. This, in turn, typically renders *Turner* toothless when it comes to protecting the First Amendment speech rights of inmates. Perhaps this is why the type of rigorous application of *Turner* witnessed in the dissenting opinions of both Justice John Paul Stevens³⁵³ and Justice Ruth Bader Ginsburg³⁵⁴ in the Supreme Court’s 2006 opinion in *Beard v. Banks*³⁵⁵ was evidenced only in two of the eight cases from 2010 and 2011 examined above, namely the Ninth Circuit’s ruling in *Hrdlicka v.*

³⁴⁸ Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 453 (1999).

³⁴⁹ Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078 (2008).

³⁵⁰ See Moss, *supra* note 212 and accompanying text (noting the similarities between how prisoners and public school students are treated under the law when it comes to free speech rights).

³⁵¹ Professor Gia B. Lee makes this point in a recent law journal article:

A common set of arguments advanced to justify courts’ limited review of speech restrictions within government institutions or programs stresses the initial decisionmaker’s superior knowledge or judgment in a particular field. On this view, executive and administrative officials such as school administrators, prison wardens, and military officials have the relevant experience and expertise to reach decisions that ensure well-functioning institutions.

Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1718 (2009).

³⁵² The specter of violence like the kind caused by Eric Harris and Dylan Klebold in April 1999 at Columbine High School is still evident in judicial decisions more than a decade after that tragedy. See, e.g., *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 756, 764, (8th Cir. 2011) (involving a student, D.J.M., who “sent instant messages from his home to a classmate in which he talked about getting a gun and shooting some other students at school,” and concluding that “[i]n light of [a school district]’s obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such as Columbine,” the trial court correctly ruled that the school district “did not violate the First Amendment by notifying the police about [student] D.J.M.’s threatening instant messages and subsequently suspending him after he was placed in juvenile detention”) (emphasis added).

³⁵³ *Beard v. Banks*, 548 U.S. 521, 542–53 (Stevens, J., dissenting).

³⁵⁴ *Id.* at 553–56 (Ginsburg, J., dissenting).

³⁵⁵ 548 U.S. 521 (2006); see *supra* Part I (examining the high court’s ruling in *Beard*).

*Reniff*³⁵⁶ and the decision by United States District Judge James Turk out of the Western District of Virginia in *Couch v. Jabe*.³⁵⁷

Though it often is rendered toothless when applied by federal appellate and district court judges,³⁵⁸ this Article makes it clear that *Turner* certainly is the judicial standard of choice twenty-five years after it was handed down. The Eighth Amendment standard of review championed by Justices Clarence Thomas and Antonin Scalia was adopted in none of the 2010 and 2011 federal court cases involving the access-to-speech rights of inmates.³⁵⁹

The bottom line is that unless an inmate's case involves particularly outrageous facts or happens to be assigned to a pro-free speech jurist who refuses to grant expansive deference to prison officials, there is very little hope of a First Amendment triumph under *Turner* today. As Part III explained, the question of causation of harm is one particular aspect of the *Turner* rational basis approach that greatly harms free speech interests but that largely could be cured by instantiating into *Turner* the proof-of-causation approach embraced by the Supreme Court in *Brown* in 2011. That result, however, as Part III explained, is not likely to occur.

³⁵⁶ See *supra* subpart II.A.4 (examining *Hrdlicka*).

³⁵⁷ See *supra* subpart II.B.4 (examining *Couch*).

³⁵⁸ The exceptions to overly deferential review under *Turner* described in this Article are found in *Hrdlicka v. Reniff* and *Couch v. Jabe* described above in subparts II.A.4 and II.B.4, respectively.

³⁵⁹ See *supra* notes 81–97 and accompanying text (describing the Eighth Amendment standard supported by Justices Thomas and Scalia).

APPENDIX

Below are the names and brief descriptions of some other federal court decisions rendered from January 2010 through September 2011 involving the free speech rights of inmates but not otherwise discussed in this article.

1. *Frazier v. Ortiz*, 417 Fed. Appx. 768 (10th Cir. 2011) (involving an inmate's claim of wrongful denial of access to *Rolling Stone*, *Maxim*, and *Spin* magazines, and finding no abuse of discretion by a judge who denied the inmate's motion to amend because the inmate failed to clear the burden to avoid summary judgment).
2. *Jordan v. Sosa*, 654 F.3d 1012, 2011 U.S. App. LEXIS 14753 (10th Cir. July 20, 2011) (involving an inmate's lawsuit against prison officials challenging a ban on usage of federal funds to distribute commercially published, sexually explicit materials, and holding the claims were moot because the inmate failed to seek relief on a system-wide basis rather than against specific individuals at an institution where he no longer was incarcerated).
3. *Kaden v. Slykhuis*, 651 F.3d 966, 968 (8th Cir. 2011) (involving denial of inmate access to the magazine *Shonen Jump* due to its allegedly violent content, and reversing dismissal of the inmate's case and remanding it for further consideration of the validity of the prison's regulation as applied to *Shonen Jump* because the inmate's lawsuit "was dismissed before [prison] officials were required to answer the complaint, let alone to advance evidence that might help us decipher whether [the prison's] decision to apply the violent-prison-mail regulation to this publication was appropriate, or an exaggerated response to prison concerns").
4. *Parkhurst v. Lampert*, 418 Fed. Appx. 712 (10th Cir. 2011) (affirming summary judgment in favor of prison officials who refused to deliver unsolicited and bulk copies of an inmate's newsletter to prisoners in the Wyoming State Penitentiary).
5. *Woods v. Comm'r Ind. Dep't of Corr.*, 652 F.3d 745 (7th Cir. 2011) (involving a policy prohibiting inmates from advertising for pen-pals and receiving materials from websites and publications that allow persons to advertise for pen-pals, and upholding the regulation as reasonably related to the legitimate penological objective of preventing inmate fraud).
6. *Stauffer v. Gearhart*, No. H-08-1587, 2011 U.S. Dist. LEXIS 65624 (S.D. Tex. July 20, 2011) (rejecting an inmate's claim of wrongful denial of access to *Hot Rod*, *Performance Products*, and *Jeg's High Performance* magazines because they commonly feature sexually explicit material).
7. *Brown v. Gulash*, No. 07-cv-370-JPG-PMF, 2011 U.S. Dist. LEXIS 29766 (S.D. Ill. Mar. 22, 2011) (rejecting prison officials' motion for summary judgment on a claim alleging they violated an inmate's First Amendment speech rights by

- denying access to magazines and books because prison officials failed to offer any justification for rejecting them).
8. *Lucas v. Ozmint*, No. 9:10-17-CMC-BM, 2011 U.S. Dist. LEXIS 30353 (D. S.C. Mar. 22, 2011) (rejecting prison officials' summary judgment motion regarding an inmate's First Amendment claims because defendants provided no evidence that policies used to reject access to *Maxim*, *GQ*, and *Sports Illustrated* magazines were related to legitimate penological interests).
 9. *Jones v. Golden*, No. 5:10CV00068 JMM-BD, 2011 U.S. Dist. LEXIS 42565 (E.D. Ark. Mar. 9, 2011) (rejecting inmate's claim that prison officials wrongfully denied him access to *Angels of Death* magazine because it featured gang signs and violated a prison policy against delivery of material condoning "criminal activity").
 10. *Erler v. Dominguez*, No. 2:09-CV-88-TLS, 2011 U.S. Dist. LEXIS 20632 (N.D. Ind. Feb. 28, 2011) (involving a claim filed by an inmate alleging prison officials violated his First Amendment speech rights by denying him access to a magazine because it violated prison policy against delivery of publications containing semi-nude photographs of women).
 11. *De Puente-Hudson v. Adams*, No. 1:08-cv-01228-OWW-GSA-PC, 2011 U.S. Dist. LEXIS 16421 (E.D. Cal. Feb. 18, 2011) (involving a pro se action against prison officials for prohibiting and confiscating *Maxim*, *Stuff*, and *FHM* magazines, and holding the inmate's First Amendment rights were not violated by the policy because it satisfied the *Turner* test).
 12. *Reynolds v. Rios*, No. 1:10-cv-00051-OWW-GBCPC, 2011 U.S. Dist. LEXIS 18588 (E.D. Cal. Feb. 10, 2011) (dismissing an inmate's claim targeting denial of access to publications such as *Vanity Fair*, *W*, *Esquire*, and *GQ*, but granting a thirty-day leave to amend his complaint).
 13. *Glassman v. Yates*, No. 1:08-cv-01485-OWW-SKO PC, 2011 U.S. Dist. LEXIS 10075 (E.D. Cal. Feb. 2, 2011) (rejecting a prisoner's claim for access to magazines including *Dungeons and Dragons* and *The Forgotten Temple of Tharizdan* because they constituted a threat to prison safety and security).
 14. *Mashaney v. Call*, No. 09-3105-JTM, 2010 U.S. Dist. LEXIS 137319 (D. Kan. Dec. 29, 2010) (rejecting an inmate's claim that prison officials violated his First Amendment rights by denying access to *Interview* magazine because it contained sexually explicit material in violation of a prison policy).
 15. *Newsom v. Knight*, No. 1:09-cv-1252-JMS-DML, 2010 U.S. Dist. LEXIS 135513 (S.D. Ind. Dec. 21, 2010) (rejecting an inmate's claim that prison officials wrongly denied him access to *Slingshot* newspaper under a policy prohibiting access to violent materials and dismissing plaintiff's claim regarding denial of the hardcover book *Harry Potter and the Deathly Hallows* because the prison

- officials against whom the inmate filed the claim had no involvement with enforcing the policy).
16. *Davis v. Zavaras*, No. 09-cv-00266-REB-BNB, 2010 U.S. Dist. LEXIS 141575 (D. Colo. Nov. 10, 2010) (involving a claim made by a sex-offender inmate that prison officials violated his First Amendment rights by ordering mailroom staff to deny him access to magazines such as *Playboy*, *Maxim*, *National Geographic*, *The Picture Pimp*, *Garden State Periodicals*, *Fantasy World*, and *Manga Woman*, as well as the books *Real Girls* and *Fresh Girls*; and upholding defendants' summary judgment motion because confiscation of the publications was related to legitimate penological interests).
 17. *Banks v. Ludeman*, No. 08-5792 (MJD/JJK), 2010 U.S. Dist. LEXIS 36711 (D. Minn. Oct. 4, 2010) (dismissing a sex-offender inmate's complaint against Minnesota Department of Human Services officials for denying him access to *Christies New York Photographs* catalog because it violated prison policy prohibiting possession of sexually explicit materials but denying the defendants' summary judgment motions regarding confiscation of the DVD *The Adventure of Photography: 150 Years of the Photographic Image* and the magazine *Pacific Island Ladies*, because the defendants provided no evidence how the materials violated prison policy).
 18. *Johnson v. Shemonic*, No. 10-071-GPM, 2010 U.S. Dist. LEXIS 104446 (S.D. Ill. Sept. 30, 2010) (rejecting plaintiff's First Amendment claim that prison officials wrongfully denied him access to magazines under a policy prohibiting sexually explicit material because such denial was rationally related to legitimate penological interests).
 19. *Givens v. Landers*, No. 09-cv-00945-PAB-BNB, 2010 U.S. Dist. LEXIS 95072 (D. Colo. Aug. 4, 2010) (dismissing an inmate's complaint alleging wrongful denial of access to *Curves* and *Smooth Girl* magazines because they contained photos of women in minimal clothing, violating a policy prohibiting delivery of sexually explicit materials).
 20. *Hedgespeth v. Bartow*, No. 09-cv-246-slc, 2010 U.S. Dist. LEXIS 76280 (W.D. Wis. July 27, 2010) (rejecting an inmate's First Amendment claims regarding access to video games, gaming systems, CDs, and DVDs because of security concerns associated with possession and lending of such materials within the prison system).
 21. *Hunsaker v. Jimerson*, No. 08-cv-01479-REB-MJW, 2010 U.S. Dist. LEXIS 95546 (D. Colo. July 9, 2010) (involving a sex-offender inmate's claim that prison officials wrongfully denied access to *Maxim*, *Sunset*, *Rolling Stone*, *Newsweek*, and the *Rocky Mountain News* under a prison policy the inmate alleged was unconstitutionally vague and/or overbroad, and rejecting the officials' motion that the claim be summarily dismissed).

22. *Gonzalez v. Mullen*, No. C 09-00953 CW (PR), 2010 U.S. Dist. LEXIS 55947 (N.D. Cal. May 14, 2010) (involving an inmate's claim against prison officials for denying him access to R-rated movies but dismissing his complaint because the prison did not enforce the policy and thus the policy had no apparent effect on him).
23. *Espinosa v. Addams*, No. 1:09-cv-00760-DLB PC, 2010 U.S. Dist. LEXIS 46177 (E.D. Cal. Apr. 8, 2010) (involving an inmate's claim alleging prison officials wrongfully denied him access to a Wicca book his family purchased because it contained nudity, and dismissing his claim because he alleged no facts indicating officials' violated his First Amendment rights).
24. *Baker v. Holder*, No. 06-CV-91-HRW, 2010 U.S. Dist. LEXIS 30560 (E.D. Ky. Mar. 30, 2010) (holding that a prison policy denying prisoners access to magazines that contained sexually explicit material did not violate the prisoner's First Amendment rights).