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The TURNER Standard:
Balancing Constitutional Rights & Governmental Interests in Prison

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INTRODUCTION

The First Amendment of the Constitution safeguards some of the most basic individual rights that Americans hold dear: freedom of speech, freedom of association, and freedom of religion. Just as students in public schools do not "shed their constitutional rights at the school house gate,"[1] prison walls do not "form a barrier separating prison inmates from the protections of the Constitution."[2] Granted, incarceration by its very nature results in the temporary cessation of certain rights; however, restrictions on the rights of inmates must be administered rationally, particularly when the fundamental rights provided by the First Amendment are at stake.

The United States Supreme Court has held that the Constitution allows prison administrators the power to develop and enforce policies meant to promote better inmate behavior and overall prison security. This places inmates in a unique position, because their rights must be delicately balanced with the restrictions found in these policies. The First Amendment requires that prison policies must not impinge upon an inmate's constitutional rights unless they reasonably address a legitimate threat to the security of guards, inmates, or the prison itself.

Today, the Supreme Court defers greatly to the expertise of prison administrators, allowing them to create legitimate prison policies. The Court will, however, entertain challenges to a particular policy's reasonableness. In such cases, the Court determines whether policies that restrict inmates' rights

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[1] *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969).

[2] *Turner v. Safley,* 482 U.S 78, 84 (1987).

are reasonable reactions to the demands of the prison system or exaggerated responses to perceived security issues.[3]

This article surveys four cases in which the Supreme Court evaluated the reasonableness of prison policies that restricted inmate rights. The first case, *Turner v. Safley*, dealt with the constitutionality of two prison policies that restricted communication between inmates and banned inmate marriage. This case established the *Turner* standard: a four-part test used to assess the reasonableness of prison policies. The *Turner* standard was then applied in each of the subsequent cases. In *Overton v. Bazzetta*, the Supreme Court addressed the constitutionality of a prison policy that set restrictions on inmates' visitation rights. In *O'Lone v. Estate of Shabazz*, the Court considered the constitutionality of a prison policy that restricted the freedom of inmates to exercise their religion. In the most recent case, *Banks v. Beard,* the Court evaluated the constitutionality of a prison policy that restricted inmates' reading and viewing materials.

Careful examination of these cases will demonstrate that, over time, the Court has altered its application of the *Turner* standard. The standard's original purposes were: (1) to balance the security and rehabilitative goals of prison administrators with the constitutional rights of inmates, and (2) to provide courts with a tool for consistency in cases involving inmate rights. This analysis will show that by deviating from the original intent of the *Turner* standard, the Court has been placing greater emphasis on the goals of prison administrators at the expense of inmates' rights *and* creating inconsistent precedent in the process.

FIRST AMENDMENT PROTECTION

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

[3] A policy represents an "exaggerated response" to prison concerns when ready alternative(s) exist that fully accommodate the inmate's rights at *de minimis* costs to valid penological interests. *Id*. at 80. "De minimis" refers to something so trifling, minimal, or insignificant that a court may overlook it in deciding an issue or case. Black's Law Dictionary 464 (8th ed. 2004).

government for a redress of grievances."[4] The Supreme Court has elaborated that the "freedom of speech … includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read and the freedom of inquiry [and] of thought…."[5] Currently the courts protect these liberties by using the *Turner* standard to determine whether policies intended to promote prison security are constitutional.

APPLICATION IN THE PRISON SETTING: EVOLUTION OF *TURNER* AND ITS PROGENY

Turner v. Safley

In *Turner v. Safley*, an inmate, Leonard Safely, challenged the constitutionality of two Missouri prison policies: (1) the prohibition of communication between convicts residing in separate state prisons, and (2) a ban on inmate marriages with very few exceptions.[6] Safely claimed the correspondence policy violated inmates' First Amendment speech and association rights and the marriage ban infringed on the fundamental right to marry.[7] Prison administrators argued that the policies were necessary to maintain prison security. First, administrators asserted that inmates could use correspondence to communicate escape plans or arrange for assaults.[8] Second, they maintained that the marriage ban reduced the likelihood of "love triangles," which "might lead to violent confrontations between inmates."[9]

The district court held that the correspondence policy was "unnecessarily sweeping" and "arbitrary and capricious" in its application.[10] In addition, the court agreed that the prohibition of inmate marriages "[unconstitutionally infringed] upon [the inmates'] fundamental right to marry"

[4] U.S. Const. amend. I.

[5] *Beard v. Banks,* 126 S. Ct. 2572, 2586 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

[6] Generally only pregnancy or the birth of an illegitimate child would have been considered a "compelling" justification for inmate marriage. *Turner*, 482 U.S. at 78.

[7] *Id.* at 81.

[8] *Id*. at 91.

[9] *Id*. at 97.

[10] *Id.* at 83, 93.

and that the policy was exaggerated and unnecessary.[11] The Third Circuit upheld the district court's opinion.[12]

The Supreme Court then granted review and established four factors to be used when determining whether a policy limiting prison inmates' rights is reasonable.[13] The Court considered all four factors relevant to its evaluation of the policies at issue. These factors, referred to by later courts as the *Turner* standard, are as follows:

1. "There must be a 'valid, rational connection' between the prison policy [at issue] and the legitimate government interest put forward to justify it."[14] In other words, the policy in question must address a valid issue of prison security or rehabilitation.
2. Inmates must have alternate means of exercising the rights restricted by prison policies.[15] The policy should not eliminate all possible means of exercising the asserted constitutional rights.
3. Courts must consider the "impact [that] accommodating an asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."[16]

[11] *Id*. at 83.

[12] *Id*.

[13] *Id* at 82. The *Turner* standard was established from precedent in multiple cases. For factor one, the Supreme Court held that "a valid, rational connection" justifies a prison regulation so long as it represents a "[legitimate] government interest." *Id*. at 83 (citing *Block v. Rutherford*, 468 U.S. 576 (1984)). For factor two, the rationality of prison regulations was scrutinized in terms of whether or not "alternative means of exercising the right" existed for inmates. *Id*. at 90 (citing *Pell v. Procunier*, 417 U.S. 817 (1974)). For factor three, the "impact accommodation" was examined in terms of how other inmates and guards would be affected if inmates were granted the relief they were seeking. *Id*. (citing *Jones v. North Carolina Inmates' Union*, 433 U.S. 119 (1977)). For factor four, the Court held that any policy not promoting a legitimate penological interest was considered an "exaggerated response" to prison concerns. *Id*. at 83 (citing *Block v. Rutherford*, 468 U.S. 576 (1984)).

[14] *Id*. at 89.

[15] *Id*. at 90.

[16] *Id*.

If accommodating the asserted right leads to disturbance, security risks, or "threaten[s] functions of prison administrators,"[17] it would be reasonable to limit that right.

4. "The absence of ready alternatives [for accommodating the prison's goals] is evidence of the reasonableness of a prison policy. The existence of obvious, easy alternatives may be evidence that the policy is not reasonable, [and thus] is an 'exaggerated response' to prison [administrators'] concerns."[18] This final factor finds a policy unreasonable if an inmate can prove there is an alternate way to further the administrators' goals without limiting inmates' constitutional rights.

Fulfilling these factors effectively means that the prison policy at issue is "logically connected" and "reasonably related" to overall prison security; this is often referred to as the "reasonable relation" standard.[19] A prison policy that fails this test is viewed as an unconstitutional "exaggerated response" to prison administrators' concerns.[20]

In applying the standard to the facts in *Turner*, the Supreme Court Majority agreed that correspondence between inmates could result in hazardous behavior, such as communicating escape plans or arranging assaults or other violent acts.[21] Because these behaviors would affect the safety of inmates, guards, and the prison environment, the Majority found the policy was reasonably related to prison security, thus fulfilling factor one. Regarding factor two, the Majority determined that the policy did not deny inmates all forms of expression, but simply limited contact with a particular class of people. In applying factor three, the Majority held that the need to relocate guards to review each piece of mail could be accommodated only at a significant cost to prison security. In addressing factor four, they found that "the only alternative proffered by the [inmates], the monitoring of inmate correspondence, clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals."[22] Testimony from prison administrators

[17] *Id.* at 92.

[18] *Id.* at 90 (citing *Block v. Rutherford*, 468 U.S. at 587).

[19] *Beard v. Banks*, 126 S. Ct. 2572, 2580 (2006).

[20] *Id.* at 2578.

[21] *Turner*, 482 U.S. at 91.

[22] *Id.* at 93.

suggested, "[I]t would be impossible to read every piece of inmate-to-inmate correspondence," and "[inmates] could easily write in jargon or codes to prevent detection of their real messages."[23] This lack of easy alternatives demonstrated that the prison had not acted arbitrarily. Consequently, the Majority ruled that the correspondence policy responded to legitimate security concerns, and was therefore constitutional.

With regard to the marriage restriction, the *Turner* Majority determined that marriage was an "expression of emotional support and public commitment … that many religions recognize as having spiritual significance … [and that marriage has no detrimental effect on] confinement and facility safety concerns."[24] As a result, the marriage restriction failed the first factor of the *Turner* standard and, therefore, was deemed an "exaggerated response" to rehabilitation and safety needs.[25] As such, the marriage restriction was found unconstitutional.

Justices Stevens, Brennan, Marshall, and Blackmun dissented, arguing that "if the standard can be satisfied by nothing more than a 'logical connection' between the [policy] and any legitimate penological[26] concern perceived by a cautious [administrator,] it is virtually meaningless."[27] They cautioned that "[a]pplication of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the [administrator] produce[d] a plausible security concern."[28] The dissenters agreed that the marriage ban was too broad; however, they believed prison administrators did not provide sufficient evidence to support the correspondence restrictions.

Overton v. Bazzetta

The 1995 case of *Overton v. Bazzetta* addressed a revision to the Michigan Department of Corrections (MDOC) visitation policies.

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[23] *Id*.

[24] *Id*. at 95-96.

[25] *Id*. at 90.

[26] "Penology" is the study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including the art of fitting the right treatment to an offender. Black's Law Dictionary 1170 (8th ed. 2004).

[27] *Turner*, 482 U.S. at 100-01 (Stevens, J., dissenting).

[28] *Id*.

Administrators believed that visitation made it difficult to prevent the smuggling of drugs. The MDOC claimed that the trafficking of drugs was "a direct threat to legitimate objectives of the corrections system, including rehabilitation, the maintenance of basic order and the prevention of violence in the prisons."[29] The new visitation policy stated that only immediate family and individuals placed on a pre-approved list were allowed to visit inmates. This policy had very few exceptions, and only allowed visits by guests who were not on the list if they were "qualified members of the clergy [or] attorneys on official business."[30]

The new policy was problematic for inmates, their friends, and family. It stated that an unlimited number of an inmate's immediate family members were allowed on the visitor list; however, only ten others were permitted, and they were subject to some restrictions. The policy further stated that juveniles under eighteen years old were not allowed on any inmate's visitor list unless they were "the children, stepchildren, grandchildren, or siblings of the inmate."[31] Former inmates were also prohibited from visitor lists unless they were members of the inmate's immediate family and approved by prison administrators. Finally, inmates were prohibited from receiving *any* visitors beyond "attorneys and members of the clergy" if they were found to have committed multiple substance-abuse violations.[32]

Bazzetta, along with friends and family members, brought suit in federal court arguing that the policy violated their First Amendment right to freedom of association.[33] The district court agreed and held that the visitation policy was unconstitutional. The Sixth Circuit Court of Appeals affirmed and the U.S. Supreme Court granted certiorari.[34]

Applying the *Turner* standard to the facts of the case, the Supreme Court held that the policy preventing children from visiting met factor one because the policy protected minors from "accidental injury" and "exposure to

[29] *Overton v. Bazzetta*, 539 U.S. 126, 129 (2003).
[30] *Id*. at 129.
[31] The child could not be a visitor if an inmate's parental rights had been terminated. *Id*. at 130.
[32] *Id.*
[33] *Id.*
[34] *Id*. at 136.

sexual or other misconduct."[35] Therefore, there was a *rational* connection to the overall security and legitimate interests of the MDOC. The Court also associated the policy prohibiting former inmates as visitors with "the State's interest in … preventing future crimes" because "communication with other felons is a potential spur to criminal behavior."[36] The Court further determined that "drug smuggling and drug use in prisons are intractable problems," and that the restrictions on substance users promoted the "legitimate goal of deterring the use of drugs and alcohol within prisons."[37]

Despite the rational connection to prison security, the plaintiffs argued that the policy left no alternate means of exercising their restricted right. Applying the second *Turner* factor, the Court ruled that "alternatives do not need to be ideal; they only need to be available."[38] Because inmates could communicate through letters and telephone calls, the Court found that this prong of *Turner* had been satisfied.

Regarding factor three, the Court held that "accommodating [the plaintiffs'] demands would cause a significant reallocation of the prison system's financial resources and would impair the ability of [administrators] to protect all who are inside a prison's walls."[39] Prison administrators argued that "reducing the number of children [visiting inmates] allows guards to supervise [the children] better to ensure their safety and to minimize the disruptions they cause within visiting areas."[40] Also, accommodating the inmates' request for visitation with other inmates would require additional supervision by guards to carefully monitor the conversations.[41] Finally, concessions for substance

[35] Inmates contended that because minors would be "accompanied and supervised by … a family member or legal guardian," the restriction on visitation by "minor nieces and nephews and children as to whom parental rights have been terminated bore no rational relationship to [the] penological interest [of protecting the minors from potential harm]." The Court "reject[ed] the contention" stating that "a line must be drawn, and the categories set out by these regulations are reasonable." *Id*. at 133.

[36] *Id*. at 133-34.

[37] *Id*. at 134.

[38] *Id*. at 135.

[39] *Id*.

[40] *Id*. at 133.

[41] *Id*. at 133-34.

abusers could undermine administrators' authority and ability to effectively control inmate behavior, negatively impacting prison security.[42]

Under the final *Turner* factor, the Court determined that the inmates did not present any alternatives that could protect these prison interests without "imposing more than a *de minimus* cost to the valid penological goal."[43] The Court found that the inmate's proposal to allow "visitation by nieces and nephews or children for whom parental rights have been terminated," would "have [a significantly negative effect] on the goals served by the regulation."[44] The Court also rejected the inmates' suggestion that visitation with former convicts "could be time limited."[45] The justices deferred to the MDOC's finding that "[the] restriction better serves its interest in preventing criminal activity that can result from these interactions."[46] Lastly, the inmates argued the restrictions should be instituted "only for the most serious [substance-abuse] violations;" however, the Court held that the inmate's proposal undermined administrative and rehabilitative goals.[47] Consequently, the Court held that the MDOC's limits on prison visitation did not violate the First Amendment and reversed the Third Circuit.[48]

O'Lone v. Estate of Shabazz

O'Lone v. Estate of Shabazz involved a claim by Muslim inmates that their First Amendment freedom to exercise their religion was violated by a New Jersey state prison policy. In 1983, the prison compelled all inmates classified as "gang minimum security" to work outside the main prison facility.[49] However, during the gradual implementation of the new policy, administrators allowed some Muslim inmates to work inside the main facility so they could

[42] *Id*. at 134.
[43] *Id*. at 136.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 137.
[49] The Leesburg prison complex used three custody classifications, including maximum security, gang minimum, and full minimum security. Due to policies, inmates could not graduate from maximum security to full minimum; they had to graduate from one stage to the next in succession. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987).

attend weekly services for *Jumu'ah*.[50] In 1984, following complete implementation of the policy, these Muslim inmates (like all other inmates) were required to work outside the main prison facility. As a result, they were no longer able to attend *Jumu'ah*.[51] The administrators determined that allowing the inmates to return to the main facility midday to attend *Jumu'ah* posed security risks and would require the allocation of additional prison guards.

In response, two Muslim inmates filed a complaint in federal district court.[52] They argued the policy violated their constitutional rights to free exercise of religion as guaranteed by the First Amendment. The district court held, however, that the policy was constitutional because: (1) it "'plausibly advanced' the goals of security, order, and rehabilitation … [and] (2) no less restrictive alternatives could be adopted without potentially compromising a legitimate institutional objective."[53] The Third Circuit Court of Appeals agreed that a prison policy was valid only if: (1) "[it] … served the penological goal of security, and (2) no reasonable method existed by which [inmates'] religious rights [could] be accommodated without creating bona fide security problems."[54] However, the Third Circuit reversed the district court's ruling, having found that the facts of the case did not meet these standards.

After granting certiorari, the U.S. Supreme Court applied the *Turner* standard's first factor, which provides that any prison policy allegedly violating constitutional rights must be reasonably related to overall prison security. Any restriction that cannot satisfy this standard is considered to be an exaggerated response to prison concerns.[55] The Majority found it relevant that when the

[50] *Jumu'ah* (Ṣalāt al-Jum'ah), the congregational Friday prayer performed in place of the normal noon prayer, can only be performed in a group and normally follows the khutbah (sermon). The New Encyclopedia of Islam 401 (Revised ed. 2002).

[51] Both inmates in *O'Lone* were classified as gang minimum security inmates when this suit was filed, and one was later re-classified as full minimum. They were prevented from attending *Jumu'ah,* which was held in the main prison building and in a separate facility for minimum security inmates known as "The Farm." *O'Lone*, 342 U.S. at 345.

[52] *Id*. at 347.

[53] *Id*.

[54] *Id*.

[55] In *O'Lone*, the Third Circuit had required proof of a legitimate security interest and verification that no other reasonable means existed for allowing the inmates to exercise their religious rights to observe *Jumu'ah* without comprimisng prison security. In this

inmates returned from attending *Jumu'ah* in the main facility, they had to pass a security check at the gate. Inmates awaiting approval to enter or leave the facility caused a backup in traffic at the gate, and the prison administrators viewed this flood of traffic as a security risk.[56] Thus, the Majority found that the policy requiring those working outside to remain there for the whole day had a "rational" connection to a reasonable security concern.[57] The Muslim inmates' inability to attend *Jumu'ah* was a consequence of implementing a reasonable security measure.

In applying the *Turner* standard's second factor, the Majority acknowledged that the policy resulted in no alternative means for Muslim inmates to attend *Jumu'ah*. The Court did, however, find that inmates were not deprived of all forms of religious exercise. Muslim inmates maintained access to Imams, diets free from pork, and special schedules during the month of *Ramadan*. [58] Balancing this against legitimate security concerns, the Majority determined that the inability to accommodate *Jumu'ah* did not deprive Muslim inmates from exercising their religion.

Regarding *Turner's* third factor, the Majority determined that the alternatives presented by the plaintiffs for accommodating the restricted rights all resulted in adverse effects on prison security and resources.[59] The Majority held that the extra supervision necessary to transport Muslim inmates back to the main prison facility for *Jumu'ah* would drain scarce human resources.[60] The Majority also held that making special arrangements for one group of inmates could lead to animosity by other inmates based on perceived favoritism.[61]

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sense, the first and third prongs of the *Turner* standard were used. *O'Lone,* 482 U.S. at 361 (Brennan, J., dissenting).

[56] *O'Lone*, 482 U.S. at 346 (majority opinion).

[57] The Court has repeatedly stated that prison administrators are in a better position to establish policies due to their first-hand experience with handling problems within the prison and promoting order. The Court affords deference to administrators whenever possible in order to avoid excessive intrusion into prison matters. *Id*. at 349.

[58] *Id*. at 352.

[59] Options suggested by inmates included "placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslims." *Id*.

[60] *Id*. at 353.

[61] *Id*. at 352.

Though the *Turner* standard contains four distinct factors, the *O'Lone* Majority actually combined factors three and four. They justified the fulfillment of the fourth factor based on the inability of Muslim inmates to provide an acceptable alternative for exercising the asserted right. While Muslim inmates provided a number of arguments for accommodating their request, the Majority determined that the counter-arguments by prison administrators justified the policy. Thus, the Majority ultimately held that there were no obvious alternatives to the policy and, therefore, it was not an exaggerated response to prison concerns.[62]

Justices Brennan, Marshall, Blackmun, and Stevens joined in dissent based on multiple arguments. First, they viewed the use of "'reasonableness' as a standard of review for *all* constitutional challenges by inmates as inadequate."[63] They argued "the degree of scrutiny of prison [policies] should depend on 'the nature of the right being asserted by [inmates], the type of activity in which [inmates] seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right.'"[64] The dissenters further argued:

> [W]here the exercise of the asserted right is not presumptively dangerous, and where the prison has completely deprived an inmate of that right, then prison [administrators] must show that a "particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restrictions are no greater than necessary to effectuate the governmental interest involved."[65]

The dissenters believed that the prison failed to justify the restriction as necessary.[66] That, coupled with the fact that other Muslim inmates were allowed to participate in *Jumu'ah* throughout the entire federal prison system, supported their position.[67]

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[62] *Id*. at 353.

[63] *Id*. at 356 (Brennan, J., dissenting) (emphasis in original).

[64] *Id*. at 358 (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985)).

[65] *Id*.

[66] *Id.* at 361.

[67] *Id*. at 362.

Banks v. Beard

Banks v. Beard[68] represents the most recent case dealing with prison policies and the deprivation of constitutional rights. In the Pennsylvania Department of Corrections (PDOC), prisons house a general population of inmates as well as three special units.[69] The Long Term Segregation Unit (LTSU), which is the "most restrictive" of these units, includes two levels and houses the "most incorrigible, recalcitrant inmates."[70] Level 2 of the LTSU, the stricter unit, restricts inmates from newspapers, magazines and personal photographs. Level 2 inmates are allowed one visitor per month (only immediate family) and phone privileges are limited to cases of emergency. They are, however, permitted legal and personal correspondence, two library books, religious and legal materials, and writing paper.

Level 1, the less strict unit of the LTSU, permits additional access to one newspaper and five magazines; however, Level 1 still bans personal photographs.[71] When initially confined to the LTSU, inmates are placed in Level 2 and given ninety days to "graduate" to the less restrictive Level 1. Inmate behavior is observed and analyzed when considering eligibility for Level 1.[72]

Level 2 inmate Ronald Banks filed suit on behalf of himself and two other Level 2 inmates, against Jeffrey Beard, Secretary of the PDOC. Banks argued that the Level 2 policy restricting reading and viewing materials violated the inmates' First Amendment right to free speech.[73] He claimed the policy

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[68] Author's note: both the lower court (*Banks v. Beard*) and appellate (*Beard v. Banks*) opinions are referred to as the "*Banks"* case within the text of the article.

[69] The three special units within the Pennsylvania's department of Corrections are: (1) the "Restricted Housing Unit," (RHU) which was constructed to house inmates "under disciplinary sanction or who are assigned to administrative segregation;" (2) the "Special Management Unit," (SMU) designed for inmates who "exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility;" and (3) the Long Term Segregation Unit (LTSU), which houses the "most incorrigible, recalcitrant inmates." *Beard*, 126 S. Ct. at 2576.

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] "Freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom

"[bore] no rational connection to any legitimate penological interest" and "[was] an exaggerated response to [any] such an interest."[74]

After hearing Banks' claim, the district court granted Secretary Beard's motion for summary judgment.[75] In looking at the first *Turner* factor, the court found that prohibiting access to newspapers, magazines, and photographs was "rationally related to the legitimate and interrelated penological interests in rehabilitation and security."[76] The judge was persuaded that the policy could motivate inmates to graduate to Level 1. Applying *Turner's* second factor, the district court held that the policy did not eliminate all means of exercising the asserted right and that inmates could gain access to restricted materials "by qualifying [for Level 1] with good behavior"[77] Considering the third factor, the judge noted that the policy protected guards and other inmates by restricting access to raw materials commonly used to create weapons, start fires, and throw feces. The judges did not discuss the fourth *Turner* factor, but still ruled that the policy was reasonable under the *Turner* standard.[78]

The Court of Appeals for the Third Circuit, however, disagreed with the district court and reversed the decision. The appellate court agreed with Banks' argument that increased contact with society (through news media and visitation) might, in fact, encourage rehabilitation. The court also considered the percentage of inmate graduation from Level 2 to Level 1. Two years after the policy's implementation, the graduate rate remained static at 25%, suggesting the policy was not successful in motivating better behavior.[79] Following the Third Circuit's reversal, the U.S. Supreme Court granted certiorari.

Applying the *Turner* standard, the Supreme Court Majority held that there was a reasonable and rational connection between the policy and prison

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of thought…" *Id*. at 2586 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

[74] *Banks v. Beard*, 399 F.3d 134, 138 (3rd Cir. 2005).

[75] Summary judgment is a "judgment granted on a claim or defense about which there is no genuine issue of material facts and upon which the movant is entitled to prevail as a legal matter." Black's Law Dictionary 1476 (8th ed. 2004).

[76] *Banks*, 399 F.3d at 138.

[77] *Beard*, 126 S. Ct. at 2589 (Stevens, J., dissenting).

[78] *Banks*, 399 F.3d at 138.

[79] *Beard*, 126 S. Ct. at 2581 (majority opinion).

security and that the appellate court had "[placed] too high of an evidentiary burden upon the Secretary."[80] Under factor one, the Court determined that "[t]he articulated connection between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, [were] logical ones."[81] Therefore, the logical relationship between the restriction of newspapers, magazines, photographs and prison security supported the policy's reasonableness. Under factor two, the Majority ruled that the policy limited inmate rights, but while the policy provided no alternative means of accessing the restricted materials in Level 2, inmates could graduate after 90 days and regain their lost rights in Level 1. The Majority held that this option complied with *Turner's* second factor.

The remaining two factors were seemingly overlapped and minimally scrutinized compared to the others. Under factor three, the Majority deferred to the administrator's assertion that "if the [p]olicy helps to produce better behavior, then its absence will help to produce worse behavior, e.g., 'backsliding' (and thus the expenditure of more 'resources' at level 2)."[82] Under factor four, the Majority found no immediate alternative that would "fully accommodate the inmates' rights at *de minimis* cost to valid penological interests."[83] The Majority went on to state:

> In fact, the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor's basic logical rationale. The fact that two of these latter three factors seem to support the Policy does not, therefore, count in the Secretary's favor. The real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation.[84]

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[80] *Id*.

[81] *Id.* at 2579.

[82] *Id.* at 2580 (citing *Turner*, 482 U.S. at 90).

[83] *Id*. 2580 (citing *Turner*, 482 U.S. at 90, 91). Valid penological interests were considered to be: (1) "motivation of better behavior in order to promote graduation to Level 1, [(2)] to minimize property controlled by inmates would allow for less contraband and higher security, and [(3)] to diminish the amount of material a inmate could use as a weapon."

[84] *Id.* at 2581.

Therefore, the Majority found that if administrators could prove that a policy met the reasonable relation standard under the first factor of the *Turner* standard, then the policy was reasonable under the *Turner* standard.

In their dissent, Justices Stevens and Ginsburg argued that though LTSU Level 2 inmates were deemed the "worst of the worst," they were still United States citizens and thus entitled to the rights guaranteed by the Constitution. Citing *Turner*, they also relied on the "reasonable relation" standard for the proposition that a prison policy is invalid unless it is "reasonably related to a legitimate penological interest."[85] The dissenters argued that the Majority's "logical connection between the policy and the asserted goal [was] so remote as to render the policy arbitrary or irrational."[86] They noted that "plainly, the rule at issue in this case strikes at the core of the First Amendment rights to receive, to read, and to think."[87]

Like the Third Circuit, the dissenters also rejected the Secretary's "better behavior" argument noting the low rates of graduation to Level 1. They further speculated that, because neither Level 2 nor Level 1 LTSU inmates were allowed access to photographs, perhaps there was insufficient incentive to motivate Level 2 inmates to improve their behavior in that regard.[88] Ultimately, according to the dissenters, the LTSU prison policy did not provide a conclusive "reasonable relation" to the overall well-being of the prison and thus represented an "exaggerated response" to prison concerns.

ANALYSIS:
APPLICATION OF THE *TURNER* FACTORS

The *Turner* standard's original intent was to: (1) balance the security and rehabilitative goals of prison administrators with the constitutional rights of inmates, and (2) provide courts with a tool to guarantee consistent results in cases involving inmate rights. Utilizing this tool, courts determine whether prison policies (that restrict inmates' constitutional rights) address a valid issue of prison security or rehabilitation, and additionally analyze whether policies

[85] *Id.* at 2590 (Stevens, J., dissenting).
[86] *Id.* at 2593.
[87] *Id.* at 2581, 86.
[88] *Id*. at 2581, 89.

eliminate all means of exercising an asserted right. Courts also determine whether accommodating an asserted right might reasonably lead to disturbances or security risks, or if the policy is simply an exaggerated response to security concerns.[89]

The multi-factored *Turner* standard was the appropriate test to apply in each of these four cases; however, the Supreme Court's varying application of the factors is problematic. Not only are the factors unevenly applied within each case, but this unbalanced application has lead to varying results between cases. Additionally, in each of the cases analyzed in this article, with the exception of *Overton v. Bazzetta*, the Court failed to take important substantive considerations into account. This failure has resulted in placing greater weight on those factors that emphasize prison goals rather than inmates' rights.

FACTOR 1: RELEVANT PENOLOGICAL INTEREST

Overton v. Bazzetta

The *Overton* Court correctly determined that all three of the visitation restrictions bore "a rational relationship to a legitimate penological interest."[90] By reducing the number of children, the total number of visitors was reduced, and the disruption caused by children in general was limited.[91] The restriction helped "[maintain] internal security and [protect] child visitors from exposure to sexual or other misconduct or from accidental injury."[92] Overall the Court properly determined that the restriction on visitation by former inmates "[bore] a self-evident connection to the State's interest in maintaining prison security and preventing future crimes" and the restriction on visitation rights "for inmates with two substance abuse violations … serve[d] the legitimate goal of deterring the use of drugs and alcohol within the prisons."[93]

[89] *Turner,* 482 U.S at 92.
[90] *Overton*, 539 U.S. at 135.
[91] *Id*. at 126.
[92] *Id*. at 133-34.
[93] *Id*. at 134.

O'Lone v. Estate of Shabazz

In considering penological interest, the *O'Lone* Majority adequately assessed most of the issues presented by administrators. Issues of gate security and increases in guard workload were evaluated and found to be reasonably related to prison security. A third consideration led to conflicting views. Administrators tried to create a rehabilitative environment in the prison which simulated "working conditions and responsibilities in society."[94] They argued that accommodating *Jumu'ah* was contrary to that goal. Inmates, however, counter-argued that in public life, employees often rearrange their schedules to accommodate personal needs. In light of this fact, inmates argued that the accommodation of their request to attend *Jumu'ah* was reasonable and sufficiently connected to the goal of rehabilitation. Overall, the *O'Lone* Court determined that prison administrators had shown a sufficiently logical connection between prison needs and the refusal to make special accommodations for these inmates.

Banks v. Beard

Prison administrators in *Banks* argued that policies restricting reading material were necessary to maintain prison security. However, administrators "failed to demonstrate" that this policy would have "any marginal effect on security."[95] While they claimed that these materials could be used to create cell fires and indecent objects, the same could be said for the religious or legal materials, library books, writing paper, and blankets that current prison policy already permitted to inmates. Library book pages can be used to start a fire as easily as a newspaper.[96] Magazine pages and writing paper are similar in consistency, weight, and texture; thus, inmates could just as easily use those materials for tossing feces.

In addition to their flawed connection between the LTSU restriction on reading materials and prison security, the *Banks* Court erroneously validated the administration's reference to security concerns to justify policies restricting phone calls and visitation. Outside of emergencies, LTSU inmates were prohibited from making phone calls and they were only permitted one visitation

[94] *O'Lone*, 482 U.S. at 351.
[95] *Beard*, 126 S. Ct. at 2586 (Stevens, J., dissenting).
[96] *Id*.

per month. This monthly visit was limited to an immediate family member.[97] Administrators expressed concern that, by allowing phone calls or visitations by non-family members, smuggling of contraband or formulation of escape plots might result. This logic is faulty, however, because immediate family members typically have a vested personal interest in the happiness of their inmate family member and, therefore, may be more likely than non-family members to smuggle contraband or assist in escape plots, in hopes of helping or pleasing the inmate. Thus, allowing family visitation while prohibiting other visitors is not a rational response to concerns that visitors are involved in escape plots. The policy is therefore excessive since it is not logically connected or reasonably related to a legitimate security concern.

Finally, in *Banks*, the Court accepted the argument that restricting Level 2 inmates' access to newspapers and magazines encouraged "better behavior" and graduation to Level 1. However, Level 1 inmates are still denied personal photographs. Inmates know they will not gain *complete* access to *all* materials at the next level; this knowledge could result in the policy not providing sufficient incentive to inmates to improve their behavior. The graduation rate historically being no more than 25% further illustrates that the restrictions on magazines and newspapers had no significant impact in motivating Level 2 inmates.[98] Records indicated that "a significant majority of inmates confined at LTSU-2 remained there since the inception of the program over two years earlier."[99] The statistical record shows the policy had a marginal effect at most, therefore not necessarily serving a "legitimate penological interest."

FACTOR 2: ALTERNATIVE METHODS FOR EXPRESSION

Overton v. Bazzetta

The *Overton* Court determined that, despite the restriction on visitation, inmates retained "alternative means of associating with those prohibited from visiting."[100] Inmates completely barred from physical visitation retained the ability to "communicate with persons outside the prison by letter and

[97] *Id*. at 2589.
[98] *Id*. at 2581 (majority opinion).
[99] *Id*. at 2590 (Stevens, J., dissenting).
[100] *Overton*, 539 U.S. at 135.

telephone" and inmates with limited physical visitation could send messages to *unauthorized* visitors through *authorized* visitors. Though inmates, friends, and family members protested, the *Overton* Court cited precedential authority that under the *Turner* standard the alternatives to an impinged constitutional right do "not need to be ideal … they need only be available."[101]

O'Lone v. Estate of Shabazz

Jumu'ah "is the central religious ceremony of Muslims and cannot be regarded as one of several essentially fungible religious practices."[102] As a result, even though prison policies in the *O'Lone* case allowed Muslim inmates to practice other religious observances, these practices did not substitute for the *Jumu'ah* in Islam. Just as a Christian inmate's ability to observe *Lent* and "have opportunities to pray" does not substitute for his ability to attend church on Sunday, a Muslim inmate's ability to observe other religious practices cannot be an alternative to a cornerstone of his faith. The *O'Lone* Majority's failure to recognize the importance of *Jumu'ah* led to the erroneous conclusion that other Islam observances qualified as acceptable alternative methods of religious expression.

Banks v. Beard

In *Banks*, the deputy superintendent conceded that at Level 2, "no 'alternative means of exercising the right' remain[ed] open" to inmates.[103] While graduation to Level 1 would reinstate "access to most of the lost rights," such as magazines, no alternatives existed *while* inmates were confined *within* Level 2.[104] Though the prison allows library books, these books give no insight into current events, and should not be considered alternatives to news media. Therefore, the policy prohibiting newspapers and magazines at Level 2 does not properly satisfy the second *Turner* factor.

The *Banks* Court also failed to consider that the policy limiting visitors to immediate family members might leave some inmates with no alternative method of expression. The Court overlooked the fact that some inmates do not

[101] *Id*.
[102] *O'Lone*, 482 U.S. at 360 (Brennan, J., dissenting).
[103] *Beard*, 126 S. Ct. at 2579.
[104] *Id*.

have immediate family members available to visit, due to death, geography, or other factors. These inmates may need to rely upon emotional support from people outside of their immediate family. Again, this oversight demonstrates that the second *Turner* factor was not properly applied.

FACTOR 3: ACCOMMODATION IMPACT

Overton v. Bazzetta

The *Overton* Court properly determined that accommodating additional children as visitors would require the prison to allocate additional guards to ensure safety. The Court duly considered the potentially harmful impact of allowing visitation with former inmates. Finally, the damage to administrative authority that might result from reducing restrictions on substance abusers was appropriately considered a negative impact that would result from accommodating the asserted right. Balanced consideration was given to these three issues and the *Overton* Court determined that the inmates presented no alternatives to the policy that did not negatively impact the prison, its resources, or its rehabilitative goals.

O'Lone v. Estate of Shabazz

The *O'Lone* Court agreed with prison administrators that accommodating Muslim inmates' request to attend *Jumu'ah* would negatively impact the allocation of guards and might result in animosity from other inmates based on the perception of preferential treatment. However, administrators make arrangements for Christian and Jewish inmates to attend religious services despite any potential impact on prison resources. Additionally, the existing accommodations for Muslims such as dietary restrictions and *Ramadan* schedules had not reportedly resulted in resentment from other inmates. In contrast, administrators seem unconcerned about resentment by Muslim inmates toward other religious groups who were allowed to participate in their central religious practices. Ultimately, the Court failed to consider that allowing Muslim inmates to remain in the main facility on Friday for *Jumu'ah* was no different then allowing Christians and Jews to remain inside on Saturday or Sunday. In giving deference to administrators on this factor, the Court minimized these important counter-arguments.

Banks v. Beard

In the *Banks* case, administrators asserted that restricting LTSU Level 2 inmates from newspapers and magazines would encourage better behavior and graduation to Level 1. This better behavior was seen as a positive impact on prison security and resources. However, all LTSU inmates were held in their cells for twenty-three hours each day.[105] In accepting the administrators' assertions, the *Banks* Court failed to consider that possessing materials, such as magazines and newspapers, might provide inmates with something to productively fill these hours. Inmates claimed that access to these materials may have a positive impact, encouraging inmates to read about current events and national concerns and thereby motivating them to earn their freedom. If rehabilitation is considered a legitimate penological goal, restricting the inmates' already-limited access to society would not advance that goal. Unfortunately, the Court did not duly consider these possibilities.

FACTOR 4: ALTERNATIVES FOR PRISON ADMINISTRATORS

Overton v. Bazzetta

Through proper application of *Turner's* fourth factor, the *Overton* Court ruled that the inmates presented no alternatives for accommodating the asserted right that would impose "more than a *de minimus* cost to the valid penological goal."[106] The Court found that the inmates' suggestion to allow "visitation by nieces and nephews or children for whom parental rights have been terminated [was] an obvious alternative," but would "have more than a negligible effect on the goals served by the regulation."[107] The Court also rejected the suggestion that visitation with former inmates "could be time limited, … [deferring] to MDOC's judgment that a longer restriction better serves its interest in preventing criminal activity that can result from these interactions."[108] Lastly, the Court found that the inmates' suggestion that "the duration of the restriction for inmates with substance-abuse violations could be shortened or that it could be applied only for the most serious violations, but

[105] *Id*. at 2576.
[106] *Overton*, 539 U.S. at 136.
[107] *Id*.
[108] *Id*.

these alternatives do not go so far toward accommodating the asserted right…"[109] In the process, the Court did give due consideration to this factor of the *Turner* test.

O'Lone v. Estate of Shabazz

This final factor in the *Turner* test is meant to put the court's focus on possible ways that prison administrators could achieve their valid penological goals *without* placing the challenged restriction on inmates' constitutional rights. As such, the dissenters in *O'Lone* recognized:

> [T]hat Muslim inmates [have the ability] to participate in *Jumu'ah* throughout the entire federal prison system suggests that the practice is, under normal circumstances, compatible with the demands of prison administration.
>
> Indeed, the Leesburg State Prison permitted participation in this ceremony for five years, and experienced no threats to security or safety as a result. In light of both standard federal prison practice and the prison's own past practice, a reasonableness test in this case demands at least minimal substantiation by prison administrators that alternatives that would permit participation in *Jumu'ah* are infeasible.[110]

Inmates also suggested that they be allowed to work on Saturday or Sunday, in exchange for remaining in the main prison facility for Friday *Jumu'ah*.[111]

Again, the Majority failed to give adequate consideration to the fact that the schedules of Jewish and Christian inmates accommodate Saturday and Sunday services and the same could have been done for Muslim inmates on Fridays. Therefore, in the *O'Lone* case, this third factor of the *Turner* test did not receive the careful consideration it deserved.

[109] *Id*.
[110] *O'Lone*, 481 U.S. at 362-63 (Brennan, J., dissenting).
[111] *Id*. at 365.

Banks v. Beard

In *Banks*, the Court utilized flawed logic when analyzing potential alternatives to the LTSU Level 2 restrictions on newspapers and magazines. Because Level 2 prisoners retained the ability to start fires or throw feces with the readings materials that *were* still permitted (such as legal materials), *allowing* the prohibited reading materials would have created an alternative form of constitutional expression that created *no further* danger to prison security. In addition, since statistics suggested that the restrictions did not promote better behavior or graduation to Level 1, allowing the prohibited forms of communication would have been the "obvious, easy alternative" to the constitutional deprivation *without* undermining this aspect of prison's goal.[112]

CONCLUSION

This article does not suggest that prison inmates should retain all the constitutional rights guaranteed to ordinary citizens. On the contrary, prison administrators must restrict certain rights in order to ensure that the goals of incarceration (security and rehabilitation) are achieved. However, these rights cannot be withheld without careful examination. The *Turner* standard serves to create a balance, weighing administrators' goals against the restrictions on inmates' rights and their alternate means to express those rights. When prison policies are challenged on constitutional grounds, the courts are responsible for applying the *Turner* standard and for determining whether the restrictions on inmates' rights are reasonable. However, as evidenced in the foregoing analysis, through inconsistent application of the *Turner* standard and lack of due respect for some of its four factors, the Supreme Court has been sending a dangerous signal to lower courts.

Turner's multi-factor test was designed to prevent prisons from taking advantage of their policy-making discretion; however, the *Turner* test cannot achieve this goal unless *all* of its factors are carefully considered. While the Court in *Overton v. Bazzetta* presented a balanced analysis of the four factors of the *Turner* standard, the decisions in *Banks v. Beard* and *O'Lone v. Estate of Shabazz* display more emphasis on prison-friendly factors and insufficient consideration of arguments favoring inmates.

[112] *Turner,* 482 U.S at 90 (citing *Block v. Rutherford*, 468 U.S. 576, 587 (1984)).

The Court's incomplete analysis of all four factors in the *Banks* and *O'Lone* cases reaffirms the notion that other courts may be using *Turner's* first factor (inherently deferential to prison authorities) almost exclusively in deciding similar cases. In fact, it is possible that some lower courts may rely solely on the first factor in rendering their decisions. If this is true, what will stop prisons across the country from infringing upon other constitutional rights under the banner of motivating better behavior?

Although it is important to maintain a safe environment in prisons, incarcerating inmates under unreasonably harsh conditions should be a concern for the public as well. The goal of imprisonment is not only to prevent criminals from further harming society, but to rehabilitate offenders as well. Prison administrators have a duty to accomplish this latter goal by implementing constitutionally reasonable policies, rather than by implementing policies that merely seem to offer the simplest alternative. The *Turner* standard was established as a tool to measure the fine line between reasonable prison policies and exaggerated responses. Courts must ensure that the totality of the standard is appropriately applied in order to uphold the integrity of the Constitution. This was accomplished in *Overton v. Bazzetta*. Sloppy use of the *Turner* standard, however, can lead to the acceptance of unreasonable prison policies such as those upheld in *Banks v. Beard* and *O'Lone v. Estate of Shabazz*. Ensuring that restrictive policies are implemented only in reasonable *and* appropriate circumstances is of the utmost importance to guarantee the constitutional rights of *every* citizen, *even when the citizen is an inmate*.