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Pornography behind Bars

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NOTE

PORNOGRAPHY BEHIND BARS

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INTRODUCTION

Sex sells. This tenet of advertising reflects the power of all things sex-related in American society. Particularly valued is the right to access sexually explicit material, and discussion of the scope of this right evokes visceral reactions in both advocates and opponents of pornography. The debate over pornography's position in the marketplace of ideas becomes even more heated when that marketplace lies within the confines of the United States penal system.

The question of whether prisoners should retain the right to view sexually explicit publications implicates First Amendment[1] freedoms, rights which are usually among those most fervently cherished by the American people and most fiercely protected by the courts.[2] When

1 U.S. CONST. amend. I ("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 Government for a redress of grievances.").

2 *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (reversing conviction for disturbing the peace of defendant who walked through courthouse wearing a jacket that bore a slogan that included curse words).

those rights belong to prisoners, however, legislatures and judges seem to place less value on such freedoms. Prisoners "are denied reading material deemed objectionable by their captors, exposed to retaliation for expressing opinions at odds with those of their jailers, refused access to the news media, punished for possessing 'radical' views, and rewarded for renouncing them."[3] Although citizens acknowledge that lawbreaking may result in imprisonment and may jeopardize the privilege to enjoy certain First Amendment rights, a government-sponsored retraction of those rights may simply be unconstitutional.[4] Furthermore, the consequences of imprisonment are of particular significance in the United States, the nation that "leads the world in per capita incarceration."[5] Thus, the debate over which rights are conditioned upon one's adherence to the law continues.[6]

One view within this debate is that criminals are entitled to rights similar to those that the general population enjoys.[7] The opposing view is that citizens who break the law are at the mercy of the government, which may revoke any of their privileges.[8] Between these two extremes, a gray area exists in which the scope of prisoners' rights remains unclear. The question of access to sexually explicit material lies within this realm of uncertainty. Like many areas of constitutional law, regulation of sexually explicit material in prisons is shrouded in a blur of tests that the Supreme Court employs to explain its holdings.[9] With respect to prohibitions on inmates' access to pornography, however, these tests not only create confusion in the lower courts, but also effectively trample on prisoners' First Amendment rights in the process.

This Note surveys the line of cases establishing the framework for assessing the constitutionality of prison regulations, and advocates a return to heightened scrutiny analysis of these regulations because the current standard impinges on prisoners' rights. This Note argues that under this more stringent review, regulations prohibiting sexually ex-

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3 Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1005 (1993).

4 *See infra* Part IV.A.

5 Kuby & Kunstler, *supra* note 3, at 1005.

6 *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 350-51 (1996) (discussing prisoner access to the courts); Hudson v. Palmer, 468 U.S. 517, 536 (1984) (holding that prison inmates do not have a reasonable expectation of privacy in their prison cells that would entitle them to Fourth Amendment protection against unreasonable search and seizure).

7 *See Banning Porn in Prison*, BOSTON HERALD, Sept. 16, 1998, at 44 ("It appears to need restating once again that prisoners do not lose all their constitutional rights when the prison doors clang behind them." (quoting Amatel v. Reno, 156 F.3d 192, 204 (D.C. Cir. 1998) (Wald, J., dissenting), *cert. denied*, 119 S. Ct. 2392 (1999))).

8 As former Representative John Ensign of Nevada explained, "[c]riminals don't have the same First Amendment rights that you and I do." Tony Batt, *Court Upholds Prison Pornography Ban*, LAS VEGAS REV.-J., Sept. 16, 1998, at 4B.

9 *See infra* Part II.

plicit material in prisons are unconstitutional. Part I provides a general background of the development of prisoners' rights and depicts the judicial atmosphere and attitude during the twentieth century. Part II discusses prisoners' rights in the First Amendment context and illustrates the Supreme Court's vacillation between a proactive and a deferential approach to the subject. Part III looks at the narrower issue of sexually explicit material in prisons by describing the similar approaches of two courts of appeals; these decisions demonstrate the trend of deference to prison authorities instituting bans on pornography. Part IV of this Note argues that a ban of this kind is unconstitutional, and it advocates a return to an intermediate scrutiny test for analyzing prisoners' First Amendment claims. This Part suggests that under intermediate scrutiny, prisoners will be able to invalidate restrictions on access to sexually explicit material. This Part also argues that a careful application of the current reasonableness test should enable prisoners to successfully challenge pornography prohibitions. Finally, this Note concludes that the courts should establish a pattern of protecting prisoners' First Amendment rights to ensure that the United States retains its democratic character.

I
BACKGROUND ON PRISONERS' RIGHTS

To understand prisoners' rights, it is helpful to briefly trace the origins of the penal system in this country. At the time of the United States' founding, no organized prison system existed.[10] The institutionalization of prisons did not occur until the 1800s, when there was "a Jacksonian hope that human improvement was possible if a criminal's unfortunate upbringing could be overcome in an antiseptic and healthy setting—a hope given urgency by the fear that unless deviant activity was controlled, the very openness of American society would cause it to fly apart."[11] The prevailing view of prisoners' rights at this time was that they did not have any; a Virginia Court of Appeals judge epitomized this viewpoint when he wrote that prisoners were "slave[s] of the state" with the associated dearth of rights.[12] The court's words reflect the prevailing opinion at the time that prisoners had given up their rights as a penalty for their crimes.[13] When this viewpoint became "a bit too raw for most judges" during the early to mid-twentieth century, American courts began to change their ideas about prison-

10 *See* Alvin J. Bronstein, *Offender Rights Litigation: Historical and Future Developments*, *in* 2 PRISONERS' RIGHTS SOURCEBOOK 5, 5 (Ira P. Robbins ed., 1980).

11 *Id.*

12 Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 797 (1871).

13 *See* LYNN S. BRANHAM & SHELDON KRANTZ, SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS IN A NUTSHELL 128 (4th ed. 1994).

ers' rights.[14] Courts then followed the "hands-off doctrine," which stood for the proposition that although prisoners may possess rights, enforcing them was not within the ambit of the courts' jurisdiction.[15]

Courts offered many justifications for this new policy. The first was a separation of powers argument, which asserted that it was the responsibility of the legislative and executive branches to enforce prisoners' rights.[16] Under this view, judicial interference would only hamper these efforts.[17] Second, courts argued that because prisons are generally state-run, federal court intervention would violate the principle of federalism and might usurp state power.[18] Third, courts expressed concern "that judicial involvement in the operation of prisons might jeopardize institutional security and frustrate the goals of incarceration."[19] Finally, the judiciary feared that if prisoners were permitted to sue, courts would be inundated with frivolous claims that would deplete judicial resources.[20] The result of this hands-off doctrine was "a persistent and virtually uniform refusal to enforce barely any constitutional rights for prisoners," leaving prisoners "to the not-so-tender mercies of their keepers."[21]

The age of civil rights dawned in the 1960s and 1970s, and prisoners were not immune from the fever.[22] During this period, courts began to recoguize prisoners' constitutional rights; this retreat from the hands-off doctrine resulted from both societal and judicial changes.[23] In addition to an increasingly militant prison population asserting its

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14 Bronstein, *supra* note 10, at 6; *see also* Jack E. Call, *The Supreme Court and Prisoners' Rights*, FED. PROBATION, March 1995, at 36, 36-38 (providing historical overview of judicial approaches to prisoners' rights); Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1175-78 (1996-1997) (discussing the "hands-off" approach in detail).

15 BRANHAM & KRANTZ, *supra* note 13, at 128.

16 *See id. See generally* Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2682-84 (1996) (discussing different approaches to the separation of powers doctrine).

17 *See id.*

18 *See* BRANHAM & KRANTZ, *supra* note 13, at 128-29; *see also* Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950) (asserting that the federal government is not concerned with controlling the internal discipline of state prisons).

19 BRANHAM & KRANTZ, *supra* note 13, at 129. As Branham and Krantz observe, "[t]he judges recognized that they lacked correctional expertise, and they were also concerned that the prospect of liability might sometimes dissuade prison officials from taking the steps needed to protect institutional security, with resultant harm to people and property within the prisons." *Id.* Courts were also concerned with the threat of security breaches from prisoners travelling from the prison to the courthouse to pursue their suits. *See id.*

20 *See id.*

21 Bronstein, *supra* note 10, at 6; *see also* Call, *supra* note 14, at 36 ("Before the 1960's, courts (including the Supreme Court) did not involve themselves in the issue of prisoners' rights.").

22 *See* Bronstein, *supra* note 10, at 11-12 (noting advances in the area of prisoners' rights).

23 *See* BRANHAM & KRANTZ, *supra* note 13, at 129-30; Call, *supra* note 14, at 37-38.

rights, the legal profession became more responsive to prisoners' complaints.[24] Contemporaneously, the public began to recognize the unacceptable conditions common in American prisons.[25] These factors made "it difficult for the courts to adhere to the view that they could trust the executive and legislative branches of the government to respect the constitutional rights of prisoners."[26] The outbreak of prison riots, especially the 1971 riot at Attica State Prison in New York, further goaded the judiciary into taking a more active role in protecting prisoners' rights.[27]

The Supreme Court's decision in *Monroe v. Pape*[28] significantly hastened the demise of the hands-off doctrine and "marked a turning point in modern civil rights litigation."[29] In *Monroe*, the Supreme Court permitted an African-American plaintiff complaining of police misconduct to bring an action under 42 U.S.C. § 1983.[30] The court clarified the meaning of § 1983's requirement that officials have acted "under color of" state law, holding that this requirement could be met if the violation was a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ."[31] The case also "held that the fact that the officer may have been violating local law did *not* insulate the defendant from suit under the Civil Rights Act . . . [and] even if the plaintiff [could sue] under state law, he was not required to exhaust such remedy before seeking relief under section 1983."[32] Thus, *Monroe* made it substantially easier for prisoners to bring claims under § 1983.

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24 *See* BRANHAM & KRANTZ, *supra* note 13, at 130.

25 *See id.*

26 *Id.*

27 *See id.*

28 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

29 Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 423 (1993).

30 *See Monroe*, 365 U.S. at 187. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (Supp. III 1997).

31 *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941) (internal quotation marks omitted)).

32 Eisenberg, *supra* note 29, at 423.

Another case that scholars characterize as a "turning point in constitutional analysis"[33] is *Cooper v. Pate*.[34] Commentators view this decision as "effectively initiat[ing] the demise of the hands-off doctrine."[35] In *Cooper*, the Supreme Court implicitly acknowledged that inmates retain various rights and privileges bestowed by the Constitution, despite their imprisonment.[36] Additionally, the Court recognized that prisoners may seek redress through the court system for an infringement of their rights.[37] After the *Cooper* decision, the Court confronted the scope of prisoners' rights in many areas.[38]

Despite these advances, remnants of the hands-off doctrine litter the area of prisoner litigation.[39] The Supreme Court has repeatedly asserted that deference is owed to prison officials, resulting in frequent curtailment of prisoners' rights.[40] A prime example of this result—and the central focus of this Note—is censorship of inmate mail.

II

BACKGROUND ON PRISONERS' FIRST AMENDMENT RIGHTS

Regulation of prisoners' mail implicates the Free Speech Clause of the First Amendment.[41] The evolution of prisoners' First Amendment rights has followed a path similar to that of prisoners' rights in general, and the judiciary's approach has likewise mutated from a hands-off stance to an active one.[42] Regulation of prisoners' mail has been a contested issue since courts began hearing these claims.[43] Unfortunately, most of the history in this area is plagued with uncertainty and inconsistency.[44] This uncertainty is due to the Supreme Court's unwillinguess to articulate a clear standard of review for these complaints, as well as the lower courts' confused application of those standards the Court did suggest.[45]

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33 Barbara Belbot, *Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate*, 42 N.Y.L. SCH. L. REV. 1, 1 (1998).

34 378 U.S. 546 (1964) (per curiam).

35 Matthew P. Blischak, Note, O'Lone v. Estate of Shabazz: *The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 460 (1988); *see also* Call, *supra* note 14, at 37 (discussing *Cooper* as an example of the Supreme Court "jump[ing] on the prisoners' rights bandwagon").

36 *See Cooper*, 378 U.S. at 546 (holding unanimously that prisoner had a § 1983 cause of action for violation of his freedom of religion).

37 *See id.*

38 *See* Belbot, *supra* note 33, at 1. The Court addressed prisoners' rights in the context of "access to the courts, medical care, and censorship of mail." *Id.* (footnotes omitted).

39 *See* BRANHAM & KRANTZ, *supra* note 13, at 132.

40 *See id.*

41 *See* U.S. CONST. amend. I.

42 *See supra* Part I.

43 *See* JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 40 (5th ed. 1997).

44 *See id.* at 41-50.

45 *See infra* Parts II.A-C, III.A-B, IV.B.1.

The traditional view regarding mail regulation is that "control of inmate mail is an administrative matter in which the courts will not interfere, unless it is shown that some independent constitutional right is being infringed."[46] Under this conception of prisoners' rights, an inmate unable to implicate an independent constitutional right[47] would likely face an unsuccessful claim.[48] Historically, prison restrictions on incoming mail were justified on the grounds that they would prevent contraband from slipping into prisons, and would enable prison officials to ferret out escape plans.[49] Courts generally found this rationale sufficient to uphold these restrictions.[50] However, when prison administrators refused to mail prisoner correspondence that neither contained "contraband [n]or details of illegal schemes," courts grew critical.[51] While courts criticized restrictions on these other materials, they considered the policies themselves acceptable under the traditional view.[52] In contrast, the new approach to censorship cases requires officials to justify their restrictions.[53]

A. *Procunier v. Martinez*

The rationale for requiring this justification is exemplified by *Procunier v. Martinez*,[54] in which the Supreme Court addressed the constitutionality of a prison mail censorship regulation.[55] Prior to this decision, lower courts had no clear standards to apply when analyzing the constitutionality of prison regulations.[56] Thus, it was imperative for the Supreme Court to articulate a standard of review to ensure consistency and even-handed oversight across the country. Prior to *Martinez*, the Supreme Court had never specifically articulated "the

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46 PALMER, *supra* note 43, at 41.

47 Examples of these constitutional rights include the following:

> [C]ommunication between an inmate and a court involved the right of access to the court system. Communication between an inmate and his attorney involved both the right of access to courts and the Sixth Amendment's guarantee of counsel for criminals. The First Amendment right to petition government for redress of grievances justified court intervention in correspondence to and from nonjudicial public officials and agencies. The cherished American freedoms of speech and press were involved in regulations concerning access to news media. These rights also were involved in attempts by prison officials to exclude newspapers, magazines, and books from an institution.

Id.

48 *See id.*

49 *See id.* at 42.

50 *See id.*

51 *Id.*

52 *See id.*

53 *See id.*

54 416 U.S. 396 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

55 *See id.* at 398-400.

56 *See supra* notes 46-53 and accompanying text.

appropriate standard of review for prison regulations restricting freedom of speech."[57] The tension between the historical judicial deference to prison authority and the emerging concern about prisoners' constitutional rights led to a muddled group of conflicting opinions between circuits.[58] Hence, the *Martinez* Court undertook to resolve this confusion by establishing a standard of review for analyzing inmate mail regulations.[59]

Although the Court declined to rule on the extent of prisoners' constitutional rights in this context, the Court did establish a uniform test for determining the constitutionality of mail censorship regulations. This test

> h[e]ld that censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.[60]

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

58 *See id.* As the *Martinez* Court noted,

> Some [courts] have maintained a hands-off posture in the face of constitutional challenges to censorship of prisoner mail. Another has required only that censorship of personal correspondence not lack support "in any rational and constitutionally acceptable concept of a prison system." At the other extreme some courts have been willing to require demonstration of a "compelling state interest" to justify censorship of prisoner mail. Other courts phrase the standard in similarly demanding terms of "clear and present danger." And there are various intermediate positions, most notably the view that a "regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose."

Id. at 406-07 (citations omitted).

59 *See id.* at 407-14.

60 *Id.* at 413-14. The Court added:

> This does not mean . . . that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty.

Id. at 414.

This test is important for several reasons. First, as discussed above, it is the first clear enunciation of a standard for reviewing prisoners' First Amendment claims.[61] Significantly, however, the Court viewed the First Amendment "in terms of the rights of society, rather than [solely] those of the prisoner,"[62] and thus "stopped short of articulating a *broad* standard of review for restrictions on prisoners' first amendment rights."[63] Second, some courts and commentators have classified this standard as one requiring intermediate scrutiny[64] of the challenged regulation,[65] while others have described it as a "least re-

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61 *See* Jennifer A. Mannetta, Note, *The Proper Approach to Prison Mail Regulations: Standards of Review*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 209, 213 (1998) (noting that *Martinez* pronounced the first "standard of review regarding prison regulations on First Amendment rights"); *supra* notes 54-57 and accompanying text.

62 Mannetta, *supra* note 61, at 214.

63 Blischak, *supra* note 35, at 461-62 (emphasis added); *see also* Emily Calhoun, *The First Amendment Rights of Prisoners*, *in* 2 PRISONERS' RIGHTS SOURCEBOOK, *supra* note 10, at 43, 45 ("[The *Martinez* test] was used to secure vicarious relief for prisoners from the impact of prison regulations only because the regulations also implicated the first amendment rights of free persons."); Geoffrey S. Frankel, Note, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1627-28 (1991) ("*Martinez* . . . expressly left open the question of what protection would be accorded to inmate speech that did not also implicate the free speech rights of free persons.").

64 Standards of review commonly appear in equal protection decisions. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 601 (5th ed. 1995). In those cases, the level of scrutiny the Court applies depends on the type of classification made by the government. *See id.* The Court traditionally uses two standards, the rational relationship test and the strict scrutiny test. *See id.* Under the rational relationship test, "the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution." *Id.* Rational basis review "gives a strong presumption of constitutionality to the governmental action," and "the Court only invalidates the law if it has no rational relationship to any legitimate interest of goverument." *Id.* at 605. Fundamentally, "[t]he rational basis test is notoriously weak." Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 941 (1991). In contrast, under the strict scrutiny test, "the Justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end." NOWAK & ROTUNDA, *supra*, § 14.3, at 601-02. Strict scrutiny is most often characterized as "requir[ing] a classification to be necessary (narrowly tailored) to a compelling or overriding government interest." *Id.* at 606. This test is generally applied when legislation restricts a fundamental right or when a law makes a suspect classification. *See id.* at 602.

Until the 1960s, the Supreme Court primarily used either the rational basis or strict scrutiny standard to review legislation. *See id.* at 602-03. More recently, however, the Court has utilized a standard that falls somewhere between the traditional two categories. *See id.* at 603. This "intermediate standard of review . . . is not as difficult for the government to meet as the compelling interest test, but . . . involves far less deference to the legislature than does the rationality test." *Id.* Using the intermediate scrutiny standard, the Court "will not uphold a classification unless they find that the classification has a 'substantial relationship' to an 'important' government interest." *Id.* The Court has invoked this test in cases dealing with laws making classifications on the basis of gender or illegitimacy. *See id.*

65 *See, e.g.*, Calhoun, *supra* note 63, at 55 n.23 ("[T]he [*Martinez*] test is certainly more stringent than a mere rationality standard."); *The Supreme Court, 1988 Term—Leading Cases,*

strictive means test."[66] The *Martinez* standard's status as one requiring at least some level of heightened scrutiny returned to haunt the Court in later cases, forcing the Justices to clarify exactly what that standard entailed.[67] Finally, the Court declared the importance of "the government interests which were at stake in the case: the preservation of internal order and discipline in the prison; the maintenance of institutional security against escape or unauthorized entry; and the rehabilitation of prisoners."[68] These interests would prove useful as defenses to future challenges to prison regulations.[69] Because the Court was "unwilling to define precisely the scope of prisoners' first amendment rights,"[70] this issue came before the Supreme Court again in the seminal case of this area of law.

B. *Turner v. Safley*

Turner v. Safley[71] is the landmark case in the struggle to define prisoners' First Amendment rights and is perhaps most significant because of the degree to which lower courts rely on its four-factor test to determine the legality of challenged prison regulations.[72] Two regulations were at issue in this case: "[t]he first . . . relates to correspondence between inmates at different institutions."[73] The second

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103 HARV. L. REV. 137, 241 (1989) [hereinafter *Leading Cases*] (referring to the "*Martinez* intermediate scrutiny test").

66 Frankel, *supra* note 63, at 1625; *see also* Samuel J. Levine, Note, *Restricting the Right of Correspondence in the Prison Context:* Thornburgh v. Abbott *and Its Progeny*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 896 (1994) ("[T]he *Martinez* Court posited an intermediate scrutiny standard."); Mannetta, *supra* note 61, at 237 ("[T]he Court in *Martinez* utilized a 'least restrictive means test' in the prison context."). *But see* Kuby & Kunstler, *supra* note 3, at 1007 (contending that "[t]he idea that this created a 'least restrictive means test' . . . that would apply to anyone else's rights was scotched" and citing for support the Supreme Court's statement that "[t]his does not mean . . . that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter" (quoting Procunier v. Martinez, 416 U.S. 396, 414 (1974), *overruled in part by* Thoruburgh v. Abbott, 490 U.S. 401 (1989))).

67 *See infra* Part II.B-C.

68 Blischak, *supra* note 35, at 461.

69 *See, e.g.*, Otey v. Best, 680 F.2d 1231, 1233 (8th Cir. 1982) ("[W]e believe that, especially when maintenance of institutional security is at issue, prison officials ordinarily must have wide latitude within which to make appropriate limitations."); Rogers v. Scurr, 676 F.2d 1211, 1215 (8th Cir. 1982) (same).

70 Calhoun, *supra* note 63, at 46; *see also supra* notes 62-63 and accompanying text (discussing limitations on the *Martinez* holding).

71 482 U.S. 78 (1987).

72 *See, e.g.*, Baraldini v. Thornburgh, 884 F.2d 615, 618, 620-21 (D.C. Cir. 1989); Fromer v. Scully, 874 F.2d 69, 73-76 (2d Cir. 1989); Lane v. Griffin, 834 F.2d 403, 406-07 (4th Cir. 1987); Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 331-44 (3d Cir. 1987); McElyea v. Babbitt, 833 F.2d 196, 197 (9th Cir. 1987); Allen v. Toombs, 827 F.2d 563, 567-68 (9th Cir. 1987); Rodriguez v. James, 823 F.2d 8, 11-12 (2d Cir. 1987).

73 *Turner*, 482 U.S. at 81. The Court explained that the regulation "permits . . . correspondence 'with immediate family members who are inmates in other correctional institu-

regulation allowed prisoners to marry "only with the permission of the superintendent of the prison, and provides that such approval should be given only 'when there are compelling reasons to do so.'"[74]

In reaching its decision, the Court in *Turner* first briefly surveyed several prisoners' rights cases decided during the years between *Martinez* and *Turner*.[75] The Court noted that the prison regulations in these cases did not trigger "a standard of heightened scrutiny, but instead [the Court] inquired whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."[76] The Supreme Court criticized the district court and the court of appeals for applying the "strict scrutiny standard"[77] from *Procunier v. Martinez*,[78] and for narrowly construing the cases that followed *Martinez*, thus rendering their rationales inapplicable to *Turner*.[79]

The Court then boldly asserted the crux of its opinion:

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tions,' and it permits correspondence between inmates 'concerning legal matters.'" *Id.* Other inmate-to-inmate correspondence "is permitted only if 'the classification/treatment team of each inmate deems it in the best interest of the parties involved.'" *Id.* at 81-82.

74 *Id.* at 82.

75 *See id.* at 86-87. The Court summarized four cases before beginning its analysis. It began with *Pell v. Procunier*, 417 U.S. 817 (1974), in which prisoners challenged a regulation forbidding face-to-face media interviews with inmates. *See id.* at 819-21. The Court upheld the prohibition, and explained that issues "regarding prison security 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" *Turner*, 482 U.S. at 86 (quoting *Pell*, 417 U.S. at 827). The second case the *Turner* Court discussed was *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), in which the Court upheld regulations that attempted to hinder inmate involvement in prisoner labor unions. *See id.* at 121. The *Jones* Court, showing deference to prison officials, held that the regulations were "rationally related to the reasonable . . . objectives of prison administration." *Id.* at 129. The third case the *Turner* opinion highlighted was *Bell v. Wolfish*, 441 U.S. 520 (1979), in which the Court considered a regulation prohibiting inmates from receiving hardbound books mailed from anywhere other than a bookstore, a book publisher, or a book club. *See id.* at 548-49. The Court upheld the rule, asserting that the restriction was a "rational response . . . to an obvious security problem," and was not an exaggerated response. *Id.* at 550-52. Finally, the Court mentioned *Block v. Rutherford*, 468 U.S. 576 (1984), which upheld a prohibition on contact visits because it was "reasonably related" to security concerns voiced by prison officials. *Id.* at 586, 589.

76 *Turner*, 482 U.S. at 87.

77 *Id.* at 83.

78 416 U.S. 396 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989); *see also supra* note 60 and accompanying text (describing the strict scrutiny standard).

79 *See Turner*, 482 U.S. at 87-88; *see also* Blischak, *supra* note 35, at 465 ("The Supreme Court in *Turner* expressly rejected a strict scrutiny analysis in favor of a reasonableness standard for adjudicating challenges to regulations curtailing prisoners' constitutional rights."). The *Turner* Court also "distinguished *Martinez* on the ground that it had involved a prison regulation—prohibiting inmate correspondence—that burdened the First Amendment rights of both prisoners and free persons." Frankel, *supra* note 63, at 1626.

> If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process . . . . Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."[80]

The Court proceeded to lay out several factors to consider when assessing the reasonableness of a challenged prison regulation. The first factor is whether there is a " 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[81] The Court stressed that the "governmental objective must be a legitimate and neutral one."[82] Second, a court should examine "whether there are alternative means of exercising the right that remain open to prison inmates."[83] Third, a court should consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."[84] The Court's fourth and final point was that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[85]

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80 *Turner*, 482 U.S. at 89 (citations omitted). As Frankel notes, this "test arose from . . . *Martinez*, which expressly left open the question of what protection would be accorded to inmate speech that did not also implicate the free speech rights of free persons." Frankel, *supra* note 63, at 1627-28. The *Turner* test "resolved that question." *Id.* at 1628.

81 *Turner*, 482 U.S. at 89.

82 *Id.* at 90.

83 *Id.* The court noted that "[w]here 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" *Id.* (citations omitted).

84 *Id.* The Court noted that almost without fail, changes in a prison environment will affect both the freedom of other prisoners, as well as the prison's allocation of its resources. *See id.* The Court also asserted that "[w]hen 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." *Id.*

85 *Id.* Under this factor, the Court seeks to prevent an "exaggerated response" from prison officials and points out that this is not a "least restrictive alternative" test. *Id.* (internal quotation marks omitted). However, the Court does note that "if 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." *Id.* at 91.

The *Turner* court then applied this framework to the facts of the case and held that the regulation prohibiting correspondence between inmates was "reasonably related to legitimate security interests."[86] However, the marriage regulation did not meet the test because it "constitute[d] an exaggerated response to petitioners' rehabilitation and security concerns."[87] Thus, while the treatment of these regulations is important, it is more significant that the *Turner* Court finally addressed the issue it had evaded for so long—the scope of prisoners' First Amendment rights.[88] In comparison to the pre-*Turner* era, "it will now be an uphill battle for an inmate to prevail on a constitutional claim to which the *Turner* test is applied."[89] However, the task is not impossible, as the Court's decision to strike the marriage regulation in *Turner* illustrates.[90] Despite *Turner*'s explicit test, the Court did reexamine the issue of prisoners' First Amendment rights a mere two years later. Nevertheless, the *Turner* standard's legacy remains potent today, particularly in the arena of a prisoner's right to access sexually explicit material.[91]

C. *Thornburgh v. Abbott*

In 1989, the Supreme Court decided *Thornburgh v. Abbott*,[92] a case which culminated "[t]he progression of Supreme Court cases in which inmates' free speech rights were narrowly construed."[93] The Court in *Abbott* reviewed Federal Bureau of Prisons regulations that governed the censorship of publications sent to inmates.[94] Under

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86 *Id.*; *see also* PALMER, *supra* note 43, at 43 (noting that "[t]he regulations were logically related to the legitimate security concerns of prison officials" and that they "did not deprive prisoners of all means of expression, but simply barred communication with a limited class of people . . . with whom authorities have particular cause to be concerned").

87 *Turner*, 482 U.S. at 91.

88 Additionally, *Turner* is significant because "the Court construed some of these factors so as to almost foreordain a finding in favor of the constitutionality of most prison regulations and practices." BRANHAM & KRANTZ, *supra* note 13, at 145.

89 *Id.* at 147.

90 *See id.* at 147-49.

91 *See infra* Part III.

92 490 U.S. 401 (1989).

93 BRANHAM & KRANTZ, *supra* note 13, at 149.

94 *See Abbott*, 490 U.S. at 403. The Court explained that it was "concerned primarily with the regulations set forth at 28 C.F.R. §§ 540.70 and 540.71 (1988), first promulgated in 1979." *Id.* at 404. The opinion reprints several key passages as follows:

> Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:
> (1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;
> (2) It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;
> (3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;

these regulations, an inmate generally can receive publications while incarcerated,[95] but the warden may reject material according to specific criteria.[96] Significantly, the warden has the power to reject a publication deemed "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."[97] However, "[t]he regulations provide procedural safeguards for both the recipient and the sender."[98]

The *Abbott* majority conceded that the aforementioned regulations, if applied to free citizens, would implicate serious First Amendment concerns.[99] Nevertheless, the Court applied the *Turner* reasonableness test to these regulations instead of the less deferential *Martinez* standard.[100] The Court cited several reasons for applying this standard,[101] including the Court's fear that lower courts might misinterpret the *Martinez* test as requiring a heightened degree of scrutiny.[102] Applying *Turner*'s four-factor test, the Court determined that the regulations were facially valid.[103] The Court held that incoming and outgoing prisoner mail would be analyzed under separate stan-

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(4) It is written in code;

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

Id. at 405 n.5 (quoting 28 C.F.R. § 540.71(b) (1988)).

95 *See* 28 C.F.R. § 540.71(a) (1999).

96 *See id.* § 540.71(b)(1)-(7).

97 *Id.* § 540.71(b).

98 *Abbott*, 490 U.S. at 406. These procedures include instructions that "[t]he warden may designate staff to screen and, where appropriate, to approve incoming publications, but only the warden may reject a publication," as well as directions for appealing these decisions. *Id.* (quoting 28 C.F.R. § 540.71(b)).

99 *See id.* at 407.

100 *See id.* at 413-14.

101 *See id.* at 409-12.

102 *See id.* at 409-10. The Court explained its prior decisions:

> The Court's decision to apply a reasonableness standard . . . rather than *Martinez*' less deferential approach stemmed from its concern that langnage in *Martinez* might be too readily understood as establishing a standard of "strict" or "heightened" scrutiny, and that such a strict standard simply was not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons.

Id.; *see also Leading Cases*, *supra* note 65, at 242 (explaining that "the Court had shifted to the reasonableness standard because of lower court misinterpretation of *Martinez* as requiring 'strict' or 'heightened' scrutiny"); Mannetta, *supra* note 61, at 217-18 ("The Court decided to adopt the reasonableness standard in *Turner* because the Court feared that the *Martinez* standard . . . would be misconstrued as a strict scrutiny standard.").

103 *See Abbott*, 490 U.S. at 419. The Court remanded the case to the lower courts for consideration of whether the regulations were valid as applied to 46 specific publications that were named in the parties' briefs. *See id.*

dards, thus overruling part of *Martinez*.[104] *Martinez* now applies only to outgoing personal correspondence from prisoners, while a reasonableness standard governs incoming mail.[105] Branham and Krantz note that "[a]lthough the only issue actually before the Court was the standard to be applied to incoming publications and not the standard to be applied to incoming personal correspondence, the Court sweepingly announced that application of the [*Martinez*] test was to be confined to outgoing correspondence."[106]

Commentators have criticized *Abbott* on the grounds that it perpetuates "the Court's evisceration of first amendment rights in the prison context and its expansion of the discretion afforded to prison administrators."[107] Further, "[i]ts limitation of *Martinez*' scope to situations involving outgoing correspondence effectively eliminates judicial protection of the first amendment rights of nonprisoners who seek to communicate with inmates."[108] Additionally, the Court based its application of a more deferential standard to incoming as opposed to outgoing mail on the premise that incoming mail poses a greater hazard to the state interest in prison security.[109] However, this argument focused on the dangers presented by incoming publications and did not distinguish between such publications and incoming personal correspondence.[110] Consequently, "the Court allowed for the application of a broad reasonableness standard for all mail sent into prisons, regardless of its nature."[111]

Scholars have also criticized the manner in which the *Abbott* majority characterized *Martinez* and *Turner*, as well as the distinction the

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104 *See id.* at 413-14.

105 *See id.* The Court clarified this distinction:

> [T]he logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence. As we have observed, outgoing correspondence was the central focus of our opinion in *Martinez*. The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. Any attempt to justify a similar categorical distinction between incoming correspondence from prisoners (to which we applied a reasonableness standard in *Turner*) and incoming correspondence from nonprisoners would likely prove futile, and we do not invite it. To the extent that *Martinez* itself suggests such a distinction, we today overrule that case; the Court accomplished much of this step when it decided *Turner*.

Id.

106 BRANHAM & KRANTZ, *supra* note 13, at 149-50.

107 *Leading Cases*, *supra* note 65, at 244.

108 *Id.* at 244-45.

109 The Court explained "that outgoing correspondence that magnifies grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison." *Abbott*, 490 U.S. at 411-12. The Court added that "the implications for security are far more predictable." *Id.* at 412.

110 *See id.* at 413-14.

111 Levine, *supra* note 66, at 909.

Court posited between the two cases.[112] The inmate correspondence regulation that the *Turner* Court reviewed under a reasonableness standard only implicated the rights of prisoners; it did not affect nonprisoners.[113] In contrast, the regulations in *Abbott* clearly implicated the rights of nonprisoners, specifically those of the publishers who desired communication with inmates.[114] Hence, *Abbott* is more closely analogous to *Martinez*, in which nonprisoner rights were likewise compromised.[115] Arguably, the *Martinez* decision dictates the application of an intermediate scrutiny standard, not *Turner*'s mere reasonableness test.[116] Finally, the *Abbott* Court "incorrectly asserted that *Turner* and its precursors dictated the application of a reasonableness standard" because "[t]hose cases either implicitly affirmed the continuing vitality of *Martinez* or did not undermine it."[117] *Turner* itself "implicitly affirmed both the *Martinez* standard of scrutiny and its greater protection of noninmate rights."[118] Thus, *Abbott* signalled a retreat in the area of prisoners' rights, moving back towards the hands-off approach of the early twentieth century.[119] The evolution from *Martinez* to *Abbott* demonstrates how the Court shifted from protecting prisoners' rights to restricting them.[120]

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112 *See id.* at 910-13.

113 *See* Turner v. Safley, 482 U.S. 78, 85-86 (1987); *see also supra* note 73 and accompanying text (discussing the limited scope of the regulations involved in *Turner*).

114 *See Abbott*, 490 U.S. at 408 (stating that "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners").

115 *See supra* note 63 and accompanying text; *see also* BRANHAM & KRANTZ, *supra* note 13, at 149 ("Like the censorship regulations that were at issue in *Procunier v. Martinez*, the[ ] [*Abbott*] regulations had an impact on the free speech interests of nonprisoners as well as prisoners."); Levine, *supra* note 66, at 911-12 ("The regulations in *Abbott*, as those in *Martinez*, implicated the First Amendment rights of nonprisoners; the regulations in [*Turner*] did not.").

116 *See supra* notes 64-66 and accompanying text.

117 *Leading Cases*, *supra* note 65, at 245. Notably, the Court in *Turner* "declared *Martinez* inapplicable to a regulation restricting inmate-to-inmate correspondence because *Martinez* turned on the consequential restriction of an outsider's first amendment interest in uncensored correspondence with an inmate," and "explicitly recognized that the *Martinez* standard might apply to a regulation restricting inmate marriages because of the restriction's impact on nonprisoners." *Id.* at 246.

118 *Id.* at 246.

119 *See supra* notes 15-20 and accompanying text.

120 Incidentally, some commentators have leveled scathing criticisms against the line of prisoners' rights cases described above, asserting that:

> These cases established the framework for the free speech rights of the millions of Americans to pass through the American penal system in the 1980s and early 1990s—the decade that would see the greatest growth in prison population in history. The lower federal courts, packed with Reagan-Bush clones and aided by a Justice Department eager to have as many people enjoy as few civil liberties as possible, were free to savage the free speech right of prisoners. Indeed, entrusting trained chimps to paste up cliches from *Pell*, *Martinez*, *Jones*, and *Wolfish* above the word "denied" would

III
PRISONS, THE FIRST AMENDMENT, AND SEXUALLY EXPLICIT MATERIAL

The preceding Parts describe the key cases in the area of prisoners' rights litigation. However, uncertainty still exists with respect to the standards courts should apply to evaluate prison regulations and the strictness of those standards. A sub-issue in this context is whether to allow sexually explicit material inside prison walls, a debate that implicates First Amendment considerations and evokes strong emotional reactions on both sides of the argument. This Note argues that the government should not withhold sexually explicit material from prisoners, a result that courts could possibly achieve through application of *Turner*'s reasonableness standard or, more likely, by reversion to a heightened scrutiny analysis. Two recent court of appeals cases discussing this issue are particularly instructive.

A. *Amatel v. Reno*

In *Amatel v. Reno*,[121] "[a] group of prisoners and publishers challenge[d] the constitutionality of a statutory ban on the use of Bureau of Prisons funds to distribute sexually explicit material to prisoners."[122] In 1997, three prisoners filed suit and asserted that the Ensign Amendment[123] violated their First Amendment rights.[124] The Ensign Amendment, passed in 1996, "bars the use of Bureau of Prisons funds to pay for the distribution of commercial material that 'is sexually explicit or features nudity.'"[125] The court explained that although this statute does not explicitly prevent prisoners from acquiring the proscribed material "at their own expense," this is not a legitimate possi-

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achieve roughly the same result as seeking redress from the federal judiciary.

Kuby & Kunstler, *supra* note 3, at 1010 (footnote omitted).

121 156 F.3d 192 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999).

122 *Id.* at 194.

123 Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 614, 110 Stat. 3009, 3009-66 (1996).

124 *See Amatel*, 156 F.3d at 195.

125 *Id.* at 194 (citing § 614, 110 Stat. at 3009-66). The Bureau narrowed the scope of this statute by issuing regulations that clarify its terms. *See id.* The court explained how the regulations define the following terms:

> "[N]udity" means "a pictorial depiction where genitalia or female breasts are exposed"; "features" means that "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues." Even material that otherwise would be said to "feature nudity" is excepted if it contains "nudity illustrative of medical, educational, or anthropological content." "Sexually explicit" means "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation."

Id. (citing 28 C.F.R. § 540.72(b) (1998)).

bility.[126] Thus, the court's analysis equates the Bureau's funding limitation with a ban on distribution.[127]

The prisoners sought relief from the Ensign Amendment and its implementing legislation, alleging that both violated their First Amendment rights.[128] The court consolidated these suits and joined them with similar suits filed by the publishers of the magazines to which the prisoners were denied access.[129] The district court had earlier found the Amendment facially invalid and enjoined its enforcement.[130]

As the majority noted, all parties to the litigation agreed that the *Turner* test applied.[131] Significantly, the D.C. Circuit noted that prison regulations may be "more intrusive than what may lawfully apply to the general public."[132] The court then discussed the four factors of the *Turner* "reasonable relation" test.[133] In *Amatel*, the stated purpose of the government's regulation was "the rehabilitation of prison-

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126 *Id.* at 194 n.1.

127 *See id.* The court notes that "[w]here the government absolutely monopolizes the means of speech or controls a bottleneck, as we are assuming vis-a-vis the prison distribution system, a refusal to fund functions the same as an outright ban." *Id.*

128 *See id.* at 195. The majority opinion took issue with the district court "as to the proper object of judicial scrutiny" with respect to this two-pronged claim for relief. *Id.* The D.C. Circuit criticized the district court for focusing on the statute and assuming "that the statute itself has been and will be applied to these plaintiffs. . . ." *Id.* The D.C. Circuit then stated that there was no indication that "any warden does or will apply the statute directly; so far as appears, all enforcement is mediated through the [implementing] regulations." *Id.* The court then attempted to distinguish their argument from that of the dissent, noting that

> [i]nsofar as plaintiffs attack the proscriptions of the statute not embodied in the regulations, they effectively pursue a pre-enforcement challenge. Even in the First Amendment context, such a challenge presents a justiciable controversy only if the probability of enforcement is "real and substantial." In the statutory borderland beyond the implementing regulations (i.e., the statute's apparent ban on some non-pictorial material, its vaguer language, and its lack of any exception for medical or educational material), the prospect of enforcement appears completely insubstantial. It is as if the government had waived certain provisions of the law. And with such a waiver, as *Salvation Army* explicitly holds, there is no standing to challenge the waived provisions. We therefore limit our focus to the substantive prohibitions of the regulations.

Id. (citations omitted).

129 *See id.*

130 *See id.*

131 *See id.*

132 *Id.* at 196. The court explained that in these situations, "the government is permitted to balance constitutional rights against institutional efficiency in ways it may not ordinarily do." *Id.*

133 *See supra* notes 81-85 and accompanying text. The court asserted that the first factor, "whether the restriction bears a 'valid, rational connection' to the 'legitimate governmental interest put forward to justify it,' such that the 'asserted goal is [not] so remote as to render the policy arbitrary or irrational . . . ,' is particularly important. *Amatel*, 156 F.3d at 196.

ers."[134] The court's next step was to determine if this goal was "legitimate" and "neutral" according to the *Turner* standard.[135]

The majority flatly deemed the goal of rehabilitation a legitimate one, noting that "the Supreme Court has often characterized rehabilitation as one of the primary goals of penal institutions."[136] The first *Turner* factor also involves assessing the neutrality of the goal.[137] The court distinguished neutrality in a *Turner* sense from neutrality as the district court interpreted the word, explaining that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression."[138] The regulation passed the neutrality test, because the majority believed that the Supreme Court did not intend for the test to require neutrality in the true First Amendment sense.[139]

The court next made a bold statement regarding the power of the government to essentially censor ideas or "inculcate values" in any context.[140] The court admitted that this power conflicts with the thrust of the First Amendment, but claimed that it is permissible for a state "to become a player in the marketplace of ideas."[141] In government-sponsored institutions, the court added, this power is even greater.[142] The court then drew an analogy to *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[143] claiming that if the Supreme Court has allowed the promotion of values in schools, it is likewise an allowable government interest in prisons.[144] Thus, the ma-

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134 *Id.*

135 *Id.*

136 *Id.* The court cited the historical penological goals of New York and Pennsylvania as evidence of this legitimacy. Their objective was to create a prison "free of corruptions and dedicated to the proper training of the inmate, [that] would inculcate the discipline that negligent parents, evil companions, taverns, houses of prostitution, theaters, and gambling halls had destroyed. Just as the criminal's environment had led him into crime, the institutional environment would lead him out . . . ." *Id.* at 197 (quoting DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 82-83 (1990)).

137 *See* Turner v. Safley, 482 U.S. 78, 90 (1987).

138 *Amatel*, 156 F.3d at 197 (quoting Thornburgh v. Abbott, 490 U.S. 401, 415 (1989)). The Court attempted to distinguish this definition of neutrality from First Amendment content-neutrality. *See id.*

139 *See id.* The court asserted that the proper method for analyzing neutrality is to examine the manner in which the Supreme Court has actually applied this test. *See id.* The majority explained that they "think the Court's actual application of the requirement, with its focus on the existence of some legitimate goal and on assuring that rules are in fact not framed so as to advance illegitimate or unvetted goals, must control our [, the majority's,] understanding of its meaning." *Id.*

140 *Id.*

141 *Id.*

142 *See id.* at 198. The court does concede, however, that the government does not have the ability to advocate any concept it chooses. *See id.*

143 457 U.S. 853 (1982).

144 *See Amatel*, 156 F.3d at 198.

jority "conclude[d] that rehabilitation, and such character-moulding as may be implicit therein, constitute legitimate and neutral goals as those are understood in [*Turner*]."[145]

The court next inquired whether a rational connection existed between the prison regulation and the acknowledged governmental interest.[146] While admitting that prison law "is not well enough developed to indicate precisely how demanding the requirement of rational means-end connection is,"[147] the court decided that the *Turner* test is sufficiently similar to standard rational relation review to warrant its treatment as such.[148] In this case, the court reasoned, the legislature drafted the regulation and previously determined that pornography in prisons hampers the stated goal of rehabilitation.[149] Thus, the court merely had to decide whether this determination was rational.[150] The court concluded that the government might "rationally have seen a connection between pornography and rehabilitative values."[151] The panel concluded its rationality inquiry by conceding the lack of a conclusive causal link because studies exist offering conflicting conclusions, but reiterated that analyzing this data is not the court's task.[152] The court declared that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices."[153] Clearly, the existence of conflicting authority on the issue guided the court's finding of reasonableness.[154] The court explained that "[f]or judges seeking only a reasonable connection between legislative goals and actions, scientific indeterminacy is determinative."[155]

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145 *Id.*

146 *See id.* at 198-201.

147 *Id.* at 198.

148 *See id.* at 198-99; *see also supra* note 64 (discussing constitutional standards of review).

149 *See Amatel*, 156 F.3d at 199.

150 *See id.* The court recognized the distinction between this type of review and the question of whether they agree with the legislature, which must not be the crux of rationality review: "[t]he question for us [the court] is not whether the regulation in fact advances the government interest, only whether the legislature might reasonably have thought that it would." *Id.*

151 *Id.* The court admitted, however, that no scientific data was presented to support this view, and claimed that common sense may also be instructive in determining rationality. *See id.* The opinion also discussed studies that claim to establish or refute a connection between pornography and sexual offenses, which Congress did not cite. *See id.* at 199 & n.6.

152 *See id.* at 200.

153 *Id.* (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

154 *See id.* at 200-01.

155 *Id.* at 201.

Next, the court addressed the remaining factors of the *Turner* analysis.[156] The majority summarily dismissed the second factor, which requires an examination of "the prisoners' alternative means of exercising the right at stake."[157] The court examined the regulation in a broad sense and decided that "unless there is some minimum entitlement to smut in prison, the origins of which must be obscure, this factor can hardly be fatal."[158] The third *Turner* factor deals with the potential negative impact that accommodation of the claimed right might have on other members of the prison community and allocation of resources therein.[159] The majority analogized this factor to the first prong's balancing test, stating that if the legislature determined that the presence of pornography in prisons would increase the risk of danger to both guards and inmates, the adverse impact would be substantial.[160]

Asserting a connection between the third and fourth factors, the court next launched into an analysis of the final *Turner* factor: "whether there are alternatives that can accommodate [the claimed] right 'at *de minimis* costs to valid penological interests.'"[161] The majority noted that one clear alternative is a case-by-case determination of whether specific material would adversely affect the rehabilitation of specific prisoners.[162] The court contended that this option would obviously entail significant costs and would open up official decision making to charges of vagueness.[163] The majority then suggested that the alternative to this case-by-case method is a flexible standard by which prison officials could prevent certain materials from entering the prison for a specific group of prisoners, though this approach might give rise to overbreadth challenges.[164] However, the court noted that these potential problems could not arise until such a plan was actually implemented.[165] Hence, the final *Turner* factor was satisfied.[166]

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156 *See id.* at 201-02.

157 *Id.* at 201.

158 *See id.* The court also noted that "[e]ven if there were such a bizarre entitlement, the regulations would still satisfy this factor, as they leave the inmate free to enjoy all written forms of smut not barred by the regulations upheld in *Thornburgh*." *Id.* at 201 n.7.

159 *See id.* at 201.

160 *See id.*

161 *Id.* (quoting Turner v. Safley, 482 U.S. 78, 91 (1987)). The court stressed that the *Turner* Court distinguished this test from a "least restrictive alternative" one. *Id.* (internal quotation marks omitted).

162 *See id.*

163 *See id.*

164 *See id.*

165 *See id.* at 202.

166 *See id.* at 201-02.

The majority thereby concluded that the regulation passed each prong of the *Turner* test for reasonableness.[167] The court reiterated that this reasonableness test only requires the court to determine if Congress could have reasonably believed that prohibiting these pornographic pictures from prisons would further its goal of prisoner rehabilitation.[168] The court then briefly dismissed the plaintiff's two other theories and lifted the district court's permanent injunction.[169] In this manner, the court effectively left the Ensign Amendment and its implementing regulations intact.

B. *Mauro v. Arpaio*

In contrast to the outcome in *Amatel*, the Ninth Circuit approached the same issue using the same test but reached the opposite conclusion in *Mauro v. Arpaio*.[170] The case was decided in July 1998, but on December 2, 1998, the Ninth Circuit withdrew this opinion pending a rehearing en banc.[171] In an opinion issued following that hearing, the en banc court affirmed the district court's decision to uphold the regulation, thus overturning the earlier *Mauro I* opinion.[172] By so ruling, the Ninth Circuit agreed with the District of Columbia Circuit's opinion in *Amatel*.[173] However, despite the reversal of what this Note argnes is the more constitutionally sound decision, the analysis of this Note remains unchanged. First, the outcome of *Mauro II* illustrates yet again the propensity of the judiciary to curtail the First Amendment rights of prisoners. At this time, both of the circuit courts that have addressed the issue have applied an exceptionally deferential standard that results in an unconstitutional impingement of rights. Moreover, although both courts followed a similar line of reasoning, their harsh conclusion and the vacillation apparent in the *Mauro* saga demand that this issue be revisited. Finally, the opinion of

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167 *See id.* at 202.

168 *See id.* at 203.

169 *See id.* The two additional theories alleged were "excessive vagueness and a claim that the regulations' distinction between pictorial and verbal works [wa]s content-based." *Id.* The court responded to these complaints by characterizing the distinction as one based on form, not content, and added that "in any event we have seen that *Safley*'s neutrality requirement both displaces conventional First Amendment strictures on content-based limits and is satisfied by these regulations." *Id.* The majority noted that the vagueness claim might have merit, but remanded the issue because the district court had not addressed it. *See id.*

170 147 F.3d 1137 (9th Cir.) [hereinafter *Mauro I*], *reh'g granted*, 162 F.3d 547 (9th Cir. 1998), *rev'd en banc*, 188 F.3d 1054 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000).

171 The order reads as follows: "Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-5. The three-judge panel opinion, *Mauro v. Arpaio*, . . . is withdrawn." Mauro v. Arpaio, 162 F.3d 547 (9th Cir. 1998) (citation omitted).

172 *See* Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999) [hereinafter *Mauro II*].

173 *See supra* Part III.A.

the Ninth Circuit panel that originally heard the case carries jurisprudential weight in its own right, and at the very least, that panel's reasoning is instructive.

The court's reasoning in *Mauro II* closely parallels that of the court in *Amatel. Mauro I* initially came before the appellate court when Jonathan Mauro appealed the dismissal of his § 1983[174] claim.[175] The district court had determined "that the Maricopa County prison system's policy prohibiting inmates from possessing 'sexually explicit' materials does not violate the First Amendment."[176] Mauro brought suit after the prison in which he was detained denied his request to receive a subscription to *Playboy* magazine.[177] The policy, which the County adopted in 1993, defined sexually explicit materials as "personal photographs, drawings, and magazines and pictorials that show frontal nudity."[178] Under this policy, a mail officer—a rotating position among the prison staff—determines whether incoming mail contains the proscribed material.[179] Consequently, consistent and uniform enforcement of the policy is not guaranteed.

The County expressed three reasons for its policy: "safety, rehabilitation of inmates, and reduction of sexual harassment of female prison personnel."[180] The district court granted the County's motion for summary judgment, "holding that the policy, though broad, was reasonably related to legitimate penological interests."[181] The Ninth Circuit then reviewed this grant of summary judgment de novo.[182]

In the appellate court, Mauro claimed that the County's regulation was unconstitutional, both as it related to *Playboy* specifically, and as it related to material showing frontal nudity generally.[183] In defense of its regulation, the County asserted that "(i) its policy does not concern materials protected by the First Amendment; (ii) Mauro cannot bring a facial challenge to the regulation, and (iii) even if Mauro could bring a facial challenge, the regulation is constitutional as applied to *Playboy* and as applied to any material depicting frontal nudity."[184]

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174 42 U.S.C. § 1983 (Supp. III 1997).

175 Because the facts in both *Mauro I* and *Mauro II* remain the same, this Note relies on the more detailed factual discussion presented in *Mauro I*, 147 F.3d at 1138-39.

176 *Id.* at 1138.

177 *See id.*

178 *Id.* (internal quotation marks omitted).

179 *See id.*

180 *Id.*

181 *Id.* at 1139.

182 *See id.*

183 *See id.*

184 *Id.*

In the en banc rehearing after *Mauro I* was withdrawn, the Ninth Circuit began its analysis by explaining the two central tenets of prison law that formed the basis and backdrop of its opinion.[185] The first of these principles "is that prisoners are not stripped of the protections of the Constitution upon incarceration." Thus, "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect [prisoners'] constitutional rights."[186] The second principle framing the court's analysis was the notion that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[187] The court then explicitly stated that it was compelled to "apply a deferential standard of review,"[188] requiring only a reasonable relationship between regulation and penological interest.[189]

The court proceeded to apply the four-factor test from *Turner v. Safley*.[190] The court argued that the first factor—a rational connection between the regulation and the government interest—was satisfied.[191] They asserted that the goals of rehabilitation, reduction of sexual harassment of female guards, and maintenance of jail security were legitimate and neutral, and that the policy under attack was rationally related to these objectives.[192] The court acknowledged, however, that the "'fit' between the policy and the jail's objectives was not 'exact,'" but maintained that "an exact fit is not required."[193]

Next, the court addressed the second *Turner* factor and concluded that this factor was met.[194] The court explained that "a sensible and expansive view of the constitutional right infringed by the jail's policy is the 'right to receive sexually explicit communications'" and concluded that "there are many alternative means available to the inmates."[195] Analyzing the third factor—impact on third parties—the court decided that "[t]he impact of such unrestricted access [to sexually explicit materials] would be significant."[196] Citing the risks of in-

185 *See Mauro II*, 188 F.3d 1054, 1058 (9th Cir. 1999).

186 *Id.* (internal quotation marks omitted).

187 *Id.*

188 *Id.* (internal quotation marks omitted).

189 *See id.* The court noted that the separation of powers doctrine dictates deference to prison authorities in matters of prison administration. *See id.* For an interesting discussion of the theory of separation of powers, see David C. Mayer, Note, *Reviewing National Security Clearance Decisions: The Clash Between Title VII and* Bivens *Claims*, 85 CORNELL L. REV. 786 (2000).

190 *See supra* notes 81-85 and accompanying text.

191 *See Mauro II*, 188 F.3d at 1059-60.

192 *See id.*

193 *Id.* at 1060.

194 *See id.* at 1061.

195 *Id.* ("[The regulation] does not ban sexually explicit letters between inmates and others, nor does it ban sexually explicit articles or photographs of clothed females.").

196 *Id.*

creased tension between inmates and additional harassment of female employees, the court decided that accommodation of the prisoners' asserted right would jeopardize the safety of others.[197] Thus, the court declared that deference to prison authority was warranted.[198] Finally, the court turned to the last *Turner* factor—whether the challenged regulation is "an exaggerated response to the jail's concerns."[199] The majority noted that "[t]he burden is on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the regulation."[200] Moreover, the court asserted that "if 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."[201] The court determined that Mauro's suggested alternatives would impose too great a cost on the prison's interests and were thus invalid; the policy was therefore not deemed an exaggerated response.[202]

Thus, the court in *Mauro II* concluded that the regulation was reasonably related to the asserted penological interests and therefore no First Amendment violation occurred.

IV
A More Protective View of Prisoners' Rights

This Note asserts that sexually explicit material should be permitted in prisons. This conclusion is supported by two main arguments. First, this Note argues that the judiciary should return to the test articulated in *Procunier v. Martinez* and accordingly evaluate prison regulations under an intermediate scrutiny test.[203] Application of an intermediate scrutiny test would make it more difficult for government officials to restrict pornographic material within jails. Second, this Note submits that a proper application of the *Turner* reasonableness standard[204] might also result in the invalidation of regulations broadly restricting prisoners' access to sexually explicit materials.[205]

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197 *See id.* at 1061-62.

198 *See id.* at 1062.

199 *Id.*

200 *Id.*

201 *Id.* (quoting Turner v. Safley, 482 U.S. 78, 90-91 (1987)).

202 *See id.* at 1063.

203 *See* Procunier v. Martinez, 416 U.S. 396 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989); *see also supra* notes 60-66 and accompanying text (examining the *Martinez* test).

204 *See supra* notes 81-85.

205 *See infra* Part IV.B.

A. Reversion to Intermediate Scrutiny

Over the last thirty years, courts have become increasingly deferential to prison authorities when reviewing restrictions on prisoners' rights.[206] The gravity of this development, combined with the importance of First Amendment rights generally, warrants stricter judicial scrutiny of prison regulations that burden these rights. Judicial endorsement of intermediate scrutiny could stop this dangerous progression toward complete abrogation of prisoners' First Amendment rights.

Prisoners are in a unique and vulnerable position in American society: although deserving of punishment when guilty, once incarcerated they find themselves at the whim and mercy of the government and prison officials. As Chief Judge Harry T. Edwards of the D.C. Circuit explained:

> [T]he special place of prisoners in our society makes them more dependent on judicial protection than perhaps any other group. Few minorities are so "discrete and insular," so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority. Federal courts have a special responsibility to ensure that the members of such defenseless groups are not deprived of their constitutional rights.[207]

Thus, courts should protect prisoners from unfair infringement of their rights.[208]

Categorical censorship of publications compromises inmates' First Amendment rights to free speech and expression,[209] rights which the Supreme Court usually protects vigorously.[210] Although prisoners do lose some rights upon incarceration,[211] "[p]rison walls do not form

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206 *See supra* Part II.

207 Doe v. District of Columbia, 701 F.2d 948, 960 n.14 (D.C. Cir. 1983) (separate statement of Edwards, J.).

208 *See, e.g.*, Kuby & Kunstler, *supra* note 3, at 1020 (asserting that "the justifications that have been advanced for free speech guarantees . . . should apply with equal, if not greater force, to persons in prisons. Prisoners do not value freedom of speech any less than free citizens, nor is the right of any less use to them than to nonincarcerated people").

209 *See* U.S. CONST. amend. I.

210 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . ."); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 1 (1990) (noting that "[t]he Supreme Court has declared that 'speech concerning public affairs is more than self-expression; it is the essence of self-government" (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

211 For example, prisoners forfeit "the right to associate, deemed inconsistent with the purposes of the correctional system." Daniel M. Donovan, Jr., Note, *Constitutionality of Regulations Restricting Prisoner Correspondence With the Media*, 56 FORDHAM L. REV. 1151, 1159 (1988). This limitation is illustrated by the fact that "prison officials may properly restrict a prisoner's right of association and right to communicate by refusing to allow the prisoner to leave the institution temporarily to exercise these rights." *Id.* at 1159 n.81.

a barrier separating prison inmates from the protections of the Constitution."[212] Accordingly, among other rights, prisoners retain First Amendment liberties.[213] Hence, the importance of freedom of speech transcends the barrier of the prison gate. Moreover, although sexually explicit material may be at the fringe of what society and the Supreme Court consider protected speech, pornography such as the material at issue in the above prisoners' rights cases is not necessarily obscene and consequently remains protected by the First Amendment.[214]

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212 Turner v. Safley, 482 U.S. 78, 84 (1987); *see also* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (explaining that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison").

213 *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment . . . ."); *see also* Procunier v. Martinez, 416 U.S. 396, 422-23 (1974) (Marshall, J., concurring) (asserting that inmates retain all First Amendment rights "except those expressly, or by necessary implication, taken from [them] by law" (quoting Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944)), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

214 Obscene material has traditionally been excluded from the categories of speech protected by the First Amendment. *See* NOWAK & ROTUNDA, supra note 64, § 16.56, at 1194-95. The first case to "convert[ ] [the Supreme Court's] traditional assumption into a rule of law," *id.* at 1196, was *Roth v. United States*, 354 U.S. 476 (1957). In *Roth*, the Court asserted that "obscenity is not within the area of constitutionally protected speech or press." *Id.* at 485. The *Roth* standard for identifying obscene material is that it "(a) appeals to a prurient interest in sex, (b) has no redeeming literary, artistic, political, or scientific merit, and (c) is on the whole offensive to the average person under contemporary community standards." NOWAK & ROTUNDA, *supra* note 64, § 16.57, at 1197. The next time the Court articulated a clear obscenity standard was *Miller v. California*, 413 U.S. 15 (1973), where the Court explained that the three-part test is

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

The *Miller* test is currently the controlling test for obscenity. Pornography and other "adult entertainment," however, do not fall within the ambit of the aforementioned definition of obscenity. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989))); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); Carey v. Population Serv. Int'l, 431 U.S. 678, 701 (1977) ("At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); NOWAK & ROTUNDA, *supra* note 64, § 16.61(k), at 1215 (explaining that although "[t]he state can criminalize anything that is constitutionally 'obscene,'" courts should not classify pornography as speech that is constitutionally obscene); *cf.* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985) (stating that a work that elicits "only normal, healthy sexual desires" should not be considered obscene); New York v. Ferber, 458 U.S. 747, 764-65 (1982) (adjusting the *Miller* standard when dealing with child pornography, but noting that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene . . . retains First Amendment protection"). Therefore, non-obscene pornography and sexually explicit ma-

Applying a reasonableness test like the *Turner* standard makes it inordinately easy for states or the federal government to pass any regulation restricting prisoners' rights, provided they can assert some "legitimate penological interest[ ]."[215] This approach is problematic because it may result in an unconstitutional infringement of rights under the guise of a correctly applied test. The Court in *Thornburgh v. Abbott*, however, argued to the contrary.[216] The *Abbott* majority claimed that the *Turner* reasonableness standard it adopted "is not toothless."[217] However, application of this standard in practice belies this assertion, because the *Turner* test is virtually never used to strike down a regulation that restricts prisoners' rights.[218] In his partial dissent in *Thornburgh v. Abbott*, Justice Stevens disagreed with the majority's characterization of the standard as one with teeth. He explained that

> if the standard can be satisfied by nothing more than a "*logical* connection" between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial

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terial that is at issue in prisoners' rights cases retains its status as government-protected speech. One notable exception to the "pornography is protected" idea is child pornography, which loses its classification as protected speech and is subject to stricter government regulation. *See Ferber*, 458 U.S. at 756-764 (stating that child pornography is "without the protection of the First Amendment" and explaining why "states are entitled to greater leeway in the regulation of pornographic depictions of children").

215 *Turner*, 482 U.S. at 89. As Justice Stevens explained in his partial dissent from *Turner*, "[t]he Court's . . . open-ended 'reasonableness' standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest." *Id.* at 101 n.1 (Stevens, J., concurring in part and dissenting in part).

216 *See* Thornburgh v. Abbott, 490 U.S. 401, 414 (1989) (adopting the reasonableness test and rejecting heightened scrutiny in prison mail cases).

217 *Id.* (internal quotation marks omitted).

218 This assertion remains true despite the fact that one of the regulations at issue in *Turner* itself was overturned. *See Turner*, 482 U.S. at 91 (finding that the restriction on inmate marriages did not meet the reasonableness standard because it was an exaggerated response to administrative concerns); *see also* Washington v. Harper, 494 U.S. 210, 227 (1990) (using *Turner*'s reasonableness test to uphold a regulation authorizing treatment of prisoners with antipsychotic drugs without their consent). The only cases that have questioned the *Turner* standard have done so in the context of freedom of religion; these cases merely note how the Religious Freedom Restoration Act of 1993 partially superseded *Turner* by defining a statutory right to the free exercise of religion. *See, e.g.*, Fawaad v. Jones, 81 F.3d 1084, 1086-87 (11th Cir. 1996); Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir.), *cert. denied sub nom.* Thomas v. McCotter, 515 U.S. 1166 (1995), *implied overruling recognized by* Sinnett v. Simmons, 45 F. Supp. 2d 1210, 1215 (D. Kan. 1999); Levinson-Roth v. Parries, 872 F. Supp. 1439, 1451 (D. Md. 1995).

> court is able to discern a logical connection between that concern and the challenged regulation.[219]

Thus, plausible arguments suggest that the standard is much less effective than the Justices in *Abbott* were willing to admit.[220] In the name of deference to prison authority, the Court appears to be "in a headlong rush to strip inmates of all but a vestige of free communication with the world beyond the prison gate."[221]

The Court should therefore return to a heightened scrutiny analysis for prison regulations to ensure that prisoners' rights are evaluated fairly. One goal of the Constitution is "to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing."[222] Although the Court "must give due consideration to the needs of those in power [here, prison administrators], th[e] Court's role is to ensure that fundamental *restraints* on that power are enforced."[223] As Justice Brennan posited in his dissent in *O'Lone v. Estate of Shabazz*, "adoption of 'reasonableness' as a standard of review for *all* constitutional challenges by inmates is inadequate to this task."[224]

Additionally, characterization of the rights implicated in each case supports the use of *Martinez*'s intermediate scrutiny, not *Turner*'s reasonableness test, for analyzing regulations forbidding sexually explicit material in prisons. The mail censorship regulations in *Martinez* involved the First Amendment rights of both prisoners and free citizens, a fact that the majority relied upon to support its conclusion.[225] In contrast, the regulations challenged in *Turner* only compromised the rights of inmates.[226] The cases that challenge prohibitions on sexually explicit material implicate the rights of inmates who desire those publications *and* the rights of the publishers who wish to communicate with subscribing prisoners by sending their materials to the inmates.[227] Thus, one can argue that cases such as *Mauro* and *Amatel* are

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219 *Abbott*, 490 U.S. at 434 n.18 (Stevens, J., concurring in part and dissenting in part) (quoting *Turner*, 482 U.S. at 100-01 (Stevens, J., concurring in part and dissenting in part)). Stevens added that he could envision "a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who . . . might be interested in arranging an attack within the prison . . . or an escape." *Id.*

220 *See Leading Cases*, *supra* note 65, at 247 ("*Abbott*'s validation of censorship policies that needlessly infringe upon the media's right to disseminate information demonstrates that, contrary to the majority's assertion, the reasonableness standard is 'toothless.'").

221 *Abbott*, 490 U.S. at 422 (Stevens, J., concurring in part and dissenting in part).

222 O'Lone v. Estate of Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting).

223 *Id.* (Brennan, J., dissenting).

224 *Id.* (Brennan, J., dissenting).

225 *See supra* notes 62-63 and accompanying text.

226 *See supra* notes 72-73 and accompanying text.

227 *Cf.* Thornburgh v. Abbott, 490 U.S. 401, 408 (1989) ("[T]here is no question that publishers who wish to communicate with those who, through subscription, willingly seek

more analogous to *Martinez*.[228] Therefore, the stricter *Martinez* standard should apply when courts evaluate the constitutionality of prison regulations restricting access to sexually explicit materials.

Justice Stevens suggested this point in his partial dissent in *Abbott*.[229] He explained that in *Martinez*, the Court "[f]ocus[ed] not on the rights of prisoners, but on the 'inextricably meshed' rights of nonprisoners 'who have a particularized interest in communicating with them.'"[230] Justice Stevens added "that an 'undemanding standard of review' could not be squared with the fact 'that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail.'"[231] Justice Stevens also asserted that contrary to what some Justices believed, *Martinez* is in fact still good law.[232] Thus, Justice Stevens argued that the *Abbott* majority needlessly overruled part of *Martinez* in addition to applying the wrong standard to the case at bar.[233]

Under a *Martinez*-like "least restrictive means" standard requiring a regulation to further a substantial governmental interest,[234] courts

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their point of view have a legitimate First Amendment interest in access to prisoners."); *Leading Cases*, *supra* note 65, at 246-47 (explaining that "[b]y excessively restricting publishers' ability to disseminate messages, *Abbott* offends the constitutional rights of both publishers and inmates, as well as the principles underlying the first amendment," and asserting that "[b]y according prison officials broad authority to limit publishers' access to inmates, the *Abbott* Court unduly abridges the media's right to disseminate information").

228 *Cf.* Levine, *supra* note 66, at 910 (discussing how, in considering the restrictions on publications in *Abbott*, the "Court's comparison of the regulations in *Turner* to those in *Abbott* is tenuous at best").

229 *See Abbott*, 490 U.S. at 423 (Stevens, J., concurring in part and dissenting in part) (examining with approval the requirements of *Martinez*).

230 *Id.* (Stevens, J., concurring in part and dissenting in part).

231 *Id.* (Stevens, J., concurring in part and dissenting in part).

232 *See id.* at 426-27 (Stevens, J., concurring in part and dissenting in part). Stevens asserted that *Turner* "confirmed the vitality of *Martinez* for evaluating encroachments on the First Amendment rights of nonprisoners." *Id.* at 426 (Stevens, J., concurring in part and dissenting in part). He added that *Turner* "cited and quoted from *Martinez* more than 20 times; not once did it disapprove *Martinez*'s holding, its standard, or its recognition of a special interest in protecting the First Amendment rights of those who are *not* prisoners." *Id.* at 427 (Stevens, J., concurring in part and dissenting in part). Other commentators have echoed this sentiment, noting that

> the Court in *Turner* implicitly affirmed *Martinez* in both parts of its opinion. First, it declared *Martinez* inapplicable to a regulation restricting inmate-to-inmate correspondence because *Martinez* turned on the consequential restriction of an outsider's first amendment interest in uncensored correspondence with an inmate. Thus, the Court acknowledged *Martinez*'s role in cases involving outsiders' rights. Furthermore, it explicitly recognized that the *Martinez* standard might apply to a regulation restricting inmate marriages because of the restriction's impact on nonprisoners. Thus, nowhere in *Turner* and its progenitors did the Court undermine *Martinez*. To the contrary, *Turner* implicitly affirmed both the *Martinez* standard of scrutiny and its greater protection of noninmate rights.

Leading Cases, *supra* note 65, at 246 (footnotes omitted).

233 *See Abbott*, 490 U.S. at 427-31 (Stevens, J., concurring in part and dissenting in part).

234 *See* Procunier v. Martinez, 416 U.S. 396, 413 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

would likely strike down regulations seeking to generally prohibit prisoner access to sexually explicit material. Although rehabilitation, order, and security are substantial interests as defined in *Martinez*,[235] prison administrators would be hard-pressed to illustrate how banning sexually explicit material from inmates would actually further any of those interests. Intermediate scrutiny requires a more solid link between the prison regulation and governmental interest than does a *Turner* reasonableness standard.[236] Therefore, prison officials or the legislature would have to do more than simply assert that such a link exists—they would need to offer proof.[237]

The proffered justifications for the regulations in *Amatel v. Reno*[238] illustrate the difficulty in establishing a causal link between pornography and rehabilitation. Although the D.C. Circuit upheld the restriction, the dissent pointed out that the court did so with little or no proof on the record.[239] Not only did the record itself fail to establish a link, one can argue that no connection exists at all.[240] Judge Wald argued that "[a]t best, it can be said that a few studies

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235 *See id.*

236 *See supra* note 64 and accompanying text. Additionally, a tenuous link between government interest and regulation was problematic in *Martinez*, where "the Court was not persuaded that some of the regulations actually furthered the interests invoked by the prison officials in their defense." BRANHAM & KRANTZ, *supra* note 13, at 138. This reluctance illustrated that "there were limits to the deference that the Court would accord the judgments of prison officials about what was needed to protect institutional security or to further other important correctional goals." *Id.* at 138-39.

237 *See Martinez*, 416 U.S. at 413-14. However, the Court noted that "[t]his does not mean . . . prison administrators may be required to show with certainty that adverse consequences would [occur]." *Id.* at 414. Incidentally, lack of proof may even doom a statute under *Turner*'s reasonableness test. In her *Amatel* dissent, Judge Wald noted that "[t]he Court's rejection of the marriage restriction at issue in [*Turner*] clearly turned on the quality of the evidence before the Court . . . ." Amatel v. Reno, 156 F.3d 192, 207 (D.C. Cir. 1998) (Wald, J., dissenting), *cert. denied*, 119 S. Ct. 2392 (1999). This outcome "suggests that while a reasonable relationship might possibly have been demonstrated between the marriage restriction and the interests asserted, the prison had failed to present sufficient evidence to establish that relationship." *Id.* at 208 (Wald, J., dissenting).

238 *See Amatel*, 156 F.3d at 196-97.

239 *See id.* at 208-09 (Wald, J., dissenting).

240 *See id.* (Wald, J., dissenting). There is conflicting scientific evidence regarding a link between pornography and crime, which is the result rehabilitation seeks to avoid. *See id.* (Wald, J., dissenting). The majority held that the proper inquiry is "not whether the regulation in fact advances the government interest, only whether the legislature might reasonably have thought that it would." *Id.* at 199. Thus, under the majority's view, this inconclusive or conflicting scientific evidence is sufficient. *See id.* at 199-201. In contrast, Judge Wald's dissent posits that the relationship between rehabilitation and pornography must be established on the record. *See id.* at 207 (Wald, J., dissenting). The dissent concludes that the government did not offer any evidence in that case and cited to scientific literature supporting the opposite view—that no established relationship between pornography and crime exists. *See id.* at 208-09 (Wald, J., dissenting); *see also* George C. Thomas III, *A Critique of the Anti-Pornography Syllogism*, 52 MD. L. REV. 122, 124 (1993) (asserting that there is "no available scientific evidence [that] establishes a causal relationship between pornography and rape").

have shown a causative relationship between violent pornography and short-term increases in aggression,"[241] and that "[i]n all other respects, the relationship between pornography and criminal activity is merely correlative."[242] Under *Turner's* reasonableness test, such inconclusive evidence may be sufficient because "[f]or judges seeking only a reasonable connection between legislative goals and actions, scientific indeterminacy is determinative."[243] However, such an attenuated connection should not be sufficient under intermediate scrutiny.

Additionally, many of the statutes that ban sexually explicit materials in prisons define their terms broadly.[244] As *Martinez* explains, "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[245] Therefore, even a regulation that furthers a substantial interest will be struck down if "its sweep is unnecessarily broad."[246] Regulations that ban pornography in jails are commonly attacked under the overbreadth doctrine.[247] Overbroad statutes are "designed to burden or punish activities that are not constitutionally protected, but [their] flaw is that, as drafted, they also include[ ] activities protected by the First Amendment."[248] Hence, legislatures must draft their statutes carefully in order to avoid possible constitutional invalidation under the overbreadth doctrine.[249]

One approach that would avoid overbreadth problems, permit prisoners to receive sexually explicit publications, and protect the gov-

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241 *Amatel*, 156 F.3d at 208 (Wald, J., dissenting).

242 *Id.* at 208-09 (Wald, J., dissenting). Judge Wald also argued that this correlative relationship is not sufficient to establish even the rational connection required in *Turner*. *See id.* at 209 n.6 (Wald. J., dissenting).

243 *Id.* at 201.

244 *See, e.g., supra* notes 121-25 and accompanying text.

245 Procunier v. Martinez, 416 U.S. 396, 413 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

246 *Id.* at 414.

247 For examples of overbreadth arguments, see *infra* note 248.

248 NOWAK & ROTUNDA, supra note 64, § 16.8, at 996. One example of an overbroad statute is the statute in *Amatel*: as written, the statute would not only ban pornography, but might prevent prisoners from accessing material such as "Michelangelo's *David*, for example, or grim photographs of naked bodies piled in the pits of Germany's concentration camps." *Amatel*, 156 F.3d at 210 (Wald, J., dissenting); *see also* Mauro v. Arpaio, 147 F.3d 1137, 1140 (9th Cir.) (explaining that the challenged regulation would prevent inmates from receiving "any photograph, drawing or graphic that depicted frontal nudity," and that this category "would include such magazines as *National Geographic*, medical journals, artistic works, and countless other materials"), *reh'g granted*, 162 F.3d 547 (9th Cir. 1998), *rev'd en banc*, 188 F.3d 1054 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000).

249 For example, overbreadth was one of the issues that initially doomed a New Jersey statute forbidding sexually explicit material from the state's Adult Diagnostic and Treatment Center. *See* Waterman v. Verniero, 12 F. Supp. 2d 378, 380-81 (D.N.J. 1998) (finding the New Jersey statute unconstitutionally overbroad and granting permanent injunction), *rev'd sub nom.* Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999).

ernmental interests of rehabilitation and security is for prison officials to perform a case-by-case determination of which prisoners could receive certain publications.[250] This system would allow officials to prevent psychologically unfit prisoners from handling pornographic materials, while ensuring that obscene publications remain out of prison circulation. In contrast to a blanket ban on pornography, a case-by-case determination is more limited in scope and application and does not prohibit protected material. Because a complete ban would still require officials to inspect publications, a case-by-case approach would be no more burdensome on prison resources and administrators than an overly broad scheme. Additionally, psychological examinations are already routinely performed on inmates,[251] and could also be used to determine a prisoner's candidacy to receive sexually explicit materials, thereby conserving resources. In fact, many prisons in this country have successfully implemented plans that utilize these individualized determinations.[252] Additionally, the case-by-case nature of the determinations in *Abbott* was one of the factors that

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250 *See infra* note 252 and accompanying text.

251 Some states require or provide for psychological examination of convicts upon incarceration. *See, e.g.*, CAL. PENAL CODE § 5068 (West 1999); DEL. CODE ANN. tit. 11, § 6523(a) (1999) (providing for a diagnostic service within the Department of Corrections to make social, medical, psychological, and other studies regarding persons convicted and sentenced to prison); Hines v. Anderson, 439 F. Supp. 12, 17 (D. Minn. 1977) (mandating that all inmates entering state prisons receive physical and psychological evaluations).

252 *See* Thompson v. Patteson, 985 F.2d 202, 204 (5th Cir. 1993) (discussing the Texas Department of Corrections rule "which allows denial of publications for which 'a specific factual determination has been made that the publication is detrimental to prisoner's rehabilitation because it would encourage deviate criminal sexual behavior,'" though materials "shall not be excluded solely because they have sexual content"); *see also* Dawson v. Scurr, 986 F.2d 257 (8th Cir. 1993) (examining Iowa's regulatory scheme for prisoners' access to sexually explicit material). For example, Iowa has implemented statutes that classify pornographic material, regulate each category differently, and evaluate prisoners to determine their psychological fitness. The Iowa Administrative Code Rules 291-20.6(4) to (6) control these areas:

> Rule 20.6(4) provided that prison officials could exclude publications which portrayed, *inter alia*, child sex acts, sadomasochism or bestiality. Rule 20.6(5) provided that inmates found psychologically unfit could be denied access to sexually explicit materials. Finally, Rule 20.6(6) limited inmate access to publications portraying "fellatio, cunnilingus, masturbation, ejaculation, sexual intercourse or male erection" to a "designated controlled area" (the reading room).

Id. at 259 (quoting IOWA ADMIN. CODE r. 291-20.6(4) to (6) (1981). The determination under Rule 20.6(5) involved an inquiry into whether the material "is detrimental to the rehabilitation of an individual inmate, based on psychological/psychiatric recommendation." *Id.* at 259 n.4. The rule as applied involves a process where

> publication review committee members screened publications ordered by inmates and decided whether to allow, control or deny a publication. Publications which were allowed were permitted in inmates' cells; these publications might contain sexually explicit material, but not depictions described in Rule 20.6(6). Publications which were controlled were those which contained depictions described in Rule 20.6(6); these could be viewed only in the reading room. Finally, publications which were denied

led the Court to uphold the regulations under a reasonableness standard.[253]

In conclusion, an intermediate scrutiny standard would allow prison inmates to access sexually explicit materials that are protected by the First Amendment. This approach would not foreclose the possibility of case-by-case regulation of prisoner access to sexually explicit materials. However, under an intermediate scrutiny test, as well as an overbreadth challenge, courts would likely find a blanket ban unconstitutional.

B. Application of *Turner*

As the foregoing discussion asserts, reverting to an intermediate scrutiny standard would help ensure that legislatures do not infringe on prisoners' rights. Nonetheless, even if courts refuse to apply intermediate scrutiny to regulations prohibiting sexually explicit materials in prisons, courts might still strike down unreasonable restrictions on prisoners' First Amendment rights by applying the *Turner* reasonableness test more carefully.

The *Turner* test requires a regulation to be "reasonably related" to "legitimate penological interests"[254] in order to survive constitutional scrutiny. This standard is significantly more deferential to prison authorities than is an intermediate scrutiny test, and consequently leaves many more restrictions intact. However, this Note submits that the most equitable way to employ the *Turner* reasonableness test would be to adhere to the approach in *Mauro I*,[255] utilizing this test to strike down legislation that infringes on prisoners' rights.[256] By using this approach, courts can overcome the impotence commonly displayed in

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(those containing child sex acts or bestiality, for example) were banned altogether.

Id. at 259. Thus, the Iowa regulations allowed for individualized determinations that would not prevent *all* prisoners from accessing sexually explicit material, and would actually allow prisoners to view some forms of arguably obscene pornography. *See id.* Inmates at the Iowa State Penitentiary challenged these regulations, claiming that the restriction of certain materials to the designated reading room was unconstitutional. *See id.* at 260. The Eighth Circuit, however, upheld the challenged regulation under the *Turner* reasonableness standard. *See id.* at 262-63. Hence, *Dawson* illustrates three key points: (1) prisons do allow pornography in many cases, (2) a case-by-case approach can work, and perhaps most importantly, (3) courts can use *Turner* to actually uphold a statute *permitting* pornography in prisons.

253 *See* Thornburgh v. Abbott, 490 U.S. 401, 416-17 (1989) ("[W]e are comforted by the individualized nature of the determinations required by the regulation.").

254 Turner v. Safley, 482 U.S. 78, 89 (1987); *see also supra* note 79 and accompanying text.

255 147 F.3d 1137 (9th Cir.), *reh'g granted*, 162 F.3d 547 (9th Cir. 1998), *rev'd en banc*, 188 F.3d 1054 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000).

256 *See id.* at 1144-45.

applications of the *Turner* standard and supply the teeth for this test promised by the Court in *Thornburgh v. Abbott*.[257]

1. *Mauro I*

Although *Mauro I* was vacated and reversed en banc,[258] the court's reasoning in that case demonstrates the preferable application of the *Turner* test. As mentioned above, Mauro initially brought suit to challenge a regulation banning sexually explicit material in the Maricopa County jails.[259] Following the district court's decision to uphold the ban, Mauro appealed to the Ninth Circuit.[260] After the court determined that Mauro had standing to challenge the ban as facially overbroad,[261] it addressed the constitutionality of the statute.[262] The court relied on *Procunier v. Martinez*[263] for the proposition that "[p]risoners do not lose their constitutional rights merely because they are incarcerated, although such freedoms are limited necessarily by the context of their surroundings."[264] The court then launched into an analysis following the *Turner* framework.[265]

The first *Turner* factor requires that the government "establish that its justifications are legitimate and neutral and that there is a rational connection between the regulation and the justifications for that regulation."[266] The court found that the government's three asserted interests—safety, rehabilitation of inmates, and reduction of sexual harassment—were legitimate.[267] Next, the court relayed the definition of "neutrality" as it applies to prison regulations:

> [t]he regulation or practice must further an important or substantial interest unrelated to the suppression of expression. Where . . .

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257 490 U.S. at 414.

258 *See Mauro II*, 188 F.3d at 1058, 1063.

259 *See Mauro I*, 147 F.3d at 1138.

260 *See id.* at 1139.

261 *See id.* at 1140.

262 *See id.* at 1140-45.

263 416 U.S. 396 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989); *see also supra* Part II.A (examining *Martinez* in detail).

264 *Mauro I*, 147 F.3d at 1140.

265 *See id.* at 1141-44; *see also supra* notes 81-85 and accompanying text (examining the *Turner* factors). The Ninth Circuit explained the holding in *Turner*, noting:

> that there are four factors to be considered in assessing the reasonableness of a regulation: (i) whether there is a "valid, rational connection" between the regulation and the government interest put forth as justification and whether the purported interest is neutral; (ii) the extent to which alternative means of expression remain open to prisoners; (iii) what impact accommodation of the inmates' rights would have on guards, other inmates, and allocation of prison resources; and, (iv) the absence or presence of ready alternatives.

Mauro I, 147 F.3d at 1140-41 (paraphrasing Turner v. Safley, 482 U.S. 78, 89-90 (1987)).

266 *Mauro I*, 147 F.3d at 1141.

267 *See id.*

> prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*.[268]

Using this definition, the court determined that the challenged regulation was indeed neutral, because it "purports to distinguish among incoming mail and publications based upon the materials' potential effect on prison safety, not based upon a certain message contained within that material."[269]

Next, the Ninth Circuit inquired whether a rational connection existed between the challenged regulation and the county's goal.[270] As the court explained, "[i]n demonstrating that a regulation is rationally related to a legitimate goal, prison officials need not prove that the banned material actually caused problems in the past, or that the materials are 'likely' to cause problems in the future so long as there is an 'intolerable risk' of violence."[271]

The court proceeded to examine the County's evidence that prior harassment of female guards implicated sexually explicit materials.[272] The court determined that these incidents had not involved any materials other than "magazines such as *Playboy*" and that the only evidence presented that suggested "future danger" was an official's opinion.[273] The County offered neither expert testimony nor a thorough explanation to support its argument[274] and only attempted to justify its policy with speculation.[275] Moreover, the Ninth Circuit determined that Maricopa County had "imposed a prohibition that went far beyond any sanctioned by this court, or any other."[276] Thus the court held that the County had failed to demonstrate that its regulation was "reasonably related to legitimate penological interests."[277]

The court next turned to the second factor of the *Turner* analysis: "whether a regulation leaves open alternative means of expressing the right upon which the regulation impinges."[278] In applying this rule,

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268 *Id.* (alteration in the original) (quoting *Abbott*, 490 U.S. at 415-16).

269 *Id.* at 1142.

270 *See id.* at 1142-43.

271 *Id.* at 1142 (quoting *Abbott*, 490 U.S. at 417).

272 *See id.* at 1142-43.

273 *Id.* at 1142.

274 *See id.* at 1143.

275 *See id.* The county asserted that "the possibility that 'inmates will misbehave when using materials depicting frontal nudity is clearly a reasonable possibility to which deference toward the policies of jail officials is required.'" *Id.*

276 *Id.*

277 *Id.* (internal quotation marks omitted).

278 *Id.* The court cited *Thornburgh v. Abbott*, 490 U.S. 401 (1989), as its guide for the application of the alternative means analysis. *See Mauro I*, 147 F.3d at 1143. In *Abbott*, the Supreme Court noted somewhat ambiguously that if a regulation is very broad, it has a greater chance of contravening the alternative means test. *See Abbott*, 490 U.S. at 417 n.15.

the court in *Mauro I* held that "[t]he blanket prohibition unnecessarily precludes prisoners' access to materials fully protected by the First Amendment."[279] The Ninth Circuit found the regulation overbroad because it would ban sweeping "categories of materials without individualized consideration."[280]

Finally, the court addressed the third and fourth *Turner* factors.[281] The third factor is akin to a balancing test which weighs the accommodation of the prisoner's right against the effect of accommodation on both prison guards and inmates.[282] Beyond the general claim that access to materials involving nudity would have an adverse effect upon prison security, the County did not address this factor.[283] Thus, the court rejected the County's argument and decided that it need not address this prong of the *Turner* test because the regulation failed under the other *Turner* criteria.[284] The court then determined that it had neither the "ability nor [the] need" to address the fourth prong of the *Turner* test.[285] Because Mauro did not make any allegations that implicated this factor, the court found it unnecessary to rule on this criterion.[286]

In conclusion, the Ninth Circuit determined that the County's prohibition was overbroad and that no "limiting construction" was possible.[287] The court consequently struck the entire regulation because it "impinge[d] upon the right of inmates to receive material protected by the First Amendment . . . [and was] overbroad . . . and as such [wa]s unconstitutional."[288] As this holding illustrates, the *Turner* test can in fact be used to strike legislation that curtails prisoners' First Amendment rights.

2. *Additional Considerations*

Both *Mauro I* and Judge Wald's dissent in *Amatel* offer ways for a court to overturn a pornography ban. One of the more vulnerable links in the chain of *Turner* requirements is the necessity of a relationship between the regulation and the asserted interest.[289] In *Mauro I*, the court determined that no reasonable relationship existed because

279 *Mauro I*, 147 F.3d at 1144.
280 *Id.*
281 *See id.*
282 *See id.*
283 *See id.*
284 *See id.*
285 *Id.* This ignored fourth factor was "[t]he availability of 'obvious, easy' alternatives that could be implemented at a 'de minim-u-s' [sic] cost", which "weigh[s] against the reasonableness of a regulation." *Id.* (citation omitted).
286 *See id.*
287 *Id.* at 1145.
288 *Id.*
289 *See supra* note 81 and accompanying text.

the regulation was so broad, and because the County failed to offer any "proof or reasoned explanation" for its wide ban.[290] In *Amatel*, Judge Wald makes this same argument, claiming that a sparse record is insufficient to justify a restriction on prisoners' First Amendment rights,[291] especially where the asserted link is debatable.[292] Similarly, Judge Wald's dissent also distinguishes between giving deference to the legislature's judgment that its regulation is reasonable, and blindly following the advice of the regulation's drafters with respect to both the law's reasonableness and the reasonableness of its justification.[293] Even under a reasonableness test, courts should perform a more searching review than that suggested by the *Amatel* majority in order to avoid mindless acceptance of the legislature's reasoning.[294]

The second *Turner* factor might also enable courts to strike down bans on sexually explicit materials in prisons.[295] This factor asks whether alternative means of expressing the impinged-upon right are available to prison inmates.[296] Generally, as discussed above, regulations banning sexually explicit material tend to be overbroad.[297] The Supreme Court has asserted that "the broader the regulation, the more likely that the regulation will violate the alternative means test."[298] Thus, many widely sweeping regulations risk being struck

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290 *Mauro I*, 147 F.3d at 1143.

291 *See* Amatel v. Reno, 156 F.3d 192, 207 (D.C. Cir. 1998) (Wald, J., dissenting) ("[T]he determination of whether a regulation (or statute) is reasonably related to a legitimate penological interest must depend, in all but the most obvious cases, on the evidentiary support for that nexus in the record before the court."), *cert. denied*, 119 S. Ct. 2392 (1999).

292 *See id.* at 208-12 (Wald, J., dissenting); *see also supra* notes 237-42 and accompanying text (discussing Judge Wald's disagreement with the *Amatel* majority on the issue of causal linkage).

293 *See Amatel*, 156 F.3d at 205-06 (Wald, J., dissenting). In *Amatel*, Congress, not the Bureau of Prisons, was the law-making body to which deference was owed. *See id.* (Wald, J., dissenting); *see also* Salaam v. Lockhart, 905 F.2d 1168, 1171 (8th Cir. 1990) (noting that precedent in this area does not support blind judicial deference to the state's policy rationale); Campbell v. Miller, 787 F.2d 217, 227 n.17 (7th Cir. 1986) (warning against complete deference to prison authority).

294 *See Amatel*, 156 F.3d at 206 (Wald, J., dissenting).

295 *See* Turner v. Safley, 482 U.S. 78, 90 (1987).

296 *See id.*; *see also supra* note 83 and accompanying text (discussing the second *Turner* factor).

297 *See supra* notes 247-49 and accompanying text.

298 Mauro v. Arpaio, 147 F.3d 1137, 1143 (9th Cir. 1998) (paraphrasing Thornburgh v. Abbott, 490 U.S. 401, 417 n.15 (1989)), *reh'g granted*, 162 F.3d 547 (9th Cir. 1998), *rev'd en banc*, 188 F.3d 1054 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000). In *Abbott*, the Court upheld the regulation because (1) the prisoners retained access to a variety of publications, and (2) the regulations did not impose unconstitutional shortcuts such as flatly excluding certain publications or having personnel other than the warden make individual determinations. *See Abbott*, 490 U.S. at 417-18. In contrast, the regulation struck down in *Mauro I* contained "no issue by issue determination of whether a particular depiction of nudity might cause the unwanted consequences the prison seeks to avoid, nor does the warden have a nondelegable duty to make such an individualized determination." *Mauro I*,

down for violating the second *Turner* criteria in addition to failing for overbreadth.[299]

Finally, scrutiny of the justification put forth by the government to support its statute should enable courts to invalidate restrictions on sexually explicit materials in prisons, even under more lenient standards such as *Turner*. One federal court noted that in order "[t]o establish that a legitimate penological interest supports a statute, a state must provide evidence that the interest it proffered is the actual basis for the statute."[300] Moreover, the true impetus for a regulation may not be a desire to harm a particular group or animosity toward that group.[301] Officials drafting prison regulations should keep in mind that "[w]hatever sentiments [society] might hold regarding prisoners for the crimes they have committed, these sentiments must not infect our determination of the prisoners' constitutional rights."[302] Thus, prison authorities cannot use a disingenuous penological interest to support a regulation. If a court believes that hatred of criminals was the true motivation behind a statute restricting prisoners' rights, it must strike down that law.[303]

In conclusion, courts may properly strike down a regulation banning pornography in prisons under the *Turner* reasonableness standard. However, because the likelihood of success under *Turner* is small—as the insignificant number of successful claims and the low

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147 F.3d at 1144. Additionally, the court noted that "[t]he County has not sought to ban a small subset of materials containing obscene of [sic] otherwise objectionable nudity while leaving open other means of viewing similar materials." *Id.*

299 Despite the history of courts employing the *Turner* standard to uphold prison regulations, courts have used the standard to strike down a statute restricting prisoners' rights and also to uphold a statute permitting pornography. For example, the marriage restriction in *Turner* was invalidated under the new standard articulated in that case. *See Turner*, 482 U.S. at 94-99; *see also supra* notes 86-87 and accompanying text (discussing the *Turner* Court's application of its standard to the facts of that case). Additionally, in *Dawson v. Scurr*, 986 F.2d 257 (8th Cir. 1993), the Eighth Circuit upheld a rule that allowed prisoners to keep sexually explicit materials in their cells, but required that certain controlled explicit materials be viewed in a designated reading room. *See id.* at 259, 262-63; *see also supra* note 252 (examining the Iowa scheme in greater detail).

300 Waterman v. Verniero, 12 F. Supp. 2d 364, 373 (D.N.J. 1998) (imposing preliminary injunction against enforcement of statute that barred sexually explicit materials in prison), *rev'd sub nom.* Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999).

301 *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (invalidating a state amendment that prohibited officials from protecting homosexuals from discrimination, in part because the law "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

302 Amatel v. Reno, 156 F.3d 192, 204 (D.C. Cir. 1998) (Wald, J., dissenting), *cert. denied*, 119 S. Ct. 2392 (1999). District Judge Alfred Wolin raised this same point in *Waterman*, noting that "New Jersey has failed to produce any evidence that rehabilitation, and not outrage, motivated the enactment of" a New Jersey statute banning sexually explicit material in a state prison for sexual offenders. *Waterman*, 12 F. Supp. 2d at 373.

303 *See id.*

level of judicial scrutiny illustrate—the most efficacious way to protect prisoners' rights is for courts to return to the *Martinez* intermediate scrutiny standard.

CONCLUSION

The area of prisoners' rights has undergone sweeping changes during the twentieth century. After the shift from the hands-off era to a period of judicial activism, courts are currently returning to a deferential approach in analyzing restrictions on prisoners' freedoms. This trend is especially apparent in the First Amendment context, in which prison administrators, legislatures, and the judiciary are slowly tightening their control of prisoners' liberties.

Although the right to access sexually explicit material is objectionable to some people, the right nevertheless falls under the rubric of the First Amendment.[304] By preventing prisoners from exercising this right, courts belie their "duty to uphold the Constitution, which protects all citizens, including convicted felons."[305] Thus, in order to protect inmates and preserve their First Amendment rights, courts should revert to an intermediate scrutiny standard for evaluating prisoners' rights cases. If courts do not take such action to protect those who are among the most vulnerable members of society, the implications are dangerous: "[h]istory teaches that when society stands idly by as the state violates the rights of one segment of the body politic, the rights of others will eventually be diminished."[306]

304 *See supra* notes 209-14 and accompanying text.
305 *Waterman*, 12 F. Supp. 2d at 379-80.
306 *Id.* at 380.