NOTES

Restricting the Right of Correspondence in the Prison Context: *Thornburgh v. Abbott* and its Progeny

INTRODUCTION

In the 1974 landmark decision, *Procunier v. Martinez*,[1] the United States Supreme Court held that certain prison regulations on inmates' personal correspondence,[2] under an intermediate scrutiny standard of review, violated the First Amendment to the United States Constitution.[3] In recent years, however, the Supreme Court has employed an increasingly deferential approach when evaluating restrictions on First Amendment rights in the prison context.[4] One result of the Court's more deferential approach has been the acceptance of increasingly restrictive limitations on the rights of prison inmates.[5] Yet, the restrictions upheld by the Court often affect not only the rights of the prisoners but those of free citizens as well.

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1. 416 U.S. 396 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

2. The regulations prohibited inmates from writing letters in which they "unduly complain" or "magnify grievances," defined as contraband writings "expressing inflammatory political, racial, religious or other views or beliefs," and stated that inmates "may not send or receive letters that pertain to criminal activity; are lewd, obscene or defamatory; contain foreign matter, or are otherwise inappropriate." 416 U.S. at 399-400 (quotations omitted).

3. 416 U.S. 396.

4. *Compare id.* at 413 (applying the intermediate scrutiny standard) *with* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding it sufficient that restrictions on inmate-to-inmate correspondence and inmate marriages be only "reasonably related to legitimate penological interests") *and* Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989) (upholding prison restrictions on incoming publications under a reasonableness test and limiting the intermediate scrutiny standard to outgoing mail only).

5. *See, e.g., Abbott*, 490 U.S. at 404-05 (upholding prison regulations authorizing prison officials to intercept publications sent to prisoners which threaten the institution's "security, good order, or discipline"); *Turner*, 482 U.S. at 91 (upholding prison restrictions on inmate-to-inmate correspondence).

For example, limitations on correspondence between prisoners and nonprisoners also restrict the free speech of those outside of the prisons.[6]

In *Thornburgh v. Abbott*,[7] the Supreme Court upheld the constitutionality of regulations that allowed prison officials to reject certain publications sent by publishers to prisoners.[8] Finding the regulations reasonably related to legitimate penological interests,[9] the Court for the first time applied a reasonableness standard to restrictions that directly affected the First Amendment rights of nonprisoners.[10]

In *Abbott*, the Court justified the application of a reasonableness standard by noting a number of potential security problems that may arise when certain publications are sent into the prisons.[11] However, by limiting the applicability of the *Martinez* intermediate scrutiny standard to only outgoing personal correspondence from prisoners, the Court opened the door to evaluating restrictions on incoming personal correspondence under a mere reasonableness standard.[12] Notably, the Court's holding in *Abbott* did not distinguish between incoming publications and other incoming mail.[13] As a result, lower and intermediate courts have subsequently applied a reasonableness standard to restrictions on all categories of incoming prison mail, including both publications and personal letters.[14]

More recently, the United States Courts of Appeals for the Fifth[15] and Eighth[16] Circuits have both held that, under *Abbott*, the

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6. *See Martinez*, 416 U.S. at 408 (restrictions on inmate personal mail affect the First Amendment rights of inmates' nonprisoner correspondents); *see also Abbott*, 490 U.S. at 407 (restrictions on incoming publications affect the First Amendment rights of publishers).

7. 490 U.S. 401 (1989).

8. *Id.* at 404.

9. *Id.*

10. *Cf. Martinez*, 416 U.S. at 408-14 (applying the intermediate scrutiny standard to restrictions affecting the First Amendment rights of nonprisoners).

11. *Abbott*, 490 U.S. at 411-13.

12. *See id.* at 413-14.

13. *See id.*; *see also infra* notes 86-87 and accompanying text.

14. *See* discussion *infra* part II.B.1.

15. *See* Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1081 (1994).

16. *See, e.g.*, Smith v. Delo, 995 F.2d 827 (8th Cir. 1993), *cert. denied*, 114 S. Ct.

reasonableness standard should be applied to correspondence sent by inmates as well.[17] A number of other courts, however, including the United States Courts of Appeals for the First[18] and Sixth[19] Circuits, have cited *Abbott* to hold that the intermediate scrutiny standard articulated in *Procunier v. Martinez* remains valid for restrictions on outgoing correspondence.[20]

This Note argues that the reasoning of the courts that continue to follow the *Martinez* intermediate scrutiny standard for outgoing mail is sound because the facts and holding in *Abbott* involved exclusively incoming mail.[21] The approach of the Fifth and Eighth Circuits, applying the mere reasonableness standard, represents yet another stage of increased and undesirable deference that a number of courts have accorded prison officials in enacting regulations that implicate the constitutional rights of both prisoners and free citizens.

Part I of this Note briefly reviews the instrumental Supreme Court decisions addressing First Amendment rights in the prison context. This Part traces the development of the standard of review for prison regulations that restrict First Amendment freedoms for both prisoners and nonprisoners. It concludes with a general discussion of *Thornburgh v. Abbott*. Part II critiques the *Abbott* decision and analyzes the problems inherent in the Court's reasoning. Further, this Part discusses subsequent decisions of the lower courts that have applied *Abbott* to a variety of prison mail regulations and examines the split between the circuits regarding which standard of review should apply to restrictions on outgoing prisoner mail. This Note concludes with a call for courts to more carefully scrutinize prison regulations which affect the First Amendment rights of free citizens and, specifically, to adhere to the intermediate scrutiny standard of review for restrictions on outgoing prisoner mail.

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710 (1994).

17. *See* discussion *infra* part II.B.2.a.

18. *See* Stow v. Grimaldi, 993 F.2d 1002 (1st Cir. 1993).

19. *See* Burton v. Nault, 902 F.2d 4 (6th Cir.), *cert. denied*, 498 U.S. 873 (1990).

20. *See* discussion *infra* part II.B.2.b.

21. *See* discussion *infra* part II.B.3.

I. BACKGROUND—SUPREME COURT CASES RELATING TO FIRST AMENDMENT RIGHTS IN THE PRISON CONTEXT

A. Procunier v. Martinez—*Setting the Intermediate Scrutiny Standard*

Commentators agree that, prior to the 1974 decision in *Procunier v. Martinez*,[22] courts deciding the constitutionality of prison regulations generally used a "hands-off" approach to prisoners' claims, which resulted in "absolute deference to prison officials."[23] In *Martinez*, prisoners challenged the constitutionality of prisoner mail regulations issued by the Director of the California Department of Corrections.[24] Among the many restrictions were rules that inmates should not write letters in which they "unduly complain" or "magnify grievances."[25] In addition, writings were considered contraband if they were found to be "expressing inflammatory political, racial, religious or other views or beliefs."[26] Finally, the rules stated that inmates "may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate."[27]

In *Martinez*, the United States District Court for the Northern District of California held that these regulations violated the First Amendment because they allowed censorship of protected expres-

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22. 416 U.S. 396 (1974).

23. *See* Lorijean Golichowski Oei, Note, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse?* Turner v. Safley, 33 VILL. L. REV. 393, 399-401 & nn.29-30 (1988); *see also* Barry R. Bell, Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 161-62 (1986) (stating that before the 1960s, "[m]ost judges assumed that prisoners, by the fact of conviction, had lost their constitutional rights" and that "[e]ven in the face of barbarous and arbitrary mistreatment of prisoners, most judges deferred to prison administrators"); Megan M. McDonald, Note, Thornburgh v. Abbott: *Slamming the Prison Gates on Constitutional Rights*, 17 PEPP. L. REV. 1011, 1013 & nn.17-18 (1990) (stating that federal courts' "broad hands-off attitude" prior to *Martinez* "[e]ssentially . . . functioned as a jurisdictional bar to prisoners' constitutional complaints brought to the federal courts, as the courts effectively declared that prisoners had no constitutional rights").

24. *Martinez*, 416 U.S. at 398.

25. *Id.* at 399 (quotation omitted).

26. *Id.* (quotation omitted).

27. *Id.* at 399-400 (quotation omitted).

sion without adequate justification.[28] For this and other reasons, the court enjoined further enforcement of the regulations.[29]

On appeal, the United States Supreme Court considered, as a matter of first impression, the appropriate standard of review for prison regulations which restricted freedom of speech.[30] District and circuit courts had previously adopted a wide range of inconsistent approaches due to the tension between the traditional policy of judicial restraint regarding prison regulations and the importance of protecting constitutional rights.[31] The Court noted that this lack of an accepted standard caused not only inconsistent and incomplete protection of prisoners' rights, but also unnecessary litigation and federal court involvement in prison administration.[32]

Before suggesting a standard for review, the Court stated that its analysis would be different from that of the federal courts which had previously discussed prisoners' First Amendment rights.[33] The Court noted that because correspondence includes at least two parties, the analysis did not have to address the question of what rights are retained by incarcerated prisoners.[34] Instead, the Court's discussion focused on the broader rights of the nonprisoner, whose freedom of speech is affected by restrictions on the prisoner's correspondence with that nonprisoner.[35]

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28. *Martinez v. Procunier*, 354 F. Supp. 1092, 1095-97 (N.D. Cal. 1973).

29. *Id.* at 1099. For a detailed description of the procedural history of *Martinez*, see Oei, *supra* note 23, at 403-06 & nn.45-59.

30. *Martinez*, 416 U.S. at 406.

31. *Id.* at 406-07. The Court observed that some courts had adopted a "hands-off posture," *id.* at 406 (citing McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964)), or required that censorship of personal prison correspondence find support "in any rational and constitutionally acceptable concept of a prison system," *id.* (quoting Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972)). Other courts required a compelling state interest, *id.* at 406-07 (citing Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968)), or a "clear and present danger," *id.* at 407 (quoting Wilkinson v. Skinner, 462 F.2d 670, 672-73 (2d Cir. 1972)). Finally, some courts adopted intermediate positions, such as requiring regulations to "be related both reasonably and necessarily to the advancement of some justifiable purpose," *id.* (quoting Carothers v. Follette, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970)).

32. *Id.* at 407.

33. *Id.* at 407-08.

34. *Id.* at 408.

35. *Id.* at 408-09.

Turning then to what standard should be used for a restriction on free citizens' First Amendment rights in the prison context, the *Martinez* Court posited an intermediate scrutiny standard. This standard is to be applied through a two-pronged test: (1) the regulation must "further an important or substantial governmental interest" (in the instant case, the interests of security, order and rehabilitation); and (2) "the limitation of First Amendment freedoms must be no greater than necessary or essential to the protection of the particular governmental interest."[36] Referring to the second criterion, the Court elaborated that the restriction on inmate correspondence, even if it furthers an important or substantial interest, is invalid if unconstitutionally broad.[37]

Applying this intermediate scrutiny standard, the Court affirmed the district court's decision and held that the broad restrictions on prisoners' correspondence were not shown to be necessary to further a governmental interest.[38] The Court rejected the suggestion that the restrictions were necessary to prevent dangers to prison security.[39] It noted that the regulations were not narrow enough to restrict only material that could lead to violence.[40]

In a concurring opinion, Justice Marshall expressed the view that prisoners retain all First Amendment rights "except those expressly, or by necessary implication, taken from [them] by law."[41] The concurring opinion found that the blanket authority granted to prison officials to read all prison correspondence, without reason to believe that a specific letter poses security concerns, seriously infringed upon prisoners' rights to free expression.[42] Justice Marshall argued that it was important for prisoners to be able to express their views to nonprisoners without the fear that their jailers

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36. *Id.* at 413.

37. *Id.* at 413-14.

38. *Id.* at 415.

39. *Id.* at 416.

40. *Id.*

41. *Id.* at 422-23 (Marshall, J., concurring) (quoting Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944)).

42. *Id.* at 423 (Marshall, J., concurring).

would read their letters.[43] Justice Douglas, in his concurring opinion, added that he considered it "abundantly clear that foremost among the Bill of Rights of prisoners in this country . . . is the First Amendment. Prisoners are . . . entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all of the requirements of due process."[44]

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43. *Id.* at 423-27 (Marshall, J., concurring).

44. *Id.* at 428 (Douglas, J., concurring in the judgment).

Less than two months after *Martinez*, the United States Supreme Court decided Pell v. Procunier, 417 U.S. 817 (1974). In *Pell*, four California prison inmates and three professional journalists challenged a section of the California Department of Corrections Manual which stated that "[p]ress and other media interviews with specific individual inmates will not be permitted," arguing that this section violated their constitutional rights. *Id.* at 819. Dismissing the inmates' challenge, the Court emphasized the fact that many alternative manners of communication were still open to the inmates, such as communication by mail and personal contact with members of their family, the clergy, their attorneys and friends of prior acquaintance. *Id.* at 824-25. Restrictions on face-to-face communication were found to be valid, as they were obviously related to security and administrative problems and other legitimate policy concerns of the corrections systems. *Id.* at 826. Dismissing the claims of the journalists, the Court stressed that the press simply does not have "a constitutional right of special access to information not available to the public generally." *Id.* at 833, 835 (quoting Branzburg v. Hayes, 408 U.S. 665, 684 (1972)).

The more extensive opinion in *Pell* was the dissent, written by Justice Douglas, which discussed the importance of the press as an informer of the people. Justice Douglas quoted the Court's view in Mills v. Alabama, 384 U.S. 214 (1966), that the press is the institution that "[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs." *Pell*, 417 U.S. at 841 (Douglas, J., dissenting) (quoting *Mills*, 384 U.S. at 219). He thereby rejected the majority's justification of the restrictions—that they did not restrict the media any more than they restricted the general public—since "[t]he average citizen is most unlikely" to seek information about prisoners by conducting interviews with them. *Id.* at 841 (Douglas, J., dissenting). Rather, in a society that values a free press, an interested citizen will ordinarily rely on the media for such information. *Id.* (Douglas, J., dissenting).

The dissent further emphasized the rights of the prisoners and found that the restrictions on prisoners' rights were "grossly overbroad" and unconstitutional. *Id.* at 837 (Douglas, J., dissenting). Citing from his own concurring opinion in *Martinez*, Justice Douglas again wrote that prisoners retain their constitutional rights; thus, their free speech could not be denied without satisfying due process requirements. *Id.* (Douglas, J., dissenting) (citing *Martinez*, 416 U.S. at 428-29 (Douglas, J., concurring in the judgment)). Again pointing to the practical difficulties involved in disseminating information regarding prison administration, the dissent found that the restriction on prisoner contact with the press "flatly prohibits interview communication with the media on the government's penal operations by the only citizens with the best knowledge and real incentive to discuss them." *Id.* at 839 (Douglas, J., dissenting). *See* Daniel M. Donovan, Jr., Note, *Constitu-*

B. Turner v. Safley—*Establishing a Reasonableness Standard for Restrictions on Prisoners' First Amendment Rights*

It was not until 1987, in *Turner v. Safley*,[45] that the United States Supreme Court explicitly resolved the question that it had left open in *Martinez* regarding the standard for restricting prisoners' First Amendment rights.[46] *Turner* involved regulations by the

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tionality of Regulations Restricting Prisoner Correspondence With the Media, 56 FORDHAM L. REV. 1151, 1153 (1987-1988) (advocating that prisoner correspondence with the media be classified as privileged and warning that a finding to the contrary could possibly have a "chilling effect . . . on both prisoners and their correspondents"); *see also* Doretha M. Van Slyke, Note, Hudson v. McMillian *and Prisoners' Rights: The Court Giveth and the Court Taketh Away*, 42 AM. U.L. REV. 1727, 1727 (1992-1993) (stating that because "[t]he general public hears little about inmates' suffering except in the most severe cases . . . daily horrors and small infringements of prisoners' rights go virtually unnoticed").

Notably, the Supreme Court in *Pell v. Procunier* did not properly and precisely apply the intermediate scrutiny standard articulated in *Martinez*. Rather, its analysis of the restrictions on the media was incomplete and overly deferential to prison officials. In *Pell*, the Court pointed out the alternative means of gathering information open to the media, which were sometimes beyond those available to the general public. 417 U.S. at 830-31. The Court also reviewed cases which held that the media does not necessarily have a right of access to information beyond that of the general public. *Id.* 833-35. These contentions, however, did not relate to the question of whether the regulations met the criteria of the *Martinez* intermediate scrutiny test, in particular, whether the limitation was "no greater than necessary." *See* Seth L. Cooper, Note, *The Impact of* Thornburgh v. Abbott *on Prisoners' Access to the Media, and on the Media's Access to Prisoners*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 271, 277 (1990) (suggesting that "[o]ne explanation for the divergent holding reached in *Pell* as compared to *Martinez*, is that the media's right of access was at issue in *Pell*, rather than the media's right to receive information which was at issue in *Martinez*," but noting that "the Court abandoned complete denial of relief to the media based on the 'right of access' doctrine in *Thornburgh v. Abbott*, and substituted a reasonableness standard"); Jeff W. Norris, Note, *Constitutional Law—Reasonable Versus Intermediate Standard: Reviewing Prisoners' Constitutional Claims*—Goodwin v. Turner, *908 F.2d 1395 (8th Cir. 1990)*, 64 TEMP. L. REV. 1109, 1113-14 n.41 (1991) (noting that unlike the emphasis in *Martinez* that the regulation affected free citizens as well as inmates, "this consideration was only reticently addressed in *Pell*"); Oei, *supra* note 23, at 408 n.68 (citing the suggestion that "*Pell* does not discuss the least restrictive alternative means requirement because prisoners' First Amendment rights alone do not warrant such a limitation").

45. 482 U.S. 78 (1987).

46. *Id.* at 89. The Court in *Martinez* stressed that it was setting a standard for restrictions not on prisoners' rights but on the rights of free citizens. *Martinez*, 416 U.S. at 408. The basis of the Court's justification for a new standard in *Turner* was the fact that *Turner*—and not *Martinez*—was setting the standard regarding prisoners' rights. One

Missouri Division of Corrections which restricted inmate-to-inmate correspondence and inmate marriages.[47] The correspondence regulation generally permitted correspondence with "immediate family members who are inmates in other correctional institutions" and correspondence between inmates "concerning legal matters."[48] Correspondence between inmates in non-legal matters was permitted only if "the classification/treatment team of each inmate deems it in the best interest of the parties involved."[49]

The United States District Court for the District of Western Missouri found both regulations unconstitutional.[50] Applying the intermediate scrutiny standard established in *Martinez*, the court ruled that marriages were restricted more than what was reasonable or essential to protect the state interests of security and rehabilitation and that the security problems resulting from inmate-to-inmate correspondence could have been overcome by less restrictive means.[51] The United States Court of Appeals for the Eighth Circuit affirmed. It too found that the *Martinez* standard had not been met because the state had not used the least restrictive method of achieving its security goals.[52]

The Supreme Court, however, first found that prison administration requires a specialized expertise and use of resources applica-

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article has suggested that *Pell v. Procunier* "was widely regarded as establishing a 'reasonable relationship' test." *See* Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1008 (1992-1993). However, there was no such statement in *Pell* itself, and further, the Court did not expressly establish the reasonableness standard until *Turner*.

47. *Turner*, 482 U.S. at 81. For a detailed description of the factual setting and procedural history of *Turner*, see, e.g., Oei, *supra* note 23, at 417-26 & nn.112-58.

48. 482 U.S. at 81 (quotations omitted).

49. *Id.* at 81-82 (quotations omitted). The marriage regulation permitted inmates to marry only with the approval of the superintendent of the prison, which was to be granted only "when there are compelling reasons to do so." *Id.* at 82 (quotations omitted). For a description and analysis of restrictions on prison marriage prior to *Turner*, see generally Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275 (1985).

50. Safley v. Turner, 586 F. Supp. 589 (W.D. Mo. 1984), *aff'd*, 777 F.2d 1307 (8th Cir. 1985), *aff'd in part and rev'd in part*, 482 U.S. 78 (1987).

51. 586 F. Supp. at 594-96.

52. 777 F.2d at 1313, 1315-16. Although the court of appeals used the term "strict scrutiny," it applied the *Martinez* test, which is usually referred to as an intermediate scrutiny standard.

ble only to legislative and executive branches of government.[53] The Court further noted that the *Martinez* decision did not resolve the question of which standard to apply to restrictions on prisoners' First Amendment rights but dealt exclusively with the rights of nonprisoners.[54]

Therefore, the *Turner* Court cited prior Supreme Court decisions that did discuss prisoners' rights,[55] and concluded that if they "have not already resolved the question posed in *Martinez* [regarding which standard to apply], we resolve it now."[56] Thus, the Court articulated a standard stating that "the regulation is valid if it is reasonably related to legitimate penological interests."[57] To justify this relatively lenient reasonableness standard, the Court emphasized the importance of leaving this level of discretion in prison administration in the hands of the prison officials, rather than giving the courts discretion in such matters.[58]

The Court listed four factors, gleaned from its earlier decisions, relevant in determining whether a particular regulation is reasonable. First, there must be a "valid, rational connection" between the regulation and the legitimate state interest.[59] The second factor is whether inmates retain the ability to exercise the right through alternative means.[60] The third factor is the impact that accommodation of the right would have on guards, inmates, and the general prison administration.[61] Finally, the courts must consider whether

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53. 482 U.S. at 84-85.

54. *Id.* at 85-86.

55. *Id.* at 86-87 (citing Block v. Rutherford, 468 U.S. 576 (1984) (holding county jail's blanket prohibition against contact visits was reasonable response to legitimate security interests); Bell v. Wolfish, 441 U.S. 520 (1979) (holding prohibition against inmates' receipt of packages from outside the penal institution did not deny due process); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (holding bans on inmate group meetings were rationally related to reasonable objectives of prison administration); Pell v. Procunier, 417 U.S. 817 (1974) (upholding restrictions prohibiting media interviews with specific individual inmates)).

56. *Id.* at 86-89.

57. *Id.* at 89.

58. *Id.*

59. *Id.* at 89 (quoting *Block*, 468 U.S. at 586).

60. *Id.* at 90 (citing *Jones*, 433 U.S. at 131; *Pell*, 417 U.S. at 827).

61. *Id.* (citing *Jones*, 433 U.S. at 132-33).

an alternative regulation exists for the prison to achieve the same goal.[62] Applying these four factors, the *Turner* Court upheld the restriction on inmate correspondence but held that the restriction on inmate marriage was unconstitutional.[63]

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62. *Id.* (citing *Block*, 468 U.S. at 587). *See* Cheryl Dunn Giles, Note, Turner v. Safley *and Its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219, 230-31 (1993) (criticizing the "incorrect formulation" of the fourth prong of the *Turner* test, as a result of which "courts are given much latitude to uphold prison regulations that severely restrict inmate rights even when there are viable, less intrusive alternatives," and therefore advocating that the fourth prong be formulated to state that "the presence of reasonable and available alternatives is rebuttable proof that the regulation is unconstitutional").

63. *Turner*, 482 U.S. at 91. For further analysis of the holding in *Turner*, see generally Oei, *supra* note 23.

Just eight days after the *Turner* decision, the Supreme Court, in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), decided a different facet of prisoners' First Amendment rights: freedom of religion, which requires the same constitutional protection as free speech. In *O'Lone*, prisoners of the Islamic faith in New Jersey's Leesburg State Prison challenged prison policies that prevented them from attending Jumu'ah, a weekly Muslim congregational service. The Supreme Court concluded that these restrictions were reasonable in light of the factors listed in *Turner*. *Id.* at 350-51. For a detailed description of the facts and holding in *O'Lone*, see generally Matthew P. Blischak, Note, O'Lone v. Estate of Shabazz*: The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453 (1987-1988).

The same four justices who dissented in *Turner*, Justices Stevens, Brennan, Marshall and Blackmun, dissented in *O'Lone*. *Id.* at 354-68 (Brennan, J., dissenting). The dissenters found that the reasonableness test was "inadequate" because it is "categorically deferential, and does not discriminate among degrees of deprivation." *Id.* at 356 (Brennan, J., dissenting). Instead, they proposed, as they had in *Turner*, a less deferential standard. *Id.* at 358 (Brennan, J., dissenting). Finally, the dissenters found that even under the new, more deferential standard articulated by the majority, the restrictions were unconstitutional. *Id.* at 359 (Brennan, J., dissenting). *See* Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kosher Food, Skullcaps, and Beards*, 21 AM. J. CRIM. L. 241, 255-59 (1994) (describing the ill-effects of *Turner* and *O'Lone* on the religious rights of Jewish prisoners to wear a beard and criticizing the United States Courts of Appeals for the Second and Ninth Circuits for relying on these decisions to accord prison officials with increased deference); *see also* Blischak, *supra*, at 483 (stating that the application of the reasonableness standard, "coupled with the Court's unquestioning acceptance of the views of prison officials in *Shabazz*, . . . abolish[es] many basic religious rights of the incarcerated" and calling for "some form of heightened scrutiny" in place of the reasonableness standard"); Geoffrey S. Frankel, Note, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1645 (1991) (advocating that "[p]rison authorities should be required to show a compelling justification for direct regulation of prisoners' religious practices"). *But see* Mary A. Schnabel, Comment, *The Religious Freedom Restoration Act: A Prison's Dilemma*, 29 WILLAMETTE L. REV. 323,

The dissent in *Turner* first stated that there did not seem to be a great difference between a standard requiring that a regulation not be "needlessly broad"—as the one applied by the lower courts—and a standard asking whether a regulation is "reasonably related to legitimate penological interests."[64] It was concerned, though, with the majority's allowing the standard to be satisfied by a "logical connection" between the regulation and a legitimate penological concern.[65] The dissent found that the majority's standard allowed restrictions to be based more on "administrative concerns and speculation about possible security risks" than on "evidence that the restrictions are needed to further an important governmental interest."[66] It praised the opinion of the Court of Appeals for the Second Circuit, ruling in a similar case, for "mak[ing] a more careful attempt to strike a fair balance between legitimate

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341 (1993) (advocating that the Religious Freedom Restoration Act, requiring a strict scrutiny standard for governmental regulations that substantially burden religious practices, be amended to exclude prison regulations and that "[p]rison inmates' ability to exercise their religious beliefs freely should remain at status quo, and courts should continue to apply the current standard set forth in the *Turner* and *O'Lone* decisions").

64. *Turner*, 482 U.S. at 100 (Stevens, J., concurring in part and dissenting in part).

65. *Id.* at 100-01 (Stevens, J., concurring in part and dissenting in part). *See* T. Joe Snodgrass, Note, *Constitutional Law—A Call for Strict Scrutiny: Eighth Circuit Denies Inmate's Request for Artificial Insemination*—Goodwin v. Turner, *908 F.2d 1395 (8th Cir. 1990)*, 17 WM. MITCHELL L. REV. 883, 910 (1991) (stating that "[t]he weakness of the *Turner* standard of review shows the need for the utilization of the strict scrutiny standard of review, especially where fundamental privacy rights . . . are at issue" and offering both legal theory and policy considerations to support strict scrutiny); Todd M. Turner, Note, *Constitutional Law—Prisoners' Rights—Prison Regulations Denying Inmate the Right to Artificially Inseminate Wife Held Constitutional.* Goodwin v. Turner, *908, F.2d 1395 (8th Cir. 1990)*, 13 U. ARK. LITTLE ROCK L.J. 671, 690 (1990-1991) (commenting that as a result of the *Turner* standard, "prison regulations have become increasingly difficult to effectively challenge . . . even in cases . . . where a prisoner's otherwise fundamental constitutional right has been implicated").

66. *Turner*, 482 U.S. at 101 n.1 (Stevens, J., concurring in part and dissenting in part). The dissent was particularly concerned with what it considered to be the majority's rejection of primary findings of fact by the district court. It cited the district court's holding that the prison authorities "failed to demonstrate that the needs of [the prison] are sufficiently different to justify greater censorship than is applied by other well-run institutions." *Id.* at 109 (Stevens, J., concurring in part and dissenting in part). Moreover, the dissent pointed out that in addition to being an "excessive response" according to the district court, the prohibition was inconsistent with a consensus of expert opinion. *Id.* at 112 (Stevens, J., concurring in part and dissenting in part).

penological concerns and the well-settled proposition that inmates do not give up all constitutional rights by virtue of incarceration."[67]

Finally, the dissent pointed to an inconsistency in the majority's own reasoning, by which the majority accepted both the rehabilitative value of marriage and the district court's analysis of the marriage restriction, but rejected both of these factors regarding the correspondence regulation.[68] It noted the difficulty in maintaining such reasoning, particularly because the right to communication is more clearly protected in the text of the Constitution than is the right to marriage.[69]

C. Thornburgh v. Abbott—*Applying the Reasonableness Standard to Restrictions on Publications Sent to Prisoners*

In 1989, the United States Supreme Court decided *Thornburgh v. Abbott*.[70] *Abbott* involved Federal Bureau of Prisons regulations authorizing prison officials to intercept a publication sent to a prisoner "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."[71] The regulations did place limitations on the authority of a warden. They proscribed the rejection of a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repug-

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67. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985)). In *Abdul Wali*, the Second Circuit formulated a "tripartite standard" by which to consider restrictions on a prisoner's First Amendment rights. The factors involved in deciding which of these standards to apply include "the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation on the exercise of that right." *Abdul Wali*, 754 F.2d at 1033 (parenthetical omitted); *see* O'Lone v. Estate of Shabazz, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting) (endorsing the *Abdul Wali* standard); Oei, *supra* note 23, at 432 & n.189 (same); *see also* Norris, *supra* note 44, at 1121-23 (proposing a combination of the *Abdul Wali* and *Turner* standards). For a more detailed discussion of the *Abdul Wali* standard, see Oei, *supra*, at 432-33 nn.189-93.

68. *Turner*, 482 U.S. at 113-14 (Stevens, J., concurring in part and dissenting in part).

69. *Id.* at 116 (Stevens, J., concurring in part and dissenting in part).

70. 490 U.S. 401 (1989).

71. *Abbott*, 490 U.S. at 404 (quoting 28 C.F.R. § 540.71(b) (1988)).

nant."[72] Nevertheless, the statute provided that materials subject to the warden's discretion "include but are not limited to" publications depicting or encouraging various violent or criminal activities or sexually explicit material which "poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity."[73]

A class of inmates and certain publishers challenged these regulations in the United States District Court for the District of Columbia as an unconstitutional restriction on their First Amendment rights under *Martinez*.[74] Instead of applying the *Martinez* standard, however, the court used an approach more deferential to the prison authorities and upheld the regulation.[75] The United States Court of Appeals for the District of Columbia reversed and remanded, holding that the regulations did not meet the *Martinez* standard.[76] The United States Supreme Court granted prison officials certiorari in order to determine the appropriate standard of review.[77]

The Supreme Court in *Abbott* first noted that "[t]here is little doubt that the kind of censorship" authorized by the regulations "would raise grave First Amendment concerns outside the prison context."[78] Furthermore, the Court cited a number of prior Supreme Court decisions to support the notion that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution"[79] and that free citizens retain their constitutional rights to contact those who are incarcerated.[80] Nevertheless, the

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72. *Id.* at 405 (quoting 28 C.F.R. § 540.71(b)).

73. *Id.* at 405 n.5 (quoting 28 C.F.R. § 540.71(b)).

74. *Id.* at 403 n.2. The prisoners filed the lawsuit in May 1973, and the case was certified as a class action in 1974. In 1978, three publishers, The Prisoners' Union, Weekly Guardian Associates, and The Revolutionary Socialist League, joined as plaintiffs. Individual claims for damages were severed in 1979. In 1981, a bench trial was held on the claims for injunctive relief, with a memorandum opinion and accompanying order issued by the district court in September 1984. *Id.* For a detailed description of the factual setting and procedural history of *Abbott*, see, e.g., McDonald, *supra* note 23.

75. *Abbott*, 490 U.S. at 403.

76. *Id.* at 403-04 (citing Abbott v. Meese, 824 F.2d 1166 (D.C. Cir. 1987)).

77. *Id.* at 404 (citing Meese v. Abbott, 485 U.S. 1020 (1988)).

78. *Id.* at 407.

79. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 84 (1987)).

80. *Id.* (citing *Turner*, 482 U.S. at 94-99; Bell v. Wolfish, 441 U.S. 520 (1979);

Court stressed the difficulties arising in prison administration and recognized the "delicate balance" prison officials must maintain between the security of the prison and the rights and demands of those free citizens seeking access to the prison environment.[81] Recognizing that "publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners,"[82] the Court described its role as deciding what standard of review should be applied to regulations limiting that access.[83]

Despite referring to *Martinez*, the *Abbott* Court found that subsequent decisions had articulated a "different standard" of review from that in *Martinez*.[84] Quoting *Turner*, it ruled that the question was whether the restrictions were "reasonably related to legitimate penological interests."[85] The Court held that "regulations affecting the sending of a 'publication' . . . to a prisoner must be analyzed under the *Turner* reasonableness standard."[86] Furthermore, the Court limited *Martinez* "to regulations concerning outgoing correspondence."[87]

Jones v. North Carolina Prisoners' Labor Union, Inc., 443 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974)).

81. *Id.* at 408.

82. *Id.*

83. *Id.*

84. *Id.* at 409.

85. *Id.* at 404 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

86. *Id.* at 413.

87. *Id.* As noted by Judge Bennett in Lyon v. Grossheim, 803 F. Supp. 1538, 1555 n.21 (S.D. Iowa 1992), prior to this holding in *Abbott*, many courts held that *Martinez* involved the First Amendment free speech rights of nonprisoners and *Turner* addressed the rights of prisoners. Therefore, these courts applied the *Martinez* standard to all cases of restrictions on prison correspondence affecting the rights of free citizens. *See* Lawson v. Dugger, 840 F.2d 781 (11th Cir. 1987) (prohibition against Hebrew Israelite literature is overbroad under *Martinez*), *vacated*, 490 U.S. 1078 (1989); Valiant-Bey v. Morris, 829 F.2d 1441 (8th Cir. 1987) (reversing dismissal of claim that religious publications were intercepted and confiscated by prison officials in violation of the minimum procedural requirements set forth in *Martinez*); Abbott v. Meese, 824 F.2d 1166 (D.C. Cir. 1987) (*Martinez* standards applicable to censorship of publications to which inmates subscribed), *vacated sub nom.* Thornburgh v. Abbott, 490 U.S. 401 (1989); Murphy v. Missouri Dep't of Corrections, 814 F.2d 1252 (8th Cir. 1987) (prison mail policy that operated as a total ban on white supremacist material was overly restrictive under *Martinez*); Brooks v. Seiter, 779 F.2d 1177 (6th Cir. 1985) (prisoners claim that it was unconstitutional to

The *Abbott* Court supported its conclusion by distinguishing between the security concerns involved in outgoing correspondence, which was restricted in *Martinez*, from those that may result from incoming mail, such as the magazines rejected by prison officials in the case at hand.[88] According to the Court, outgoing prisoner correspondence was not likely to pose a danger to those inside the prison, and dangerous outgoing correspondence was "more likely to fall within readily identifiable categories."[89] It described these concerns as being "of a categorically lesser magnitude than the implications of incoming materials."[90]

In contrast, the *Abbott* Court found that publications sent to individual prisoners but intended for a general audience "may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct."[91] It expressed further concern for the possibility that a prisoner who would observe these publications in the possession of another prisoner may draw inferences about the latter's beliefs, sexual orientation, or gang affiliations "and cause disorder by acting accordingly."[92]

Having limited the holding in *Martinez* to regulations concerning outgoing prisoner correspondence, the Court proceeded to con-

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prohibit them from receiving certain mail order publications was not frivolous when considered in light of *Martinez*); Pepperling v. Crist, 678 F.2d 787 (9th Cir. 1982) (blanket prohibition against prisoners' receipt of nude pictures of wives and girlfriends and *Hustler* and *High Times* magazines was contrary to the restrictive rule in *Martinez*); Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978) (follows *Martinez* in prohibiting prison officials from censoring publications critical of their penal philosophy and their activities); Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976) (prison censorship regulations overbroad under *Martinez*); Morgan v. LaVallee, 526 F.2d 221 (2d Cir. 1975) (*Martinez* is controlling in cases involving censorship of prisoners' materials); Dooley v. Quick, 598 F. Supp. 607 (D.R.I. 1984) (managers may limit expression pursuant to *Martinez*), *aff'd*, 787 F.2d 579 (1st Cir. 1986); Hopkins v. Collins, 411 F. Supp. 831 (D. Md. 1976) (a full hearing requirement before censorship of a newspaper was not necessary to meet the procedural due process standards under *Martinez*), *aff'd in relevant part*, 548 F.2d 503 (4th Cir. 1977); *see also Lyon*, 803 F. Supp. at 1555 n.21 (identifying and summarizing these decisions).

88. *Abbott*, 490 U.S. at 411.

89. *Id.* at 411-12.

90. *Id.* at 413.

91. *Id.* at 412.

92. *Id.* at 412-13.

sider the regulations in question under the *Turner* reasonableness standard.[93] Applying the four factors delineated in *Turner*,[94] the Court held that the regulations were facially valid under that standard.[95]

The dissent in *Abbott* consisted of only three justices, as Justice Blackmun not only joined the majority, but wrote the majority opinion.[96] The dissenting opinion, written by Justice Stevens, again criticized the "manipulable 'reasonableness' standard" applied by the majority.[97] Justice Stevens quoted from his partially dissenting opinion in *Turner* what he considered to be the dangers that such a standard posed.[98]

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93. *Id.* at 414.

94. *Id.* at 414-19; *see supra* notes 59-62 and accompanying text.

95. 490 U.S. at 419.

96. The approach of Justice Blackmun in the Supreme Court decisions affecting First Amendment rights in the prison context is puzzling. Justice Blackmun joined the majority opinions in Procunier v. Martinez, 416 U.S. 396 (1974), and Pell v. Procunier, 417 U.S. 817 (1974), then joined the dissent in Turner v. Safley, 482 U.S. 78 (1987) and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), but finally re-joined the majority in *Abbott*, writing the majority opinion.

In *Martinez* and *Pell*, Justice Blackmun may have agreed with each majority's standard for restrictions on the rights of nonprisoners because the issue of prisoners' rights was not relevant to the ruling in those cases. *See supra* notes 34-37 and accompanying text and note 44. When faced in *Turner*, however, with a mere reasonableness standard to be applied to prisoners' rights, Justice Blackmun may have agreed with the dissent because the standard suggested was too broad. Indeed, in *Block v. Rutherford*, Justice Blackmun expressed concern for what he called "the Court's apparent willingness to substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting." 468 U.S. 576, 593 (1984) (Blackmun, J., concurring in judgment). Further, in *O'Lone*, Justice Blackmun once again criticized the majority's standard as being too deferential. 482 U.S. at 354 (Brennan, J., dissenting).

In *Abbott*, however, Justice Blackmun adopted the more deferential view. The majority in *Abbott*, like in *Turner* and *O'Lone*, applied an explicitly deferential reasonableness standard to restrictions on prisoners' rights. In light of his dissent in *Turner*, Justice Blackmun's reliance on the majority opinion in *Turner* to agree with—and in fact put forth—the view in *Abbott* that *Martinez* was partially overruled, is difficult to justify. *See* Cooper, *supra* note 44, at 284 (noting Justice Blackmun's departure from the dissent in *Turner* to the majority in *Abbott* and commenting that "[t]his move, whether it is meant to be symbolic or not, further solidifies the Court and advances the certainty that a reasonableness standard will be applied in evaluating future regulations which restrict the media's access to prisoners").

97. *Abbott*, 490 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).

98. *Id.* at 427-28 (Stevens, J., concurring in part and dissenting in part). *See* Willa E. Rucker, Note, *Constitutional Law—Federal Bureau of Prisons Regulation Prohibiting*

The dissent also criticized what it called the majority's "casual discarding . . . of considered precedent," which "ill serves the orderly development of the law."[99] It noted that although "[t]he *Turner* opinion cited and quoted from *Martinez* more than twenty times[,] not once did it disapprove of *Martinez*'s holding, its standard, or its recognition of a special interest in protecting the First Amendment rights of those who are not prisoners."[100] Therefore, the dissent disagreed with the majority in *Abbott* that *Turner* had partially overruled *Martinez*. Finally, Justice Stevens again concluded that even under the majority's more deferential standard, the restriction would still be unconstitutional.[101]

II. *THORNBURGH V. ABBOTT* AND ITS PROGENY: APPLYING A NEW REASONABLENESS STANDARD TO RESTRICTIONS ON CORRESPONDENCE RIGHTS IN THE PRISON CONTEXT

The Supreme Court's decision in *Thornburgh v. Abbott* is troubling for a number of reasons.[102] First, the majority's analysis in

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Prisoners from Receiving Incoming Publications that Threaten the Security of a Penal Institution Does Not Violate Prisoners' First Amendment Rights—Thornburgh v. Abbott, *490 U.S. 401 (1989)*, 40 DRAKE L. REV. 451, 463 (1991) (stating that the *Thornburgh* reasonableness standard "gives feeble protection to the constitutional rights of prisoners" and "makes it too easy for a prison administrator to infringe on a prisoner's first amendment rights based merely on an administrative concern or speculation about a possible security risk"). *But see* Cooper, *supra* note 44, at 287 (focusing on the "continuing threat of disruption" that "media access" to prisoners poses "to the prison environment," and stating that "[t]hus, a more manipulable reasonableness standard which is capable of responding to the facts of each individual case may be justified").

99. *Abbott*, 490 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).

100. *Id.* at 427-28 (Stevens, J., concurring in part and dissenting in part).

101. *Id.* at 430-31 (Stevens, J., concurring in part and dissenting in part).

102. The *Abbott* decision has generated much criticism in legal scholarship. *See, e.g.*, *The Supreme Court, 1988 Term: Leading Cases—I. Constitutional Law—A. Criminal Law and Procedure*, 103 HARV. L. REV. 137, 239-49 (1989-1990) [hereinafter Harvard Note] (endorsing Justice Stevens' criticisms of the majority opinion); *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, 540-41 (1989-1990) (criticizing *Abbott* for ignoring the doctrine of overbreadth in upholding an "all-or-nothing rule," which allows an entire publication to be seized due to a single article or picture that violates regulations and "deters publishers from including any reference to controversial themes in publications sent to prisoners" and "prisoners from

Abbott contains what appears to be questionable reasoning. As discussed in the extensive dissenting opinion in *Abbott*, the majority misinterpreted the precedents set by *Turner* and *Martinez* and showed little regard for the First Amendment interests of nonprisoners.[103] Moreover, the Court's rationale for applying a more deferential standard to incoming mail than to outgoing mail was based on the special security concerns posed by incoming publications.[104] Yet, the Court did not distinguish between incoming publications and personal correspondence when applying the reasonableness test to incoming mail.[105] Thus, the Court allowed for the application of a broad reasonableness standard for all mail sent into prisons, regardless of its nature.

More disturbing is the reaction of lower and intermediate courts that have applied the *Abbott* reasonableness standard to prisoner mail regulations. As expected, courts have uniformly applied the reasonableness standard to both publications and personal letters sent into prisons, since *Abbott* failed to distinguish the two forms of mail.[106] What is both surprising and disheartening, though, is the approach of the United States Courts of Appeals for the Fifth and Eighth Circuits, which have applied *Abbott*, rather than *Martinez*, to outgoing prisoner mail as well.[107] On the other hand, a number of other courts, most notably the United States Courts of Appeals for the First and Sixth Circuits, have refused to extend *Abbott* beyond the facts and rationale of the Supreme Court decision.[108] As some of these courts have observed, an extension of *Abbott* to outgoing prisoner mail, which suggests that outgoing mail poses a sufficient danger to warrant its censorship based on a rea-

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subscribing to publications that might contain such themes," and concluding that, in short, "[t]he rule deters the exercise of massive amounts of protected speech").

103. *See* discussion *infra* part II.A.1; notes 99-101 and accompanying text; *see also* Oei, *supra* note 23 (suggesting that "the deference in [*Abbott*] is likely to turn the tide of prison constitutional review back to its pre-*Martinez*, highly deferential position"); Van Slyke, *supra* note 34, at 1727-28 & n.4 (describing "[c]ontinued pressure for a return to the 'hands-off' approach to prison administration" and citing scholarship suggesting that such a return may have already begun); *see generally* Giles, *supra* note 62.

104. *See supra* notes 85-89 and accompanying text.

105. *See* discussion *infra* part II.A.2.

106. *See* discussion *infra* part II.B.1.

107. *See* discussion *infra* part II.B.2.a.

108. *See* discussion *infra* part II.B.2.b.

sonable relationship test, expressly contradicts the logic of *Abbott* itself.[109]

A. *Problematic Aspects of the* Abbott *Rationale*

1. Disregarding Precedent and the First Amendment Interests of Nonprisoners

In supporting its application in *Abbott* of a reasonableness standard to prison restrictions on incoming publications, the Supreme Court asserted that such a standard had been used in prior cases involving First Amendment rights "in the prison context."[110] *Turner* had involved First Amendment rights in the prison context, but a reasonableness standard was applied to regulations affecting the rights of only prisoners, not nonprisoners. In *Turner*, the Court emphasized the fact that the limitations on inmate-to-inmate correspondence at issue did not implicate the rights of nonprisoners.[111] Indeed, as noted by the dissent in *Abbott*, this recognition provided the basis for the *Turner* majority's distinction between the limitations on inmate-to-inmate correspondence and the marriage restrictions, which could affect the constitutional rights of nonprisoners as well.[112] In contrast, the regulations at issue in *Abbott* implicated the First Amendment rights of publishers, who sought to communicate with prisoners by sending in their magazines.[113] Thus, the *Abbott* Court's comparison of the regulations in *Turner* to those in *Abbott* is tenuous at best.[114]

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109. *See* discussion *infra* part II.B.2.c.

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

111. *See* Turner v. Safley, 482 U.S. 78, 85-86 (1987).

112. *See Abbott*, 490 U.S. at 426-27 (Stevens, J., concurring in part and dissenting in part).

113. *See supra* note 82 and accompanying text.

114. *See* McDonald, *supra* note 23, at 1042 (criticizing *Abbott* because "[f]ree citizens corresponding with or mailing subscriptions to prisoners will have their free speech rights infringed by regulations that are subject to review by a standard that was formulated only for inmate-to-inmate correspondence"); Rucker, *supra* note 98, at 463 (harshly criticizing the Court for finding that its decision in *Abbott* affected the First Amendment rights of prisoners only, despite the fact that restrictions on incoming mail infringe on the First Amendment rights of free citizens to communicate with a prisoner by sending a letter, and stating that "[a]larmingly, prison administrators have been given free reign to

The dissent further posited that the *Abbott* majority's analysis was inconsistent with the reasoning of *Martinez*.[115] The dissenting opinion found that "[t]he Court today abandons *Martinez*'s fundamental premise"[116] because "*Martinez* was based on a distinction between prisoners' constitutional rights and the protection the First Amendment affords those who are not prisoners—not between nonprisoners who are senders and those who are receivers."[117]

In fact, the *Martinez* Court's conclusion that a nonprisoner retains First Amendment rights to correspondence sent by an inmate was based on equating those rights with the rights of the nonprisoner to send mail to the inmate.[118] The Court in *Martinez* analyzed a situation in which the wife of a prison inmate was not permitted to read all that the inmate had written to her.[119] The Court stated that she "has suffered an abridgement of her interest in communication with him as plain as that which results from censorship of her letter to him."[120] Thus, the Court found it "plain" that the free expression rights of nonprisoners are involved when they send letters; "as plain" as this right is the right of nonprisoners in letters written to them. Therefore, the Court concluded that the intermediate scrutiny standard should apply to outgoing prison correspondence, having assumed, in dicta, that it applied to incoming correspondence.[121]

Thus, the *Abbott* Court's rationale behind partially overruling *Martinez* and limiting the intermediate scrutiny standard to outgoing correspondence is unpersuasive. The regulations in *Abbott*, as

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infringe on the First Amendment rights with little or no judicial restraint); *see also* Harvard Note, *supra* note 102, at 240 (stating that "the Court ignored the censorship policy's infringement upon the rights of nonprisoners and further eviscerated constitutional protection in the prison context"); McDonald, *supra*, at 1042 n.226 (stating that the standard of review in *Abbott*, which is the same as that in *Turner*, "does not take into account the rights of free citizens").

115. *Abbott*, 490 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).

116. *Id.* at 425 (Stevens, J., concurring in part and dissenting in part).

117. *Id.* at 424 (Stevens, J., concurring in part and dissenting in part).

118. *See* Procunier v. Martinez, 416 U.S. 396, 409 (1974).

119. *Id.* at 409.

120. *Id.*

121. *Id.*

those in *Martinez*, implicated the First Amendment rights of nonprisoners; the regulations in *Turner* did not.

2. Disregarding the Distinction Between Incoming Publications and Incoming Personal Mail

The concerns expressed by the majority in *Abbott* for the danger posed by magazines sent to prisoners do not seem to justify the Court's broad conclusion that the reasonableness standard should apply to prison regulations on all kinds of incoming mail.[122] After all, the Court supported its finding that *Martinez* applied to only outgoing correspondence by describing the particular security problems that could result specifically from certain magazines being sent to prisons.[123]

The Court's first concern related to a magazine's audience.[124] Although magazines were requested by an individual inmate, the court found that because they were "targeted to a general audience," the possibility of their subsequent circulation among other prisoners could potentially result in "coordinated disruptive conduct."[125] In contrast, personal mail is not only sent to an individual inmate but is also inherently targeted only to that particular inmate. Thus, subsequent circulation of a personal letter among other inmates and any resulting disruptions are less likely. The Court's other concern was that if other prisoners observed an individual prisoner in possession of certain materials, they may draw inferences about that prisoner's personal preferences and react in a disorderly manner as a result.[126] Because of the less conspicuous nature of a personal letter, incoming correspondence generally would not

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122. *See supra* notes 86-87 and accompanying text; Harvard Note, *supra* note 102, at 245 (warning that "nothing prevents extension of the *Abbott* Court's distinction between the levels of constitutional protection accorded to incoming and outgoing publications to *all* incoming materials, including personal correspondence" and "[i]n the future, prison administrators may justify substantial censorship merely by reciting talismanic incantations of security and good order").

123. *Abbott*, 490 U.S. at 411-12.

124. *Id.* at 411.

125. *Id.* at 412.

126. *Id.* at 412-13.

cause such problems.

The Court did cite an example of a regulation on personal prison correspondence that was required to meet only the reasonableness test.[127] As the Court noted, *Turner* itself, which set the reasonableness standard, involved what the Court called "incoming personal correspondence."[128] Yet, the Court's use of the term "incoming" correspondence for comparing the regulations in *Turner* to those in *Abbott* is misleading. *Turner* involved inmate-to-inmate correspondence and created a reasonableness standard applicable when the rights of only prisoners are involved.[129] There is no indication from the analysis in *Turner* that any correspondence involving nonprisoners could similarly be restricted by meeting a reasonableness test.

B. Abbott*'s Progeny—Lower Court Decisions Addressing First Amendment Correspondence Rights in the Prison Context*

Since the Supreme Court's decision in *Abbott* to limit the intermediate scrutiny standard to outgoing correspondence, lower courts have followed—and, at times, extended—the level of deference accorded to the prison administration. First, courts faced with restrictions on publications and personal mail sent to prisoners have universally applied the reasonableness standard articulated in *Abbott* to determine their constitutionality.[130] More significantly, some courts have recently held prison security to be so important that even restrictions on outgoing correspondence did not have to meet the intermediate scrutiny standard, but were valid if they met the reasonableness test.[131]

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127. *Id.* at 413.
128. *Id.*
129. *See supra* notes 54-57 and accompanying text.
130. *See* discussion *infra* part II.B.1.
131. *See* discussion *infra* part II.B.2.a.

1. Following *Abbott*—Applying the Reasonableness Standard to Incoming Publications and Personal Mail

Subsequent to the decision in *Abbott*, lower and intermediate courts have uniformly applied *Abbott* to constitutional challenges against restrictions on publications delivered to prisoners and have often upheld such regulations as reasonably related to legitimate penological interests such as order, rehabilitation and security.[132]

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132. *See, e.g.*, Spruytte v. Feighner, No. 93-2009, 1994 U.S. App. LEXIS 2187, *3 (6th Cir. Feb. 4, 1994) (holding that Michigan state prison officials did not violate inmate's First Amendment rights when they refused to deliver to him an unsigned greeting card sent by his parents for his personal use because prison regulations requiring inmates to purchase goods only from authorized vendors was reasonably related to a legitimate security interest); Dawson v. Scurr, 986 F.2d 257, 262 (8th Cir.) (holding that Iowa state prison regulations authorizing prison officials to exclude certain sexually explicit publications was reasonably related to the legitimate penological interests of rehabilitation and security), *cert. denied*, 114 S. Ct. 232 (1993); Manning v. Abramajtys, No. 91-1450, 1992 U.S. App. LEXIS 5059, *8 (6th Cir. Mar. 17, 1992) (finding that under *Abbott*, a Michigan state prison's refusal to deliver a legal publication entitled *Prisoners' Self-Help Litigation Manual*, following prison procedure not to deliver outside publications to prisoners unless they were ordered through the institutionally approved vendor, was reasonably related to a legitimate security objective); Smith v. Donohue, No. 91-1647, 1992 U.S. App. LEXIS 25066, *12-*13 (7th Cir. Sept. 24, 1992) (holding that Illinois state prison officials' confiscation of two sexually explicit magazines sent to inmate was reasonably related to legitimate penological interests); Harris v. Bolin, 950 F.2d 547 (8th Cir. 1991) (holding that prison officials' screening prisoner's mail and retaining obscene articles did not violate prisoner's First Amendment rights); Johnson v. Daniels, No. 89-2012, 1990 U.S. App. LEXIS 13777, *4 (6th Cir. Aug. 9, 1990) (holding that state prison officials' denial of copies of *Hustler* and *Club International* to a prisoner was reasonably related to legitimate security interests); Pike v. Gomez, No. C-91-2114, 1993 U.S. Dist. LEXIS 12228, *7 (N.D. Cal. Aug. 23, 1993) (holding that California state prison officials' confiscation of white supremacist material from prisoner's mail was reasonably related to security interests); Avery v. Powell, 806 F. Supp. 7, 9 (D.N.H. 1992) (holding that New Hampshire state prison restrictions against receiving greeting cards except from vendors was reasonably related to maintaining prison security); Cox v. Embly, 784 F. Supp. 685, 688-89 (E.D. Mo. 1992) (holding that Missouri state prison officials did not deprive prisoner of his constitutional rights by confiscating certain sexually explicit magazines, because prison regulations were reasonably related to prison security); Larkin v. Murphy, No. 91-C-0861-C, 1992 U.S. Dist. LEXIS 21573, *14 (W.D. Wis. June 12, 1992) (holding that Wisconsin state prison policy prohibiting an inmate from possessing newspaper or magazine clippings unless the clippings were related to the inmate's legal case were reasonably related to prison security and order), *aff'd*, No. 92-2597, 1993 U.S. App. LEXIS 18590 (7th Cir. July 19, 1993); McKown v. Schneider, No. 89-0036-C-5, 1990 U.S. Dist. LEXIS 19538, *6-*7, *10 (E.D. Mo. Jan. 24, 1990) (holding that Missouri state prison officials' confiscation of seven incoming issues of the *Behold! Newsletter* was

At times, however, courts have found that certain restrictions did not meet even the reasonableness standard.[133] For example, in *Williams v. Alameda County Sheriff Dep't*,[134] a California state prisoner claimed that prison officials violated his constitutional rights by confiscating a gardening magazine as well as advertising inserts placed in another magazine. The United States District Court for the Northern District of California granted the defendants summary judgment.[135]

The United States Court of Appeals for the Ninth Circuit first considered the constitutionality of the confiscation of the advertising inserts.[136] Citing *Abbott*, the court found that prison officials may censor prisoner mail when their actions are reasonably related to the penological interest of uncovering contraband.[137] Prison officials considered the advertising inserts contraband because inmates had ordered magazines or credit cards and then defaulted on payment.[138] Therefore, the court held that the confiscation served the legitimate penological interest of preventing harm to the pub-

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reasonably related to security interests); Lambrix v. Dugger, 610 So.2d 1366 (Fla. Dist. Ct. App. 1992) (holding that Florida state prison officials' interception of certain sexually explicit photographic materials did not violate inmate's rights because the regulations were reasonably related to security interests); Montgomery v. Coughlin, 605 N.Y.S.2d 569 (N.Y. App. Div. 1993) (holding that New York state prison policy prohibiting inmates from receiving newspapers from nonpublisher sources was reasonably related to security interests); *In re* Malik, 552 N.Y.S.2d 182, 184 (N.Y. App. Div. 1990) (holding New York state prison officials' removal of a particular article form an issue of *The Freedom Press* was reasonably related to security interests).

133. *See, e.g.*, Williams v. Alameda County Sheriff Dep't, No. 91-16316, 1993 U.S. App. LEXIS 6000 (9th Cir. Mar. 19, 1993) (finding no legitimate penological interest served by California state prison officials' confiscation of gardening magazine); Nichols v. Nix, 810 F. Supp. 1448, 1467 (S.D. Iowa 1993) (holding that Iowa state prison's denying an inmate three religious publications was not reasonably related to a legitimate penological interest), *aff'd*, 16 F.3d 1228 (8th Cir. 1994); Lyon v. Grossheim, 803 F. Supp. 1538, 1555 (S.D. Iowa 1992) (holding that Iowa state prison's denying an inmate certain religious comic books was not reasonably related to a legitimate penological interest).

134. No. 91-16316, 1993 U.S. App. LEXIS 6000 (9th Cir. Mar. 19, 1993).

135. *Id.* at *2.

136. *Id.* at *3.

137. *Id.*

138. *Id.*

lic.[139]

The court then considered the confiscation of the magazine, *Organic Gardening*.[140] Again, citing *Abbott*, the court applied the *Turner* reasonableness standard to prison restrictions affecting the sending of a publication to prisoners.[141] Applying this standard to the confiscation of the magazine, the court reversed and remanded, finding no legitimate penological interest served by such a confiscation.[142]

Following the holding in *Abbott*,[143] courts have also applied the reasonableness standard to restrictions on personal mail sent to prisoners and have upheld such restrictions as reasonably related to legitimate penological interests.[144] For example, in *In Re Rules Adoption Regarding Inmate Mail*,[145] the Supreme Court of New Jersey considered proposed New Jersey Department of Corrections regulations regarding inmate mail to attorneys, public officials, and news media representatives. The regulations authorized prison officials to open and inspect incoming correspondence, other than

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139. *Id.*

140. *Id.* at *4.

141. *Id.* at *8.

142. *Id.*

143. *See supra* notes 86-87 and accompanying text.

144. *See, e.g.*, Walker v. Navarro County Jail, 4 F.3d 410 (5th Cir. 1993) (holding that Texas state prison officials' opening and inspecting incoming mail for contraband was reasonably related to a legitimate security interest), *reh'g denied*, 1993 U.S. App. LEXIS 32037 (5th Cir. Nov. 19, 1993); Arbing v. Page, No. 92-1312, 1993 U.S. App. LEXIS 8597 (7th Cir. Mar. 8, 1993) (holding that Illinois state prison officials who opened mail sent to prisoner by clerk of the court was reasonably related to prison order and security, and that the mail did not qualify as privileged); Nobles v. Hoffman, No. 92-2692, 1993 U.S. App. LEXIS 19958 (7th Cir. Aug. 2, 1993) (holding that confiscation of photographs portraying gang-related symbols sent to prisoner was reasonably related to legitimate penological objectives); Griffin v. Lombardi, 946 F.2d 604 (8th Cir. 1991) (holding the *Abbott* reasonableness standard applicable to determine the constitutionality of Missouri prison officials' refusal to deliver prisoner's original diploma from a paralegal course and his original grade transcript), *reh'g en banc denied*, 1991 U.S. App. LEXIS 27988 (8th Cir. Nov. 25, 1991); Allen v. Reynolds, No. 89-6148, 1990 WL 14063 (6th Cir. Feb. 16, 1990) (finding that Tennessee state prison officials opened prisoner's incoming mail in order to determine the proper recipient, and holding that they acted reasonably under *Abbott*).

145. 576 A.2d 274 (N.J. 1990).

legal correspondence, for contraband, and to read it "upon [the] prior authorization of the Superintendent or his or her designee" if "there is reason to believe that [it] contains disapproved content."[146] The regulations' criteria for "disapproved" mail included material leading to a variety of security concerns.[147]

The public advocate challenged the regulations, proposing that officials should not be allowed to open, read, and censor mail between inmates and public officials, government agency officials, and media representatives, but that such mail should instead be considered privileged legal correspondence.[148] As such, this mail would be opened only in the presence of the inmate and referred to corrections personnel only if there was substantial "reason to believe" it was illegal or disapproved.[149]

The court cited *Abbott* to hold the *Turner* reasonableness standard of review applicable for analyzing the regulations affecting incoming inmate correspondence.[150] It proceeded to consider the regulations under question in light of the four factors enumerated in *Turner*[151] and concluded that the regulations were valid because they were reasonably related to legitimate penological interests.[152]

2. Outgoing Prisoner Mail

Some of the commentators who have addressed the *Abbott* decision expected that the *Martinez* intermediate scrutiny standard would continue to be applied to regulations restricting outgoing correspondence. This expectation was based on the Court's find-

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146. *Id.* (quoting N.J.A.C. 10A:18-2.6(g) (1991)).

147. *Id.* at 275-76.

148. *Id.* at 276.

149. *Id.*

150. *Id.* at 279. The court stated that "[c]entral to the [*Abbott*] Court's analysis was that any materials entering a prison—publications or correspondence—pose a potentially greater risk of harm to institutional security than materials leaving a prison." *Id. But see* discussion *supra* part II.A.2. (arguing that the rationale in *Abbott* is relevant specifically to publications and that the analysis did not express a similar concern for the dangers posed by correspondence).

151. *In re Rules Adoption*, 576 A.2d at 279-80.

152. *Id.* at 280.

ings in *Abbott* that outgoing prisoner correspondence does not pose a serious danger to prison security.[153] However, some courts have recently extended the reasonableness standard in *Turner* and *Abbott* to outgoing prisoner correspondence as well.[154] Since 1993, four Eighth Circuit decisions[155] and one Fifth Circuit decision[156] upheld prison regulations on prisoners' outgoing mail, holding that the regulations were reasonably related to legitimate penological interests. Yet, the reasoning of these courts is questionable in light of the dissenting opinion of an Eighth Circuit judge as well as the holdings of the First and Sixth Circuits, which have continued to apply the intermediate scrutiny standard articulated in *Martinez*.[157]

a. Extension of *Abbott*—Applying the Reasonableness Standard to Outgoing Correspondence

The first of the Eighth Circuit cases to apply the reasonableness standard to outgoing prisoner correspondence was *Smith v. Delo*.[158] *Smith* involved the classification by the Potosi Correctional Center in Missouri of outgoing inmate mail addressed to members of the media or the clergy. Prior to 1989, such mail was classified as privileged, and thus could be sent to the prison mail room sealed.[159] After February 1989, however, this type of mail was reclassified as not privileged. This classification required that the prisoners leave the letters unsealed for prison officials to inspect them for threats or evidence of illegal activity.[160] Smith, an inmate, filed suit alleging that the reclassification violated his First Amendment rights.[161]

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153. *See* Cooper, *supra* note 44, at 288 & n.130; *see also* McDonald, *supra* note 23, at 1042 (criticizing the deferential reasonableness standard in *Abbott*, yet assuming that in cases involving regulations on outgoing mail, the *Martinez* intermediate scrutiny standard would still be applied).

154. *See* discussion *infra* part II.B.2.a.

155. Gassler v. Wood, 14 F.3d 406 (8th Cir. 1994); Thongvanh v. Thalacker, 17 F.3d 256 (8th Cir. 1994); Loggins v. Delo, 999 F.2d 364 (8th Cir. 1993); Smith v. Delo, 995 F.2d 827 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 710 (1994).

156. Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1081 (1994).

157. *See* discussion *infra* part II.B.2.b.

158. 995 F.2d 827 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 710 (1994).

159. 995 F.2d at 829.

160. *Id.*

161. *Id.*

The magistrate judge granted the prison officials' motion for summary judgment, and the United States District Court for the Eastern District of Missouri adopted the magistrate's report and recommendation.[162]

On appeal to the Eighth Circuit, Smith argued that his case should be considered under the *Martinez* test because, unlike the regulations at issue in *Turner* and *Abbott*, the Missouri regulations involved restrictions on outgoing mail.[163] The court of appeals rejected this reasoning.[164] The court acknowledged *Abbott*'s statement that "the logic of [the] analyses in *Martinez* . . . requires that *Martinez* be limited to regulations concerning outgoing correspondence,"[165] implying that even after *Abbott*, the *Martinez* intermediate scrutiny standard still applied to outgoing correspondence. Yet, the court held, in a 2-1 decision, that the "context" of this statement in *Abbott* indicated that the Supreme Court distinguished between the security risks posed by different types of correspondence, rather than the standard to apply to restrictions on correspondence.[166] The court of appeals concluded that *Abbott* established the reasonableness test for all restrictions on prisoner correspondence.[167] Considering Smith's claims under the *Turner* reasonableness standard,[168] it held that classifying mail addressed to media and the clergy as non-privileged was reasonably related to the prison officials' legitimate interest in preventing mail containing "contraband, threats, evidence of escape plans and other illicit activity."[169]

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162. *Id.*

163. *Id.*

164. *Id.* at 830.

165. *Id.* (quoting Thornburgh v. Abbott, 490 U.S. 401, 413 (1989)).

166. *Id.*

167. *Id. Contra* Bressman v. Farrier, 825 F. Supp. 231, 233 (N.D. Iowa 1993) (citing *Abbott* as holding that "*Martinez* [is] still the correct standard in cases involving outgoing inmate mail"); Nichols v. Nix, 810 F. Supp. 1448, 1457 n.16 (S.D. Iowa 1993) (stating that *Abbott* limited the use of the *Martinez* test to regulations governing outgoing correspondence only and that "this court does not understand *Abbott* to have completely overruled *Martinez*"), *aff'd*, 16 F.3d 1228 (8th Cir. 1994) (affirming on procedural grounds); Lyon v. Grossheim, 803 F. Supp. 1538, 1546 n.21 (S.D. Iowa 1992) (same).

168. *Smith*, 995 F.2d at 830-32.

169. *Id.* at 832.

The *Smith* majority's reading of *Abbott* prompted a dissenting opinion by Judge Arnold.[170] Judge Arnold found that *Martinez* controlled for prison regulations on outgoing mail, requiring that "limitation of [inmates'] First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[171] Based on this standard, he found that the Missouri regulation was not justified by a sufficient threat to prison security.[172] Distinguishing the Missouri regulation from those considered in *Turner* and *Abbott*,[173] Judge Arnold reasoned that "[t]he same type of regulation considered generally necessary to screen incoming mail can hardly be considered generally necessary to screen outgoing mail because the former admittedly poses a far greater threat to prison security than does the latter."[174] Judge Arnold called for a modified regulation, to "eliminate the inevitable chilling effect that the current restriction has on inmates' exercise of their First Amendment rights."[175]

A little over a month later, the Eighth Circuit decided *Loggins v. Delo*.[176] Loggins, also an inmate at the Potosi Correctional Cen-

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170. *Id.* at 832-33 (Arnold, J., dissenting).

171. *Id.* at 832 (Arnold, J., dissenting) (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

172. *Id.* at 833 (Arnold, J., dissenting).

173. *Id.* at 832 (Arnold, J., dissenting).

174. *Id.* at 833 (Arnold, J., dissenting).

175. *Id.* (Arnold, J., dissenting). Judge Arnold's dissenting opinion is thus important for its recognition that the language in *Abbott*, on its face, did not reject the *Martinez* standard for outgoing mail. It should be noted, however, that his dissent was imprecise in its citation of *Martinez*, failing to accurately acknowledge *Turner*'s explanation of *Martinez*. Judge Arnold's dissent inserted the word "inmates" in the key phrase it cited from *Martinez*, referring to "a regulation's 'limitation of [inmates'] First Amendment freedoms.'" *Id.* at 832 (Arnold, J., dissenting) (quoting *Martinez*, 396 U.S. at 413). In *Turner*, the Supreme Court did not expressly overrule *Martinez*, but rather stressed that in *Martinez*, the restrictions infringed on the rights of nonprisoners as well as those of prisoners. Turner v. Safley, 482 U.S. 78, 85-86 (1987). The Court in *Turner* held that because the restrictions at issue affected only prisoners' rights, the restrictions did not have to meet as high a standard as required under *Martinez*. *Id.* *See also* discussion *supra* notes 54-57 and accompanying text. Thus, after *Turner*, the Court interpreted the *Martinez* standard as applying only to prison restrictions that affected nonprisoners. Judge Arnold was then correct in applying the *Martinez* standard to regulations on prisoner mail, which was addressed to nonprisoners, but imprecise in stating that *Martinez* referred to the First Amendment rights of the prisoners themselves.

176. 999 F.2d 364 (8th Cir. 1993).

ter in Missouri, placed a letter to his brother in the outgoing prison mail.[177] A mail room clerk discovered in the letter what she considered to be a violation of a prison rule that prohibited an inmate from "using abusive or obscene language . . . or making a written statement, intended to annoy, offend or threaten."[178] Loggins was found guilty of violating the rule and was sentenced to ten days disciplinary detention.[179] Loggins alleged that his First Amendment rights had been violated.[180]

A magistrate judge held that "*Martinez* clearly established that inmates could not be disciplined for merely insulting or derogatory comments made in outgoing mail."[181] The magistrate added that *Abbott* and *Turner* did not overrule *Martinez* but only limited its reasoning to "regulations concerning outgoing correspondence."[182] The United States District Court for the Eastern District of Missouri accepted the magistrate's report and recommendation, holding that the disciplinary action violated *Martinez*.[183]

The Eighth Circuit affirmed the district court's decision, holding that "because the language in Loggins' letter to his brother did not implicate security concerns, the disciplinary action violated *Martinez*."[184] Despite citing *Martinez*, however, the Eighth Circuit quoted its decision in *Smith*, which held that "*Martinez* is limited to outgoing correspondence when deciding the degree of security risk involved."[185] Therefore, the court accepted the ruling from *Smith*, holding that a regulation on outgoing mail was constitutionally valid because, under *Abbott*, it was "rationally related to the prison's interest in detecting evidence of illegal activity."[186] Thus, the Eighth Circuit again applied *Abbott* to outgoing prison corre-

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177. *Id.* at 365.
178. *Id.*
179. *Id.*
180. *Id.* at 365-66.
181. *Id.* at 366.
182. *Id.* (quoting Thornburgh v. Abbott, 490 U.S. 401, 413 (1989)).
183. *Id.*
184. *Id.* at 367.
185. *Id.* (quoting Smith v. Delo, 995 F.2d 827, 830 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 710 (1994)).
186. *Id.* at 367 n.2 (citing *Smith*, 995 F.2d at 832).

spondence.

Two 1994 Eighth Circuit cases also followed *Smith* in applying *Abbott* to restrictions on outgoing prisoner mail. In *Gassler v. Wood*,[187] inmates in a Minnesota state prison claimed that prison officials had violated their constitutional rights by providing a third party with photocopies of their non-legal mail. The United States District Court for the District of Minnesota granted defendants' request for summary judgment.[188] The Eighth Circuit's extensive analysis of the inmates' legal claim relied exclusively on *Martinez*.[189] Applying the intermediate scrutiny standard, the court held that "even under a strict and literal reading of *Martinez*, and without reference to other cases, we have no doubt" that the officials did not violate the inmates' constitutional rights.[190] In a footnote, the court explained that these "other cases" were *Abbott* and *Smith*, and pointed out that "we, of course, are bound by stare decisis" to apply the reasonableness standard to outgoing mail.[191] Nevertheless, according to the court, "under any standard we would affirm the judgment below."[192]

Finally, in *Thongvanh v. Thalacker*,[193] an inmate in an Iowa state prison challenged regulations requiring that all his correspondence, other than that with his parents and grandparents, be in English. Relying on *Smith*, the Eighth Circuit held that the reasonableness standard applied to all of the inmate's mail, both incoming and outgoing.[194] Applying this standard, the court agreed with the holding of the United States District Court for the Northern District of Iowa that defendants were not entitled to judgment as a matter of law.[195]

In addition, the United States Court of Appeals for the Fifth

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187. 14 F.3d 406 (8th Cir. 1994).
188. *Id.* at 407.
189. *Id.* at 408-09.
190. *Id.* at 409-10.
191. *Id.* at 410 n.6.
192. *Id.*
193. 17 F.3d 256 (8th Cir. 1994).
194. *Id.* at 259.
195. *Id.* at 260.

Circuit also applied the *Abbott* reasonableness standard to outgoing prisoner correspondence. In *Brewer v. Wilkinson*,[196] inmates brought a civil rights action against prison officials who had opened their incoming legal mail and inspected it for contraband outside their presence.[197] In addition, Brewer alleged that defendants violated his First Amendment rights on several occasions by failing to deliver incoming and outgoing correspondence with his wife.[198] The United States District Court for the Northern District of Texas concluded that the inmates alleged "a violation of a clearly established constitutional right," but granted defendants' motion for summary judgment because the inmates had failed to make out a cognizable constitutional claim, having not alleged any harm or prejudice resulting from the officials' conduct.[199]

Similar to the reasoning of the Eighth Circuit in *Smith*, the Fifth Circuit held that the *Turner* reasonableness standard applied to outgoing prisoner mail as well as incoming mail.[200] Although the court acknowledged that *Abbott* "appeared to draw a distinction between incoming and outgoing mail and to preserve the viability of *Martinez* with respect to outgoing mail," it concluded that the "reading" of *Martinez* in *Abbott* "suggests that *Turner*'s 'legitimate penological interest' test would also be applied to outgoing mail."[201] The Fifth Circuit offered no further explanation for its conclusion, but it appeared to follow the analysis of the Eighth Circuit in holding that *Abbott* adopted the reasonableness standard for all inmate mail.

b. Inapplicability of *Abbott*—Applying *Martinez* to Outgoing Correspondence

In contrast to the Eighth and Fifth Circuits, the First Circuit,[202] Sixth Circuit,[203] and a number of other courts[204] have held that the

196. 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1081 (1994).
197. 3 F.3d at 817-18.
198. *Id.* at 818.
199. *Id.* at 819 (quoting from the district court's unpublished opinion).
200. *Id.* at 824.
201. *Id.*
202. Stow v. Grimaldi, 993 F.2d 1002 (1st Cir. 1993).
203. Burton v. Nault, 902 F.2d 4 (6th Cir.), *cert. denied*, 498 U.S. 873 (1990).
204. *See, e.g.*, Mujahid v. Sumner, CIV. No. 92-00060, 1992 U.S. Dist. LEXIS

Martinez intermediate scrutiny standard is appropriate for restrictions on prisoners' outgoing mail. In *Stow v. Grimaldi*,[205] an inmate at New Hampshire State Prison challenged prison regulations requiring outgoing prisoner mail to be sent unsealed, unless sent to one of ten listed persons or entities.[206] The inmate claimed that his mail should be considered privileged because it contained a personal matter—his grades.[207] A magistrate judge recommended that the complaint be dismissed, and the United States District Court for the District of New Hampshire agreed.[208]

The United States Court of Appeals for the First Circuit cited *Martinez* as controlling for restrictions on outgoing prisoner correspondence and applied the intermediate scrutiny standard. In addition to quoting from *Martinez* itself, the court cited *Abbott* as standing for the proposition that the "*Martinez* standard applies when assessing the constitutionality of regulations concerning outgoing correspondence," and that the more deferential reasonableness standard should be applied only to regulations on incoming

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19841 (D. Haw. Sept. 18, 1992), *aff'd*, No. 92-17082, 1993 U.S. App. LEXIS 16867 (9th Cir. 1993) (holding that a state prison's regulations preventing an inmate from writing to specific members of the news media did not violate the inmates constitutional rights because, under *Martinez*, they furthered the important state interest of maintaining prison security and were not greater than necessary to further that interest); Avery v. Powell, 806 F. Supp. 7 (D.N.H. 1992) (holding that state prison regulations prohibiting inmates from sealing outgoing correspondence unless addressed to a recognized attorney, certain government agencies, or a court furthered the important government interest of prison order and did not limit First Amendment freedoms more than necessary to protect that interest); Martyr v. Mazur Hart, 789 F. Supp. 1081, 1086 (D. Or. 1992) (holding that restrictions on patient's outgoing mail from state hospital under his plan of treatment was valid under *Martinez*, and citing *Abbott* as holding that the *Martinez* standard remained valid for censorship on outgoing mail, yet, in discussing the second part of the *Martinez* test—whether the restriction is greater than necessary to protect the governmental interest—considering the first three of the factors listed in *Turner*); In Re Rules Adoption Regarding Inmate Mail, 576 A.2d 274 (N.J. 1990) (holding that *Abbott* upheld the *Martinez* standard for regulations on outgoing mail, and finding that state regulations on outgoing prisoner mail failed both the *Martinez* analysis and the *Turner* reasonableness analysis).

205. 993 F.2d 1002 (1st Cir. 1993).

206. *Id.* at 1003.

207. *Id.*

208. *Id.*

mail.[209] The court held that under Martinez, the prison officials did not violate the inmate's constitutional rights.[210]

In *Burton v. Nault*,[211] an inmate in a Michigan state prison claimed that prison officials violated his First Amendment rights when they opened and read an unmailed letter from the inmate to his attorney, having found the letter next to the inmate after his attempted suicide.[212] The United States District Court for the Western District of Michigan granted the defendants summary judgment.[213]

In deciding which standard to apply to the prison officials' actions, the Sixth Circuit first quoted *Martinez*, holding that censorship of prisoners' mail must meet the intermediate scrutiny test.[214] Similar to the First Circuit, the court then cited *Abbott*'s holding that the *Martinez* analysis applied to censorship on outgoing prisoner mail, while the *Turner* reasonableness standard applied to all incoming correspondence.[215]

3. The Proper Approach Regarding Prisoner Correspondence

The decisions by the Eighth and Fifth Circuits have been disturbing in their application of the holding in *Abbott* to outgoing prisoner correspondence. Their approach contradicts both the holding and the logic of *Abbott*. In *Abbott*, the Supreme Court explicitly held that the *Turner* reasonableness standard was appropriate for analyzing restrictions on incoming publications but that the *Martinez* intermediate scrutiny standard was still appropriate for evaluating restrictions on outgoing personal correspondence.[216] Moreover, the Court premised its limitation of *Martinez* to outgoing correspondence on the unique threats to prison security posed specifical-

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209. *Id.* at 1004 (citing Thornburgh v. Abbott, 490 U.S. 401, 413 (1989)).
210. *Id.*
211. 902 F.2d 4 (6th Cir.), *cert. denied*, 498 U.S. 873 (1990).
212. 902 F.2d at 4-5.
213. *Id.* at 4.
214. *Id.* at 5.
215. *Id.*
216. *See supra* notes 86-87 and accompanying text.

ly by mail sent into prisons.[217] The decisions of the Eighth and Fifth Circuits fly in the face of these conclusions in *Abbott*.

The First and Sixth Circuits, on the other hand, have more carefully followed Supreme Court precedent. When faced with restrictions on outgoing prisoner correspondence, these courts have correctly recognized that *Martinez* addresses precisely this question. Despite *Abbott*'s modification of *Martinez*, these circuit courts,[218] in addition to a number of other courts,[219] have acknowledged that the facts, holding and rationale in *Abbott* limit that case's applicability exclusively to those materials sent into the prisons. Fortunately, the decisions of these courts have helped protect against further limitations on First Amendment rights in the prison context.

CONCLUSION

Since 1974, the Supreme Court has shown a gradual willingness to defer to prison authorities in regulating First Amendment rights in the prison context. In *Martinez*, a case involving restrictions on the First Amendment rights of both prisoners and nonprisoners, the Court required that such restrictions be evaluated under the intermediate scrutiny standard of review. *Turner* enunciated a lower reasonableness standard for restrictions that affected the constitutional rights of prisoners only, but left intact the *Martinez* standard for regulations implicating the constitutional rights of free citizens. In *Abbott*, however, the Court concluded for the first time that regulations affecting the First Amendment rights of nonprisoners were constitutional as long as they were reasonably related to legitimate penological interests.

This increasing deference to prison restrictions on the rights of both prisoners and nonprisoners has elicited much protest, both in concurring and dissenting Supreme Court opinions and in legal scholarship. The holding in *Abbott* allows for the interpretation that the reasonableness standard applies for all incoming mail,

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217. *See supra* notes 86-91 and accompanying text.

218. *See supra* notes 202-203.

219. *See supra* note 204.

including personal letters, even though the facts and analysis in *Abbott* refer specifically to incoming publications. Understandably, courts have applied the *Abbott* reasonableness standard to prison restrictions on both incoming publications and incoming personal mail.

However, the Fifth and Eighth Circuits have recently extended the *Abbott* reasonableness standard to restrictions on outgoing prisoner correspondence, contradicting the holding and the logic of *Abbott* itself. The decisions of these courts are both surprising and disturbing, as they embody a new level of deference to prison restrictions on correspondence with nonprisoners.

The First and Sixth Circuits, as well as a number of other courts, have correctly applied the *Martinez* intermediate scrutiny standard to prison restrictions on outgoing mail. In the future, courts should continue to follow in this path and prevent any further evisceration of the constitutional rights of both prisoners and free citizens in the prison context.

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