

Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny

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ABSTRACT

The Supreme Court declared thirty years ago in Turner v. Safley that prisoners are not without constitutional rights: any restriction on those rights must be justified by a reasonable relationship between the restriction at issue and a legitimate penological objective. In practice, however, the decision has given prisoners virtually no protection. Exercising their discretion under Turner, correctional officials have saddled prisoners' expressive rights with a host of arbitrary restrictions—including prohibiting President Obama's book as a national security threat; using hobby knives to excise Bible passages from letters; forbidding all non-religious publications; banning Ulysses, John Updike, Maimonides, case law, and cat pictures. At the same time, the courts have had no difficulty administering the Religious Land Use and Institutionalized Persons Act (RLUIPA), which gives prisons far less deference by extending strict scrutiny to free exercise claims by prisoners. Experience with the Turner standard demonstrates that it licenses capricious invasions of constitutional rights, and RLUIPA demonstrates that a heightened standard of review can protect prisoners' expressive freedoms without compromising prison security. It is time for the Court to revisit Turner.

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INTRODUCTION

“When 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. . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.”

—Justice Thurgood Marshall (1974)¹

Some of the greatest works of literature and social commentary—everything from *Don Quixote*, to O. Henry’s stories, to Martin Luther King Jr.’s “Letter from a Birmingham Jail”—were written in whole or in part while their authors were incarcerated.² In many prisons and jails today, however, speech is burdened by regulations that make little sense. Examples include the following:

- A federal prison employee prevented a prisoner in Colorado from receiving books by President Obama, citing national security concerns.³
- A Wisconsin prison banned all materials related to the fantasy roleplay game *Dungeons & Dragons*, concerned that the game would promote gang activity.⁴
- A jail in South Carolina prohibited all publications with staples on the ground that staples could be used in makeshift tattoo guns.⁵ At the same time, the jail allowed prisoners to purchase legal pads that contained staples from the jail’s commissary.⁶
- Jail employees in Virginia used scissors or a hobby knife to cut out biblical passages from letters a mother wrote to her incarcerated son.⁷ The letters given to the son had holes where the biblical passages had been.⁸

1 Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

2 See Heba Hasan, *Jailhouse Lit: Great Works of Literature Written in Prison*, THE ATLANTIC (Aug. 17, 2012), <http://www.theatlantic.com/entertainment/archive/2012/08/jailhouse-lit-great-works-of-literature-written-in-prison/261190/> (highlighting *Don Quixote* by Miguel de Cervantes); John J. Miller, *His Writers’ Workshop? A Prison Cell*, WALL ST. J. (June 8, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704852004575258824174766374> (discussing the works of author William Sydney Porter, also known as O. Henry); *King Center Marks 50th Anniversary of MLK’s ‘Letter from a Birmingham Jail,’* KING CTR. (Apr. 16, 2013), <http://www.thekingcenter.org/news/2013-04-king-center-marks-50th-anniversary-mlk-s-letter-birmingham-jail> (commemorating Martin Luther King Jr.’s “Letter from a Birmingham Jail,” written while King was incarcerated).

3 See *infra* Part III.E.

4 See *infra* Part II.C.

5 See *infra* Part IV.

6 See *id.*

7 See *infra* Part III.A

8 See *id.*

- A Wisconsin prison forbade a prisoner from ordering the *Physicians' Desk Reference*.⁹
- Some jails ban all newspapers and magazines.¹⁰ Others prohibit letters sent to prisoners and allow only postcards.¹¹
- A purge of books in religious libraries maintained by federal prisons resulted in works by Maimonides, the medieval Jewish philosopher, being pulled from the shelves.¹²
- A prison allowed magazines such as *Playboy* and *Maxim* but prohibited works by John Updike as salacious.¹³

This Article catalogues speech restrictions imposed without reasonable justification in American prisons and jails; those above are but a few examples. The picture that emerges from this exercise is rather bleak: incarcerated men and women are often subjected to substantial limitations on their ability to communicate, and many of these restrictions are indefensible. In cases involving prisoners' First Amendment rights, the Supreme Court has often repeated the principle that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”¹⁴ Despite this admonition, however, jailers frequently act as if unconstrained by judicial review in matters affecting the speech of those in their custody.

This was not the state of affairs the Supreme Court intended to create some three decades ago, when it handed down *Turner v. Safley*.¹⁵ The task at hand, Justice Sandra Day O'Connor wrote, was to balance two conflicting considerations at play in prison First Amendment cases: the “policy of judicial restraint regarding prisoner complaints” and “the need to protect constitutional rights.”¹⁶ The legal test the Court devised to answer this challenge is now called the *Turner* standard: there must be a reasonable relationship between the restriction at issue and a legitimate penological objective.¹⁷ Today, *Turner* has been cited in over 8000 judicial decisions.¹⁸ The *Turner*

⁹ See *infra* Part II.B.

¹⁰ See *infra* Part I, notes 85–95 and accompanying text (discussing *Beard v. Banks*, 548 U.S. 521 (2006)); *infra* Part III.H.

¹¹ See *infra* Part III.K.

¹² See *infra* Part III.L.

¹³ See *infra* Part III.Q.

¹⁴ *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

¹⁵ *Turner v. Safley*, 482 U.S. 78 (1987).

¹⁶ *Id.* at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974)).

¹⁷ *Id.* at 89.

¹⁸ Online legal search engines may not be comprehensive; however, a Westlaw search showed that 8743 cases have cited to *Turner*.

standard has been described, fairly, as “the most important and widely used legal standard for evaluating prisoners’ rights claims.”¹⁹

Three decades after the decision, we are now in a position to assess whether in a practical reality—and by this, I mean on the ground in American prisons and jails—the *Turner* standard has accomplished the objective behind its genesis. Does the standard strike a reasonable balance between the deference due to prison officials and the expressive liberties of incarcerated men and women?

While the *Turner* standard has been widely discussed in the scholarly literature, this Article offers a new perspective by focusing on the practical realities that exist in prisons and jails. Others have offered doctrinal and theoretical assessments of the *Turner* standard or analyzed the manner in which *Turner* plays out in the lower courts.²⁰

¹⁹ Christopher E. Smith, *Justice Sandra Day O'Connor and Corrections Law*, 32 *HAMLIN L. REV.* 477, 493 (2009).

²⁰ Erwin Chemerinsky, for example, argues that judicial deference in authoritarian institutions—i.e., prisons, schools, and the military—can be dangerous for two reasons: “first, the authoritarian nature of these institutions makes them places where serious abuses of power and violations of rights are likely to occur; and second, the political process is extremely unlikely to provide any protections in these arenas.” Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 *SUFFOLK U. L. REV.* 441, 458 (1999). Scott Moss contends that judicial review of speech restrictions has splintered into too many different rules for separate institutions (including prisons, schools, and workplaces) and that, in all of these contexts, the application of intermediate scrutiny “seems the best way to assure that courts take appropriate, but not excessive, account of institutional needs that might justify speech restrictions.” Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 *UCLA L. REV.* 1635, 1678–79 (2007). Sharon Dolovich, examining judicial deference in prison cases generally, writes that Supreme Court doctrine gives the impression “of a skewed process that deprives a whole category of vulnerable citizens of meaningful constitutional protections while only seeming to take their legal claims seriously.” Sharon Dolovich, *Forms of Deference in Prison Law*, 24 *FED. SENT’G REP.* 245, 245 (2012). Ronald Kuby and William Kunstler offer a colorful perspective that the lower courts are so deferential in prison speech cases that “entrusting trained chimps to paste up clichés from [Supreme Court decisions regarding prisoner speech] above the word ‘denied’ would achieve roughly the same result as seeking redress from the federal judiciary.” Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 *CREIGHTON L. REV.* 1005, 1010 (1993). Clay Calvert and Kara Carnley Murrhee conclude, after a survey of prison First Amendment cases decided by the lower federal courts in 2010 and 2011, that prisoners face a “steep, uphill battle . . . when fighting for their First Amendment rights to access magazines, movies, music, and other popular forms of media materials.” Clay Calvert & Kara Carnley Murrhee, *Big Censorship in the Big House—A Quarter-Century After Turner v. Safley: Muting Movies, Music & Books Behind Bars*, 7 *Nw. J.L. & SOC. POL’Y* 257, 269 (2012); see also Alphonse A. Gerhardstein, *False Teeth? Thornburgh’s Claim That Turner’s Standard for Determining a Prisoner’s First Amendment Rights Is Not “Toothless,”* 17 *N. KY. L. REV.* 527, 529 (1990) (arguing that when courts apply the *Turner* standard, “deference to prison administrators should not cause courts to accept watered-down evidence in support of challenged regulations”); Giovanna Shay, *Ad Law Incarcerated*, 14 *BERKELEY J. CRIM. L.* 329, 341 (2009) (arguing that *Turner* “emphasizes deference to prison officials and the relative technical and administrative

What this Article shows, through numerous examples of unjustified prison speech restrictions imposed throughout the country, is that prison and jail officials often act as if unconstrained by judicial review and impose arbitrary (indeed, nonsensical) restrictions on speech. For this reason, if strict scrutiny may be characterized as “‘strict’ in theory and fatal in fact,”²¹ the legacy of *Turner* may be described—fairly, if somewhat polemically—as lenient in theory and dumb in fact. Judicial deference has been complicit in allowing even the worst rules to remain on the books.²² An important measure of a constitutional standard is whether, in reality, the standard accords due weight to the interests it purports to balance. Here, the evidence suggests that the standard must change.

The laxness of the *Turner* standard becomes especially anomalous when compared to the far more searching standard of review for prisoners’ free exercise claims expounded by the Supreme Court in its recent decision in *Holt v. Hobbs*.²³ In 2000, Congress enacted the Re-

expertise of corrections authorities”); Anna C. Burns, Note, *Beard v. Banks: Restricted Reading, Rehabilitation, and Prisoners’ First Amendment Rights*, 15 J.L. & POL’Y 1225, 1227–28 (2007) (arguing, based on doctrinal analysis, that *Turner*, as interpreted in *Beard v. Banks*, insufficiently protects prisoner First Amendment claims, and that courts should afford less deference to prison administrators); Cheryl Dunn Giles, Note, *Turner v. Safley and Its Progeny: A Gradual Retreat to the “Hands-Off” Doctrine?*, 35 ARIZ. L. REV. 219, 230 (1993) (presenting doctrinal argument that *Turner* “unnecessarily restricts the scope of inmate rights in some instances”); Tara Kao, Note, *They Can Take Your Body but Not Your Soul—or So You Thought—the Third Circuit’s Application of the Turner Standard in Prisoners’ Free Exercise Cases*, 10 BOALT J. CRIM. L. 1, ¶ 47 (2005) (concluding, based on analysis of case law, that *Turner*’s “policy of deference . . . has allowed courts to arbitrarily infringe on prisoners’ free exercise rights”); Lorraine Golichowski Oei, Note, *The New Standard of Review for Prisoners’ Rights: A “Turner” for the Worse?* *Turner v. Safley*, 33 VILL. L. REV. 393, 432 (1988) (arguing that “[t]he *Turner* Court’s excessively deferential reasonableness standard provides the barest scrutiny of restrictions upon prisoners’ rights and essentially validates officials’ action on the basis of assertions regarding possible administrative and security problems rather than on the basis of any proof that the regulations are necessary to further governmental interests”); Kyrsten Sinema, Note, *Overton v. Bazzetta: How the Supreme Court Used Turner to Sound the Death Knell for Prisoner Rehabilitation*, 36 ARIZ. ST. L.J. 471, 472 (2004) (arguing, based on analysis of doctrine, that the *Turner* standard should be abandoned in favor of a return to the more exacting *Procunier v. Martinez* standard); Joseph Thomas Wilson, Comment, *The Big Man in the Big House: Prisoner Free Exercise in Light of Employment Division v. Smith*, 73 LA. L. REV. 219, 220 (2012) (arguing, based on doctrinal analysis, that the *Turner* standard is more protective than the *Employment Division v. Smith* standard for nonprisoner free exercise claims, and that the *Turner* standard should be abandoned for such claims); Eric J. Zogry, Comment, *Orthodox Jewish Prisoners and the Turner Effect*, 56 LA. L. REV. 905, 926–27 (1996) (examining rulings on the free exercise rights of Orthodox Jewish prisoners and concluding that the *Turner* standard is overly deferential).

21 See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

22 See *infra* Part II.

23 *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

ligious Land Use and Institutionalized Persons Act (“RLUIPA”),²⁴ which provides that a restriction may not substantially burden a prisoner’s religious exercise unless it “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”²⁵ *Holt* clarifies that the RLUIPA standard is a species of strict scrutiny.²⁶

RLUIPA creates a bifurcated regime for expressive activity in prison, in which speech claims are governed by a highly deferential standard²⁷ while free exercise claims are reviewed under strict scrutiny.²⁸ Thus, for example, a prisoner who challenges a restriction on the number of books she may have in her cell because she wants to read secular publications has a far weaker claim than a prisoner who challenges the same restriction but wants to read religious books.²⁹ RLUIPA has been in effect, and this rather anomalous dual regime has operated, for nearly fifteen years³⁰—and there is little evidence that the stricter standard for religious claims has undermined prison authorities or caused major security threats.³¹ By analogy, the security

²⁴ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc5 (2012).

²⁵ *Id.* § 2000cc(a)(1).

²⁶ *See Holt*, 135 S. Ct. at 863.

²⁷ *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 583 (2005).

²⁸ *See* *Cutter v. Wilkinson*, 544 U.S. 709, 713–14 (2005); Robert J. D’Agostino, *The Religious Rights of Incarcerated Persons: The Georgia Clergy Privilege, RLUIPA, and the Free Exercise Clause*, 1 J. MARSHALL L.J. 91, 106 (2008).

²⁹ *See, e.g., Jones v. Shabazz*, No. H-06-1119, 2007 WL 2873042, at *4 (S.D. Tex. Sept. 28, 2007) (“Plaintiff fails to show that TDCJ’s denial of his request for these secular books, especially in light of other accessible reading material, in any way materially burdens the exercise of his faith in violation of RLUIPA.”); *Kaufman v. Schneider*, 474 F. Supp. 2d 1014, 1027 (W.D. Wis. 2007) (“[P]rison officials are not required to indulge secular interests in the same way they are required to accommodate religious beliefs.”); Gaubatz, *supra* note 27, at 583.

³⁰ *See* James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2059 (2009) (“[I]n 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which re-established strict scrutiny for government actions regarding . . . federally funded institutions (including prisons) that substantially burden religious exercise.”).

³¹ *Cutter*, 544 U.S. at 725 (“For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners.”) (quoting Brief for United States as Amici Curiae Supporting Petitioners at 24, *Cutter*, 544 U.S. 709 (2005) (No. 03-9877)); *see also* Kelly Gower, *Religious Practice in Prison & The Religious Land Use and Institutionalized Persons Act (RLUIPA): Strict Scrutiny Properly Restored*, 6 RUTGERS J.L. & RELIGION 7, ¶ 39 (2004) (“Under RLUIPA, correctional administrators and officials will not lose their ability to argue that restrictions on the free exercise of religion further a compelling governmental interest in the context of prison safety and security.”).

risks of careful judicial review of speech regulations may be overstated.³² Thus, it is not only the experience of *Turner* but also the experience of RLUIPA (and its predecessor, the Religious Freedom Restoration Act) that suggests that the time has come for a stricter standard in prison speech cases.

That being said, the *Turner* standard alone cannot be blamed for all the unnecessary speech restrictions that exist in prisons and jails.³³ Many indefensible restrictions are never litigated because of barriers (some economic, some procedural) that are external to the *Turner* standard,³⁴ but that combine with it to ratchet up the difficulties prisoners face when challenging First Amendment regulations. The real-world effect of these obstacles is to confer upon prison officials a layer of what I call “practical immunity”—effective insulation from suit that flows partly from formal immunity doctrines (such as absolute or qualified immunity) but primarily from other barriers that protect potential defendants.³⁵ These obstacles include, among others, limited access to counsel,³⁶ procedural requirements imposed by the Prison Litigation Reform Act (“PLRA”),³⁷ and restrictions on the recovery of damages and attorneys fees in prisoners’ rights cases.³⁸ The result of jailers’ “practical immunity” is to weaken their incentives to eliminate illegal regulations.

Part I of this Article surveys the *Turner* decision and those that have followed it in the Supreme Court, showing that the standard was meant to be deferential, but not excessively so—indeed, *Turner* itself struck down a regulation. Part II argues that, to the extent the Su-

³² See *Cutter*, 544 U.S. at 722–26.

³³ See generally Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015) (presenting updated statistics on the decline in civil litigation caused by the PLRA).

³⁴ See Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1225–26 (2011) (describing conditions of incarceration and prisoners’ general inability to access legal tools as barriers to litigation); Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 283 (2010) (“Not only do inmates face procedural difficulties . . . but prisoners may also fear retaliation from prison officials for filing grievances.”).

³⁵ Schlanger, *Trends in Prisoner Litigation*, *supra* note 33, at 162.

³⁶ See Ahmed A. White, *The Concept of “Less Eligibility” and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737, 786 (2008).

³⁷ Prison Litigation Reform Act, 42 U.S.C. § 1997e (2012). For discussion as to the procedural requirements this statute forces, see Grace DiLaura, Comment, “Not Susceptible to the Logic of *Turner*”: *Johnson v. California and the Future of Gender Equal Protection Claims from Prisons*, 60 UCLA L. REV. 506, 555 (2012).

³⁸ See 42 U.S.C. § 1997e(e) (2012); Schlanger, *Trends in Prisoner Litigation*, *supra* note 33, at 167–68; Wilson, *supra* note 20, at 247 n.187, 248.

preme Court intended the standard to have teeth, many lower court decisions have defanged it with an obsequious deference to prison administrators. Part III turns away from judicial rulings and toward decisions made on the ground in correctional institutions throughout the country, showing that prison officials have abused judicial deference and saddled prisoners with unnecessary restrictions.

Such restrictions might be less significant if it were easy to eliminate unconstitutional restrictions through litigation, but, as Part IV suggests, based on my personal experience litigating publication restrictions imposed by a jail in South Carolina, challenging even the most irrational speech restrictions can require substantial time and resources. Part V expands the discussion to a broader set of impediments to litigation brought by prisoners. Prisoners litigating First Amendment claims encounter an array of barriers, of which *Turner* is but one. As a result of these obstacles, some litigation that could succeed even under the *Turner* standard is never brought, and invalid speech restrictions remain in force.

Part VI considers the experience of RLUIPA and finds that it has been at least moderately successful in improving protection of prisoners' religious access rights without demonstrably compromising security. Finally, Part VII suggests that Congress or the Supreme Court should follow the same model in revisiting the standard for speech claims brought by prisoners.

I. *TURNER* IN THE SUPREME COURT

In 1987, in *Turner v. Safley*,³⁹ the Supreme Court of the United States wrestled with the appropriate constitutional standard for restrictions on speech by incarcerated persons, a task complicated by earlier authorities that pointed in opposite directions. In *Pell v. Procunier*,⁴⁰ a case dealing with media access to prisons, and in other earlier decisions, the Court's language buzzed with the words "deference" and "latitude";⁴¹ judges, it was said, should not look too closely at the day-to-day operations of prisons and jails.⁴² But in *Procunier v.*

³⁹ *Turner v. Safley*, 482 U.S. 78 (1987).

⁴⁰ *Pell v. Procunier*, 417 U.S. 817 (1974).

⁴¹ *Id.* at 826–27.

⁴² *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) ("The District Court, we believe,

Martinez,⁴³ a case about censorship of prisoners' outgoing mail, the Court spoke with a different voice.⁴⁴ While acknowledging the view that courts should afford "deference to the appropriate prison authorities," the Court enunciated a test that suggested a heightened standard of review, one akin to intermediate—if not strict—scrutiny.⁴⁵

Turner, then, lay at a crossroads: which *Procunier* would carry the day?⁴⁶ In the end, deference won—for the most part. The Court narrowed *Procunier v. Martinez* with a reading specific to its facts; its more exacting standard was relegated to outgoing mail from a prisoner, as distinguished from speech entering a prison or occurring within a prison.⁴⁷

More specifically, *Turner* involved a challenge to two Missouri prison regulations.⁴⁸ The first banned prisoner correspondence with other prisoners, with exceptions for legal correspondence and letters with incarcerated members of one's immediate family.⁴⁹ The second forbade prisoners from marrying anyone, whether a prisoner or not, with limited exceptions.⁵⁰

In considering the inmate correspondence ban, the *Turner* Court wrote that its task was "to formulate a standard of review for prisoners' constitutional claims" that balanced two conflicting considerations: the "policy of judicial restraint regarding prisoner complaints" and "the need to protect constitutional rights."⁵¹ While proclaiming that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," the Court underscored the need for deference to the professional judgments of prison officials:

got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement."); *Pell*, 417 U.S. at 826 ("So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, 'prison officials must be accorded latitude.')" (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

⁴³ *Procunier v. Martinez*, 416 U.S. 396 (1974).

⁴⁴ *Id.* at 400, 405.

⁴⁵ *Id.* at 413 ("First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.").

⁴⁶ The lead defendant in the two earlier cases is the same person, Raymond K. Procunier, Director of the California Department of Corrections. See *id.* at 398; *Pell*, 417 U.S. at 819.

⁴⁷ See *Turner v. Safley*, 482 U.S. 78, 85–89 (1987).

⁴⁸ *Id.* at 81.

⁴⁹ *Id.* at 81–82.

⁵⁰ *Id.* at 82.

⁵¹ *Id.* at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.⁵²

In an attempt to give due regard to the competing interests, the Court developed a four-part test. “First, there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it”⁵³—a standard much lower than the strict scrutiny or even intermediate scrutiny ordinarily applied to First Amendment claims in other contexts. This factor has proven dispositive in other cases, and may justly be called the heart of the *Turner* standard.⁵⁴ The three additional factors identified in *Turner* are: (1) “whether there are alternative means of exercising the right,” (2) “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally,” and (3) whether “obvious, easy alternatives” to the challenged regulation exist.⁵⁵

Applying this standard, the Court upheld the prisoner correspondence regulation.⁵⁶ Justice O’Connor wrote that correspondence among prisoners “is a potential spur to criminal behavior” and that prohibiting prisoner-to-prisoner correspondence may further Missouri’s policy of “separating and isolating gang members” from each

⁵² *Id.* at 84–85.

⁵³ *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

⁵⁴ *See, e.g.*, *Beard v. Banks*, 548 U.S. 521, 532–33, (2006) (acknowledging 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,” and stating: “The real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation”); *Overton v. Bazetta*, 539 U.S. 126, 131–32 (2003) (“We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question.”); *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989) (“[T]he relevant inquiry is whether the actions of prison officials were ‘reasonably related to legitimate penological interests.’”) (quoting *Turner*, 482 U.S. at 89).

⁵⁵ *Turner*, 482 U.S. at 90.

⁵⁶ *See id.* at 91.

other.⁵⁷ But the Court went on to strike down the marriage ban, applying the same standard it had just articulated in upholding the correspondence ban.⁵⁸ The Court viewed the prison's concern that marriage would foster excessive dependency by prisoners, undermine rehabilitation, and promote "love triangles" as exaggerated.⁵⁹

Turner marked the first and last time that the *Turner* standard resulted in the invalidation of a prison regulation in a case before the Supreme Court.⁶⁰ In the decades since *Turner* was decided, the result in prison First Amendment cases has always been the same: the prison wins.⁶¹

Eight days after *Turner* was decided, the high Court handed down *O'Lone v. Estate of Shabazz*,⁶² which extended the *Turner* standard to free exercise claims.⁶³ A prison in New Jersey had allowed Muslims to participate in the daily Jumu'ah, a weekly congregational prayer required by their religion, in an area of the prison compound known as "the Farm."⁶⁴ The prison, however, experienced problems with prisoners on work assignments outside the prison leaving their details for various reasons, including to participate in the Jumu'ah.⁶⁵ In the view of prison administrators, this both created security problems related to the movement of prisoners and detracted from the rehabilitative function of work assignments.⁶⁶ The prison therefore forbade prisoners with outside work assignments from returning to the prison during their shifts—a policy that had the effect of prohibiting prisoners with such assignments from participating in the Jumu'ah.⁶⁷

The Supreme Court, in an opinion by Chief Justice Rehnquist, upheld the policy under the *Turner* standard.⁶⁸ The opinion noted both that the prison had experimented unsuccessfully with solutions other than banning returns from outside work details, and that the prison was solicitous of Muslim inmates practicing other aspects of

⁵⁷ *Id.* at 91–92.

⁵⁸ *See id.* at 97.

⁵⁹ *Id.* at 97–98.

⁶⁰ *See* Trevor N. McFadden, Note, *When to Turn to Turner? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 143 (2006).

⁶¹ *See id.* at 144.

⁶² *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

⁶³ *Id.* at 349–50.

⁶⁴ *Id.* at 344–45.

⁶⁵ *See id.* at 346.

⁶⁶ *See id.* at 351.

⁶⁷ *See id.* at 347.

⁶⁸ *See id.* at 349–50.

their religion.⁶⁹ As in *Turner*, the Court took the “opportunity to reaffirm [its] refusal, even where claims are made under the First Amendment, to ‘substitute [its] judgment on . . . difficult and sensitive matters of institutional administration.’”⁷⁰

Two years later, the Supreme Court revisited regulations that limit prisoners’ First Amendment rights in *Thornburgh v. Abbott*,⁷¹ which involved a Federal Bureau of Prisons’ policy that restricted the publications prisoners could receive in the mail.⁷² The regulations at issue allowed a federal prison warden to refuse to deliver a publication to a prisoner “if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.”⁷³

The majority opinion, written by Justice Blackmun, acknowledged that the challenged regulation countenanced content-based restrictions on speech, and that “[t]here is little doubt that the kind of censorship just described would raise grave First Amendment concerns outside the prison context.”⁷⁴ Nonetheless, the Supreme Court upheld the regulation as reasonable in a prison context—not so much for fear that the content of the publications would negatively affect the recipient, but because “prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow’s beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly.”⁷⁵ While rejecting the facial challenge to the regulation, the Court did not analyze whether the censorship of particular publications under the regulation ran afoul of the First Amendment; it passed this issue to the lower court on remand.⁷⁶

The Court remained silent on First Amendment rights in prison for the next fourteen years, handing down *Overton v. Bazzetta*⁷⁷ in 2003. *Overton* involved several restrictions on prisoner visits imposed by the Michigan Department of Corrections.⁷⁸ First, the Department banned contact visits (meaning all interactions with visitors would oc-

⁶⁹ *See id.* at 346, 352.

⁷⁰ *Id.* at 353 (quoting *Block v. Rutherford*, 468 U.S. 576, 588 (1984)).

⁷¹ *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

⁷² *Id.* at 403.

⁷³ *Id.* at 404 (quoting 28 C.F.R. § 540.71(b) (1988)).

⁷⁴ *Id.* at 407.

⁷⁵ *Id.* at 412–13.

⁷⁶ *Id.* at 419.

⁷⁷ *Overton v. Bazzetta*, 539 U.S. 126 (2003).

⁷⁸ *Id.* at 128.

cur through a pane of glass) for those prisoners considered the most dangerous.⁷⁹ Second, children except for immediate family—defined as children, stepchildren, grandchildren, or siblings of the prisoner—were not permitted to visit prisoners.⁸⁰ Third, if a prisoner had multiple substance abuse violations, he or she could not receive any visitors other than attorneys and clergy.⁸¹

The Court, in an opinion by Justice Kennedy, upheld these and other visitation regulations.⁸² While asserting that “freedom of association is among the rights least compatible with incarceration,” the Court applied the *Turner* standard, rather than establishing an even weaker standard for prisoners’ associational claims.⁸³ The Court found that the prison’s interest in limiting visitation, including “reducing the total number of visitors,” “limiting the disruption caused by children in particular,” and disciplining prisoners who abused drugs all provided reasonable justifications for the challenged policies.⁸⁴

The Supreme Court’s most recent pronouncement regarding the First Amendment rights of prisoners came in 2006 in *Beard v. Banks*.⁸⁵ The case involved a challenge to conditions in Pennsylvania’s Long Term Segregation Unit (“LTSU”), a tier designed to hold some forty prisoners, deemed by the corrections department to be the “most incorrigible, recalcitrant inmates” in the state.⁸⁶ When it came to communications with the outside world, restrictions were severe: phone calls were banned except in emergencies; prisoners could receive but one visit each month; and newspapers and magazines were off-limits.⁸⁷ The prison authorities contended that these severe restrictions were necessary to incent better behavior.⁸⁸ By improving their conduct, these “incorrigible” prisoners could ascend a ladder of expanding privileges.⁸⁹

The case did not produce a majority opinion, and the judgment was cobbled together from a plurality opinion by Justice Breyer (joined by Chief Justice Roberts, Justice Kennedy, and Justice Souter)

⁷⁹ *Id.* at 130.

⁸⁰ *Id.* at 129.

⁸¹ *Id.* at 130.

⁸² *Id.* at 131, 133–34, 137.

⁸³ *Id.* at 131–32.

⁸⁴ *Id.* at 133–34.

⁸⁵ *Beard v. Banks*, 548 U.S. 521 (2006).

⁸⁶ *Id.* at 525 (citation omitted).

⁸⁷ *Id.* at 526.

⁸⁸ *Id.* at 531.

⁸⁹ *Id.* at 526, 531.

and a concurring opinion by Justice Thomas (joined by Justice Scalia).⁹⁰ Justice Stevens, joined by Justice Ginsburg, dissented, and Justice Alito took no part in the decision.⁹¹

The plurality opinion held that Pennsylvania's rehabilitative goals justified the severe restrictions on the First Amendment interests of LTSU prisoners.⁹² As the opinion acknowledged, the posture by which *Beard* came to the Court was somewhat unique.⁹³ When the prisoners opposed summary judgment, they did not submit "any fact-based or expert-based refutation"—so the plaintiffs were stuck on appeal with the defendants' version of the facts.⁹⁴

In his concurrence, Justice Thomas expanded on an earlier concurrence in *Overton*, setting forth the view that the First Amendment has no role to play in the judicial review of prison policies.⁹⁵ In Justice Thomas's view, the Constitution does not provide any "implicit definition of incarceration," leaving the states "free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations," subject to only one constraint—the Eighth Amendment.⁹⁶ In short, if a prison policy does not constitute cruel and unusual punishment, the policy must stand, for constitutional provisions external to the Eighth Amendment do not apply behind bars. Justice Thomas complained of "the shortcomings of the *Turner* framework," suggesting that he (and Justice Scalia, who joined the opinion) would overrule *Turner* if given the chance.⁹⁷

While Justices Thomas and Scalia spurned *Turner*, six Justices wrote or joined opinions that applied and endorsed *Turner*—the plurality opinion by Justice Breyer and the dissents by Justices Stevens and Ginsburg.⁹⁸ These opinions deserve a careful reading because they shed light on a question central to this Article: according to a majority of the Supreme Court, in its most recent ruling on the First Amendment in prisons, how much bite does the *Turner* standard have?

⁹⁰ See *id.* at 524, 536.

⁹¹ See *id.* at 536, 542.

⁹² See *id.* at 530–32.

⁹³ *Id.* at 527–28.

⁹⁴ *Id.* at 534.

⁹⁵ *Id.* at 537–40 (Thomas, J., concurring) (quoting *Overton*, 539 U.S. at 139 (Thomas, J., concurring)).

⁹⁶ *Id.* at 537.

⁹⁷ See *id.* at 540–41 (Thomas J., concurring).

⁹⁸ See, e.g., *id.* at 555 (Ginsberg, J., dissenting) ("*Turner* deference can and should be incorporated into the evaluation of a motion for summary judgment . . .").

The answer that emerges from the case is that the *Turner* standard, although deferential to prison administrators, is not meant to be devoid of rigor. Although the plurality voted for entry of summary judgment against the prisoners before them, their opinion asserted that the *Turner* standard is not an insurmountable barrier for all prisoners:

[W]e do not suggest that the deference owed prison authorities makes it impossible for prisoners or others attacking a prison policy like the present one ever to succeed or to survive summary judgment. After all, the constitutional interest here is an important one. *Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective. A prisoner may be able to marshal substantial evidence that, given the importance of the interest, the Policy is not a reasonable one. Cf. [*Turner*.] 482 U.S. at 97–99 . . . (striking down prison policy prohibiting prisoner marriages).⁹⁹

In short, as far as the *Beard* plurality was concerned, *Turner* review, although deferential, is also meaningful and should result in the invalidation of at least some regulations. That, after all, is precisely what happened with the marriage ban in *Turner*, as the *Beard* plurality underscored above.¹⁰⁰

The dissenting Justices, of course, would have struck down the LTSU regulations and therefore advanced an even more robust form of *Turner* review than the plurality. Justice Stevens, joined by Justice Ginsburg, opined that “the record is insufficient to conclude, as a matter of law,” that the *Turner* standard was satisfied.¹⁰¹ Justice Ginsburg, writing a separate dissent as well, asserted that “prison officials ‘cannot avoid court scrutiny by reflexive, rote assertions,’” and that “[t]raditional deference does not mean that courts [are to] abdicat[e] their duty to protect those constitutional rights that a prisoner retains.”¹⁰² In her view, *Turner* requires prison officials to do more when confronted with a First Amendment challenge than “to say, in our professional judgment the restriction is warranted.”¹⁰³ In short,

⁹⁹ *Id.* at 535–36 (plurality opinion).

¹⁰⁰ *See id.*

¹⁰¹ *Id.* at 552 (Stevens, J., dissenting).

¹⁰² *Id.* at 554–55 (Ginsburg, J., dissenting) (first quoting *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996); then quoting *Banks v. Beard*, 399 F.3d 134, 140 (3d Cir. 2005)).

¹⁰³ *Id.* at 556.

six of the eight Justices who participated in *Beard* described *Turner* review as more than a rubber stamp.¹⁰⁴

Although Justices Thomas and Scalia, as noted above, believe that prisoners should receive no First Amendment protection, they, too, agree that the standard, as it now exists, has at least some bite. In *Johnson v. California*,¹⁰⁵ the Supreme Court held that strict scrutiny applies to racial discrimination claims brought by prisoners.¹⁰⁶ Justice Scalia joined Justice Thomas in dissent, arguing that *Turner* should apply to such claims, and that *Turner* does not require absolute deference:

[T]he majority presents a parade of horrors designed to show that applying the *Turner* standard would grant prison officials unbounded discretion to segregate inmates throughout prisons. But we have never treated *Turner* as a blank check to prison officials. Quite to the contrary, this Court has long had “confidence that . . . a reasonableness standard is not toothless.”¹⁰⁷

II. *TURNER* IN THE LOWER COURTS

Turner is not meant to be toothless, but, as this Part shows, decisions by the lower federal courts sometimes render it so. Prison speech restrictions do not always survive *Turner* review in the lower courts, nor do all judges misapply the standard. The point, rather, is this: regulations founded on flimsy rationales get upheld frequently enough, and the reasoning is often poor enough that there is cause for alarm. The analysis in this section adds further support to the view of Clay Calvert and Kara Carnley Murrhee that prisoners face a “steep, uphill battle . . . when fighting for their First Amendment rights”¹⁰⁸

¹⁰⁴ Others have argued that *Beard* sounded the death knell for any meaningful review under *Turner*. See Burns, *supra* note 20, at 1253–58 (arguing that *Beard* distorted *Turner* and applied too much deference by treating rehabilitation, as opposed to only safety, as a legitimate penological interest); Stanley Wu, Note, *Persona Non Grata in the Courts: The Disappearance of Prisoners’ First Amendment Constitutional Rights in Beard v. Banks*, 28 WHITTIER L. REV. 981, 1001, 1005–06 (2007) (arguing that *Beard* was incorrectly decided and overly deferential to prison administrators). As shown above, however, a majority of the *Beard* Court reaffirmed the proposition that *Turner* requires a genuine connection between a regulation and a penological interest.

¹⁰⁵ *Johnson v. California*, 543 U.S. 499 (2005).

¹⁰⁶ *Id.* at 509.

¹⁰⁷ *Id.* at 524, 547 (Thomas, J., dissenting) (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)).

¹⁰⁸ Calvert & Murrhee, *supra* note 20, at 269.

A. Hatch v. Lappin (*First Circuit*)

Richard Hatch was the winner in the first season of *Survivor*, a reality television show, and the victory brought him a large monetary award.¹⁰⁹ But fortune turned when he was convicted of evading taxes on the payout.¹¹⁰ After serving a period in federal prison, he was placed on house arrest for the balance of his sentence.¹¹¹ NBC received permission from the Federal Bureau of Prisons to interview Hatch in his home, where Hatch complained to the media that he had been wrongfully convicted and that prosecutors had engaged in misconduct.¹¹² Later in the day, an attorney who prosecuted Hatch went on the air with a local radio station and responded to Hatch's comments made in the NBC interview.¹¹³ Hatch then called into the radio station.¹¹⁴ The federal authorities responded by taking Hatch back to prison for the rest of his sentence, on the grounds that he lacked authorization to engage with the media, save for a single interview with NBC's Today Show.¹¹⁵

Hatch sought a writ of habeas corpus returning him to house arrest, and the district court refused.¹¹⁶ The court found that the rule requiring preauthorization of media interviews was justified by a legitimate "interest in enforcing a rule that prohibits inmates in home confinement from being in the presence of a person with a criminal record or someone possessing a deadly weapon and/or controlled substances."¹¹⁷ The court did not even acknowledge that Hatch's call to the radio station hardly placed him in another's presence—he made the call from his house.¹¹⁸ In a one-paragraph order, the First Circuit affirmed the ruling.¹¹⁹

¹⁰⁹ See Kelly Phillips Erb, *Once a Survivor, Always a Survivor: Richard Hatch Speaks Out on Taxes, IRS*, FORBES (May 2, 2012, 9:16 AM), <http://www.forbes.com/sites/kellyphillipserb/2012/05/02/once-a-survivor-always-a-survivor-richard-hatch-speaks-out/>.

¹¹⁰ Hatch v. Lappin, 660 F. Supp. 2d 104 (D. Mass. 2009); see Erb, *supra* note 109.

¹¹¹ See 'Survivor' Hatch Behind Bars for TV Interviews, TODAY NEWS (Aug. 19, 2009, 5:10 PM), http://www.today.com/id/32468188/ns/today-today_news/t/survivor-hatch-behind-bars-tv-interviews/#.VNVWHivF9jY.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ Hatch v. Lappin, 660 F. Supp. 2d 104, 107 (D. Mass. 2009) (describing that NBC sent three "units" to each interview Hatch: the Today Show, Access Hollywood, and the station's local affiliate); see also Erb, *supra* note 109.

¹¹⁶ See Hatch, 660 F. Supp. 2d at 107.

¹¹⁷ *Id.* at 109.

¹¹⁸ See *id.* at 107.

¹¹⁹ Hatch v. Lappin, No. 09-2361, slip op. at 1 (1st Cir. Oct. 7, 2009).

B. *Munson v. Gaetz (Seventh Circuit)*

James Munson had an array of medical conditions, and prison doctors prescribed him a complex cocktail of medications that staff distributed to him.¹²⁰ However, for nearly two weeks, a staff member accidentally administered another prisoner's medication to Munson—an error that could have resulted in serious complications, or even death, due to drug interactions.¹²¹ Munson therefore educated himself at the prison library about drug interactions and side effects.¹²² Because he found that access to the library was limited, and that he had to wait long periods of time to check out books, he ordered his own copies of several medical publications, including the *Physicians' Desk Reference*, from a vendor authorized by the prison.¹²³

The prison refused to deliver the *Physicians' Desk Reference*, memorializing the reason for rejection—"DRUGS"—on a standard form.¹²⁴ This was sufficient for the appellate court: "Quite simply, the prison gave the books' drug-related content as one of the reasons justifying its decision to restrict Munson's access to the books and we don't need to look beyond the books' titles and the content of Munson's complaint to know that the books contain information about drugs."¹²⁵

The court acknowledged, but then brushed aside, a fact that threw the consistency of the prison's policies into serious question: the same publication was available to prisoners in the library, but, as the court posited, "[a]llowing reduced access does not mean that barring unfettered access is illegitimate, even if restricted access creates an appearance of inconsistency."¹²⁶ The court went on to unanimously affirm the dismissal of Munson's complaint under Federal Rule of

¹²⁰ *Munson v. Gaetz*, 673 F.3d 630, 631 (7th Cir. 2012).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 631–32.

¹²⁴ *Id.* at 632. The prison also refused to deliver another book, the *Complete Guide to Prescription & Nonprescription Drugs 2009*, for the same reasons as the *Physicians' Desk Reference*:

[The] publication review officer Lisa Shemonic decided Munson could not have the [two books]. To justify the decision, Shemonic provided three reasons for both books. Shemonic simply checked the available boxes for the first two reasons: the books were "listed on the Disapproved Publications List," and the books contained material deemed "otherwise detrimental to security, good order, rehabilitation, or discipline, or it might facilitate criminal activity or be detrimental to mental health."

Id.

¹²⁵ *Id.* at 633.

¹²⁶ *Id.* at 637.

Civil Procedure 12(b)(6).¹²⁷ In the court’s view, in other words, even drawing all reasonable inferences in Munson’s favor, no rational person could fail to conclude that prohibiting delivery of a book *available in the library* was reasonable under *Turner*.¹²⁸

C. Singer v. Raemisch (*Seventh Circuit*)

Kevin Singer enjoyed the role-playing game *Dungeons & Dragons*, and incarceration in a Wisconsin prison did not dampen his passion for the game.¹²⁹ For two years, he ordered and received *Dungeons & Dragons* materials while in prison, all “without incident.”¹³⁰ But the prison employed a gang specialist, Muraski, who received an anonymous letter from another prisoner suggesting that Singer was attempting to form a “gang” centered on *Dungeons & Dragons*.¹³¹ Muraski, alarmed, resolved to “check into this gang before it gets out of hand.”¹³² Muraski confiscated an array of books and magazines related to the game from Singer’s cell.¹³³ Muraski told Singer that going forward, “inmates are not allowed to engage in or possess written material that details rules, codes, dogma of games/activities such as ‘Dungeons and Dragons’ because it promotes fantasy role playing, competitive hostility, violence, addictive escape behaviors, and possible gambling.”¹³⁴

After bringing suit, Singer obtained affidavits from eleven prisoners and three experts in role playing games, all of which made, in substance, the same point: *Dungeons & Dragons* bears no relationship to gang activity.¹³⁵ Indeed, as some of the affidavits continued, the game may even “help[] rehabilitate inmates and prevent[] them from joining gangs and engaging in other undesirable activities.”¹³⁶ Prison, after all, is a monotonous place in which forced idleness can breed agitation and restlessness; distractions are therefore often salutary. The “inmate affiants—who collectively served over 100 years in prison—all testified that they had never heard of any gang-related or

¹²⁷ *Id.* at 638.

¹²⁸ *See id.* at 632–33 (summarizing standards to be applied).

¹²⁹ *Singer v. Raemisch*, 593 F.3d 529, 531–32 (7th Cir. 2010).

¹³⁰ *Id.* at 532.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.* at 533.

¹³⁶ *Id.*

other violent activity associated with [*Dungeons & Dragons*] gameplay or paraphernalia.”¹³⁷

The prison agreed with Singer that *Dungeons & Dragons* had never caused a gang problem.¹³⁸ The prison responded to Singer’s evidence with one affidavit—Muraski’s—and moved for summary judgment.¹³⁹ Muraski made a series of poorly supported assertions:

[Muraski] explained that the policy was intended to promote prison security because co-operative games can mimic the organization of gangs and lead to the actual development thereof. Muraski elaborated that during [*Dungeons & Dragons*] games, one player is denoted the “Dungeon Master.” The Dungeon Master is tasked with giving directions to other players, which Muraski testified mimics the organization of a gang. At bottom, his testimony about this policy aim highlighted [the prison’s] worries about cooperative activity among inmates, particularly that carried out in an organized, hierarchical fashion. Muraski’s second asserted governmental interest in the [*Dungeons & Dragons*] ban was inmate rehabilitation. He testified that [*Dungeons & Dragons*] can “foster an inmate’s obsession with escaping from the real life, correctional environment, fostering hostility, violence and escape behavior,” which in turn “can compromise not only the inmate’s rehabilitation and effects of positive programming but also endanger the public and jeopardize the safety and security of the institution.”¹⁴⁰

The court accepted all of these arguments, granted summary judgment, and upheld the regulation under *Turner*.¹⁴¹

D. *Hause v. Vaught (Fourth Circuit)*

Stephen Hause, confined in a county jail in South Carolina, challenged a policy that forbade detainees from receiving any books or periodicals in the mail.¹⁴² The prison argued that publications could be used for smuggling contraband into the jail, and that publications contain paper, which can be used to set fires.¹⁴³ As for the “fires” rationale, detainees were allowed to receive (equally flammable) let-

¹³⁷ *Id.* at 536.

¹³⁸ *Id.*

¹³⁹ *Id.* at 533.

¹⁴⁰ *Id.* at 535.

¹⁴¹ *Id.* at 537–40.

¹⁴² *Hause v. Vaught*, 993 F.2d 1079, 1081 (4th Cir. 1993).

¹⁴³ *Id.* at 1082–83.

ters from friends and family.¹⁴⁴ The court explained away this inconsistency: “[I]n our view the efforts of prison administrators to accommodate First Amendment rights by allowing inmates to receive correspondence should not be weighed against them in considering other measures adopted in the interest of security.”¹⁴⁵ But the correct question under *Turner* was not what should be “held against” a jail, but whether the prohibition of books and magazines, considered in light of the fact that letters were permitted, furthered a penological interest.¹⁴⁶

Addressing the smuggling rationale, the court dismissed the possibility that the jail could allow detainees to receive publications only from publishers.¹⁴⁷ The court speculated, without any evidence in the record beyond the fact that Hause himself was not incarcerated at the jail for long, that “most publications sent from publishers and book clubs will arrive after a detainee has been transferred to another facility or released from confinement.”¹⁴⁸ The appellate court then affirmed the district court’s grant of summary judgment for the jail.¹⁴⁹

E. Prison Legal News v. Livingston (*Fifth Circuit*)

The Texas prison system refused to deliver to prisoners five books distributed by Prison Legal News, and Prison Legal News brought suit.¹⁵⁰ One of the books, *Women Behind Bars*, a monograph on the treatment of women in prison, was censored in its entirety based on a single sentence: “The dark secret of her life was that she had been forced to perform fellatio on her uncle when she was just four years old.”¹⁵¹ Delivery was refused because a prison official believed the sentence in question “could impair the rehabilitation of sex offenders or cause disruptive outbursts by prisoners who were similarly victimized.”¹⁵²

The official later changed her mind.¹⁵³ As the court recognized, “[p]resumably, the decision to approve the book indicates that [she] does not believe the once-censored passage actually poses a threat to

¹⁴⁴ *Id.* at 1083–84.

¹⁴⁵ *Id.* at 1083.

¹⁴⁶ *Turner v. Safley*, 482 U.S. 78, 89 (1987).

¹⁴⁷ *Hause*, 993 F.2d at 1083.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1086.

¹⁵⁰ *Prison Legal News v. Livingston*, 683 F.3d 201, 207 (5th Cir. 2012).

¹⁵¹ *Id.* at 210.

¹⁵² *Id.* at 217.

¹⁵³ *Id.*

[the prison system's] legitimate goals."¹⁵⁴ Despite this rather significant fact in the plaintiff's favor, the court posited that "this reassessment alone does not establish that the past exclusion was necessarily unreasonable."¹⁵⁵ The court itself deemed it "unlikely" that the passage would cause any problems, but went on to hold that censorship of the entire book still satisfied the standards set forth in *Turner* and *Thornburgh*:

Though it seems unlikely that the brief, non-explicit passage in *Women Behind Bars* would create a significant threat to a prison's legitimate goals, in light of the Supreme Court's recognition in *Thornburgh* that "prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for . . . order and security," [Prison Legal News] must do more to meet its burden than merely assert that [the] policy is unreasonable. As with the other books, [Prison Legal News] has not produced evidence that contradicts the rationality of [the] exclusion of *Women Behind Bars*.¹⁵⁶

The court then upheld Texas's decision to ban the book throughout all of its prisons and affirmed the lower court's grant of summary judgment.¹⁵⁷

All of the cases discussed above, but perhaps *Singer* most starkly, raise a troubling question: If the *Dungeons & Dragons* ban and similar restrictions survived *Turner* review, what could flunk it? After all, the plaintiff in *Singer* put forth what the court called "an impressive trove of affidavit testimony"—all of which disclaimed any connection between the game and the formation of gangs—and there was no evidence that *Dungeons & Dragons* had ever contributed to gang incidents or gang formation.¹⁵⁸ The prison put forth one witness, albeit a gang specialist, who speculated about negative effects he associated with the game.¹⁵⁹ In the appellate panel's unanimous view, this did not even create an issue of fact under *Turner* and warranted summary judgment for the prison¹⁶⁰—meaning that no rational person could doubt that the constitutional standard was satisfied.¹⁶¹

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (citations omitted).

¹⁵⁷ *Id.* at 224.

¹⁵⁸ See *Singer v. Raemisch*, 593 F.3d 529, 536 (7th Cir. 2010).

¹⁵⁹ See *id.* at 533.

¹⁶⁰ See *id.* at 538.

¹⁶¹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (stating that for a plaintiff

It also bears mention that in most of the cases cited in Part II (*Hause, Livingston, Munson, Singer*), the defendant prevailed despite a procedural posture supposedly generous to the plaintiff (summary judgment or a motion to dismiss).¹⁶² In these decisions, the *Turner* standard, deferential in theory, became toothless in practice.

III. *TURNER* ON THE GROUND

Although the lower court decisions discussed in the previous Part accord excessive deference to speech restrictions, the picture on the ground in prisons and jails—evident in policies and practices that may never see the inside of a courtroom—is even more concerning. The examples cited in this section demonstrate that corrections officials abuse, with some frequency, the discretion granted to them by *Turner* and its progeny. If the purpose of *Turner* was to strike a reasonable balance between the challenges of administering a correctional institution and the free speech interests of prisoners, the examples below suggest that recalibration is necessary.

A. *Challenging a Jail's Censorship of Bible Passages*

In 2009, a woman sent letters to her son, who was incarcerated at the Rappahannock Regional Jail in Virginia.¹⁶³ These letters often quoted passages from the Bible.¹⁶⁴ Upon receiving the letters, the jail cut out the biblical passages with scissors or a hobby knife, delivering to the son missives with large holes.¹⁶⁵ For example, because the jail excised Biblical passages, in one instance, all the son received of a three-page letter from his mother was the salutation, the first paragraph of the letter, and the closing, “Love, Mom.”¹⁶⁶ The written reason given by jail staff for censorship of this nature was sometimes “Internet Pages” and sometimes “Religious Material from Home.”¹⁶⁷

While working as an attorney for the American Civil Liberties Union, I wrote a public letter to the superintendent of the jail com-

to survive summary judgment there need only “be evidence on which the jury could reasonably find for the plaintiff”).

¹⁶² Sharon Dolovich has found that on the Supreme Court level, deference in prison cases has been used to “justify the altering of existing procedural rules.” Dolovich, *supra* note 20, at 246.

¹⁶³ Letter from David M. Shapiro, Staff Counsel, Nat’l Prison Project of the Am. Civil Liberties Union, et al., to Joseph Higgs, Jr., Superintendent of Rappahanock Regional Jail 1 (July 9, 2009), <https://www.aclu.org/files/pdfs/prison/lettertosuperintendenthiggs.pdf>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

plaining of the censorship, and was joined by various religious groups: the Becket Fund for Religious Liberty, the Friends Committee on National Legislation, the Prison Fellowship, the Rutherford Institute, and the Virginia Faith Center for Public Policy.¹⁶⁸ The Reverend Pat Robertson then featured the issue on his show, the 700 Club, and declared on national television, “This is horrible. It’s happening in Virginia of all places, and whoever did that in that jail needs to get fired. Just that simple, needs to be fired.”¹⁶⁹ Other media outlets carried the story as well.¹⁷⁰ Ultimately, in response to the public pressure, the jail backed down and changed its policy.¹⁷¹

B. Case Law and Medical Textbooks Prohibited

In Arizona, a prisoner had copies of legal decisions sent to him while working to appeal his criminal conviction.¹⁷² However, the cases were prohibited by the mailroom as contraband because “he was not a party in the cases and they involved prisoners other than him, and the decisions detailed facts about other prisoners’ crimes.”¹⁷³ The same prisoner’s mother sent him copies, through an approved outside vendor, of medical books, including *Gray’s Anatomy*.¹⁷⁴ He wanted these books because they related to anatomical and medical issues germane to his appeal.¹⁷⁵ The prison prohibited these books for two reasons.¹⁷⁶ First, if the prisoner “became more knowledgeable about his medical conditions, he might request more health care.”¹⁷⁷ Second, some anatomical diagrams in the books were deemed “sexually explicit.”¹⁷⁸ The prisoner proposed removing the “sexually explicit” pages so he

¹⁶⁸ See *id.* at 5.

¹⁶⁹ Charlene Aaron, *ACLU, Religious Groups Question Jail Censorship*, CBN NEWS (July 16, 2009), <http://www.cbn.com/cbnnews/us/2009/July/ACLU-Religious-Groups-Question-Jail-Censorship> (video at link for Pat Robertson’s comments beginning at 3:20).

¹⁷⁰ See, e.g., *Jail Removes Bible Verses from Letters to Inmate; ACLU on Case*, USA TODAY (July 16, 2009, 1:25 PM), http://usatoday30.usatoday.com/news/religion/2009-07-16-aclu-bible-prison_N.htm; *Rappahannock Regional Jail Lets God Back In*, NBC WASHINGTON (Aug. 10, 2009, 5:36 PM), <http://www.nbcwashington.com/news/local/Rappahannock-Regional-Jail-Lets-God-Back-In-52907247.html>.

¹⁷¹ Press Release, Am. Civil Liberties Union, *Virginia Jail Ends Censorship of Religious Material After ACLU Letter* (Aug. 10, 2009), https://www.aclu.org/prisoners-rights_religion-belief/virginia-jail-ends-censorship-religious-material-after-aclu-letter.

¹⁷² E-mail from Corene Kendrick, Staff Att’y at Prison Law Office, to David Shapiro (Aug. 25, 2014, 14:45 EST) (on file with author).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

could receive the remainder of the publications.¹⁷⁹ The prison refused.¹⁸⁰

The prisoner attempted to have his mother photocopy and send him the five most relevant pages of *Gray's Anatomy*.¹⁸¹ The prison rejected this solution as well, “in the interest of upholding federal law.”¹⁸² The prison was concerned that the mother’s copying of the pages “might be a violation of copyright law.”¹⁸³

C. *Lunar Maps Deemed to Create Escape Risk*

It is common for prisoners to prohibit maps because they may prove useful to prisoners who manage to escape from the walls of their institution. But a New York prison took this concern to an extreme—it “deemed all maps to present risks of escape, and pursuant to this edict maps of the Moon and other planets were removed from the prison library.”¹⁸⁴

D. *Crime Novels and Malcom X Biography Forbidden*

A jail in Washington, D.C. bans *The Autobiography of Malcom X* on the grounds that it promotes racial antagonism.¹⁸⁵ The same jail prohibits detective novels by George Pelecanos because they deal with crime.¹⁸⁶

E. *President's Books Rejected as a National Security Threat*

The Federal Bureau of Prisons refused two requests by a prisoner, who was convicted of being a member of Al Qaeda and planning to assassinate George W. Bush, to receive two of President Obama’s books, *Dreams From My Father* and *The Audacity of Hope*.¹⁸⁷ The Bureau’s rejections stated that the contents of the books were “poten-

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Brief of the Correctional Association of New York as Amicus Curiae Supporting Respondent at 13 n.14, *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (No. 87-1344), 1988 WL 1025666, at *14 n.14.

¹⁸⁵ E-mail from Deborah Golden, Project Dir., D.C. Prisoners’ Project, to David Shapiro (Aug. 25, 2014, 15:15 EST) (on file with author).

¹⁸⁶ *Id.*

¹⁸⁷ See *Obama Books OK'd for Inmates*, L.A. TIMES (July 11, 2009), <http://articles.latimes.com/2009/jul/11/nation/na-briefs11.S2>.

tially detrimental to national security.”¹⁸⁸ The Bureau later reversed course.¹⁸⁹

F. *Cat Picture Banned*

In New York, a prisoner was forbidden to receive “a glossy, large-format publication” about political prisoners.¹⁹⁰ An attorney pressed the prison, unsuccessfully, to change course:

[T]he prisoner appealed and I wrote a letter in support, pointing out that what the publication actually advocated was . . . communicating with public officials and elected representatives to advocate executive clemency or parole for the individuals involved. On appeal, the central office media review committee struck down all the justifications for censorship save one—the presence of a photo, no larger than two inches square, of the famous Lowndes County Black Panther Party poster depicting a large black feline stalking toward the viewer. This, they said, was a gang symbol. I wrote further to point out (a) the Black Panthers were not a gang, (b) they have been defunct for some decades, and (c) the New Black Panther Party has nothing to do with it and indeed has been denounced by many of its survivors. This was all to no avail.¹⁹¹

G. *Journals Censored for Summaries of Judicial Decisions*

The federal Supermax prison in Florence, Colorado prohibits any material sent by mail to a prisoner in the facility that references another prisoner in the facility.¹⁹² This rule has been applied to ban entire issues of the legal information journal *Prison Legal News* that contain summaries of judicial decisions involving other prisoners.¹⁹³ For example, the entire July 2013 issue of *Prison Legal News* was banned due to an article entitled *Tenth Circuit: No Section 2241 Jurisdiction for BOP Supermax Challenge; Claims Must be Brought as Bivens Action*.¹⁹⁴

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ E-mail from John Boston, Project Dir., Prisoners’ Rights Project, Legal Aid Society, to David Shapiro (Aug. 25, 2014, 13:15 EST) (on file with author).

¹⁹¹ *Id.*

¹⁹² See Complaint at 5–6, *Prison Legal News v. Fed. Bureau of Prisons*, No. 15-cv-2184 (D. Colo. filed Oct. 1, 2015). The author of this Article was counsel for *Prison Legal News* in this litigation.

¹⁹³ See *id.* at 6–8.

¹⁹⁴ See *id.* at 6, 8; *Tenth Circuit: No Section 2241 Jurisdiction for BOP Supermax Challenge*;

H. Complete Newspaper and Magazine Ban

Despite numerous cases invalidating total bans on prisoners' receipt of newspapers and magazines, some jails continue to impose such bans anyway.¹⁹⁵ The jail in Reno County, Kansas banned all newspapers until the Tenth Circuit invalidated the rule in 1999.¹⁹⁶ The proffered reason for the restriction—paper can be used to start fires—was unpersuasive to the court because prisoners were allowed Bibles and other paperback books that could be used for the same purpose.¹⁹⁷ The next year, the Fifth Circuit rejected a jail's attempt to use similar rationales to justify a ban on all magazines sent by mail.¹⁹⁸ From 2008 to 2010, the Berkeley County Jail in South Carolina refused to deliver books and magazines, writing “no magazines” and “books not allowed” on the returned items.¹⁹⁹

In some jails, the rules are so unclear that de facto publication bans result. Indeed, as one district court wrote in 2013 about a large jail in Arizona:

Despite the absence of a formal policy governing magazines and newspapers, the practice in the mailroom was to ban them. Detention Aides McBirnie, Hensley-Salisberry, and

Claims Must Be Brought as Bivens Action, PRISON LEGAL NEWS (July 15, 2013), <https://www.prisonlegalnews.org/news/2013/jul/15/tenth-circuit-no-section-2241-jurisdiction-for-bop-supermax-challenge-claims-must-be-brought-as-bivens-action/>.

¹⁹⁵ See, e.g., *Johnson v. Forrest Cty. Sheriff's Dep't*, No. 98-60556, 2000 WL 290118, at *1 (5th Cir. Feb. 15, 2000) (per curiam) (“A blanket ban on newspapers and magazines on the basis that they constitute a fire hazard or pose a threat to plumbing violates the First Amendment.”); *Thomas v. Leslie*, Nos. 97-3346, 97-3361, 1999 WL 281416, at *7 (10th Cir. Apr. 21, 1999) (finding that an “absolute ban on newspapers” violates the First Amendment); *Crofton v. Roe*, 170 F.3d 957, 960–61 (9th Cir. 1999) (striking down prison ban on gift publications); *Sizemore v. Williford*, 829 F.2d 608, 610 (7th Cir. 1987) (noting that prisoners have a “First Amendment right to receive and to read newspapers and periodicals”); *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986) (holding that jail's prohibition on newspapers violates First Amendment); *Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) (finding a “policy that forbade inmates to receive or possess newspapers and magazines” violated First Amendment); *Wilkinson v. Skinner*, 462 F.2d 670, 673 n.5 (2d Cir. 1972) (noting that “refusal to deliver a newspaper would ordinarily be interference with appellant's First Amendment rights”); *Parnell v. Waldrep*, 511 F. Supp. 764, 768 (W.D.N.C. 1981) (“The prohibition of virtually all reading materials deprives the inmates of their First Amendment right to receive information and ideas.”); *Hutchings v. Corum*, 501 F. Supp. 1276, 1299 (W.D. Mo. 1980) (concluding that “defendants absolute denial of access to newspapers violates the inmates' First Amendment guarantees”); *U.S. ex rel. Manicone v. Corso*, 365 F. Supp. 576, 577 (E.D.N.Y. 1973) (ordering jail to “permit petitioner reasonable access to current newspapers”); *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971) (striking down jail's total prohibition on receiving newspapers and magazines by mail).

¹⁹⁶ See *Thomas*, 1999 WL 281416, at *5, *7–8.

¹⁹⁷ See *id.* at *5, *7.

¹⁹⁸ See *Johnson*, 2000 WL 290118, at *1.

¹⁹⁹ See *infra* Part IV.

Romero all believed newspapers and magazines were banned. Likewise, Sergeant Delgado and Lieutenant Rushing believed that newspapers and magazines were contraband and should be immediately rejected.²⁰⁰

In 2014, yet another federal court, this time in Georgia, struck down a policy prohibiting prisoners from receiving publications by mail.²⁰¹ Meanwhile, in Allen County, Kansas, a detainee inquired about the jail's publication policies, and an official responded: "The jail does *not* allow newspapers or magazines no exceptions!!!!!"²⁰²

I. Mail Rejected for Incoherent Reasons

A mail log obtained from the Berkeley County Detention Center in South Carolina revealed that the facility rejected mail sent to detainees for various unnecessary and contradictory reasons.²⁰³ On July 22, 2010, a staff member refused to deliver mail, writing "photo too small."²⁰⁴ Eight days later, a staff member wrote the opposite reason, "photo 2 big."²⁰⁵ Other reasons for rejection of mail included: "'photo of a dog,' 'business card,' 'pamphlets not allowed,' 'dictionary,' 'bookmark,' and 'sonogram' (presumably sent by a pregnant loved one)."²⁰⁶ Between 2008 and 2011, the jail rejected mail at least sixteen times for containing jokes, at least nine times for containing song lyrics, and more than three hundred times for containing tri-fold cards.²⁰⁷

J. Publication Censored for Containing Certain Pages Then Censored for Not Containing the Same Pages

The Movement is a publication that contains "legal news, political analysis, human rights reports, interviews with and articles by community activists and professionals, academic essays, [and] letters and arti-

²⁰⁰ *Prison Legal News v. Babeu*, 933 F. Supp. 2d 1188, 1197 (D. Ariz. 2013), *reconsideration denied*, No. CV 11-01761-PHX-GMS, 2013 WL 1832080 (D. Ariz. May 1, 2013), *aff'd mem.*, 552 F. App'x 747 (9th Cir. 2014).

²⁰¹ *Prison Legal News v. Chapman*, 44 F. Supp. 3d 1289, 1311 (M.D. Ga. 2014).

²⁰² Letter from Doug Bonney, Chief Counsel & Legal Dir., Am. Civil Liberties Union Found. of Kan., to Alan D. Weber, Allen Cty. Counselor (Apr. 3, 2014), <https://aclukansas.org/wp-content/uploads/2014/04/2014.04.03-Allen-County-newspaper-magazine-ban-demand.pdf>.

²⁰³ See Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 25–26, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed May 4, 2011).

²⁰⁴ *Id.* at 25.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 25–26.

cles by prisoners and their families”²⁰⁸ One issue of the publication was censored by a Pennsylvania prison on the ground that five particular pages *inter alia*, advocated violence or were racially inflammatory.²⁰⁹ The publisher then re-sent the issue with the five offending pages removed.²¹⁰ The second mailing was also rejected—this time, the rationale was that a sender is forbidden to alter a publication.²¹¹

K. *Postcard-Only Policies*

In recent years, many jails have imposed “postcard only” policies, under which prisoners may send and receive only postcards, rather than letters contained in envelopes.²¹² In the view of some jail officials, such policies save staff time by removing the need to open envelopes and search for contraband.²¹³ In 2014, an ACLU attorney mailed letters in envelopes to twenty-five detainees in the Livingston County Jail in Michigan, seeking to communicate with prisoners in building a legal challenge to the jail’s postcard-only policy.²¹⁴ The jail, in turn, confiscated the letters under the postcard-only policy, even though they were clearly marked “Legal Mail.”²¹⁵ The district court granted a preliminary injunction striking down the jail’s postcard-only policy as applied to legal mail.²¹⁶ Meanwhile, in California, a jail applied its postcard-only policy to prevent detainees from receiving copies of legal cases sent by mail.²¹⁷

²⁰⁸ Complaint at 16, *Holbrook v. Jellen*, No. 3:14-cv-00028 (M.D. Pa. filed Oct. 17, 2014). The author is counsel for the plaintiffs in this litigation.

²⁰⁹ *Id.* at 17, 19.

²¹⁰ *Id.* at 20.

²¹¹ *Id.* at 21. The author is counsel for the plaintiffs in the case challenging these restrictions. *Holbrook v. Jellen*, No. 3:14-cv-0028, 2015 WL 3540774 (M.D. Pa. June 3, 2015).

²¹² See *Mail Policy*, GWINNETT CTY. SHERIFF’S OFF., <http://www.gwinnettcountysheriff.com/index.php/mail-policy/> (last visited June 23, 2016); Bill Oram, *Jails to Limit Inmate Mail to Postcards Only*, OREGONIAN (Dec. 29, 2009, 4:57 PM), http://www.oregonlive.com/washington-county/index.ssf/2009/12/jails_to_limit_inmate_mail_to.html; Jessica Vander Velde, *Gripes Over Hillsborough Jail’s Postcard-Only Policy Subside*, TAMPA BAY TIMES (Jan. 12, 2014, 7:37 PM), <http://www.tampabay.com/news/publicsafety/gripes-over-hillsborough-jails-postcard-only-policy-subside/2160713>.

²¹³ See Oram, *supra* note 212; Vander Velde, *supra* note 212.

²¹⁴ See *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 23 F. Supp. 3d 834, 837 (E.D. Mich. 2014).

²¹⁵ *Id.*

²¹⁶ *Id.* at 843.

²¹⁷ *Prison Legal News v. Cty. of Ventura*, No. CV 14-773-GHK (Ex), 2014 WL 2519402, at *1 (C.D. Cal. May 29, 2014).

L. *Federal Prisons Censor Maimonides*

The Federal Bureau of Prisons sought to remove any books that could “incite violence” from chapel libraries (which are libraries of religious works maintained at federal prisons).²¹⁸ Soon, however, “the list grew to the tens of thousands” and became unmanageable.²¹⁹ The Bureau then changed course: rather than listing unacceptable works, officials generated a list of acceptable works—and purged what remained.²²⁰ In a federal prison in New York, the project “resulted in the removal of three-quarters of the Jewish books . . . ranging from the Zohar to the works of 12th-century Jewish scholar Moses Maimonides to Rabbi Harold Kushner’s *When Bad Things Happen to Good People*.”²²¹

News of the Standardized Chapel Library Project resulted in a massive outcry from religious leaders and conservative Republican legislators, who declared in a letter to the head of the Bureau: “We must ensure that in America the federal government is not the undue arbiter of what may or may not be read by our citizens.”²²² Ultimately, Congress banned the Standardized Chapel Library Project through federal legislation, which provided that “[n]ot later than 30 days after the date of enactment of this Act, the Director of the Bureau of Prisons shall discontinue the Standardized Chapel Library project”²²³

M. *Solitary Confinement for Facebook Posts*

In South Carolina, nearly 400 prisoners have been disciplined over the past four years for violating a rule against posting anything on social media sites.²²⁴ Forty of them have been sentenced to two or more years in solitary confinement.²²⁵ One prisoner was sentenced to over thirty-seven years of disciplinary detention in 2013 for thirty-

²¹⁸ See Neela Banerjee, *Prisons to Restore Purged Religious Books*, N.Y. TIMES (Sept. 27, 2007), http://www.nytimes.com/2007/09/27/washington/27prison.html?_r=0.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See Michael Gerson, Opinion, *Prison Library Purge*, WASH. POST (Sept. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/13/AR2007091301414.html>.

²²² See Laurie Goodstein, *Critics Right and Left Protest Book Removals*, N.Y. TIMES (Sept. 21, 2007), <http://www.nytimes.com/2007/09/21/us/21prison.html?ref=washington>.

²²³ Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-199, § 214(a), 122 Stat. 657 (2008).

²²⁴ See Dave Maass, *Hundreds of South Carolina Inmates Sent to Solitary Confinement Over Facebook*, ELECTRONIC FRONTIER FOUND. (Feb. 12, 2015), <https://www EFF.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook>.

²²⁵ *Id.*

eight Facebook posts.²²⁶ Another prisoner lost 875 days of goodtime for posting on Facebook, extending his period of incarceration by more than two years.²²⁷

N. No to John Updike, Yes to Porn

The following example, and those that follow, are instances in which courts struck down speech restrictions under the *Turner* standard. Again, not all courts that have applied *Turner* treat it as a rubber stamp.²²⁸ These examples, however, illustrate restrictions that prison and jail authorities *thought* they could impose under the legal standard, even if incorrectly. While these restrictions ultimately did not survive scrutiny, the fact that officials tried to implement them at all provides further support for the view that *Turner's* ability to deter constitutional violations at the outset is limited.

In *Cline v. Fox*,²²⁹ the district court considered a purge of a prison library, which resulted in the removal of 259 books, which, in the view of the prison, constituted “obscene material.”²³⁰ Prison staff were instructed to read every book in the library and “to eliminate any book that contained language that might arouse the reader.”²³¹ Books purged from the shelves included “William Styron’s *Sophie’s Choice*, Gore Vidal’s *Myra Breckinridge*, and a number of works by John Updike.”²³² The court noted that “[t]he prohibition also applies regardless of the context of the depiction or the content of the work as a whole. Therefore, literary classics like George Orwell’s *1984* and religious texts like the Bible technically violate this regulation.”²³³ Meanwhile, prisoners were allowed to receive commercial pornography, including such magazines as *Playboy* and *Maxim*.²³⁴ Based on this inconsistency, the court struck down the regulation under *Turner*.²³⁵

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See *supra* Part I, discussion of *Beard v. Banks*, 548 U.S. 521 (2006).

²²⁹ *Cline v. Fox*, 319 F. Supp. 2d 685 (N.D. W.Va. 2004).

²³⁰ See *id.* at 688, 696.

²³¹ *Id.* at 689.

²³² *Id.*

²³³ *Id.* at 692 (footnote omitted).

²³⁴ *Id.* at 693.

²³⁵ *Id.* at 696.

O. *Internet Printouts Banned*

The California Department of Corrections implemented a state-wide policy that forbid prisoners from receiving “mail containing material that has been downloaded from the internet” but permitted anything typed or copied into a word processing document.²³⁶ In *Clement v. California Department of Corrections*,²³⁷ prison officials put forth two justifications for the regulation.²³⁸ First, the regulation reduced the overall volume of mail for the prison to process.²³⁹ Internet mail, however, was a drop in the bucket—the prison received no more than 500 pieces of Internet mail each month, compared to 300,000 letters.²⁴⁰ Second, the rule against Internet mail was said to reduce opportunities to hide coded messages in documents, but there was no showing that embedding secret codes in Internet printouts was any easier or more prevalent than hiding codes in word-processed documents.²⁴¹ The court invalidated the rule.²⁴²

P. *Internet Printouts Banned (Again)*

Various “prison pen pal” sites create Internet pages for prisoners.²⁴³ Because a prisoner generally does not have direct access to the Internet while incarcerated, these sites create an online profile for a prisoner and forward the prisoner hard copies of any email messages sent to the prisoner’s profile.²⁴⁴

A Wisconsin prison implemented a rule prohibiting prisoners from receiving copies of emails sent to such “prison pen pal” sites.²⁴⁵ The prison claimed that the rule helped conserve resources by reducing the volume of mail and prevented prisoners from manipulating people through online profiles.²⁴⁶ The appellate court reversed the district court’s grant of summary judgment, finding that a genuine issue of material fact existed as to the validity of the prison’s rationales for the policy. The first rationale was a potentially arbitrary way of

²³⁶ *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1150–51 (9th Cir. 2004).

²³⁷ *Clement*, 364 F.3d 1148 (9th Cir. 2004).

²³⁸ *Id.* at 1152.

²³⁹ *Id.*

²⁴⁰ *Id.* at 1151.

²⁴¹ *Id.* at 1152.

²⁴² *Id.*

²⁴³ *E.g.*, WRITEAPRISONER.COM, <http://www.writeaprisoner.com/> (last visited June 23, 2016).

²⁴⁴ *See, e.g.*, *FAQs: Writing an Inmate*, WRITEAPRISONER.COM, http://www.writeaprisoner.com/faq.aspx#Can_I_e-mail_a_prisoner_you_have_listed (last visited June 23, 2016).

²⁴⁵ *See Jackson v. Pollard*, 208 F. App’x 457, 459 (7th Cir. 2006).

²⁴⁶ *See id.*

reducing the overall volume of mail that would need to be tried on remand.²⁴⁷ As for protecting the public, the court noted that the regulation was underinclusive because prisoners were permitted other means of contacting the public, including by maintaining websites and exchanging correspondence.²⁴⁸

Q. *Ulysses Banned*

In *Couch v. Jabe*,²⁴⁹ the district court struck down a policy on sexually explicit content so broad and amorphous that officials refused to let a prisoner order *Lady Chatterley's Lover* and James Joyce's *Ulysses*.²⁵⁰ The court was particularly doubtful that Joyce's dense and esoteric style would have any effect on prison security: "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."²⁵¹

IV. THE REALITIES OF LITIGATING UNDER *TURNER*

The regulations discussed in the previous section implicitly raise the question: how hard is it to eliminate such limitations on prisoner speech through litigation? After all, the harm of such regulations could be minimal if they were easy to remove. Much of the time, however, upending even a poorly justified regulation requires resources far beyond what a prisoner can muster. The result of this reality is that many prison regulations, including some of the examples cited in the previous section, remain on the books even though a very strong argument can be made that they violate the *Turner* standard.²⁵²

The practical realities that make litigation under the *Turner* standard difficult are illustrated below with a case study drawn from my legal practice. In this case, altering an indefensible policy required full-blown litigation and major expenditures: full discovery, expert witnesses, the intervention of the United States Department of Justice, and hundreds of thousands of dollars of attorney time. The litigation, *Prison Legal News v. DeWitt*,²⁵³ involved restrictions imposed on

²⁴⁷ See *id.* at 461.

²⁴⁸ *Id.* at 460–61.

²⁴⁹ *Couch v. Jabe*, 737 F. Supp. 2d 561 (W.D. Va. 2010).

²⁵⁰ See *id.* at 562.

²⁵¹ *Id.* at 569.

²⁵² Compare *Turner v. Safley*, 482 U.S. 78, 89 (1987), with *supra* Parts I–III.

²⁵³ *Prison Legal News v. DeWitt*, No. 2:10-cv-02594 (D.S.C. filed Oct. 6, 2010).

publications sent by mail to detainees at the Berkeley County Detention Center in South Carolina.²⁵⁴ The jail's shifting claims regarding what policies were in place, and its shifting rationales for those policies, made litigation protracted and expensive.²⁵⁵ Although the litigation ultimately succeeded, the resources necessary to succeed were quite high—and any number of equally problematic restrictions likely remain in force in other localities due to prisoners' inability to challenge them.²⁵⁶

The plaintiffs in the case—Prison Legal News and the Human Rights Defense Center—comprised a nonprofit organization (under section 501(c)(3) of the Internal Revenue Code) and published an award-winning fifty-six page monthly journal titled *Prison Legal News*.²⁵⁷ The journal provides information about legal issues such as access to courts, disciplinary hearings, prison conditions, excessive force, and religious freedom.²⁵⁸ *Prison Legal News*, which has been continuously published since 1990 had, at the time of the litigation, over seven thousand subscribers in the United States and abroad, including prisoners, attorneys, journalists, public libraries, and judges.²⁵⁹ The plaintiffs also distributed approximately forty-five legal and self-help books on topics ranging from legal research to writing a business letter.²⁶⁰

After numerous instances in which the Detention Center returned to sender and refused to deliver plaintiffs' publications, *Prison Legal News* editor Paul Wright inquired about the jail's mail policies.²⁶¹ On July 12, 2010, the Detention Center responded in writing: "Our inmates are only allowed to receive soft back bibles in the mail directly from the publisher. They are not allowed to have magazines, newspapers, or any other type of books."²⁶²

Just two days before plaintiffs filed their complaint, the jail's commanding officer and second in command confirmed the "Bible only" policy in a brief submitted through their counsel in another case: "De-

²⁵⁴ See generally Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 5, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed Oct. 6, 2010) [hereinafter Support Mem.]. Because the author of this Article wrote this memorandum, some language from the memorandum reproduced in this Article is left unquoted.

²⁵⁵ See generally *id.* at 2–11.

²⁵⁶ See *infra* Part V.

²⁵⁷ Support Mem., *supra* note 254, at 2.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

tention Center policy does not deprive the Plaintiff of *all* books, magazines, and reading material. Rather, it merely limits the amount and types of reading material he may possess. The Plaintiff can possess his primary religious book and legal materials.”²⁶³ On the day plaintiffs filed *Prison Legal News v. DeWitt*, the Detention Center “confirmed” for an Associated Press reporter that “the only reading material its . . . inmates are allowed to have are paperback Bibles.”²⁶⁴

Shortly after confirming the “Bible only” policy for the Associated Press, the jail presented a new rationale for the censorship.²⁶⁵ The defendants’ counsel sent an email to another reporter, claiming that the email in which the Detention Center admitted the “Bible only” policy, “was simply mistaken.”²⁶⁶ The defendants then claimed that the Detention Center never had a “Bible only” policy, merely a rule against publications that contain staples.²⁶⁷ The defendants then pursued the “no staples” theory in the case, asserting that “Prison Legal News is not an allowed publication due to its staples.”²⁶⁸

Staples were not the real reason that the jail banned plaintiffs’ publications—or at least not the reason most of the time.²⁶⁹ The staples rationale turned out mainly to be a litigation strategy. Indeed, the jail maintained a mail log that listed each rejected piece of mail, including the reason for rejection.²⁷⁰ Detention Center staff repeatedly wrote reasons for rejection of the plaintiffs’ publications that included “magazine,” “book,” “newspaper,” and “no newspapers.”²⁷¹ The mail log never referred to staples as a reason for rejecting *Prison Legal News* until March 16, 2011—more than five months after the plaintiffs filed the case.²⁷² The Detention Center also rejected numerous books sent by the plaintiffs, even though none of the books contained staples.²⁷³ Even after *Prison Legal News* brought suit, Detention Center staff continued to reject other publications for reasons that included: “Book not allowed,” “GED Book,” “newspaper,”

²⁶³ *Id.* at 3 (quoting Response in Opposition to Plaintiffs’ Motion for Summary Judgment, *Williams v. Habersham*, No. 9:10-cv-01571 (D.S.C. Jun 18, 2010)).

²⁶⁴ *Id.* (alteration in original).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 3, 3 n.6.

²⁶⁹ *Id.* at 4.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

“only legal or religious books,” and “Not religious.”²⁷⁴ The defendants claimed in their answer to the complaint that they prohibited *Prison Legal News* due to staples, but a staff person later admitted that *all nonreligious publications* were banned until at least January 2011.²⁷⁵

Throughout 2008, 2009, and 2010, the Detention Center repeatedly returned copies of books and magazines to Plaintiffs with notations such as “magazines not allowed” and “book not allowed” written on the returned items, and the few notations that mentioned staples at all also referred to a total ban on all newspapers.²⁷⁶ When detainees filed request forms regarding access to newspapers, Detention Center staff responded by citing a total ban on newspapers, not a rule against staples.²⁷⁷ These responses included: “[y]ou can not get any type of Newspaper here in jail. That’s why you have not got it,” “[y]ou can not get Newspapers,” and “I have told you many times you can not get Newspaper or magazine [sic].”²⁷⁸

Not only was the “no staples” rationale largely invented *post hoc*, but the jail’s reasons for the policy shifted throughout the litigation.²⁷⁹ In October 2010, when the defendants announced the “no staples” rule in the media, they cited three rationales: (1) detainees place staples in locks, (2) detainees interfere with plumbing by flushing staples down toilets, and (3) detainees use staples to make tattoos.²⁸⁰ Later, the defendants put forth a new set of rationales—staples are used to tamper with sinks, toilets, and sprinklers; to short circuit locks; to start fires; and to charge cell phones.²⁸¹

Meanwhile, in another case also involving detainee access to *Prison Legal News*, the jail’s commanding officer put forth a completely different rationale for banning staples.²⁸² In December 2010, during the same time period that the defendants were asserting various justifications in *Prison Legal News v. DeWitt*, the head of the jail filed an affidavit in the other case, stating: “Staples have been known to be used as weapons” The accompanying summary judgment brief stated:

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 4–5.

²⁷⁸ *Id.* at 5 (alteration in original).

²⁷⁹ *See id.* (alteration in original).

²⁸⁰ *Id.* at 5–6.

²⁸¹ *Id.* at 6.

²⁸² *Id.*

[T]he Inmate Rules and the Inmate Hand Guide . . . clearly state that homemade weapons or other articles that could be used as weapons are considered contraband. Staples can be used as weapons and are considered contraband.

Prison Legal News is a magazine that is bound with staples, and thus, inmates in A-Pod are not allowed to possess a copy of it.²⁸³

Not only did the jail fail to assert the “weapons” rationale in *Prison Legal News v. DeWitt*, but none of the rationales identified in that case, such as making tattoos or jamming locks, were asserted in the summary judgment brief in the other case.²⁸⁴ The jail, in short, simultaneously advanced different theories in different cases.²⁸⁵

An even greater flaw in the defendants’ argument was that they admitted that through January 2011, the jail’s own commissary sold detainees legal pads with staples.²⁸⁶ Although the defendants claimed not to have known about the staples contained beneath a white strip in the pads, their failure to investigate earlier provided some evidence that their concern with staples in publications was pretextual.²⁸⁷

Partway through the litigation, the jail put forth another rationale for banning *Prison Legal News*: “[Y]our publication now contains sexual content. That is going to be an issue in addition to the staples.”²⁸⁸ At the time of the litigation, *Prison Legal News* sometimes contained advertisements for sexually explicit content. The majority of the advertisements contained no pictures, and in the rare cases when pictures were included, “these [were] barely visible; each [was] less than one square inch; there [was] no nudity; and any clothed depictions of breasts, buttocks, or the groin area [were] rendered invisible by a white star.”²⁸⁹

The sexual content rationale was devised *post hoc*.²⁹⁰ The Detention Center had *never* returned to the plaintiffs a publication with a notation regarding sexual or inappropriate content, only notations such as “[n]o magazines allowed” and “[b]ooks not allowed.”²⁹¹ Since

283 *Id.* at 6–7 (quoting Memorandum in Support of Defendants’ Motion for Summary Judgment, *Hazel v. McElvogue*, No. 2:09-cv-03276-RMG-RSC (D.S.C. 2010)).

284 *Id.* at 7.

285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.* at 8.

289 *Id.* at 11.

290 *Id.* at 8.

291 *Id.* at 8–9 (alteration in original).

2008, the mail log contained over 500 references to inappropriate content, but not a single one involved publications sent by plaintiffs.²⁹² A Detention Center staff person with primary responsibility for processing mail could recall no instance prior to 2011 in which she rejected *Prison Legal News* due to sexual content.²⁹³

The jail's persistent defense of its publication policies, and its shifting rationales for its rules, drove up the time and expense of litigation. Each time the defendants put forth a new rationale, it was necessary for the plaintiffs to serve additional written discovery requests, each of which ultimately led to motions to compel.²⁹⁴

Indeed, the seemingly straightforward case proceeded without resolution for so long that the United States Department of Justice intervened in support of the plaintiffs under the Civil Rights of Institutionalized Persons Act,²⁹⁵ which allows the federal government to bring suit in its own name in cases involving prison conditions.²⁹⁶ Now

²⁹² *Id.* at 9.

²⁹³ *Id.* At the time of the litigation, an array of sweeping and inconsistent Detention Center rules applied to “sexual content.” Both the correspondence policy (HFDC 706) and the Inmate Hand Guide stated that detainees could not receive “[a]ny photo that is considered inappropriate (i.e., pornographic, lack of clothing, drugs, weapons, alcohol, cigarettes, etc.)” Policies left the meaning of “inappropriate” to the discretion of staff “consider[ing]” a given item. As a Detention Center staff member testified, to determine if a photograph is “considered inappropriate” under the policy “normally we just—if we see that it is inappropriate, then we send it back.” The term “pornographic” in the policy “would be anything that’s related to anything sexual,” and the word “etc.” meant that the policy does not list all items that could be “considered inappropriate.” HFDC 706 and the Inmate Hand Guide separately ban[ned] “[m]aterial that would encourage deviant sexual behavior” without defining what constitutes “deviant sexual behavior” or what expressive materials “encourage” such behavior. A Detention Center staff person agreed that “the term ‘encourage deviant sexual behavior’ included *any material* that refers to sex.” Under these rules, a publication would be banned in its entirety if it contained any depiction of a man or woman without a shirt or without pants or a skirt—even if the person were wearing a shirt and underwear. *Id.* at 9–10.

When shown advertisements for underwear, alcohol, and tropical vacations that appeared in the *Washington Post* and *USA Today*, a Detention Center staff member who processed mail stated that she would refuse, under HFDC 706, to deliver any issue of the newspapers that contained the advertisements. She further stated that under these policies she would ban any publication that contained great works of art that depict nudity, including the *Venus de Milo* sculpture and Botticelli's *Birth of Venus*. *Id.*

²⁹⁴ *E.g.*, Plaintiffs' Motion to Compel Discovery at 1–3, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed Oct. 6, 2010); Plaintiffs' Second Motion to Compel Discovery at 1–2, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed Oct. 6, 2010); Plaintiffs' Third Motion to Compel Discovery at 1–2, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed Oct. 6, 2010).

²⁹⁵ Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997–1997j (2012).

²⁹⁶ *See id.* § 1997a(a) (2012) (“Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons

facing both the ACLU and the federal government as litigation opponents, the jail continued to defend its restrictions. Department of Justice attorneys toured the jail,²⁹⁷ hired expert witnesses (who also toured the jail and wrote expert reports),²⁹⁸ participated in depositions,²⁹⁹ moved to compel discovery,³⁰⁰ filed extensive briefs, and argued in court hearings.³⁰¹

Ultimately, the plaintiffs succeeded: the case resulted in a consent decree that fundamentally restructured the jail's publications policy³⁰² and a substantial damages award—\$100,000.00.³⁰³ But the prolonged and intensive litigation resulted in an award of attorneys' fees and expenses—\$499,900.00—that greatly exceeded the economic value of the case.³⁰⁴ All told, eradicating the policy required:

- Tours of the jail and expert reports by five expert witnesses (one for plaintiffs, two for defendants, and two for the United States Department of Justice);³⁰⁵
- Eleven depositions;³⁰⁶

residing in or confined to an institution . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm . . . the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary . . .”).

²⁹⁷ See, e.g., United States' Motion to Compel Discovery at 7, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed Oct. 6, 2010).

²⁹⁸ See, e.g., United States' Supplemental Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, Expert Report of James E. Aiken at Ex. C 3, 6, *Prison Legal News v. DeWitt*, No. 2:10-02594-MBS (D.S.C. filed Oct. 6, 2010); *id.*, Expert Report of John L. Clark at Ex. N 3, 5.

²⁹⁹ See, e.g., Declaration of David Shapiro, Riley Dep. at Ex. B, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed Oct. 6, 2010); *id.* McElvogue Dep. at Ex. A.

³⁰⁰ See, e.g., United States' Motion to Compel Discovery at 1, *supra* note 297.

³⁰¹ See, e.g., Minute Entry, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-MBS (D.S.C. filed Oct. 6, 2010).

³⁰² See Consent Inj. at 3–6, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-SB-BM (D.S.C. filed Oct. 6, 2010).

³⁰³ Settlement Agreement at 1, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-SB-BM (D.S.C. filed Oct. 6, 2010).

³⁰⁴ *Id.*

³⁰⁵ See Plaintiffs' Supplemental Brief in Support of Preliminary Injunction, Expert Report of Toni V. Bair at Ex. S, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-SB-BM (D.S.C. filed Oct. 6, 2010); Memorandum in Support of Defendant's Motion for Summary Judgment on Plaintiffs' Claims, Expert Report of Donald L. Leach at Att. 1, *Prison Legal News v. DeWitt*, No. 2:10-02594-MBS (D.S.C. filed Oct. 6, 2010); *id.*, Expert Report of Gary DeLand at Att. 9; Aiken Report, *supra* note 306; Clark Report, *supra* note 306.

³⁰⁶ See Docket, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-SB-BM (Docket Entry Nos. 139, 160, 176, 178, 186, 188).

- Six motions to compel;³⁰⁷
- Seventeen substantive motions;³⁰⁸
- A grant of discovery sanctions against defendants' counsel;³⁰⁹
- At least six round trip flights (by the author and co-counsel) from Washington, D.C. to South Carolina, with hotel stays; one trip by the author to Salt Lake City, Utah for an expert deposition; and at least four trips by United States Department of Justice attorneys from Washington, D.C. to Charleston, South Carolina;
- Five court hearings;³¹⁰ and
- \$499,900.00 in attorneys' fees.³¹¹

As this example illustrates, even when a plaintiff (1) is challenging an indefensible First Amendment restriction and (2) has the counsel and resources necessary to fully and aggressively prosecute the case, the road is far from easy. In the vast majority of situations, however, prisoners lack the resources and ability to litigate cases at all. The following section discusses the barriers to litigation that prisoners face.

V. BROADER BARRIERS TO PRISON CONDITIONS LITIGATION

In prison litigation, success is certainly possible when counsel with substantial resources undertakes representation, as in the *Prison Legal News* case. The reality, however, is that prisoners have great difficulty both in obtaining counsel and in litigating cases on their own. This Part discusses the obstacles to successful litigation that prisoners face. Most of these barriers are external to *Turner*. These additional impediments combine with the *Turner* standard to impede litigation of First Amendment claims.

³⁰⁷ See Plaintiffs' Motions to Compel Discovery, *supra* note 294; United States' Motion to Compel Discovery, *supra* note 297; Plaintiffs' Renewed Motion to Compel Discovery, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-SB-BM (D.S.C. filed Oct. 6, 2010); Defendants' Motion to Compel Plaintiff to Answer Discovery, *Prison Legal News v. DeWitt*, No. 2:10-cv-02594-SB-BM (D.S.C. filed Oct. 6, 2010).

³⁰⁸ See Docket, *supra* note 306 (Docket Entry Nos. 23, 35, 47, 58, 85, 100, 101, 113, 114, 124, 125, 136, 143, 152, 176, 179, 189).

³⁰⁹ *Id.* at 25 (No. 145).

³¹⁰ *Id.* at 11, 17, 25, 28–29 (Nos. 43, 91, 145, 170, 171).

³¹¹ Settlement Agreement, *supra* note 303. This was solely the fee award ultimately agreed to by the parties—a substantial reduction from the value of the time that plaintiffs' counsel actually recorded. Moreover, it does not account for any of the time expended by defendants' counsel and United States Department of Justice attorneys.

Prison officials take on what I call “practical immunity”—effective insulation from suit that flows partly from formal immunity doctrines (such as absolute or qualified immunity) but primarily from other obstacles that insulate potential defendants from suit. Practical immunity likely emboldens some prison officials to maintain unconstitutional speech regulations. The effect is predictable: regulations, such as those discussed in Part III, remain on the books even though they would, in many cases, be invalidated if challenged by competent counsel.

A complete analysis of the multitude of barriers to litigation that a prisoner encounters, and that give rise to officials’ practical immunity, is beyond the scope of this Article.³¹² That being said, these impediments are important to the analysis here because *Turner* deference cannot be understood in isolation.

A. Access to Counsel

In absolute terms, the United States imprisons more people than any other country on earth, including Russia and China.³¹³ Only one

³¹² For more on this topic, see Schlanger, *Trends in Prisoner Litigation*, *supra* note 33. That article discusses the Prison Litigation Reform Act’s effects on prisoner claims. Specifically, the author argues that empirical data shows the PLRA has radically shrunk the coverage of injunctive prison litigation, *id.* at 155, filings are more difficult for both prisoners and attorneys, *see id.*, and rates of filings, after shrinking through the late 1990s, have plateaued since 2007, *id.* at 156. The author also argues that the PLRA has made cases more difficult to win. *Id.* at 162.

In short, in cases brought by prisoners, the government defendants are winning more cases pretrial, settling fewer matters, and going to trial less often. Those settlements that do occur are harder fought; they are finalized later in the litigation process. Plaintiffs are, correspondingly, winning and settling less often, and losing outright more often. Probably not all these changes were caused by the PLRA . . .

But given the PLRA’s very definite anti-plaintiff tilt, it seems nearly certain that the statute has caused at least some of the declining access to court remedies . . .

Id. at 163. In another article, Margo Schlanger and Giovanna Shay explain three of the PLRA’s hurdles: its ban on compensatory damages for nonphysical injuries, its exhaustion requirement which “encourages prison and jail authorities to come up with ever-higher procedural hurdles in order to foreclose subsequent litigation,” and its application to incarcerated juveniles who have difficulty following the law’s requirements. Margo Schlanger and Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141 (2008). Finally, in *Inmate Litigation*, Schlanger discusses the state of prison litigation both before and after the PLRA’s passage. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). She finds that “[i]nmates fare worse than all other federal court plaintiffs in all measures of success.” *Id.* at 1563. Schlanger explores PLRA’s effects on both filings and outcomes, arguing “the PLRA did indeed reduce the quantity of inmate lawsuits but that its interventions were far from neutral for constitutionally meritorious cases, which it simultaneously made more difficult both to bring and to win.” *Id.*

³¹³ DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRIS-

country—Seychelles, a nation of less than 92,000 people³¹⁴—has a higher per capita incarceration rate.³¹⁵ It is a surprising reality, given that other countries either have far more people (e.g., India), more authoritarian governments (e.g., North Korea), or both (China). “Over the past four decades, imprisonment in the United States has increased explosively, spurred by criminal laws that impose steep sentences and curtail . . . probation and parole.”³¹⁶ Over the last thirty years, the number of people incarcerated in the United States has grown by 500%.³¹⁷ Today, the United States incarcerates approximately 2.2 million people.³¹⁸

Relative to this large prison population, lawyers who devote a substantial portion of their time to prison condition cases are rare.³¹⁹ Unsurprisingly, prison condition cases are overwhelmingly and disproportionately litigated pro se.³²⁰ In prisoner civil rights cases litigated in federal court in 2012, the plaintiff represents herself 94.9% of the time (compared to 26.1% for the entire pool of federal cases).³²¹ The prisoner civil rights category of federal litigation has a higher pro se rate than any other type of case.³²² The next highest pro se rate (88.8%) is for a category that consists of habeas cases and other “quasi-criminal” cases.³²³ From there, it drops to 35.4% (for immigration cases).³²⁴

There are four primary avenues through which a prisoner may obtain an attorney: (1) retain an attorney with her own funds, (2) persuade a public interest attorney to take the case, (3) obtain court-appointed counsel, or (4) hire a private attorney, typically for a

ONS AND MASS INCARCERATION 5 (2011), https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

³¹⁴ SEYCHELLES NAT’L BUREAU OF STAT., SEYCHELLES IN FIGURES 8 (2015), <http://www.nbs.gov.sc/wp-content/uploads/2015/12/Seychelles-in-Figures-2015-edition1.pdf>.

³¹⁵ See Lisa Mahapatra, *Incarcerated In America: Why Are So Many People in US Prisons? [CHARTS]*, INT’L BUS. TIMES (Mar. 19, 2014, 3:36 PM), <http://www.ibtimes.com/incarcerated-america-why-are-so-many-people-us-prisons-charts-1562451>.

³¹⁶ SHAPIRO, *supra* note 313, at 5.

³¹⁷ *Incarceration*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited June 23, 2016).

³¹⁸ *Id.*; BUREAU OF JUSTICE STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, 2 (Jan. 21, 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>.

³¹⁹ See Schlanger, *Inmate Litigation*, *supra* note 312, at 1609–10 (showing that nearly all civil rights and prison conditions litigations are pro se); *infra* Section V.B.1.

³²⁰ Schlanger, *Trends in Prisoner Litigation*, *supra* note 33, at 166.

³²¹ *Id.*

³²² See *id.*

³²³ *Id.* at 164–66.

³²⁴ *Id.*

contingent fee. As the pro se statistics above suggest, and as most prisoners who have tried to retain counsel for a prison conditions suit can attest, these options are usually fruitless.

B. *Retained Counsel*

The reality is that very few prisoners have the money to hire their own attorneys.³²⁵ Many prisoners are also burdened with outstanding fines or with court-imposed restitution.³²⁶ There is, of course, no constitutional right to a lawyer in a civil case, which all prison conditions cases are.³²⁷

1. *Public Interest Lawyers*

Public interest lawyers who take prison conditions cases are rare for a number of reasons. First, changes to the law regarding federally funded Legal Services Corporations forced such organizations to jettison their prison conditions work in 1996.³²⁸ Second, in the world of privately funded legal nonprofits, prison conditions work is a specialty practiced by a small set of lawyers (a group that appears even smaller relative to the nation's 2.2 million incarcerated population).³²⁹ While there are no statistics available on the number of "prisoners' rights" lawyers, the American Civil Liberties Union's National Prison Project is the largest nonprofit office in the country that litigates prison condi-

³²⁵ See, e.g., AM. CIVIL LIBERTIES UNION, *IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS* 27 (Oct. 2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf; CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STAT., *DEFENSE COUNSEL IN CRIMINAL CASES* 1 (Nov. 2000), <http://www.bjs.gov/content/pub/pdf/dccc.pdf> ("At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties in 1996 and 66% of Federal defendants in 1998."); Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, at 14–15 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474 (noting that in 2004 and 2006, only 20% of criminal defendants charged with a felony in the 75 most populous counties hired a private attorney); Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 *LOY. J. PUB. INT. L.* 319, 328 (2014) (estimating 80% of inmates are indigent).

³²⁶ See AM. CIVIL LIBERTIES UNION, *supra* note 325, at 5–10.

³²⁷ See, e.g., *Farmer v. Haas*, 990 F.2d 319, 323 (7th Cir. 1993) ("There is no constitutional or for that matter statutory right to counsel in federal civil cases . . .").

³²⁸ Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 *FORDHAM URB. L.J.* 687, 693 (2009).

³²⁹ DANIELLE KAEBLE ET AL., BUREAU OF JUSTICE STAT., *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2014, 2 (Jan. 21, 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> (showing the breakdown of persons currently under the supervision of the U.S. correctional system).

tions cases exclusively. It has a full complement of five lawyers and three paralegals.³³⁰

2. *Court-Appointed Lawyers*

Court-appointed counsel is a form of relief that is often requested but rarely granted.³³¹ Courts do not pay lawyers who take on civil cases, and cannot force them to do so for free.³³²

3. *Contingent Fees*

For private attorneys who earn a living by winning cases and receiving both contingent fees and statutory fee awards in constitutional cases, the average prison conditions case is economically unattractive. In 2012, the average damages awarded for a prison conditions case successfully litigated to judgment was \$20,815, and the *total* damages recovered in prison conditions cases brought by prisoners was just above \$1,000,000 nationwide.³³³

4. *Reasons that Prison Conditions Litigation is Economically Unrewarding for Private Attorneys*

Several provisions of the Prison Litigation Reform Act (“PLRA”), enacted in 1996, limit the ability of both prisoners and their attorneys to obtain substantial damage and fee awards and thereby greatly reduce the economic viability of prison conditions litigation by private lawyers. First, the PLRA creates the following rule for court-awarded attorneys’ fees in any damages case “brought by a prisoner”: The court may award in fees no more than the *lesser* of (1) one and a half times the damages awarded to the plaintiff (“fees-damages cap”) and (2) the number of hours reasonably billed by the attorney, multiplied by an hourly rate capped at 150% of the rates established by the Criminal Justice Act (“hourly rate cap”).³³⁴

Both of these constraints are quite severe. As for the fees-damages cap, damages awards in cases brought by prisoners are notoriously low—perhaps because of some judges’ and jurors’ suspicion of

³³⁰ This assertion is based on the personal experience of the author, who worked at the ACLU National Prison Project from 2008 to 2012.

³³¹ Schlanger, *Inmate Litigation*, *supra* note 312, at 1612 (“In general, however, counsel appointments have been quite rare, which makes sense given that courts can neither compel counsel to serve nor compensate them for their service.”).

³³² *Id.*

³³³ Schlanger, *Trends in Prisoner Litigation*, *supra* note 33, at 167–68.

³³⁴ 42 U.S.C. § 1997e(d)(2), (d)(3) (2012); *see also* JOHN BOSTON, THE PRISON LITIGATION REFORM ACT 396 (2013).

prisoner-plaintiffs.³³⁵ For the attorney, one and a half times a limited damages award is a limited fee. To cite one example, in *Nelson v. Correctional Medial Services*,³³⁶ a child died during birth because the mother, a prisoner, was shackled by staff during labor.³³⁷ The district court denied summary judgment to two of the defendants,³³⁸ an Eighth Circuit panel reversed,³³⁹ but the en banc court reversed the panel and remanded the case for trial.³⁴⁰ After these extensive appellate proceedings, the case proceeded to a two-day trial,³⁴¹ at the conclusion of which the jury awarded a verdict of \$1.00 to the plaintiff.³⁴² The court, pursuant to the PLRA fees-damages cap, then awarded \$1.50 in attorneys' fees.³⁴³

The hourly rate cap also diminishes a lawyer's compensation. The current Criminal Justice Act rate is \$141.00 per hour, making the PLRA rate \$211.50.³⁴⁴ This is well below the rates that a plaintiff is usually permitted to recover when she prevails in constitutional litigation, other than prison conditions litigation, under 42 U.S.C. § 1983.³⁴⁵ For example, an attorney with twenty or more years' experience in the District of Columbia will typically recover over \$500.00 per hour pursuant to the customary fee schedule for civil rights cases established by the District's U.S. Attorneys Office.³⁴⁶ Of course, to be entitled to a fee award at all, the plaintiff must win the case³⁴⁷—in other words, not only are the rewards low, but the risks of no reward are substantial.

³³⁵ See Schlanger, *Inmate Litigation*, *supra* note 312, at 1606 ("These extremely defendant-friendly standards, joined with judge and jury suspicion and dislike of incarcerated criminals, have made inmate cases extremely hard to win."); *see also id.* at 1589 ("[T]he average inmate civil rights case took under an hour of judge time, from filing to disposition.").

³³⁶ *Nelson v. Corr. Med. Servs.*, No. 1:04cv00037 JMM-JWC, 2007 WL 1703562 (E.D. Ark. June 11, 2007).

³³⁷ *See id.* at *2.

³³⁸ *See id.* at *10.

³³⁹ *Nelson v. Corr. Med. Servs.*, 533 F.3d 958, 960 (8th Cir. 2008).

³⁴⁰ *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 525 (8th Cir. 2009) (en banc).

³⁴¹ Minute Entry at 1–4, *Nelson v. Corr. Med. Servs.*, No. 1:04-cv-00037-JMM (E.D. Ark. July 15, 2010).

³⁴² Order at 1, *Nelson v. Corr. Med. Servs.*, No. 1:04-cv-00037-JMM (E.D. Ark. Sept. 13, 2010).

³⁴³ *Id.* at 1–2.

³⁴⁴ See E-mail from Judy Gallant, Att'y Advisor, Defender Servs. Office, Admin. Office of the U.S. Courts, to Bonita Tenneriello, Prisoners Legal Servs. (Jan. 13, 2014, 15:19 EST) (on file with author).

³⁴⁵ 42 U.S.C. § 1983 (2012).

³⁴⁶ See *Laffey Matrix—2003–2014*, U.S. ATTORNEYS OFF. FOR D.C., http://www.justice.gov/usao/dc/divisions/Laffey_Matrix%202014.pdf (last visited June 23, 2016).

³⁴⁷ See 42 U.S.C. § 1988(b) (2012).

A prisoner bringing a First Amendment claim for damages faces an additional obstacle—the PLRA’s physical injury requirement. A prisoner who has suffered a “mental or emotional injury” cannot bring suit for damages unless she has also suffered a physical injury.³⁴⁸ The circuits are divided as to whether this provision bars monetary recovery for First Amendment violations in prison where the prisoner has not suffered a physical injury.³⁴⁹

In sum, a rational private attorney who wishes to recover fees and/or a contingent portion of damages by litigating all but the strongest prison First Amendment cases will realize at the outset: (1) in several circuits, most First Amendment damages cases are barred by the physical injury requirement; (2) even in circuits where damages can be recovered for a nonphysical First Amendment injury, damages will likely be low; (3) if the attorney prevails in the case, she will recover in fees, at most, the lesser one and a half times the damages award or her reasonable hours multiplied by \$211.50; (4) the risks of losing the case, and recovering no fees, are substantial; and (5) the attorney could make more money pursuing almost any other type of civil case.

C. *Pro Se* Litigation

Most prisoners, then, litigate conditions claims without counsel.³⁵⁰ Representing oneself is rarely easy, but an unrepresented prisoner suing her jailers encounters several additional barriers, many of them the result of the PLRA.

First, the PLRA requires a court immediately to dismiss any suit brought by a prisoner who has not exhausted available administrative remedies.³⁵¹ This requirement results in the immediate dismissal of an array of potential lawsuits because the PLRA, as interpreted by the courts, does not excuse a prisoner who misses a prison’s administrative deadline (even a very short one) or who makes a technical mistake in submitting an administrative grievance. Administrative remedy schemes can be so complicated or internally contradictory

³⁴⁸ See *id.* § 1997e(e) (2012).

³⁴⁹ Compare *Allah v. Al-Hafeez*, 226 F.3d 247, 250–51 (3d Cir. 2000) (finding damages would be barred for alleged violation of First Amendment right of free religious exercise), with *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (finding PLRA’s physical injury requirement did not apply to First Amendment rights violation claim). See also *BOSTON*, *supra* note 334, at 268 n.1233; *JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS’ SELF-HELP LITIGATION MANUAL* 621 (4th ed. 2010); *Schlanger & Shay*, *supra* note 312, at 143–47.

³⁵⁰ See *Schlanger, Inmate Litigation*, *supra* note 312, at 1609–10 (showing that nearly all civil rights and prison conditions litigations are pro se).

³⁵¹ 42 U.S.C. § 1997e(a).

that they invite errors. Despite having a law degree and focusing my practice on prison conditions litigation, I myself frequently find administrative remedy schemes difficult to understand and explain to clients. Schlanger and Shay describe the state of play as follows:

[T]he PLRA's exhaustion requirement has been held to grant constitutional immunity to prison officials based on understandable mistakes by pro se prisoners operating under rules that are often far from clear. Wardens and sheriffs routinely refuse to engage prisoners' grievances because those prisoners commit minor technical errors, such as using the incorrect form, sending the right documentation to the wrong official, or failing to file separate forms for each issue, even if the interpretation of a single complaint as raising two separate issues is the prison administration's. Each such misstep by a prisoner bars consideration of even an otherwise meritorious civil rights action.³⁵²

Finally, prisoners as a group have substantially lower rates of literacy and educational attainment, and substantially higher rates of mental illness, than the population at large.³⁵³ Obviously, these factors make it even more difficult both to litigate against trained lawyers and to successfully navigate a complex administrative exhaustion scheme.³⁵⁴

To summarize, while the *Turner* standard is a major obstacle to litigation challenging prison speech restrictions, it would be an error to lay all of the blame at *Turner's* doorstep. *Turner* is one element of the broader regime of prison conditions law—a regime that cloaks prison officials in the mantle of “practical immunity.”

³⁵² Schlanger & Shay, *supra* note 312, at 148.

³⁵³ See Schlanger, *Inmate Litigation*, *supra* note 312, at 1611 n.161 (noting that “[o]nly about a third of inmates are sufficiently literate to ‘make literal or synonymous matches between the text and information given in the task, or to make . . . low-level inferences.’” (quoting and interpreting NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., PUB. NO. 1994-102, LITERACY BEHIND PRISON WALLS 19 tbl.2.3 (Oct. 1994), <http://nces.ed.gov/pubs94/94102.pdf>)); *Mentally Ill Persons in Corrections*, NAT’L INST. OF CORRECTIONS, <http://nicic.gov/mentalillness> (last visited June 23, 2016) (“In a 2006 Special Report, the Bureau of Justice Statistics (BJS) estimated that 705,600 mentally ill adults were incarcerated in state prisons, 78,800 in federal prisons and 479,900 in local jails. In addition, research suggests that ‘people with mental illnesses are overrepresented in probation and parole populations at estimated rates ranging from two to four times the general population.’ Growing numbers of mentally ill offenders have strained correctional systems.”) (citation omitted).

³⁵⁴ See Schlanger, *Inmate Litigation*, *supra* note 312, at 1611.

VI. LESSONS FROM RELIGIOUS EXERCISE STATUTES

The previous sections have explored the negative effects that the *Turner* standard, both individually³⁵⁵ and combined with other factors that give rise to “practical immunity,”³⁵⁶ exerts on prisoners’ freedom of speech. That conclusion alone, however, does not demonstrate that a different standard would be an improvement over the status quo. Rather, a consideration of two other issues must first be undertaken: (1) the costs of more searching review, and (2) whether the contours of such review can be made coherent and workable. The history of the Religious Freedom Restoration Act (“RFRA”)³⁵⁷ and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)³⁵⁸ provide information relevant to both questions and suggest that more rigorous review would be neither detrimental to prison security nor practically unworkable.

A. History of RFRA and RLUIPA

In 1993, Congress passed RFRA, which created a heightened standard of review for restrictions imposed on religious exercise by state, local, and federal government entities.³⁵⁹ Specifically, RFRA provides that any government regulation that substantially burdens religious exercise is invalid³⁶⁰ unless it: “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”³⁶¹ The statute makes no distinction between free exercise by prisoners and non-prisoners in imposing this heightened standard in religious access cases.³⁶²

In 1996, however, the Supreme Court struck down RFRA in part in *City of Boerne v. Flores*,³⁶³ holding that Congress had exceeded its limited constitutional authority to enforce the Fourteenth Amend-

³⁵⁵ See *supra* Part II.

³⁵⁶ See *supra* Section V.A.

³⁵⁷ Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

³⁵⁸ Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

³⁵⁹ See Shann R. Jeffery, *Prisoners’ Rights*, 73 DENV. U. L. REV. 883, 887 (1996) (stating that “Congress clearly intended RFRA to impose a heightened standard of review”).

³⁶⁰ See 42 U.S.C. § 2000bb-1(a).

³⁶¹ *Id.* § 2000bb-1(b).

³⁶² *Jolly v. Coughlin*, 76 F.3d 468, 475 (2d Cir. 1996) (“The statute itself, however, draws no distinction between claims by prison inmates and claims by others . . .”).

³⁶³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

ment against state and local governments.³⁶⁴ Following *City of Boerne*, RFRA continues to require heightened review of religious claims brought against the federal government by prisoners (and non-prisoners), but the statute no longer protects individuals whose religious exercise is burdened by state and local governments.³⁶⁵

In 2001, Congress responded to *City of Boerne* by passing RLUIPA.³⁶⁶ Whereas RFRA extends to all government action that burdens religious exercise, RLUIPA, more circumscribed, applies only to cases alleging that prison regulations or land use regulations burden religious exercise.³⁶⁷ RLUIPA's substantive legal standard, however, is identical to RFRA's: a burden on religious exercise is invalid unless it is the least restrictive means of furthering a compelling governmental interest.³⁶⁸ In 2005, the Supreme Court held in *Cutter v. Wilkinson*³⁶⁹ that RLUIPA did not violate the Establishment Clause.³⁷⁰

RLUIPA and RFRA create a statutory cause of action (in addition to the constitutional free exercise claim) that a prisoner may plead in a religious access case. The standard for the statutory cause of action is more stringent than the standard under *Turner* and *O'Lone* for the constitutional cause of action.³⁷¹ RFRA and RLUIPA, then, give rise to an anomaly in the legal rules that govern prisoners' expressive rights—a bifurcated regime in which expression of a religious nature receives greater protection than secular expression.³⁷²

B. *Costs of Heightened Review*

The principal rationale for deferential review is, of course, prison security—the risks inherent in judges' second-guessing the decisions

³⁶⁴ *Id.* at 519.

³⁶⁵ *Id.* at 515–16, 536.

³⁶⁶ 42 U.S.C. §§ 2000cc-1 to -5 (2012).

³⁶⁷ *See id.* § 2000cc-1(a).

³⁶⁸ *See id.* § 2000cc-1(a)(1)–(2).

³⁶⁹ *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

³⁷⁰ *Id.* at 714–15.

³⁷¹ *See infra* Section VI.C (examples of applying RFRA/RLUIPA standard and constitutional standard to different results).

³⁷² The net result of the legal landscape described above is that prisoners' religious exercise has been protected by heightened standards of review as follows: first, the religious exercise of federal prisoners has been continuously protected by heightened scrutiny under RFRA since the enactment of the statute in 1993. *See* 42 U.S.C. § 2000bb-2(1) (2012). Second, the religious exercise of state and local prisoners was protected by RFRA between its enactment in 1993 and its invalidation, in 1996, as to state and local government regulations. *See Cutter*, 544 U.S. at 714–15. Third, state and local prisoners regained heightened scrutiny with the passage of RLUIPA in 2001, and that protection has continued to apply ever since. *Id.* at 714.

of corrections professionals.³⁷³ Because there never has been a period of searching judicial review of prisoners' speech clause claims, the argument that such review would compromise prison security remains speculative—impossible to prove, but also impossible to disprove.³⁷⁴ RLUIPA and RFRA, however, offer the best substitute for a real-world test of the likely effects of more rigorous review of speech claims.³⁷⁵ After all, these statutes already provide heightened scrutiny to prisoners' free exercise claims.³⁷⁶

More than twenty years since the enactment of RFRA, and close to fifteen years after the enactment of RLUIPA, the evidence that more rigorous review in free exercise cases has negatively impacted prison security is quite limited.³⁷⁷ The closest approximation of a full study occurred in 1996 when the National Association of Attorneys General sent surveys regarding the effects of RFRA to the attorneys general and corrections heads of fifty-six states and territories.³⁷⁸ The "preliminary" results, based on a partial set of survey responses, were summarized in a memorandum by the Attorney General of Florida,³⁷⁹ but it does not appear that the study was completed or that the states' individual responses were made public. Although the Florida Attorney General's summary noted that gangs and hate groups had attempted to use RFRA to "assert the right to wear special [gang] clothing or medallions as expressions of religious freedom," claimed that RFRA "has had a disruptive effect on the operation and security of the nation's prisons," and stated that prisoners used RFRA to make "bogus or bizarre" demands for religious accommodation that siphoned resources away from other programs, the study failed to cite any particular examples in which RFRA had resulted in a breach of security.³⁸⁰

Moreover, federal government's amicus brief in *Cutter v. Wilkinson*, made it clear that heightened protection of religious exercise did not compromise prison security:

³⁷³ See Nelson, *supra* note 30, at 2054, 2068.

³⁷⁴ See *Cutter*, 544 U.S. at 725; Nelson, *supra* note 30, at 2061.

³⁷⁵ See Nelson, *supra* note 30, at 2069–70.

³⁷⁶ See, e.g., *id.* at 2063, 2066.

³⁷⁷ See *Cutter*, 544 U.S. at 725–26.

³⁷⁸ See *Protecting Religious Freedom After Boerne v. Flores Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong., app. at 66–67 (1997) (Memorandum from Kim Tucker, Deputy Gen. Counsel, to Robert A. Butterworth, Att'y Gen. State of Fla. (July 19, 1996)) <http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/29/hear-55-1-1997.pdf>.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 66–67, 69–70.

[O]perational objections to RLUIPA founder in the face of the practical experience of the federal Bureau of Prisons and other States. For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners.³⁸¹

The Supreme Court found this portion of the amicus brief persuasive, and cited it in the decision in *Cutter* upholding RLUIPA.³⁸² In short, the history of RFRA and RLUIPA has not produced convincing evidence that heightened review of free exercise claims significantly impedes prison security.

In the final paragraph of *O’Lone*, which extended *Turner* to constitutional free exercise claims by prisoners, Chief Justice Rehnquist wrote: “We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to ‘substitute our judgment on . . . difficult and sensitive matters of institutional administration,’ for the determinations of those charged with the formidable task of running a prison.”³⁸³ That statement was made in 1987, and more evidence of its effects is available now. Given that RLUIPA has been on the books for fifteen years without producing any clear demonstration that prison security has been compromised, it is fair to ask whether *O’Lone*’s concerns about heightened review of free exercise restrictions in prisons and jails were exaggerated. And it is reasonable to question, for similar reasons, whether the level of deference currently afforded to restrictions on nonreligious speech under *Turner* is necessary to correctional security.

Although RLUIPA has not caused clear negative effects, the statute appears to have produced its intended consequence—greater protection for prisoners’ religious rights. Indeed, it is not uncommon for a prisoner to prevail on a RLUIPA claim while losing a free exercise claim in the same case and on the same facts.³⁸⁴

³⁸¹ Brief for the United States as Amici Curiae Supporting Respondents at 24, *Cutter*, 544 U.S. 709 (No. 03-9877), 2004 WL 2961153, at *24 (citation omitted).

³⁸² See *Cutter*, 544 U.S. at 725.

³⁸³ *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (citation omitted).

³⁸⁴ See, e.g., *Davila v. Gladden*, 777 F.3d 1198, 1212, 1214 (11th Cir. 2015) (affirming grant of summary judgment against prisoner seeking to possess religious beads and shells in free exercise claim while reversing under the RFRA/RLUIPA standard); *Lovelace v. Lee*, 472 F.3d 174, 188 n.3 (4th Cir. 2006) (striking down Ramadan restrictions under RLUIPA despite other case law upholding them under the First Amendment and stating, “the inquiry under RLUIPA is more rigorous than under the First Amendment”); *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 983–84, 988–89 (8th Cir. 2004) (affirming grant of summary judgment in congregational prayer claim

C. Coherent Standards

The appropriate balance between deference and scrutiny for free speech claims is not straightforward, but here, too, RFRA and RLUIPA jurisprudence provides a helpful model. Although the RFRA/RLUIPA standard closely tracks the language typically used to describe strict scrutiny³⁸⁵—the most stringent standard of review for a speech claim—the Supreme Court added a gloss to the RFRA/RLUIPA standard in dicta in *Cutter v. Wilkinson*: “[P]rison security is a compelling state interest, and that deference is due to institutional officials’ expertise in this area.”³⁸⁶ Following *Cutter*, it was not entirely clear what this relaxed form of strict scrutiny meant. Because strict scrutiny and deference to the government are, in a sense, opposites, there is a certain incoherence to the very notion of “strict scrutiny with deference.” The Justices grappled with this issue recently in *Holt v. Hobbs*, a case that addresses, under RLUIPA, a restriction that prevented a Muslim prisoner from growing a beard.³⁸⁷ During oral argument, Justice Alito inquired, “How do you reconcile deference with the strict scrutiny that the statute requires?”³⁸⁸ Later in the argument, Justice Kagan stated that “deference in the context [of RLUIPA] . . . just seems like a contradiction in terms.”³⁸⁹

With its recent decision in *Holt*, the Court has further defined the contours of judicial review under RFRA/RLUIPA. Conspicuously absent from the opinion, a unanimous ruling authored by Justice Alito, is the language in *Cutter*, cited above, regarding “deference . . . due to institutional officials’ expertise.”³⁹⁰ This omission, likely intentional, may signal that the same skepticism that surfaced in the Justices’ questions at argument has led the Court to abandon the notion of strict scrutiny with deference. Indeed, *Holt* strongly suggests that courts

under *Turner*, but reversing under RLUIPA); *Kikumura v. Hurley*, 242 F.3d 950, 956–62 (10th Cir. 2001) (affirming denial of preliminary injunction regarding a prisoner’s request for pastoral visit under the free exercise clause, but reversing under RLUIPA).

³⁸⁵ See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)).

³⁸⁶ *Cutter*, 544 U.S. at 725 n.13.

³⁸⁷ *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

³⁸⁸ Transcript of Oral Argument at 19, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-6827_48c4.pdf (last visited June 24, 2016).

³⁸⁹ *Id.* at 54.

³⁹⁰ *Cutter*, 544 U.S. at 725 n.13.

should apply RLUIPA with far less deference than the dictum in *Cutter* had implied:

RLUIPA . . . does not permit . . . unquestioning deference. RLUIPA . . . “makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.” . . . Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA’s rigorous standard.³⁹¹

At the same time, the Court made it clear that context still matters: “[C]ourts should not blind themselves to the fact that the analysis is conducted in the prison setting.”³⁹²

Taken as a whole, *Holt* suggests that courts should not accept prison officials’ decisions without a hard look, but nor should they forget that security and management concerns unique to prison may require restrictions that could not be justified in the free world. First, the set of interests that are “compelling” must be defined contextually. For example, the interest in preventing escape has little applicability in free society, but certainly is a compelling interest in the context of a prison. Second, the means necessary to accomplish compelling interests must also depend to some extent on context. For example, prohibiting ownership of heavy metal crucifixes that could be used as a weapon in prison would not be permissible in society generally, but could serve a compelling interest in many prison settings.

This much is clear: judicial review under RFRA and RLUIPA is searching and exceeds the rigor of *Turner*, but such scrutiny must also be cabined by the realities of prison life. In short, the Supreme Court has already developed a relatively coherent standard that reconciles rigorous review with the context of prison. There is no apparent reason that such a standard would become incoherent if applied to Speech Clause claims.

CONCLUSION: RETHINKING *TURNER*

To be sure, *Turner* deference does not operate in a vacuum—it is but one stone in an edifice of “practical immunity” that makes prisoners’ First Amendment claims difficult to win. But as this Article has demonstrated, the manner in which *Turner* has been applied is an im-

³⁹¹ *Holt*, 135 S. Ct. at 864 (citation omitted).

³⁹² *Id.* at 866.

portant factor in the outcome of prison First Amendment cases, and one that should be corrected. Two solutions are proposed below.

First, the Supreme Court could grant certiorari in a case involving a truly senseless prison speech restriction and invalidate the rule. As matters now stand, *Turner* was the first and last time that the Supreme Court struck down a regulation under *Turner*.³⁹³ In the decades since *Turner*, the high court has upheld regulations that are quite restrictive—including a severe limitation on books for the highest security prisoners in *Beard v. Banks* and harsh visitation restrictions in *Overton v. Bazetta*.³⁹⁴ While reasonable people might very well disagree that such regulations were necessary, none of these restrictions upheld by the Supreme Court could fairly be called ridiculous—there was some connection to a legitimate penological interest.³⁹⁵ Some lower federal courts, however, have given prison officials far more deference than *Turner* requires. Appellate court decisions which uphold bans, for example, on monographs about prison conditions, *Dungeons & Dragons*, and the *Physicians' Desk Reference*³⁹⁶ invite a reminder that regulations *can* be invalidated under *Turner*—and that the high court meant what it said in *Beard v. Banks*: “*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective.”³⁹⁷

What the Supreme Court does in these cases may send a stronger message to lower courts than what it says. Indeed, as Justice Stevens observed in his concurrence and dissent in *Turner*, “[h]ow a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation.”³⁹⁸ Granting certiorari for the purpose of striking down a patently flawed regulation would send a clear message that deference does not mean the abandonment of review.

Second, the Supreme Court could revisit the *Turner* standard in light of the thirty years of history and experience since the decision. The deference the Court decided to afford to prison and jail administrators in crafting speech restrictions has often been abused. Exercising their discretion under *Turner*, correctional officials have done

³⁹³ See *supra* Part I.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ See *supra* Part II.

³⁹⁷ *Beard v. Banks*, 548 U.S. 521, 535 (2006); *supra* Part I.

³⁹⁸ *Turner v. Safley*, 482 U.S. 78, 100 (1987) (Stevens, J., concurring in part and dissenting in part).

everything from prohibiting President Obama's book as a national security threat; to using hobby knives to excise Bible passages from letters; to forbidding all nonreligious publications; to banning *Ulysses*, John Updike, Maimonides, case law, and cat pictures.³⁹⁹ Some jailers, it appears, believe that anything goes.

This was not the intent of *Turner*. Rather, the "task," as the Supreme Court stated in *Turner*, was to "formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'"⁴⁰⁰ The years since *Turner* demonstrate that—on the ground, and as a practical reality—the standard has failed to create the balance for which it was designed.

At the same time, RFRA and RLUIPA appear to have succeeded in expanding protection of prisoners' expression without compromising institutional safety—the statutes accomplished the very balance of expressive freedom and security that *Turner* was meant to produce.⁴⁰¹ *Holt*, meanwhile, has provided the lower courts with valuable guidance about how to reconcile strict scrutiny with the prison context in free exercise cases.⁴⁰²

All of this suggests that the time has come for a substantial recalibration, modeled on the RFRA/RLUIPA standard, of judicial review of prisoner Speech Clause claims. Indeed, it may now be appropriate for the Supreme Court to overrule *Turner* and extend RFRA/RLUIPA-style strict scrutiny to such claims as a matter of constitutional law.⁴⁰³ Under such a standard, courts would be required to assess whether a restriction on speech is the least restrictive means of accomplishing a compelling interest, but would not be permitted to ignore the contextual factors unique to prison that must bear on the analysis.⁴⁰⁴ Of course, Congress, too, could extend the standard, doing for speech claims what RFRA and RLUIPA did for free exercise claims.⁴⁰⁵

³⁹⁹ See *supra* Part III.

⁴⁰⁰ *Turner*, 482 U.S. at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974)).

⁴⁰¹ See *supra* Part VI.

⁴⁰² *Id.*

⁴⁰³ See *supra* Part II (discussing that *Turner* no longer successfully addresses free speech).

⁴⁰⁴ 42 U.S.C. § 2000cc(a)(1).

⁴⁰⁵ This would require compiling a sufficient legislative record of First Amendment violations in prison—otherwise such a statute would be vulnerable on the ground that it purported to extend, rather than enforce, the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 530–31 (1997). Given the frequency with which jails and prisons violate the First Amendment, see *supra* Part III, such a legislative record would not be difficult to compile. Cf. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) ("Before enacting [RLUIPA], Congress documented, in

The history of RFRA and RLUIPA suggests that strict scrutiny is more true to the objectives of *Turner* than *Turner* itself.⁴⁰⁶ While *Turner* set out to balance prison security and expressive rights, RFRA and RLUIPA have accomplished, in free exercise cases, a more successful accommodation of the conflicting interests. Hence an ironic state of affairs: the way to be true to *Turner* is to overrule it.

hearings spanning three years, that ‘frivolous or arbitrary’ barriers impeded institutionalized persons’ religious exercise.”); 146 CONG. REC. S7774–75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (“Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.”).

⁴⁰⁶ Compare *Turner v. Safley*, 482 U.S. 78, 85 (1987) (noting that the task of the Court is to create a standard of review to balance judicial restraint and protection of prisoners’ constitutional rights), with *supra* Section VI.B (Costs of Heightened Review).