Volume 10 | Issue 1

Winter 2006

The Rehnquist Court and the "Turnerization" of Prisoners' Rights

James E. Robertson
Minnesota State University

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

Part of the [Law Commons](#)

Recommended Citation

James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. City L. Rev. 97 (2006).
Available at: 10.31641/clr100106

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

THE REHNQUIST COURT AND THE “TURNERIZATION” OF PRISONERS’ RIGHTS

*James E. Robertson**

I. INTRODUCTION

In *Kimberlin v. United States Department of Justice*,¹ the highly respected Court of Appeals for the District of Columbia Circuit swept aside constitutional objections to the Federal Bureau of Prisons’ “No Frills” regulations banning electric or electronic musical instruments. Upon applying the multi-factor test articulated by the Supreme Court in *Turner v. Safley*,² the *Kimberlin* court found the regulations “reasonably related to the asserted goal—conserving correctional funds.”³ The court reached this conclusion without needing any facts. “Common sense,” posited the three-judge panel, “tells us . . . that a prisoner’s possession and use of an electric guitar costs correctional institutions money for electricity, upkeep, storage and supervision.”⁴ The plaintiff’s First Amendment rights virtually dissolved into a tautology, and meanness became a constitutionally acceptable, symbolic condition of confinement.

The *Kimberlin* ruling can be read as an exemplar of three dominant features of prisoners’ rights adjudication during the tenure of the Rehnquist Court: (1) the seemingly ubiquitous application of the deferential, rational-basis test enunciated in *Turner v. Safley* (“the *Turner* test”); (2) the trivialization of “legitimate” penal objectives, which are nonetheless allowed to trump prisoners’ rights, including those “fundamental” to ordered liberty; and (3) a willingness to forego empirically based “facts” in favor of prison officials’ asserted “truths.” The interlocking nature of these practices has synergized the *Turner* test, resulting in the “Turnerization” of prisoners’ rights.

This Article documents and critiques the Rehnquist Court’s primary correctional legacy: the Turnerization of prisoners’ rights. Part II of the Article provides historical context by presenting the

* Distinguished Professor of Corrections & Correctional Law, Minnesota State University; editor-in-chief, *The Criminal Law Bulletin*; contributing editor, *Criminal Justice Review*. This Article is dedicated to my law tutor at Oxford University, Professor Roger Hood, upon his retirement.

¹ 318 F.3d 228 (D.C. Cir. 2003).

² 482 U.S. 78, 89–92 (1987).

³ *Kimberlin*, 318 F.3d at 233.

⁴ *Id.* (citing *Amatel v. Reno*, 156 F.3d 192, 198 (D.C. Cir. 1998)).

genealogy of the *Turner* test, concluding with a description of its four parts. Part III maps the expansion of the *Turner* test beyond its First Amendment base into a variety of constitutional issues. Part IV critiques the underpinnings of the *Turner* test, finding that Turnerization has given legitimacy to a thin, underenforced federal Constitution for prisoners. Part V concludes the Article by establishing that Turnerization represents a normative strain in the bureaucratic state, with the *Turner* test advancing the management of prisoners as a permanent underclass and thereby inflicting great damage to the grundnorm—or basic norm—of prisoners' rights.

II. THE ORIGINS OF TURNERIZATION

The Framers did not envisage a nation where more than two million detainees and inmates reside in warehouse-like institutions.⁵ At its birth, the new republic had yet to be populated by a fortress-like prison. Jails had long operated in the Old and New Worlds, mostly in a manner whereby filth, disease, and despair plagued the ranks of their wards.⁶ By the eighteenth century, the management of jails epitomized arbitrary government⁷—the very evil that inspired the Bill of Rights.⁸ Hamilton, in *The Federalist* No.

⁵ See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2004 at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs//pub/pdf/p04.pdf> (delineating the size of the prison population). The Author has described the "warehouse prison" as follows:

During the 1980s three forces transformed the prison: 1) a dramatic rise in the incarceration rate; 2) disillusionment with rehabilitation; and 3) a penal strategy that manages the underclass. Their marriage produced the "human warehouse with a junglelike underground." Seemingly powerless to combat the rampant violence and pervasive idleness that often accompanies incarceration, the warehouse prison-type operates without the pretense that it does anything other than store and recycle offenders.

James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1014 (1997) (footnotes omitted).

⁶ See Edward M. Peters, *Prison Before Prison: The Ancient and Medieval Worlds*, in THE OXFORD HISTORY OF THE PRISON 3 (Norval Morris & David J. Rothman eds., 1995) (describing early approaches to incarceration).

⁷ See, e.g., Matthew W. Meskell, *The History of Prisons in the United States from 1877 to 1977*, 51 STAN. L. REV. 839, 848 (1999) ("Colonial jails, like their English predecessors, were run mostly for profit. Jailers extorted often exorbitant sums from those in their care for food, clothing, and luxury goods like alcohol and tobacco.") (footnote omitted).

⁸ See, e.g., Alfredo Garcia, *The Fifth Amendment: A Comprehensive Historical Approach*, 29 U. TOL. L. REV. 209, 223 (1998) ("Power was the antithesis of liberty. Governmental power had to be checked, and curtailing the ability of the state to wield a coercive mechanism which meant the difference between life or death was critical. The spe-

84 quoting Blackstone, wrote that "confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten," constituted "*a more dangerous engine of arbitrary government*" than punishment.⁹ For good reason, gaolers owed their wards the duty at common law to provide a habitable environment.¹⁰ By the beginning of the twentieth century that duty acquired considerable breadth: In *Westbrook v. State*¹¹ the Georgia Supreme Court announced that a prisoner "has all the rights of the ordinary citizen which are not expressly or by necessary implication taken from him by law."¹²

A. *The Hands-Off Doctrine*

By the 1930s, the "hands-off" doctrine had taken hold in lower federal courts.¹³ It posited that federalism created a constitutional roadblock to adjudicating the merits of prisoner complaints brought from state prisons and jails.¹⁴ Lower federal courts also advanced a host of other reasons for the hands-off doctrine, including judges' lack of familiarity with prison life¹⁵ and that time consuming, frivolous pro se filings would clog the courts.¹⁶ Some courts effected a hands-off policy by advancing the elusive distinc-

cific protections embedded in the Bill of Rights took root and expanded as the new nation grappled with the proper constraints upon the coercive power wielded by the government.").

⁹ THE FEDERALIST NO. 84, at 437-38 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987).

¹⁰ See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (acknowledging a constitutional basis for "the common law view that 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of liberty, care for himself'" (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (1926))); *Ex parte Jenkins*, 58 N.E. 560, 561 (Ind. App. 1900) (holding that the wife of a lynched prisoner could sue a sheriff for breach of "the duty he owes the prisoner himself to exercise reasonable and ordinary care to protect the prisoner's life and health").

¹¹ 66 S.E. 788 (Ga. 1909).

¹² *Id.* at 585. This ruling hardly comports with infamous and much-repeated dictum in *Ruffin v. Commonwealth* that inmates are but "slaves of the State." 62 Va. (21 Gratt.) 790, 796 (Va. 1871). Contemporary casebooks have overstated its influence given that *Corpus Juris* in 1917 insisted that the case incorrectly stated the legal status of prisoners. Donald H. Wallace, *Prisoners' Rights: Historical Views*, in CORRECTIONAL CONTEXTS 248, 248-52 (James W. Marguaret & Jonathan R. Sorensen eds., 1997).

¹³ See generally Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C. L. REV. 795 (1977).

¹⁴ See, e.g., *United States ex rel. Lawrence v. Ragen*, 323 F.2d 410, 412 (7th Cir. 1963); *Eaton v. Bibb*, 217 F.2d 446, 448 (7th Cir. 1954).

¹⁵ See, e.g., *Garcia v. Steele*, 193 F.2d 276, 278 (8th Cir. 1951); see also NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 18 (1973) ("Judges felt that correctional administration was a technical matter to be left to experts rather than to courts . . .").

¹⁶ See, e.g., *Stroud v. Swope*, 187 F.2d 850, 852 (9th Cir. 1951).

tion between rights and privileges; the latter invariably formed the gravamen of the complaint, causing the plaintiff to lose.¹⁷

Prisoners confined during the era of the hands-off doctrine experienced a host of inhumane acts, including racial segregation;¹⁸ poor medical care;¹⁹ inmate-on-inmate assault;²⁰ staff brutality and indifference;²¹ and squalor.²² The sordid reality of prison life under the hands-off doctrine came to the fore in a 1967 presidential commission that found confinement "at best barren and futile, at worst unspeakably brutal and degrading."²³

Between 1967 and 1977 the federal judiciary underwent a historic transformation. It abandoned the hands-off doctrine and constitutionalized most aspects of incarceration, such as classification of inmates;²⁴ discipline;²⁵ medical care;²⁶ access to the courts;²⁷ religious freedom;²⁸ exercise;²⁹ prison rules;³⁰ treatment of pretrial detainees;³¹ speech;³² search and seizure;³³ food, shelter, clothing, and sanitation;³⁴ and the totality of living conditions.³⁵ Several lower federal courts also assumed control of entire state

¹⁷ See, e.g., *Douglas v. Sigler*, 386 F.2d 684, 687 (8th Cir. 1967); *Parks v. Ciccone*, 281 F. Supp. 805, 809-10 (W.D. Mo. 1968).

¹⁸ See, e.g., JOHN IRWIN, *PRISONS IN TURMOIL* 9 (1980) (observing that blacks and whites resided in separate sections of the "Big House" prison-type); MICHAEL WELCH, *CORRECTIONS: A CRITICAL APPROACH* 369 box 13-2 (1996) (observing that until the 1960s, institutional racism could be found throughout the prison).

¹⁹ See, e.g., *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (finding an absence of "prompt and efficient" medical care in Mississippi prisons); *Newman v. Alabama*, 349 F. Supp. 278, 281 (M.D. Ala. 1972) (finding that the one hospital for Alabama's inmates employed no full-time physicians).

²⁰ See, e.g., Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANS-ACTION 8, 9 (1968). In Philadelphia's jails "virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison." *Id.* at 9.

²¹ See, e.g., *Jackson v. Bishop*, 404 F.2d 571, 579-80 (8th Cir. 1968) (banning the whipping of inmates).

²² See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

²³ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 159 (1967).

²⁴ See, e.g., *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975).

²⁵ See, e.g., *Knell v. Bensinger*, 489 F.2d 1014, 1018 (7th Cir. 1973).

²⁶ See, e.g., *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972).

²⁷ See, e.g., *Corby v. Conboy*, 457 F.2d 251, 253 (2d Cir. 1972).

²⁸ See, e.g., *Walker v. Blackwell*, 411 F.2d 23, 28-29 (5th Cir. 1969).

²⁹ See, e.g., *Sinclair v. Henderson*, 331 F. Supp. 1123, 1129-30 (E.D. La. 1971).

³⁰ See, e.g., *Collins v. Schoonfield*, 344 F. Supp. 257, 272-74 (D. Md. 1972).

³¹ See, e.g., *Conklin v. Hancock*, 334 F. Supp. 1119, 1121 (D.N.H. 1971).

³² See, e.g., *Sostre v. McGinnis*, 442 F.2d 178, 202 (2d Cir. 1971).

³³ See, e.g., *Bonner v. Coughlin*, 517 F.2d 1311, 1316 (7th Cir. 1975).

³⁴ See, e.g., *Newman v. Alabama*, 559 F.2d 283, 286 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978).

prison systems through all-encompassing structural injunctions.³⁶

B. "The Cry of Wolfish"

By 1977, lower federal courts had written a broad charter of rights for prisoners in piecemeal fashion.³⁷ The Southern District of New York's ruling in *United States ex rel. Wolfish v. Levi*³⁸ demonstrated the expanse of this charter. While the court spoke of deference to "the primary authority and expertise of those charged with building and running the prisons,"³⁹ the decision accorded no weight to the judgments of prison officials when "made arbitrarily or in conflict with particular rights given by Constitution or statute."⁴⁰ For pretrial detainees, the charter of rights forbade "any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, [and any deprivation or restriction] must be justified by a compelling necessity."⁴¹ This standard effectively dictated the least-restrictive form of confinement for pretrial detainees unless their keepers advanced a strong case to the contrary—one not merely based on financial or administrative considerations. The court held that the defendants failed to meet this considerable burden of proof on several counts, including plaintiff's complaint of double-bunking.⁴²

The Supreme Court's 1979 ruling in *Bell v. Wolfish*⁴³ halted the expansion of prisoners' rights. Writing for the Court, then-Justice Rehnquist repudiated the premises embraced by the lower court. First, rather than deference ending where rights began, deference came into play in determining the scope of those rights.⁴⁴ Second, rather than detainees possessing all rights of free citizens absent a

³⁵ See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

³⁶ See, e.g., *Newman*, 559 F.2d at 289–90; *Palmigiano v. Garrahy*, 443 F. Supp. 956, 986–89 (D.R.I. 1977).

³⁷ See *supra* notes 24–35 (citing cases).

³⁸ 439 F. Supp. 114 (S.D.N.Y. 1977), *aff'd in part, rev'd in part sub nom.* *Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978), *rev'd sub nom.* *Bell v. Wolfish*, 441 U.S. 520 (1979).

³⁹ *Id.* at 124.

⁴⁰ *Id.*

⁴¹ *Id.* (quoting *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975)).

⁴² See *id.* at *passim*.

⁴³ 441 U.S. 520 (1979).

⁴⁴ *Id.* at 546–49.

That the Court can uphold these indiscriminate searches highlights the bankruptcy of its basic analysis. Under the test adopted today, the rights of detainees apparently extend only so far as detention officials decide that cost and security will permit. Such unthinking deference to administrative convenience cannot be justified where the interests at

compelling justification, the necessities of confinement precluded certain rights and severely limited others.⁴⁵ Accordingly, the Court held that adverse conditions or restrictions pass constitutional muster under the Due Process Clause if they are “reasonably related to a legitimate governmental objective.”⁴⁶ Moreover, when applying the test of reasonableness, “courts should ordinarily defer to” prison staff’s supposed expertise.⁴⁷ The Court reversed the trial court on all the primary issues.⁴⁸

A long-time litigator on behalf of inmates would later characterize *Wolfish* as “the first emphatically general statement of the requirement of deference to the expertise of prison officials, regardless of whether they actually possess such expertise.”⁴⁹ And the *Wolfish* Court certainly took its own advice. The facts of the record mattered little, because a majority of the justices accepted at face value the defendant’s security concerns and accorded them greater weight than the liberty interests of persons presumed innocent.⁵⁰

For the next fourteen years, “the cry of *Wolfish*”—the Court’s call for deference to the actions of prison officials⁵¹—did not fully resonate among the lower federal courts in large part because the remedy, not the right, became the real keystone of prisoners’ rights.⁵² Comprehensive structural injunctions as well as equally expansive consent decrees refashioned prison conditions in a man-

stake are those of presumptively innocent individuals, many of whose only proven offense is the inability to afford bail.

Id. at 579 (Marshall, J., dissenting).

⁴⁵ *Id.* at 554.

Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

Id.

⁴⁶ *Id.* at 539.

⁴⁷ *Id.* at 543 n.23 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

⁴⁸ *Id.* at 563.

⁴⁹ Fred Cohen, *The Limits of Judicial Reform of Prisons: What Works, What Doesn't*, 40 CRIM. L. BULL. 421, 440–41 (2004) (quoting John Boston); see also *id.* at 441 n.101 (“If the poet laureate of New York were named a prison warden on January 1, he would be a corrections expert in the *Bell* [*v. Wolfish*] mode the following morning.”).

⁵⁰ See *id.* at 441.

⁵¹ Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 212 (1980).

⁵² See William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 638–39 (1982). “The remedial decree, rather

ner once reserved for legislation.⁵³ One amendment carried most of the doctrinal weight. In the Eighth Amendment prohibition of cruel and unusual punishment, lower federal courts found the proverbial "empty vessel."⁵⁴ Two commentators were not fooled: Feeley and Rubin, in their seminal study of the period, wrote, "Unless there is additional content in the text [of the Eighth Amendment], those decisions must be recognized as policy making, however much the rule maker may try to characterize them as interpretation."⁵⁵

C. Answering the "Cry of Wolfish"

One court that did not hear "the cry of *Wolfish*" was the district court in *Turner v. Safley*,⁵⁶ which employed heightened scrutiny⁵⁷ in finding unconstitutional prison regulations largely forbidding correspondence between inmates and barring inmate marriages.⁵⁸ The district court had deemed these activities to be fundamental rights⁵⁹—that is, "the very essence of a scheme of ordered lib-

than the finding of a constitutional violation, is commonly perceived as the key to the success or the failure of the litigation." *Id.*

⁵³ See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1298–302 (S.D. Tex. 1980), *modified by* 650 F.2d 555 (5th Cir. 1981) (per curiam), *modified*, 666 F.2d 854 (5th Cir.), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982) (ordering system-wide relief in Texas); *Newman v. Alabama*, 559 F.2d 283, 290 (5th Cir. 1977) (ordering system-wide relief in Alabama), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 986–89 (D.R.I. 1977) (ordering system-wide relief in Puerto Rico), *vacated*, 599 F.2d 17 (1st Cir. 1979); *Holt v. Sarver*, 309 F. Supp. 362, 382–85 (E.D. Ark. 1970) (ordering system-wide relief in Arkansas), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

⁵⁴ See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 14 (1998).

⁵⁵ *Id.* at 15.

⁵⁶ *Safley v. Turner*, 586 F. Supp. 589 (W.D. Mo. 1984), *aff'd*, 777 F.2d 1307 (8th Cir. 1985), *aff'd in part, rev'd in part*, 482 U.S. 78 (1987).

⁵⁷ Heightened scrutiny applies to classifications employing suspect criteria. See, e.g., *In re Griffiths*, 413 U.S. 717, 721 (1973) (holding that legislation barring aliens from practicing law violated equal protection); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (concluding that legislation restricting welfare benefits on the basis of alienage violated equal protection); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (holding that legislation barring the cohabitation of interracial unmarried couples violated equal protection); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (ruling that segregated schools violated equal protection). Compare Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (stating that heightened scrutiny is "strict" in theory and fatal in fact), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

⁵⁸ See *Turner*, 482 U.S. at 82–83.

⁵⁹ *Id.* at 83 (noting that the district court "held the marriage regulation to be an

erty"⁶⁰—and thus barred limitations on their exercise unless they constituted the least-restrictive method to achieving penal goals.⁶¹ The court of appeals affirmed using the same demanding test.⁶²

Writing for the Supreme Court in *Turner*, Justice O'Connor rejected application of the strict scrutiny test because she deemed it incompatible with the Rehnquist Court's policy that judges should not "become the primary arbiters of what constitutes the best solution to every administrative problem."⁶³ In place of heightened scrutiny, the *Turner* Court advanced a reasonableness standard consisting of the following prongs:

- Whether there is a "‘valid, rational connection’ between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it."⁶⁴
- "[W]hether there are alternative means of exercising the right [that is, the general constitutional right, such as freedom of expression, rather than a particular aspect—such as corresponding through the mail,] that remain open to prison inmates."⁶⁵
- "[T]he impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."⁶⁶
- "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."⁶⁷

Four members of the Court—Justices Stevens, Marshall, Brennan, and Blackmun—dissented. Speaking for the dissenters, Justice Stevens characterized the test as "open-ended" and thus inviting prison staff's speculative concerns to carry the day, every day.⁶⁸ He

unconstitutional infringement upon the fundamental right to marry because it was far more restrictive than was either reasonable or essential for the protection of the State's interests in security and rehabilitation" (citing *Safley*, 586 F. Supp. at 594)).

⁶⁰ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁶¹ *Turner*, 586 F. Supp. at 594, 596.

⁶² *Turner*, 482 U.S. at 83–84.

⁶³ *Id.* at 89.

⁶⁴ *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

⁶⁵ *Id.* at 90.

⁶⁶ *Id.* ("When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." (citing *Jones v. N.C. Prisoners' Union*, 433 U.S. 119, 132–33 (1977))).

⁶⁷ *Id.* at 91.

⁶⁸ *Id.* at 101 n.1 (Stevens, J., dissenting).

feared that wardens could invariably "produce[] . . . [some] plausible security concern" to justify an exercise of power, including "the use of bullwhips" to enforce prison rules.⁶⁹

III. THE IMPACT OF TURNERIZATION

Chief Justice Rehnquist and the other members of the *Turner* majority envisaged a test governing *all* rights implicated by prison regulations. Justice O'Connor, writing for the *Turner* Court, posited that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁷⁰ On the heels of the *Turner* ruling, the Court applied the *Turner* test to prison regulations addressing two other aspects of the First Amendment: religious practices in *O'Lone v. Estate of Shabazz*⁷¹ and receipt of books in *Thornburgh v. Abbott*.⁷² In 2004, the *Turner* test would completely encircle the First Amendment when the Court upheld limitations on freedom of association in *Overton v. Bazzetta*.⁷³

Meanwhile in *Washington v. Harper*,⁷⁴ the Chief Justice voted with the majority in applying the *Turner* test outside its original First Amendment boundaries. The respondent had objected to a policy allowing the involuntary use of psychotropic medication.⁷⁵ Even though the Court found that the policy implicated a due process liberty interest, it nonetheless applied the *Turner* test in finding that it reasonably advanced prison security.⁷⁶ Regarding its scope, the Court stated: "We made quite clear that the standard of review we adopted in *Turner* applies to *all circumstances* in which the needs of prison administration implicate constitutional rights."⁷⁷

A. Boundary-Defining Criteria

During the long interval between *Harper* and the Court's 2005 decision in *Johnson v. California*,⁷⁸ the Court expressed inconsistent views regarding the reach of the *Turner* test. On the one hand in

⁶⁹ *Id.* at 101.

⁷⁰ *Id.* at 89 (majority opinion).

⁷¹ 482 U.S. 342, 348 (1987).

⁷² 490 U.S. 401, 419 (1989). The Roberts Court would embrace the *Turner* test to determine the constitutionality of severe restrictions on published material for prisoners in long-term segregation in *Beard v. Banks*, 126 S. Ct. 2572 (2006).

⁷³ 539 U.S. 126, 132 (2003).

⁷⁴ 494 U.S. 210, 224–25 (1991).

⁷⁵ *Id.* at 214–15.

⁷⁶ *Id.* at 225–26.

⁷⁷ *Id.* at 224 (emphasis added) (citing *Turner v. Safley*, 482 U.S. 78, 85 (1987)).

⁷⁸ 543 U.S. 499 (2005).

Shaw v. Murphy,⁷⁹ the Court spoke of the *Turner* test as the “unitary, deferential standard for reviewing prisoners’ rights claims.”⁸⁰ On the other hand, the Court did not apply the *Turner* test to prison cases addressing the Fifth Amendment right against self-incrimination⁸¹ and the Eighth Amendment right against cruel and unusual punishment.⁸²

Meanwhile, federal courts of appeals advanced three boundary-defining approaches. One posited that the several prongs of the *Turner* test applied to rights that involve “multi-faceted balancing.”⁸³ In articulating this criterion, the Eighth Circuit Court of Appeals used the *Turner* test to adjudicate a claim that cross-gender searches violated male inmates’ right to privacy.⁸⁴ Cross-gender searches, according to the federal panel, necessitated the balancing of prisoners’ rights to privacy, equal employment rights of female officers, and the institution’s interest in internal security.⁸⁵

A second boundary-defining approach limited the *Turner* test to situations involving day-to-day penal management. The Court of Appeals for the District of Columbia articulated this criterion by ruling that the *Turner* test did not apply to a lawsuit brought by female federal prisoners who complained of unequal treatment because their male counterparts were housed closer to Washington, D.C.⁸⁶ The court observed that the proximity of the female prison rested on policy decisions rather than day-to-day management.⁸⁷

A third test, initially employed by the Ninth Circuit in *Jordan v. Gardner*,⁸⁸ posited that the *Turner* test “has been applied only where

⁷⁹ 532 U.S. 223 (2001).

⁸⁰ *Id.* at 229.

⁸¹ *McKune v. Lile*, 536 U.S. 24, 48 (2002) (holding that an inmate’s refusal to make incriminating admissions in order to qualify for a sex abuse treatment program did not result in adverse consequences sufficiently severe to constitute self-incrimination under the Fifth Amendment).

⁸² *Farmer v. Brennan*, 511 U.S. 825, 843, 848 (1994) (applying the prohibition of cruel and unusual punishment to inmate-on-inmate assault); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (applying the prohibition of cruel and unusual punishment to conditions of confinement).

⁸³ *See Timm v. Gunter*, 917 F.2d 1093, 1099 n.8 (8th Cir. 1990) (citing *Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988)).

⁸⁴ *See id.* at 1099–1101.

⁸⁵ *See id.* at 1100.

⁸⁶ *Pitts v. Thornburgh*, 866 F.2d 1450, 1451–52 (D.C. Cir. 1989). Plaintiffs claimed that “their being incarcerated far from the District” results “in the hardship of fewer visitors (especially family members) and less preparation for and support in their eventual return to the District than that afforded males imprisoned at the D.C. facilities.” *Id.* at 1452.

⁸⁷ *Id.* at 1454.

⁸⁸ 986 F.2d 1521 (9th Cir. 1993).

the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment."⁸⁹ The court held that the *Turner* test did not determine what constitutes cruel and unusual punishment because the Eighth Amendment prohibition of such punishment does "not conflict with incarceration," but instead "limit[s] the hardships which may be inflicted upon the incarcerated as 'punishment.'"⁹⁰

In *Johnson v. California*, the Supreme Court delimited the *Turner* test to situations in which asserted rights are "'inconsistent with proper incarceration.'"⁹¹ However, Justice O'Connor's majority opinion failed to identify criteria for making this determination except to posit that cruel and unusual punishment as well as racial segregation fell outside the new standard because they were incompatible with "public respect for our system of justice."⁹² Justices Thomas and Scalia, the lone dissenters, would likely have agreed with a circuit judge's assessment in *Gerber v. Hickman* that "[t]he repetition of . . . [the *Johnson* Court's] vague principle in numerous ways, however, does not explain why . . . [a right] is *fundamentally* inconsistent with incarceration."⁹³ The editors of the *Harvard Law Review* agreed: "[T]he Court has done little to assure that they will be resolved in a predictable fashion. The key question that *Johnson* passes over, and which underlies the doctrinal confusion it will create, is why prisoners lose full constitutional protection at all."⁹⁴

B. Charting the Constitutional Divide

1. Settled Territory

Prior to *Johnson v. California*, the Supreme Court had applied the *Turner* test to challenges brought under the First Amendment in *Turner v. Safley*,⁹⁵ *O'Lone v. Estate of Shabazz*,⁹⁶ *Thornburgh v. Abbott*,⁹⁷ *Shaw v. Murphy*,⁹⁸ and *Overton v. Bazzetta*,⁹⁹ as well as prison-

⁸⁹ *Id.* at 1530 (citing *Washington v. Harper*, 494 U.S. 210, 224 (1990)).

⁹⁰ *Id.* (citing *Spain v. Proconier*, 600 F.2d 189, 193–94 (9th Cir. 1979)).

⁹¹ 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

⁹² *Id.* at 511 (citing *Batson v. Kentucky*, 476 U.S. 79, 99 (1986)).

⁹³ *Gerber v. Hickman*, 291 F.3d 617, 624 (9th Cir. 2002) (Tashima, J., dissenting) (en banc), *cert. denied*, 537 U.S. 1039 (2002).

⁹⁴ *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 228, 235 (2005).

⁹⁵ 482 U.S. 78 (1987).

⁹⁶ 482 U.S. 342, 348 (1987) (holding that institutional regulations restricting the exercise of religion are reasonably related to institutional goals).

⁹⁷ 490 U.S. 401, 419 (1989) (holding that institutional regulations restricting publications are reasonably related to institutional goals).

ers' right to privacy in *Washington v. Harper*.¹⁰⁰ Lower federal courts extended the reach of *Turner* to the prohibition of cruel and unusual punishment;¹⁰¹ the ban on unreasonable searches;¹⁰² denial of equal protection of the law because of race,¹⁰³ gender,¹⁰⁴ and religious affiliation;¹⁰⁵ as well as matters of statutory interpretation.¹⁰⁶

The Court's decision in *Johnson* gave no indication that the constitutional territory it had previously staked out for the *Turner* test, as delineated above, would be lost to a different test. Indeed, the Court explicitly spoke of only two rights—the prohibition of cruel and unusual punishment and racial discrimination—that lay beyond the reach of the *Turner* test.¹⁰⁷ Subsequently, lower federal courts have been true to this reading of *Johnson*. For example, the district court in *Roe v. Crawford*¹⁰⁸ rejected the plaintiff's assertion that a woman's right to terminate her pregnancy in prison is comparable to the right to be free of racial segregation and therefore is "not a right that need necessarily be compromised for the sake of proper prison administration."¹⁰⁹ The court asserted that *Johnson* intended "*many rights*," including reproductive freedom, to fall under the *Turner* test.¹¹⁰

2. Contested Territory

Commencing shortly after the Court's ruling in *Turner v. Safley*, lower federal courts have extended the *Turner* test into areas not yet staked out by the Supreme Court. Although *Johnson v. California* categorically barred the lower federal courts from applying *Turner* test to the Eighth Amendment and to race-based equal protection challenges, it failed to address definitively the importation

⁹⁸ 532 U.S. 223, 231 (2001) (holding that inmates lack a First Amendment right to assist other inmates in legal matters).

⁹⁹ 539 U.S. 126, 127 (2003) (barring visitation with children when the inmate's parental rights have been terminated).

¹⁰⁰ 494 U.S. 210, 236 (1991) (allowing the involuntary use of psychotropic medication).

¹⁰¹ *Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 419 (3d Cir. 2000).

¹⁰² *Doe v. Delie*, 257 F.3d 309, 316 (3d Cir. 2001).

¹⁰³ *White v. Morris*, 832 F. Supp. 1129, 1137 (S.D. Ohio 1993).

¹⁰⁴ *Klinger v. Dep't of Corr.*, 31 F.3d 727, 732 (8th Cir. 1994) (applying *Turner* to an equal protection claim).

¹⁰⁵ *Salaam v. Collins*, 830 F. Supp. 853, 861 (D. Md. 1993).

¹⁰⁶ *Gates v. Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994).

¹⁰⁷ *Johnson v. California*, 543 U.S. 499, 511–12 (2005).

¹⁰⁸ 439 F. Supp. 2d 942 (W.D. Mo. 2006).

¹⁰⁹ *Id.* at 948 (citing *Johnson*, 543 U.S. at 510).

¹¹⁰ *Id.* (emphasis added) (citing *Johnson*, 543 U.S. at 510).

of the *Turner* test by lower federal courts into the subject areas examined below.

a. *Equal Protection*

Albeit still limited, post-*Johnson* caselaw supports application of the *Turner* test to equal protection challenges not based on race. As the court in *Tolbert v. McGrath*¹¹¹ concluded:

For distinctions drawn among prisoners other than those based on race, strict scrutiny is inappropriate to test the infringement of prisoners' constitutional rights. Where a prison regulation (other than a race-based one) impinges on inmates' constitutional rights, the regulation or practice is valid if it is reasonably related to legitimate penological interests.¹¹²

Moreover, lower federal and state courts have ruled that disparate treatment of persons of color that can be attributed to some factor other than race or ethnicity should be adjudicated by the *Turner* test.¹¹³ For instance, in *Meggett v. Pennsylvania Department of Corrections*,¹¹⁴ a state court applied the *Turner* test to a prison regulation that treated Afro haircuts differently than other haircuts.¹¹⁵ The court reasoned that Afro haircuts were race-neutral because they could be worn by white people.¹¹⁶ The court ultimately ruled in favor of the defendant.¹¹⁷

In turn, *Johnson* does not contravene earlier case law that applied the *Turner* test to claims of religious discrimination.¹¹⁸ For instance, *Salaam v. Collins*¹¹⁹ addressed whether staff had discriminated against Muslim inmates in denying them ritually slaughtered meat.¹²⁰ By contrast, prison officials had honored Jewish inmates' desire for kosher meals.¹²¹ The court in *Salaam* applied the highly

¹¹¹ No. 04-3039 (SI), 2005 WL 3310065 (N.D. Cal. Dec. 7, 2005).

¹¹² *Id.* at *6 (citations omitted).

¹¹³ See, e.g., *McClain v. Rogers* 155 F. App'x 918, 921 (7th Cir. 2005) (characterizing a white supremacist's claim as religion-based given his affiliation with a white supremacist religion); *Meggett v. Pa. Dep't of Corr.*, 892 A.2d 872 (Pa. Commw. Ct. 2006) (rejecting claim that restrictions on Afro haircuts was racially based). Because the disparate treatment affecting a black inmate in *McGrath* arose due to his attendance at Muslim religious services, the court used the *Turner* test and, not surprisingly, ruled against the plaintiff. *McGrath*, 2005 WL 3310065, at *6.

¹¹⁴ *Meggett*, 892 A.2d 872.

¹¹⁵ *Id.* at 883–84.

¹¹⁶ *Id.* at 888.

¹¹⁷ *Id.*

¹¹⁸ See, e.g., *Benjamin v. Coughlin*, 905 F.2d 571, 574–75 (2d Cir. 1990); *Salaam v. Collins*, 830 F. Supp. 853, 855–56 (D. Md. 1993).

¹¹⁹ 830 F. Supp. 853.

¹²⁰ *Id.* at 854–55.

¹²¹ *Id.* at 860.

deferential *Turner* test in ruling that financial considerations justified the unequal treatment of Muslim inmates: Their dietary demands, unlike those of the Jewish inmates, would impose more than *de minimis* costs.¹²²

By placing discrimination based on race alone outside the reach of the *Turner* test, *Johnson* invites lower federal courts to reconsider their earlier case law on sex discrimination in prison. Shortly after the ruling in *Turner*, however, the D.C. Circuit in *Pitts v. Thornburgh*¹²³ rejected defendant prison officials' contention that the *Turner* test governed alleged sexual discrimination in the housing of inmates,¹²⁴ advancing three reasons for not doing so. First, *Turner* addressed "the day-to-day operations of prisons that restrict the exercise of prisoners' individual rights," whereas the facts of the instant case concerned where to locate a women's prison, which the court characterized as a nonjudiciable policy decision.¹²⁵ Second, unlike the facts of *Turner*, the instant case alleged gender discrimination, "a classification that traditionally summons heightened scrutiny."¹²⁶ Finally, the right to equal protection is different from other individual rights in that it implicates the ill-will of government and thus an improper governmental motive.¹²⁷

Citing the *Pitts* case, the Eighth Circuit in *Pargo v. Elliott*¹²⁸ observed that *Turner* does not foreclose all heightened judicial review.¹²⁹ Female inmates imprisoned in Iowa complained of programs inferior to their male counterparts.¹³⁰ Employing the *Turner* test, the district court ruled against them.¹³¹ The circuit court vacated and remanded the trial court judgment;¹³² moreover, the court implied that *Turner's* deferential standard should not be applied because the women's suit did not address a matter of internal prison security.¹³³

Earlier, the Eighth Circuit in *Klinger v. Department of Correc-*

¹²² *Id.* at 861.

¹²³ 866 F.2d 1450 (D.C. Cir. 1989).

¹²⁴ *Id.* at 1453-55.

¹²⁵ *Id.* at 1453.

¹²⁶ *Id.* at 1554.

¹²⁷ *Id.* at 1555.

¹²⁸ 49 F.3d 1355 (8th Cir. 1995).

¹²⁹ *Id.* at 1357.

¹³⁰ *Id.* at 1355-56.

¹³¹ *Pargo v. Elliott*, 894 F. Supp. 1239, 1243 (S.D. Iowa. 1994), *vacated*, 49 F.3d 1355 (8th Cir. 1995).

¹³² *Id.* at 1357.

¹³³ *Id.* at 1357. The case was dismissed by the district court on remand. *Pargo v. Elliott*, 894 F. Supp. 1243 (S.D. Iowa), *aff'd*, 69 F.3d 280 (8th Cir. 1995).

tions¹³⁴ had addressed an alleged denial of equal protection arising from dissimilar programs available to female and male inmates confined in Nebraska.¹³⁵ Unlike the aforementioned *Pargo* women, these female inmates blamed the inequality on prison staff's allocation of resources.¹³⁶ Consequently, the *Klinger* court characterized the Nebraska women's claim as one addressing the "day-to-day administrative decisions of prison officials" and thus concluded that *Turner's* deferential test governed.¹³⁷ The court then sided with the defendant.¹³⁸

b. *Statutory Rights*

Johnson leaves undisturbed those lower federal court rulings that applied the *Turner* test to inmate lawsuits over restrictions on statutory rights. In *Gates v. Rowland*,¹³⁹ the court addressed a statutory claim by HIV-positive inmates. Prison staff had barred them from food service jobs, purportedly in violation of federal law forbidding disability discrimination.¹⁴⁰ The court concluded that the rights created by the statute could be limited by prison authorities if reasonably related to penal objectives.¹⁴¹ Application of the *Turner* test in this manner rested on statutory intent, so found the court:

There is no indication that Congress intended the Act to apply to prison facilities irrespective of . . . effective prison administration. . . . Thus, we deem the applicable standard for the review of the Act's statutory rights in the prison setting to be equivalent to the review of constitutional rights in a prison setting as outlined by the Supreme Court in *Turner*¹⁴²

The Ninth Circuit then deferred to defendants' explanation for excluding the HIV-positive inmates from serving food to the main-line population. The defendants asserted that they had catered to inmates' "think[ing] the worst—that . . . [HIV-positive food servers] will bleed into the food, spit into the food, or even worse."¹⁴³ This, the defendants argued, could lead to "violent actions" against

¹³⁴ 31 F.3d 727 (8th Cir. 1994).

¹³⁵ *Id.* at 729.

¹³⁶ *Id.* at 731.

¹³⁷ *Id.* at 732.

¹³⁸ *Id.* at 734.

¹³⁹ 39 F.3d 1439 (9th Cir. 1994).

¹⁴⁰ *Id.* at 1445.

¹⁴¹ *Id.* at 1447.

¹⁴² *Id.*

¹⁴³ *Id.*

HIV-positive food servers.¹⁴⁴

The Fourth and Seventh Circuits appear disposed to following the Ninth Circuit's lead on this issue. In *Torcasio v. Murray*,¹⁴⁵ the Fourth Circuit addressed an action brought under the Americans with Disabilities Act (ADA). The plaintiff-inmate asserted that staff had failed to make necessary accommodations under the ADA by refusing to modify his cell, the prison lobby, and recreation areas.¹⁴⁶ On appeal, the circuit court granted the defendants qualified immunity because they could have reasonably believed that *Turner* permitted them to place penal objectives ahead of the inmate's statutory right to reasonable accommodations.¹⁴⁷ Quoting the Ninth Circuit's decision in *Gates*, the Fourth Circuit panel reasoned, "It is highly doubtful that Congress intended a more stringent application of prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights."¹⁴⁸

In the Seventh Circuit decision of *Love v. Westville Correctional Center*,¹⁴⁹ a quadriplegic inmate brought suit under the ADA. He asserted that his disability prevented his use of numerous programs available to other inmates, as well as the recreational, dining, and visiting facilities.¹⁵⁰ Rather than asserting that the *Turner* test overrode statutory rights per se, the court stated, "It is entirely possible" that the Act's "reasonableness requirement must be judged in light of the overall institutional requirements."¹⁵¹ This could dictate that "no *reasonable* accommodations were possible."¹⁵² Because the defendant did not explain why it failed to accommodate the plaintiff, the court affirmed the jury award of damages.¹⁵³

The district court for the Eastern District of Wisconsin stands alone in expressly rejecting *Turner's* applicability to federal statutes. In *Lewis v. Sullivan*,¹⁵⁴ the court addressed the constitutionality of a key provision of the Prison Litigation Reform Act (PLRA) barring *in forma pauperis* suits. The defendants argued in part that the *Turner* test applied to federal statutes, which would require the

¹⁴⁴ *Id.* at 1447-48.

¹⁴⁵ 57 F.3d 1340 (4th Cir. 1995).

¹⁴⁶ *Id.* at 1342.

¹⁴⁷ *Id.* at 1355.

¹⁴⁸ *Id.* (quoting *Gates*, 39 F.3d at 1447).

¹⁴⁹ 103 F.3d 558 (7th Cir. 1996).

¹⁵⁰ *Id.* at 559-60.

¹⁵¹ *Id.* at 561.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 135 F. Supp. 2d 954 (W.D. Wis. 2001), *rev'd on other grounds*, 279 F.3d 526 (7th Cir. 2002).

trial court to uphold the challenged provision of the PLRA as long as it promoted a reasonable penal objective—regardless of whether it otherwise violated the plaintiff's constitutional rights.¹⁵⁵ District Judge Crabb disagreed, finding that the justification for deferring to prison regulations, per *Turner*, did not apply to federal statutes.¹⁵⁶ She explained that prison regulations, unlike statutes, "are enacted and implemented by persons in the business of running prisons," who would be impeded in "the efficient operation of prisons" if constrained by constitutional rights.¹⁵⁷

c. *Privacy, Including Searches*

In his dissenting opinion in *Jordan v. Gardner*,¹⁵⁸ Chief Judge Wallace of the Ninth Circuit asserted that *Turner* subsumed *Bell v. Wolfish* in Fourth Amendment cases.¹⁵⁹ When the *Wolfish* Court invoked a reasonableness test, it characterized its inner workings as balancing "the scope of the particular intrusion; the manner in which it was conducted; the justification for initiating it; and the place in which it is conducted."¹⁶⁰ But Chief Judge Wallace's dissent posited that "*Turner* does not authorize such balancing."¹⁶¹ Unlike *Wolfish*, he explained, "What *Turner* does not require or permit is for a judge to look at the injury to inmates, on the one hand, and the benefit to prison administration, on the other, and say this one or that one is more important"¹⁶² He could have added that *Turner* dictates penal interests are presumed much weightier, placing a considerable burden on plaintiff-inmates to overcome this presumption. Hence, factual situations that balance in favor of the plaintiff-inmates under the *Wolfish* test could be reversed under the more deferential *Turner* test.

The pre-*Johnson* caselaw on this issue lacked consensus.¹⁶³ The Second Circuit presumably would use the *Wolfish* test for pretrial detainees given its conclusion that *Turner* exclusively addresses

¹⁵⁵ See *id.* at 968.

¹⁵⁶ See *id.*

¹⁵⁷ *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

¹⁵⁸ 986 F.2d 1521 (9th Cir. 1993).

¹⁵⁹ *Id.* at 1567 (Wallace, C.J., dissenting).

¹⁶⁰ *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

¹⁶¹ *Jordan*, 986 F.2d at 1567 (Wallace, C.J., dissenting).

¹⁶² *Id.*

¹⁶³ See *Foot v. Spiegle*, 995 F. Supp. 1347, 1349 n.2 (D. Utah 1998) (indicating "some uncertainty among the lower federal courts as to the proper relationship between the *Bell* factors and the *Turner* factors in Fourth Amendment cases").

prisons rather than jails.¹⁶⁴ The Third Circuit applied the *Turner* test to inmates' right of privacy in medical information¹⁶⁵ and to non-therapeutic abortions.¹⁶⁶ Inmates possess "at best" a minimal right to privacy, wrote the Fifth Circuit in upholding cross-gender searches using *Turner's* reasonableness standard.¹⁶⁷ The Eighth Circuit applied the *Turner* test in permitting surveillance of men's showers by female officers.¹⁶⁸ Its brethren on the Ninth Circuit stated that they would use those parts of the *Turner* test they deemed applicable to the Fourth Amendment.¹⁶⁹ In a later ruling, the Tenth Circuit embraced *Wolfish's* balancing test in evaluating strip searches but indicated that *Turner's* concern with penal aims would be pertinent in deciding the appropriateness of the search's location.¹⁷⁰ Lastly, an Eleventh Circuit panel indicated that it would rely exclusively on all four prongs of the *Turner* test in determining limitations on the right to bodily privacy.¹⁷¹

The sparse post-*Johnson* caselaw favors the application of the *Turner* test when prison regulations limit the most fundamental of privacy rights—a female inmate's desire to terminate her pregnancy. At issue in *Roe v. Crawford*¹⁷² was a Missouri prison regulation that provided transportation for an off-site abortion only to safeguard the mother's health.¹⁷³ In finding that the *Turner* test governed the regulation's constitutionality, the court held that the right to an abortion is "inconsistent with proper incarceration."¹⁷⁴

d. *Pretrial Detention*

A line of lower federal court cases indicates that *Turner* does not subsume *Wolfish* for alleged inflictions of pretrial punish-

¹⁶⁴ See *Shain v. Ellison*, 273 F.3d 56, 66 n.3 (2d Cir. 2001); *Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2d Cir. 2001).

¹⁶⁵ *Doe v. Delie*, 257 F.3d 309, 316 (3d Cir. 2001).

¹⁶⁶ *Monmouth County Corr. Inst. v. Lanzaro*, 834 F.2d 326, 338–44 (3d Cir. 1987).

¹⁶⁷ *Sinclair v. Stalder*, 78 Fed. App'x 987, 989 (5th Cir. 2003); see also *Ferrell v. Bowles*, 91 Fed. App'x 949, 950 (5th Cir. 2004).

¹⁶⁸ *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990).

¹⁶⁹ See *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988). The court found *Turner's* second prong to be "much more meaningful in the First Amendment context than the Fourth or Eighth, where the right is to be free from a particular wrong." *Id.* at 331 n.1.

¹⁷⁰ *Farmer v. Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002).

¹⁷¹ *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993).

¹⁷² 439 F. Supp. 2d 942 (W.D. Mo. 2006).

¹⁷³ *Id.* at 946.

¹⁷⁴ *Id.* at 947.

ment.¹⁷⁵ They have stressed that *Wolfish's* delineation of the goals of pretrial detention differ from *Turner's* focus on "penological objectives." As the Second Circuit explained:

Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc. . .) of persons convicted of crimes. Although some of the concerns of pretrial detention, especially protection against further criminal conduct, overlap with the concerns of penology, there are important differences. Penological interests are therefore arguably not an appropriate guide for the pretrial detention of accused persons.¹⁷⁶

On the other hand, some circuits utilize the *Turner* test to address claims by pretrial detainees. The Ninth Circuit has embraced the *Turner* test when pretrial detainees assert violations of the First Amendment.¹⁷⁷ The Fourth Circuit has employed the four prongs of the *Turner* test when disabilities imposed on detainees allegedly arise from security concerns,¹⁷⁸ including those born of the fact-specific circumstances found in *Wolfish*.¹⁷⁹ Lastly, the Sixth Circuit in *Martucci v. Johnson*¹⁸⁰ applied both tests: It first held that, under the *Wolfish* test, a detainee's segregation did not inflict punishment¹⁸¹ and then used the *Turner* test in rejecting his First Amendment claims arising from jailers withholding his mail.¹⁸²

IV. THE UNDERPINNINGS OF TURNERIZATION

The broad reach of Turnerization is matched by what Lawrence Sager would have called its "thinness"—that is, its capacity to underenforce the Constitution.¹⁸³ The underpinnings of Turnerization, which are examined below, have circumscribed the potentially broad sweep of prisoners' rights.¹⁸⁴ For inmates, the consequences of underenforcement are profound. As in the previ-

¹⁷⁵ See, e.g., *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004); *Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001) (en banc).

¹⁷⁶ *Benjamin*, 264 F.3d at 187 n.10 (Kleinfeld, J., dissenting) (citing *Mauro v. Arpaio*, 188 F.3d 1054, 1059 n.2, 1067 (9th Cir. 1999) (alteration in original)).

¹⁷⁷ *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999).

¹⁷⁸ See *Hause v. Vaught*, 993 F.2d 1079, 1082 (4th Cir. 1993).

¹⁷⁹ See *id.* (applying the *Turner* test to the "publishers-only rule," which requires that all inmate publications come directly from the publisher and which the *Wolfish* Court upheld as a reasonable security measure).

¹⁸⁰ 944 F.2d 291 (6th Cir. 1991).

¹⁸¹ *Id.* at 293–94.

¹⁸² *Id.* at 296.

¹⁸³ Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1989 (2001).

¹⁸⁴ *But cf. Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) ("A prisoner retains

ously discussed *Kimberlin v. United States Department of Justice*,¹⁸⁵ in which the D.C. Circuit Court of Appeals discarded "facts" in upholding a mean-spirited policy forbidding electric and electronic musical instruments,¹⁸⁶ underenforcement has created a moral shortfall by compromising constitutional norms in exchange for penal objectives of trifling worth.¹⁸⁷

A. *Judicial Minimalism*

"All the Justices on the contemporary Rehnquist Court, other than the originalists [i.e., Justices Scalia and Thomas] . . . engage in judicial minimalism," contends Ronald Kahn.¹⁸⁸ Judicial minimalism possesses two dimensions: narrowness and shallowness. A decision is narrow when it decides the case at hand and nothing more.¹⁸⁹ A decision achieves shallowness when it provides a definitive judgment free of abstractions.¹⁹⁰

The Rehnquist Court's application of the *Turner* test bears a close resemblance to judicial minimalism, a form of judicial decisionmaking that "settles the case before it, but leaves many things undecided."¹⁹¹ Take, for instance, the Supreme Court's ruling in *Overton v. Bazzetta*.¹⁹² A burgeoning prison population led the Michigan Department of Corrections to limit the number of minors eligible to visit prisoners unless the minor is visiting an imprisoned parent and other kin.¹⁹³ Some of the rules in question barred children of inmates whose parental rights had been terminated and required juvenile visitors to be accompanied by a parent or legal guardian.¹⁹⁴ The Supreme Court ruled that the regulations satisfied each of the four parts of the *Turner* test.¹⁹⁵

Economy of analysis characterized Justice Kennedy's majority

all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").

¹⁸⁵ 318 F.3d 228 (D.C. Cir. 2003).

¹⁸⁶ *Id.* at 233.

¹⁸⁷ Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

¹⁸⁸ Ronald Kahn, *The Canon of Constitutional Law for Undergraduate Teaching: The Melding of Constitutional Theory, Law, and Interpretive/Empirical Political Science*, 17 CONST. COMMENT. 399, 408 (2000).

¹⁸⁹ CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10 (1999).

¹⁹⁰ *Id.* at 13.

¹⁹¹ *Id.*

¹⁹² 539 U.S. 126 (2003).

¹⁹³ *Id.* at 129.

¹⁹⁴ *Id.* at 129-30.

¹⁹⁵ *Id.* at 133-36.

opinion. His "bottom line" read as follows: "[T]o reduce the number of child visitors, a line must be drawn," and the one drawn by prison officials would do.¹⁹⁶ The Court achieved "narrowness" by upholding the constitutionality of the visitation restrictions without deciding whether inmates possessed a right to contact visits.¹⁹⁷ Justice Kennedy's majority opinion also obtained "shallowness" by skirting any discussion of how one determines whether an asserted right is "inconsistent with proper incarceration."¹⁹⁸

The minimalism of the *Turner* test accommodates and implicitly legitimates the "countermajoritarian difficulty."¹⁹⁹ This is the notion that the powers of the Supreme Court, especially its authority to find legislation unconstitutional, improperly conflict with majority rule.²⁰⁰ Alexander Bickel famously coined the phrase "countermajoritarian difficulty"²⁰¹ before the demise of the hands-off doctrine and thus never discussed its relationship to prisoners' rights. However, for H.N. Hirsch and other commentators, "countermajoritarian" is exactly what "[American] constitutionalism is meant to be."²⁰² The Framers surely feared what Justice Brandeis called the "tyrannies of governing majorities."²⁰³

If one acknowledges the "countermajoritarian difficulty," a caveat arises under *United States v. Carolene Products*.²⁰⁴ Its much-discussed footnote four provides for "more searching" or "more exacting" judicial scrutiny of government actions directed against "discrete and insular minorities."²⁰⁵ Erwin Chemerinsky contends

¹⁹⁶ *Id.* at 133.

¹⁹⁷ The Court denied that it was precluding a right to "intimate association" and proceeded to state that it "need not attempt to explore or define the asserted right of association." *Id.* at 131–32.

¹⁹⁸ *Id.* at 131 ("The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.").

¹⁹⁹ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1978).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² H.N. HIRSCH, *A THEORY OF LIBERTY* 5 (1992); see also *Whitney v. California* 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (arguing that judicial review existed to prevent "the occasional tyrannies of governing majorities"); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1522 (1990) ("If the Constitution's Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection.").

²⁰³ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring); see also *THE FEDERALIST* No. 10, at 129–30 (James Madison) (Benjamin F. Wright ed., 1961) (observing that "measures are too often decided, not according to the rules of Justice and the rights of the minor party, but by the superior force of an interested and over-bearing majority").

²⁰⁴ 304 U.S. 144, 152 n.4 (1938).

²⁰⁵ See, e.g., LIEF H. CARTER, *CONTEMPORARY CONSTITUTIONAL LAWMAKING* 86 (1985)

that inmates ought to be regarded as one of those groups.²⁰⁶ Indeed, several other commentators describe inmates as "a despised minority without political power,"²⁰⁷ "the untouchable class of American society,"²⁰⁸ and "the least sympathetic group of 'outsiders' in our constitutional jurisprudence."²⁰⁹ Moreover, inmates bring to prison other disadvantaging qualities: They are largely undereducated²¹⁰ and impoverished,²¹¹ and they disproportionately experience mental illness.²¹²

("[Footnote four is] the most commonly cited justification for . . . active [judicial] protection of civil rights and liberties."); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982) ("[M]any scholars think [footnote four] actually commenced a new era in constitutional law."); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 115 n.25 (1983) ("The famous . . . footnote four first suggests that the normal presumption of constitutionality may not operate in cases involving certain distinctions."). Footnote four provides:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth [Amendment].

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities. [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Products, 304 U.S. at 152 n.4 (citations omitted).

²⁰⁶ Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U.L. REV. 441, 459 (1999) ("Those in the military, in prisons, and in schools are classic discrete and insular minorities, who have little political power.").

²⁰⁷ CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 289 (1993) ("Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials.").

²⁰⁸ George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1999).

²⁰⁹ Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. REV. 173, 176 (1995).

²¹⁰ See James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 133 (2000) ("Fifty percent left school before the eleventh grade. Three of every four inmates cannot read above an eighth grade level and as many as half may be functionally illiterate.").

²¹¹ See JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 135 (5th ed. 1998). Some 50% of inmates free for a year or more before their arrest reported incomes under \$10,000; 19% reported incomes less than \$3000. *Id.*

²¹² See James R.P. Ogloff et al., *Mental Health Services in Jails and Prisons: Legal,*

B. *Faux Balancing*

Prisoners' rights came of age in a constitutional era dominated by "balancing."²¹³ In its purest form, balancing as a mode of constitutional interpretation identifies threatened constitutional rights and assigns weight to those rights to determine if their importance exceeds that of the intruding governmental interests. The four-prong *Turner* test deceptively suggests balancing, particularly with regard to all but the first prong: If the court finds that the first-prong is satisfied—the presence of a valid, rational connection between the prison regulation and the legitimate and neutral governmental interest put forward to justify it, the court then considers the remaining prongs and balances the findings.²¹⁴

In practice, the *Turner* test operates as a multi-factor test. "*Turner* does not authorize a balancing test," wrote the chief judge of the Ninth Circuit.²¹⁵ Unlike *Bell v. Wolfish*, he explained, "*Turner* does not require or permit . . . a judge to look at the injury to inmates, on the one hand, and the benefit to prison administration, on the other, and say this one or that one is more important"²¹⁶

Moreover, the several prongs have a distinct "tilt." "[W]hat is striking about the Court's application of the *Turner* test," writes one commentator, "is the way in which the *Turner* factors are crafted (or, critics might contend, contrived) to generally foreordain a finding against a prisoner's constitutional claim."²¹⁷ The first prong's commitment to rationality, the *sine qua non* of the test,²¹⁸ has a clear subtext: Reasonable means of achieving goals, including petty goals, trump rights. Indeed, penal goals acquire the status of

Clinical, and Policy Issues, 18 LAW & PSYCHOL. REV. 109, 109 (1994) (finding that serious mental illness afflicts 6.5%–10% of prisoners, with moderate mental illness found amongst an additional 15%–40%).

²¹³ See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987) (discussing the popularity of balancing).

²¹⁴ See *supra* text accompanying notes 64–67.

²¹⁵ *Jordan v. Gardener*, 986 F.2d 1521, 1567 (9th Cir. 1993) (Wallace, C.J., dissenting).

²¹⁶ *Id.*

²¹⁷ Lynn S. Branham, "Go and Sin No More:" *The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 297 (2004).

²¹⁸ See, e.g., *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001) ("If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor.") (quoting *Turner v. Safley*, 482 U.S. 78, 89–90 (1987)); *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001) (describing the first prong as the "*sine qua non*"); *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990) (explaining that the "first of these factors constitutes a *sine qua non*").

categorical imperatives, occupying a higher constitutional plane than rights. Moreover, the first prong functions as the leveler of rights by drawing no distinction between “weak” (non-fundamental) and “strong” (fundamental) rights. Similarly, this prong ignores the vulnerability of inmates as powerless outcasts to government overreaching.²¹⁹

To make matters worse for plaintiffs, the remaining three prongs are conceptually aligned in favor of defendant prison officials. As one court observed, “the first [prong] ‘looms especially large’ because it ‘tends to encompass the remaining [prongs].’”²²⁰ Because of their overlapping features, the prongs operate like dominoes: Once the first and most weighty prong falls, the others do as well. A commentator elaborates:

For example, if a court finds under the first prong that there is a valid connection between a regulation and a legitimate governmental purpose, then it will naturally conclude under prong three that the exerted right would have an impact on prison staff. This makes perfect sense. If there is a legitimate reason for enacting the regulation, it must be to prevent some deleterious effect within the prison. And, once a court finds that the regulation is rationally related to a penological purpose and that it furthers prison security, the court will likely define the prisoner’s right broadly in order to find, under the second prong, that there are other means available for exercising the right. Similarly, under prong four, a court will be less inclined to find that the regulation represents an exaggerated response, or that the state has alternative means of dealing with the problem at hand.²²¹

C. Deference

As illustrated by the Court’s embrace of challenged restrictions on child visitation in *Overton v. Bazzetta*,²²² the *Turner* test also rested upon a third element: due deference to the judgments of prison staff. Indeed, the Court in *Overton* assumed the truthfulness of the prison officials’ concerns about visitation by minors despite

²¹⁹ See *supra* note 207 and accompanying text (asserting that inmates ought to be regarded as a powerless class).

²²⁰ *Waterman v. Farmer*, 183 F.3d 208, 213–14 (3d Cir. 1999) (quoting *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998)).

²²¹ William Mark Roth, *Turner v. Safley: The Supreme Court Further Confuses Prisoners’ Constitutional Rights*, 22 LOY. L.A. L. REV. 667, 696 (1989).

²²² 539 U.S. 126 (2003); see also *supra* text accompanying notes 193–94 (describing the challenged visitation rules).

empirical evidence to the contrary.²²³ Whereas prison staff claimed that visiting children created disturbances, not one documented incident occurred.²²⁴ Moreover, one study found that "[t]he presence of children makes prisons easier, not harder, to manage, and that lawsuits have not been a problem."²²⁵ Similarly, the defendants' proposition that child visitors would become "too comfortable" with prison life and thus less likely to be deterred from criminal acts²²⁶ is refuted by studies showing that children separated from an incarcerated parent suffer considerable psychological harm and become likely candidates for criminality.²²⁷

The Rehnquist Court's strong commitment to deference²²⁸ arose from its affinity to the majoritarian constitutional paradigm.²²⁹ Born from the *Lochner* era, which spanned from 1897 to 1939 and saw the Supreme Court invalidate economic and social welfare legislation in the name of freedom to contract,²³⁰ this paradigm posits that actions taken by the majoritarian branches of government should prevail even when there exists "reasonable disagreement" over their constitutionality.²³¹ In turn, by applying *Turner's* rational-basis test to prison rules and policies, the Court has sought to restrain itself, and especially the lower federal courts, from interfering with the executive branch's management of prisons. "Prison administration," stated the *Turner* Court, "is . . . a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial

²²³ *Overton*, 539 U.S. at 133.

²²⁴ See *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 824 (E.D. Mich. 2001), *aff'd*, 286 F.3d 311 (6th Cir. 2002), *rev'd sub nom. Overton v. Bazzetta*, 539 U.S. 126 (2003).

²²⁵ Kelsey Kauffman, *Mothers in Prison*, CORRECTIONS TODAY, Feb. 2001, at 65.

²²⁶ *Bazzetta*, 148 F. Supp. 2d at 824.

²²⁷ Barbara Bloom, *Children of Prisoners*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 75 (Marilyn D. McShane & Frank P. Williams III eds., 1996). Imprisoned mothers also benefit from visits with their children. Mary Martin, *Connected Mothers: A Follow-Up Study of Incarcerated Women and Their Children*, 8(4) *WOMEN & CRIM. JUST.* 1, 18-19 (1997) (finding a strong relationship between the post-prison success of imprisoned mothers who visited most frequently with their children while incarcerated in the Minnesota Correctional Facility at Shakopee).

²²⁸ See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 *HARV. L. REV.* 54, 79 (1997) ("[J]udicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp.").

²²⁹ *Id.* at 141-42.

²³⁰ In *Lochner v. New York*, the Supreme Court found "a general right . . . to contract." 198 U.S. 45, 58 (1905). *Lochner's* offspring read laissez faire values into the Constitution. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 554 (1923) (ruling that minimum wage laws violated due process); *Coppage v. Kansas*, 236 U.S. 1, 25-26 (1915) (striking down legislation prohibiting "yellow dog" contracts).

²³¹ Fallon, *supra* note 228, at 75-77.

restraint.”²³²

The Court has also expressly linked deference to the myth that prison staff possesses unique and extraordinary skills. “Running a prison,” asserted Justice O’Connor in *Turner*, “is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”²³³ In applying the *Turner* test to censorship of books bound for prison, the Court went so far as to characterize the supervision of inmates as subject to “Herculean obstacles.”²³⁴

This perspective is disconnected from the contaminated reality of incarceration. As evidenced by Zimbardo’s famous mock prison experiment of 1971, the prison environment transforms prison officers for the worse.²³⁵ The abuses visited upon his volunteer student-inmates by student-guards led Zimbardo to conclude that at the very least a “mean spirited value system” may be inherent in the prison officer subculture.²³⁶

The Rehnquist Court would have benefited from Owen’s study of the evolving behavior of prison guards at San Quentin Prison.²³⁷ Whereas new officers begin their careers by “going by the book”²³⁸—an approach that approximates a legalistic style that the Supreme Court presumes to be the norm—they soon discern gaps between official policy and look elsewhere to make sense of the complicated prison culture.²³⁹ To address the inadequacy of “going by the book,” guards enter a second occupational style—becoming “badge heavy,” “super cops”²⁴⁰ who rely on force and its threatened use. Many guards progress to a third stage, “the old-timer phase,” which is based on a kind of “common sense” that has little to do with legality and likely justifies illegal uses of force.²⁴¹

Nor did the Rehnquist Court grasp the notion that prison guards’ shared occupational experiences give rise to an officer sub-

²³² *Turner v. Safley*, 482 U.S. 78, 85 (1987).

²³³ *Id.* at 84–85.

²³⁴ *Thornburgh v. Abbot*, 490 U.S. 401, 428 (1989).

²³⁵ Philip G. Zimbardo et al., *Reflections on the Stanford Prison Experiment: Genesis, Transformations, Consequences*, in *OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM* 193, 208 (Thomas Blass ed., 2000).

²³⁶ *Id.* at 210.

²³⁷ BARBARA A. OWEN, *THE REPRODUCTION OF SOCIAL CONTROL* (1988) (studying the attitudes and behavior of prison workers at San Quentin prison).

²³⁸ *Id.* at 87.

²³⁹ *Id.*

²⁴⁰ *Id.* at 88.

²⁴¹ *Id.* at 90.

culture that further undermines legality. John Irwin, a former inmate turned criminologist, observed that guards as well as prison administrators perceive inmates as "worthless, untrustworthy, manipulative, and disreputable deviants."²⁴² James Marguaret identified an officer code legitimating illegal beatings as means of order maintenance.²⁴³ Kelsey Kauffman's interviews with correctional officers revealed widespread unlawful guard violence directed at inmates.²⁴⁴

V. CONCLUSION

No jailhouse lawyer would have long mourned the death of Chief Justice Rehnquist. His tenure as Chief Justice could be captured in one decision handed down shortly after his elevation: *Turner v. Safley*. Surely *Turner* remains the most influential of all prisoners' rights cases. Addressing freedom of correspondence, a preferred right given heightened scrutiny by the *Turner* trial court,²⁴⁵ the Court applied its most deferential test. The Supreme Court, as well as the lower federal courts, quickly extended the *Turner* test to a host of other prisoners' rights. That *Turner* has worked a sea change was confirmed when the Ninth Circuit, reputed to be the nation's most liberal circuit,²⁴⁶ applied this standard in ruling that the racial segregation of inmates at reception centers was constitutionally acceptable.²⁴⁷ And while the Supreme Court in *Johnson v. California* retreated from its earlier language describing the *Turner* test as the "unitary, deferential standard for reviewing prisoners' rights claims,"²⁴⁸ a wide swath of constitutional territory remains subject to it.²⁴⁹

²⁴² JOHN IRWIN, *THE WAREHOUSE PRISON* 64 (2005). That this mindset can afflict prison administrators finds anecdotal support in the abuse of Iraqi prisoners at Abu Ghraib. Leah Caldwell, *The Masterminds of Torture, Humiliation and Abuse: From Supermax to Abu Ghraib*, COUNTERPUNCH, Oct. 15, 2004, <http://www.counterpunch.org/caldwell10152004.html>.

²⁴³ See James W. Marguaret, *Prison Guards and the Use of Physical Coercion As a Mechanism of Prisoner Control*, 24 CRIMINOLOGY 347, 347 (1986) (describing guard violence as "highly structured and deeply entrenched in the guard subculture").

²⁴⁴ See KELSEY KAUFFMAN, *PRISON OFFICERS AND THEIR WORLD* 130 (1988) (finding that the majority of the interviewed guards reported seeing illegal force against inmates).

²⁴⁵ *Safley v. Turner*, 586 F. Supp. 589, 595 (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).

²⁴⁶ See Jerome Farris, *Judges on Judging: The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1471 (1997).

²⁴⁷ *Johnson v. California*, 321 F.3d 791, 798 (9th Cir. 2003), *rev'd*, 543 U.S. 499 (2005).

²⁴⁸ *Shaw v. Murphy*, 532 U.S. 223, 229 (2001).

²⁴⁹ See *supra* Part III.B.

The federal judiciary's embrace of the *Turner* test reveals a "normative strain" in the bureaucratic state. On the one hand, through its broad reach and exceptional deference, Turnerization precludes effective judicial opposition to the dominant penal ideology—the new penology. In contrast to the rehabilitative ideal, which sought to reintegrate offenders into the broader community,²⁵⁰ the new penology regards prisoners as disposable social junk²⁵¹ and is dedicated to managing them as a permanent subgroup.²⁵²

On the other hand, Turnerization conflicts with the grundnorm of prisoners' constitutional rights—equal concern and respect. This grundnorm originates in the Equal Protection Clause of the Fourteenth Amendment. For George Fletcher, the Equal Protection Clause represents the "second American [C]onstitution."²⁵³ Born of the Civil War, this Constitution advances the republican ideals of "organic nationhood, equality of all persons, and

²⁵⁰ Francis Allen coined the term "rehabilitative ideal":

The rehabilitative ideal is itself a complex of ideas. . . . It is assumed, first, that human behavior is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, . . . it is assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfaction and in the interest of social defense.

Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIMINOLOGY 226, 226 (1959).

²⁵¹ See James E. Robertson, *The Majority Opinion as the Social Construction of Reality*, 53 OKLA. L. REV. 161, 190 (2000) (footnotes omitted):

Beneath the sanitized exterior of the new penology lies a correctional system that manages the underclass—the social junk of advanced capitalism. . . . [T]his lumpenproletariate occupying the inner city [has long been targeted by the criminal justice system] by virtue of their criminality, deviance, race, and perhaps foremostly their class. In the past, however, the rehabilitative ideal deflected criticism of a class-oriented crime control policy. Presently, the bureaucratized prison and its constitutional edifice—the rational-basis test—perform the same defensive function once born by the rehabilitative ideal. Their success made possible a new type of prison, the warehouse prison.

²⁵² Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 455 (1992) ("The new penology is neither about punishing [justly] or rehabilitating individuals. It is about identifying and managing unruly groups. It is concerned with rationality not of individual behavior or even community organization, but of managerial process.")

²⁵³ GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION* 2 (2001).

popular democracy."²⁵⁴ Its inclusive nature precludes ostracizing inmates from the protections of the Constitution and its amendments. Regardless of their crimes, inmates remain part of an organic community that marries civil society to the Equal Protection Clause. The effects of this marriage emanate to all constitutional amendments; they individually acquire a subtext—equal concern and respect for the punished, including the imprisoned.²⁵⁵

This subtext found new vitality in *Johnson v. California*, which recognized that equal concern and respect mandates heightened scrutiny when black and white prisoners are treated differently.²⁵⁶ However, equal concern and respect requires more than the equal treatment of the races behind bars: It dictates that all constitutional rights are consistent with incarceration, leaving no room for Turnerization.

²⁵⁴ *Id.*

²⁵⁵ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 173 (1980) (noting that the plurality in *Furman v. Georgia*, 408 U.S. 238 (1972), "took this underlying theory [of an integrated reading of the Equal Protection Clause and the Eighth Amendment ban on cruel and unusual punishment] very seriously indeed").

²⁵⁶ See *Johnson v. California*, 543 U.S. 499, 500 (2005) (ruling that "strict scrutiny" applies to "all racial classifications," including those used in prisons).