FALSE TEETH? *THORNBURGH'S* CLAIM THAT *TURNER'S* STANDARD FOR DETERMINING A PRISONER'S FIRST AMENDMENT RIGHTS IS NOT "TOOTHLESS"

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I. INTRODUCTION

> Prison rules are easy to create. "Once established, rules have great success at survival.... By ... accumulations of permanent rules passed in reaction to episodic disturbances, many prisons have evolved into places of extreme regimentation."[1]

While not all rules trace their roots to a specific incident, many restrictions imposed on prisoners are in fact premised on a belief by the administration that relaxation of a particular restriction would pose a threat to security or create administrative chaos.

Prisoners challenge these rules on their face and as applied in a wide variety of cases, alleging that the rules abridge constitutional rights.[2] For the last decade prisoner rights litigation has been marked by a determined effort to exclude what some believe are inappropriate prisoner rights claims from federal court. The Supreme Court, in search of a standard for reviewing these claims, has generally, regardless of the substantive constitutional right invoked by the prisoner, balanced the need for deference

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1. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 50 (1967).

> When a disturbance occurs, for example, as men are going from one place to another, it is decreed that if any group of five or more men is moving from one building or area to another, they must walk in a line and be accompanied by an officer. Later an argument between two men in such a line escalates to a fist fight, and henceforth no talking is allowed in line. Someone is attacked with a "shiv" made from a table knife smuggled into a cell and sharpened to a point, and henceforth no forks or knives may be used by inmates in the dining hall. *Id.*

2. *See generally Project: Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-1988, VI. Prisoners' Rights*, 77 GEO. L.J. 1339 (1989) [hereinafter *Project*].

to prison administrators against the constitutional deprivations claimed by the prisoner.[3] The result has been an overall reduction in the type of prisoner rights claims that remain viable.[4]

Several recent decisions from the Supreme Court have excluded certain prisoner claims from court altogether. For example, in *Kentucky Dept. of Corrections v. Thompson*, prisoners sought a hearing to challenge the exclusion of certain persons from inmate visitation.[5] The Supreme Court, after reviewing the state regulations setting out inmate visitation rules, held that the prisoners had no liberty interest in receiving visitors that was protected by the Due Process Clause.[6] The inmates were therefore not entitled to sue over the exclusion of certain visitors. Similarly, in *Parratt v. Taylor*, a prisoner suffering a property loss was not permitted to sue in federal court since a state tort claims procedure existed to redress deprivations caused by random, unauthorized acts by state officials.[7] Congress has further acted to cut back on prisoner cases in federal court by requiring a 90-day continuance of prisoner rights cases if the trial court believes it appropriate.[8] During this period a prisoner must exhaust grievance procedures in those states such as Ohio where procedures have been approved by the United States Attorney General.[9]

The growing number of theories that exclude prisoners from court will not stop prisoner rights litigation completely. The courtroom remains the only place that prisoners can fight for their rights outside of their own institutions. Prisoners have no political clout. Non-litigatory avenues for advocacy are closed to them.[10] Thus, carefully applying the standard of review for those

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3. *See generally* Note, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse? Turner v. Safley*, 33 VILL. L. REV. 393 (1988); Note, *Prisoner's Rights, Institutional Needs and the Burger Court*, 72 VA. L. REV. 161 (1986).

4. *See* Eastman, *Draining the Swamp: An Examination of Judicial and Congressional Policies Designed to Limit Prisoner Litigation*, 20 COLUM. HUM. RTS. L. REV. 61 (1988) [hereinafter *Draining the Swamp*]. *See also Project*, *supra* note 2.

5. Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1907 (1989).

6. *Id.* at 1911.

7. Parratt v. Taylor, 451 U.S. 527, 543-44 (1981).

8. 42 U.S.C. § 1997e (1982).

9. *Id. See* Lay, *Exhaustion of Grievance Procedures for State Prisoners Under § 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 936 (1986). *See also* Eastman, *Draining the Swamp*, *supra* note 4.

10. *See* Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring).

claims that remain viable carries heightened importance.

The standard now used and reaffirmed this past term by the Court for challenges to inmate restrictions based upon the First Amendment requires that regulations be "reasonably related to legitimate penological interests."[11] That standard of review, we are told, is not "toothless."[12] Dissenters warn, however, that this "reasonableness" standard is "manipulable" because speculation may be accepted by the trier of fact over concrete, documented reasons for the restrictions.[13]

This article explains the emerging standard of review in cases challenging prison regulation of Free Exercise and First Amendment rights. A return to a modified doctrine of overbreadth is urged for reviewing regulations subjected to attack on their face and as applied. This article further argues that deference to prison administrators should not cause courts to accept watered-down evidence in support of challenged regulations. Finally, as it is written by a practitioner, this article emphasizes that thorough discovery and presentation of the facts will ensure a vigorous inquiry under the current standard.

II. *TURNER* AND *THORNBURGH*

A. Summary of Developments Leading to Turner

Prisoner rights have been on a pendulum in the courts. Historically judges followed a hands-off doctrine, refusing to hear any complaints about prison regulations. The movement away from that doctrine accelerated in the 1960s, tracking two related trends: first, the expansion of rights for persons charged with crime and, second, the rise of § 1983 litigation after the decision in *Monroe v. Pape*.[14] During the 1970s, prisoners won Supreme Court victories regarding censorship of mail[15] and procedural due process in disciplinary matters.[16] The Court also recognized a

11. Thornburgh v. Abbott, 109 S. Ct. 1874, 1876 (1989) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

12. *Id.* at 1882.

13. *Id.* at 1889.

14. *See generally* Note, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse? Turner v. Safley*, 33 VILL. L. REV. 393 (1988); Monroe v. Pape, 365 U.S. 167 (1961).

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

16. Wolff v. McDonnell, 418 U.S. 539 (1974).

constitutionally based right to medical care.[17] During that decade, the "big" prison cases flourished. Major correctional institutions and even entire prison systems in many jurisdictions came under court order.[18] In contrast, the pendulum began swinging in the other direction during the 1980s. The Court re-established deference to prison administrators as the major factor in prisoner-conditions cases.[19]

B. Turner v. Safley

1. The Turner *Standard*

The current standard for review in prisoner First Amendment cases was generally set out in *Turner v. Safley*.[20] The Court had before it regulations affecting the right of prisoners to correspond with each other and to marry while incarcerated. The Court set out two principles in formulating a standard. First, prisoners do indeed have constitutional rights: "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[21] Second, courts should give deference to prison administrators.[22] These principles reflect the fact that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[23] Judicial restraint was therefore required.[24]

The balance between these principles caused the Court to establish a reasonable-relation test to determine the validity of a prison regulation challenged on First Amendment grounds:

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17. Estelle v. Gamble, 429 U.S. 97 (1976).

18. *See* I. ROBBINS, PRISONERS AND THE LAW App. B-13 (1989); Rhodes v. Chapman, 452 U.S. 337, 353 n.1 (Brennan, J., concurring).

19. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 561 (1979) ("restrictions and practices were reasonable responses by MCC [Metropolitan Correctional Center] officials to legitimate security concerns"); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) ("courts cannot assume that ... prison officials are insensitive to the requirements of the Constitution or the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system....").

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

21. *Id.* at 84.

22. *Id.* at 85.

23. *Id.* at 84-85.

24. *Id.* at 85.

"[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[25]

Four factors are to be applied in making determinations under this test. First, there must be a valid, neutral governmental purpose for the prison regulation and a "rational connection" between that purpose and the regulation.[26] Second, the court will look at whether alternative means of exercising the constitutional right remain available to the prisoner.[27] Third, the court will examine the impact that accommodation of the right will have on other inmates, staff, and prison resources.[28] Fourth, the court will determine whether obvious alternatives to the regulation exist. In that event, the regulation might be an "exaggerated response" to prison administration concerns.[29] The availability of alternatives that fully accommodate the prisoner's rights at little or no cost will weigh heavily toward a finding that the reasonable-relationship test is not met.[30]

Turner did not overrule *Procunier v. Martinez*.[31] That case struck down California regulations authorizing censorship of letters that "unduly complain," "magnify grievances," or express "inflammatory ... views."[32] Those regulations were held to be facially overbroad.[33] The *Martinez* standard has been described as weaker than strict scrutiny but not "undemanding." The standard allowed "censorship if it furthered 'an important or substantial governmental interest unrelated to the suppression of expression' and 'the limitation of First Amendment freedoms [was] no greater than [was] necessary or essential.' "[34] *Martinez* was distinguished in *Turner* as a case turning on the "First and Fourteenth Amendment Rights of those who are *not* prisoners."[35]

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25. *Id.* at 89.
26. *Id.*
27. *Id.* at 90.
28. *Id.*
29. *Id.*
30. *Id.* at 91.
31. Procunier v. Martinez, 416 U.S. 396 (1974).
32. *Id.* at 415.
33. *Id.*
34. *Id.* at 413.
35. Turner v. Safley, 482 U.S. 78, 85 (1987) (quoting *Martinez*, 416 U.S. at 409) (emphasis added by the *Turner* Court).

As stated above, the inmate plaintiffs in *Turner* challenged the Missouri prison restrictions on prisoner correspondence and inmate marriages. Only the marriage rule implicated non-prisoners. The Court stated that this fact may have been sufficient to support application of the *Martinez* test, which it viewed as more stringent that the reasonableness test.[36] The Court did not apply *Martinez* at all in *Turner,* however, as the marriage rule even fell short of the reasonableness test.[37]

2. Application of the Standard to the Correspondence Rule

The Missouri regulation considered in *Turner* prohibited correspondence between inmates in different institutions, but allowed exceptions for correspondence with immediate family members, for correspondence concerning legal affairs, or if the treatment team at each institution deemed such correspondence to be in the best interests of the inmate.[38] The Court held that this regulation, on its face, did not violate the First Amendment rights of the inmates.[39]

The Court found that the valid penological purpose behind the regulation was security. Prison officials had testified about a growing gang problem and stated that restricting correspondence reduced the ability of violent inmates to "communicate escape plans and arrange assaults."[40] This reason served as a logical connection between the restriction and the purpose, so the first factor was satisfied. The second factor was also satisfied since the restriction did not deprive inmates of all means of expression—only communication with a narrow group of persons: other inmates presently incarcerated.[41] No obvious alternative was seen by the majority since the prison officials testified that it would be impossible to read and monitor all inmate-to-inmate correspondence if the regulation were changed.[42] Nor was the rule, therefore, an exaggerated response to the problem.[43]

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36. *Turner*, 482 U.S. at 97.
37. *Id.*
38. *Id.* at 81-82.
39. *Id.* at 99.
40. *Id.* at 91.
41. *Id.* at 92.
42. *Id.* at 93.
43. *Id.* at 100.

Though the rule survived a facial challenge, the Court did remand the case for trial as to whether the correspondence regulation had been "applied by prison officials in an arbitrary and capricious manner."[44]

3. Application of the Standard to the Marriage Rule

State officials had also imposed a nearly complete ban on inmate marriages.[45] This regulation was held in *Turner* to be facially invalid.[46] Prison officials had cited security and rehabilitation as rationales for the rule. The security argument rested on an effort to avoid "love triangles."[47] The rehabilitation rationale focused on the female inmates' need for developing self-reliance.[48] The first factor was satisfied by these rationales, but the Court found the regulation to be an "exaggerated response" to these reasons. "Common sense," the Court stated, "suggests that there is no logical connection between the marriage restriction and the formation of love triangles."[49] Rivalries over female prisoners would likely be the same whether marriage restrictions existed or not.[50] Furthermore, rehabilitation concerns about the development of self-reliance in female prisoners offered no justification for this broad regulation, which also restricted male prisoner marriages.[51] Thus, the Court held the marriage regulation to be "facially invalid."[52]

C. O'Lone v. Estate of Shabazz

Eight days later, the Court decided *O'Lone v. Estate of Shabazz*.[53] The challenged regulations in that case prohibited Muslim inmates on work details from returning to the institution to participate in weekly Jumu'ah, a prayer service considered central to and obligatory in the Muslim religion.[54] The Court applied

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44. *Id.* at 82.
45. *Id.* at 99-100.
46. *Id.* at 97.
47. *Id.*
48. *Id.* at 97-98.
49. *Id.* at 85.
50. *Id.*
51. *Id.*
52. *Id.* at 99.
53. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).
54. *Id.* at 345.

the *Turner* standard[55] and affirmed the regulation.[56] Security concerns supported the assignment of inmates to work details that served to relieve tension within the institution and to reduce overcrowding while the inmates were on detail.[57] The additional policy of prohibiting returns to the institution during the day also was supported by a valid purpose—relieving congestion at the main gate, a high-risk area.[58] Another goal served was rehabilitation because the policy simulated working conditions within society.[59] The Court held that alternative means for exercising their religious rights existed for the Muslim prisoners.[60] Although all Jumu'ah attendance was foreclosed for certain Muslim inmates, other Muslim practices were permitted which, the Court held, was sufficient under the standard.[61] Finally, the Court held that accommodating any alternatives would unduly drain prison resources.[62] Therefore, there were no "obvious, easy alternatives" to the rule adopted by the state.[63]

D. Turner *and* O'Lone *Dissents*

In *Turner*, four Justices concurred on the marriage regulation and dissented from the ruling on the facial validity of the correspondence regulation.[64] Those same four also dissented from the holding in *O'Lone*.[65] First, these justices disagreed with the standard. They preferred a standard that varied the degree of scrutiny applied to prison regulations according to "the nature of this right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation)

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55. *Id.* at 349.

56. *Id.* at 353.

57. *Id.* at 350-51.

58. *Id.* at 351.

59. *Id.* Note, however, that in civilian working situations, the employer would have a duty to reasonably accommodate the sincerely held religious beliefs of the employee, as long as there were no undue hardships on the employer's business. *See* 42 U.S.C. § 2000e(j) (1982) and Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

60. O'Lone v. Estate of Shabazz, 482 U.S. 342, 352 (1987).

61. *Id.*

62. *Id.* at 352-53.

63. *Id.* at 353 (quoting Turner v. Safley, 482 U.S. 78, 93 (1987)).

64. *See Turner*, 482 U.S. at 100 (separate opinion of Justice Stevens, with whom Justices Brennan, Marshall, and Blackmun concurred).

65. O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987).

on the exercise of that right."[66] Under this alternative standard, if the exercise of the asserted right is not "presumptively dangerous" and if the prison has completely deprived prisoners of the right, then prison officials would be required to demonstrate that the restriction furthers an "important governmental interest" and that the restriction is limited to the extent necessary to effectuate that interest.[67]

Thus, in *O'Lone*, the dissenters would have held for the prisoners because many alternatives existed to denying inmates on work detail the right to attend Jumu'ah.[68] Further, since the regulation worked a complete deprivation of important Muslim religious practices, higher scrutiny would apply.[69]

The application of the more stringent standard, however, was not the focus of the dissent in *Turner*.[70] With respect to the correspondence restrictions, the dissent stated that "the actual showing that the court demands of the State in order to uphold the regulation" is far more important to the outcome of a prisoners' rights case than the standard of review adopted by that court.[71] Nevertheless, the *Turner* dissent attacked the "open-ended reasonableness standard" utilized by the majority because it made 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 the evidence that the restrictions are needed to further an important governmental interest."[72] Instead of findings of fact describing actual security risks, the dissent argued that the majority opinion permits the "disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security reason."[73]

The dissent demonstrated that the inmates in *Turner* attacked the correspondence regulation as it was applied,[74] while the

66. *Id.* at 358 (Brennan, J., dissenting) (quoting Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985)).

67. *O'Lone*, 482 U.S. at 358 (Brennan, J., dissenting).

68. *See id.* at 363-67.

69. *Id.* at 359.

70. Turner v. Safley, 482 U.S. 78, 100 (1987) (Stevens, J., dissenting).

71. *Id.*

72. *Id.* at 101 n.1.

73. *Id.* at 100-101.

74. *Id.* at 102.

majority, viewing it mainly as a facial challenge,[75] chose to remand for analysis of the "applied" arguments.[76] The dissent showed that the evidence of escape concerns and other security problems was "backed only by speculation,"[77] and that the Court was markedly inconsistent in its analysis of the correspondence restrictions as compared with the marriage ban that it did strike down.[78]

E. Thornburgh

The Court revisited this debate during this past term in *Thornburgh v. Abbott*.[79] At issue was the validity of the Federal Bureau of Prisons regulations authorizing prison officials to exclude incoming publications from the institutions.[80] The regulation was affirmed on its face, but the case was remanded for trial on the application of the rule to the 46 publications excluded by prison officials.[81]

Justice Blackmun, in the minority on *Turner* and *O'Lone*, wrote the opinion for the Court.[82] His opinion makes it clear that the prison regulation was attacked both on its face and as applied,[83] a distinction glossed over by the majority in *Turner*. He states that the majority adopts the *Turner* standard in this case "with confidence . . . [that] a reasonableness standard is not toothless."[84]

He rejects application of the *Martinez* standard to these incoming publications even though the censorship clearly impacts on

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75. Turner v. Safley, 482 U.S. 78, 99 (1987).

76. *Id.* at 100.

77. *Turner*, 482 U.S. at 109 (Stevens, J., dissenting).

78. *Id.* at 112-13.

79. Thornburgh v. Abbott, 109 S. Ct. 1874 (1989).

80. *Id.* at 1877. In part, the regulations state that the "Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval." 28 C.F.R. § 540.70(a) (1989). "The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (1989). *See also Thornburgh*, 109 S. Ct. at 1877 n.5.

81. *Thornburgh*, 109 S. Ct. at 1884-85. The Court's previous, more deferential standard continues to apply to regulations concerning outgoing correspondence to non-prisoners. *Id.* at 1879. That standard, set out in Procunier v. Martinez, 416 U.S. 396 (1974), required the practice to further an important governmental interest "unrelated to the suppression of expression." *Id.* at 413. The regulation must impose no greater restriction to expression than is necessary to protect the governmental interest. *Id.*

82. *Thornburgh*, 109 S. Ct. at 1876.

83. *Id.*

84. *Id.* at 1882 (quoting Pet. for Cert. 17, n.10).

the rights of nonprisoners to communicate.[85] *Martinez* is specifically limited by the *Thornburgh* decision to "regulations concerning outgoing correspondence."[86] Security implications for outgoing correspondence are of lesser magnitude than regulations governing material coming into the prison.[87]

Blackmun applied the four factors from *Turner*. The first factor is satisfied by the Bureau of Prisons censorship regulations since the regulations are supported by security concerns, a purpose "central to all other corrections goals."[88] The Court also holds that the regulations are "neutral" even though content is weighed in the determination of what to censor.[89] Under the rule, prison officials may censor only where it serves an important governmental interest unrelated to the suppression of speech.[90] The second factor is also satisfied since the right at issue must be viewed expansively.[91] Though the Bureau of Prisons rule completely deprives inmates of access to certain publications, this factor is satisfied because inmates still have access to many other publications not affected by the regulations.[92]

The third factor, the impact of accommodation on others, is also satisfied.[93] Only publications found to be "potentially detrimental to order and security" are to be excluded by the warden.[94] The "prospect" of a "ripple effect" caused by circulation of such material impacts on the safety of other staff and inmates.[95] Finally, the rule is not seen as an "exaggerated response" since no easy alternative was proposed by the plaintiff.[96] The Court applies this conclusion even to the "all-or-nothing" rule, which permits the prison officials to exclude an entire publication even if only one page is determined to pose the potential threat.[97]

In dissent, Justices Stevens, Brennan, and Marshall are not satisfied. The *Turner* standard itself is still under attack: "[T]he

85. *Thornburgh*, 109 S. Ct. at 1881.
86. *Id.*
87. *Id.*
88. *Id.* at 1882 (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974)).
89. *Thornburgh*, 109 S. Ct. at 1882.
90. *Id.*
91. *Id.* at 1883.
92. *Id.* at 1884.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

Court applies a 'manipulable' reasonableness standard to a set of regulations that too easily may be interpreted to authorize arbitrary rejections of literature addressed to inmates."[98] The dissent urges continuation of the more demanding standard set out in *Procunier v. Martinez.*[99]

The dissent concludes that the *Turner* standard is, indeed, toothless.[100] No connection between the goal of maintaining security and such unrestrained censorship is presented by these regulations. The dissent insists that the regulations permitting publications to be rejected if the contents are "detrimental" to "security, good order or discipline," or "might facilitate criminal activity" provide no check on or guidance to prison administrators making censorship decisions.[101] The dissent takes particular issue with the court's approval of the "all-or-nothing" rule, finding no burden to administrators if they simply clip the offending material rather than toss the entire publication: "[I]f, as the regulations' text seems to require, prison officials actually read an article before rejecting it, the incremental burden associated with clipping out the offending matter could not be of constitutional significance."[102]

F. Turner, O'Lone, Thornburgh *and Overbreadth*

In drawing the distinction between facial invalidity and invalidity as applied, the Court is modifying traditional overbreadth doctrine without mentioning the doctrine at all. The Court, in *Martinez*, struck down the California correspondence/censorship rules as overbroad on their face.[103] In that case, the Court stated that even 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.*"[104]

In *Thornburgh*, the Court noted that *Martinez* had held regulations "facially overbroad,"[105] but in restricting the application

98. *Id.* at 1874, 1889 (Stevens, J., dissenting).
99. *Id.*
100. *Id.* at 1892 n.18.
101. *Id.* at 1889.
102. *Id.* at 1892.
103. Procunier v. Martinez, 416 U.S. 396, 415 (1974).
104. *Id.* at 413-14 (emphasis added).
105. Thornburgh v. Abbott, 109 S. Ct. 1874, 1881 n.11 (1989).

of *Martinez*, no discussion of that doctrine is pursued. This failure to explore the doctrinal foundation of the First Amendment's application to the case is serious. Already earmarked as an exception to normal First Amendment doctrine, prison cases will completely escape a constitutional tether if the basic constitutional rules are not stated before exceptions are defined.[106]

A law or regulation challenged under the First Amendment is invalid on its face under the overbreadth doctrine if it "does not aim specifically at evils within the allowable area of control [by the government] but ... sweeps within its ambit other [constitutionally protected] activities."[107] In *Broadrick v. Oklahoma*,[108] the doctrine was first extended to civil laws. In that case, the Court rejected an attack on the facial validity of a state law prohibiting civil service employees from engaging in a variety of

106. The constitutional tether may have been broken. Just before this article went to the printer, the Supreme Court issued its decision in Washington v. Harper, 110 S. Ct. 1028 (1990). In that case, the plaintiff prisoner had been forced to take psychiatric medication without first receiving a judicial hearing. The Washington Supreme Court had held that a judicial hearing was necessary before forcing medication. Harper v. State, 110 Wash. 2d 873, 759 P.2d 358 (1988). The U.S. Supreme Court rejected that view and held that the "standard of reasonableness" set out in *Turner* should be applied to these facts. The Washington Supreme Court had rejected the *Turner* standard as limited to First Amendment issues. A wholesale expansion of the *Turner* standard into areas outside the First Amendment causes prisoner claims to be decided first by where the violation has occurred, rather than by what right is at stake. Such analysis will surely dilute constitutional rights within prisons.

None of these developments, however, may affect challenges to regulations that subject inmates to discipline. Many regulations that are challenged do expose inmates to discipline in the event of violation. If the regulation fails to give fair notice to an inmate that certain conduct is prohibited, the regulation may be vulnerable under the vagueness doctrine. Laws should "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." United States v. Thompson, 603 F.2d 1200, 1203 (5th Cir. 1979).

In Adams v. Gunnell, 729 F.2d 362 (5th Cir. 1984), a prison rule that prohibited "conduct which disrupts the orderly running of the institution" was held to be vague as applied to inmates who circulated a petition alleging racial discrimination. *Id.* at 363. The doctrine was also utilized in Rios v. Lane, 812 F.2d 1032 (7th Cir. 1987), to hold a rule prohibiting gang activity vague as applied to conduct consisting of passing a note card listing radio stations and revolutionary slogans to a known gang member. *Id.* at 1034-38.

Another related theory not directly addressed by the trilogy is retaliation. Inmates who are punished in response to their exercise of First Amendment rights state a claim for relief. *See* Newsom v. Norris, 888 F.2d 371 (6th Cir. 1989); Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989). *See, e.g.*, Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441 (1989).

107. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

108. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

political activities.[109] The Court agreed that the statute could be read to reach clearly protected conduct, such as wearing a campaign button,[110] but held that such applications were insubstantial compared with the large amount of unprotected conduct that the statute legitimately reached.[111] The Court concluded that facial invalidity depended on overbreadth that was both "real" and "substantial" compared to a statute's legitimate reach.[112]

The doctrine was recently applied by the Court to strike down as facially invalid a Lakewood, Ohio, law giving the Mayor unbridled discretion to grant or deny licenses for newspaper vending boxes.[113]

The four factors set out in the *Turner* trilogy, thus, are what courts should look to when determining, in the prison context, whether overbreadth is "real" and "substantial" when compared to the legitimate reach of the challenged regulation.[114] This is essentially what the court did when it invalidated the marriage rule in *Turner*. The Court conceded that some legitimate security risks justify placing restrictions on the right of some inmates to marry.[115] However, the broad language of the regulation allowed prison officials to prohibit almost all marriages even though such prohibition would likely have no effect on the professed goal of preventing violence.[116] Furthermore, the Court held that even though rehabilitation was a legitimate penological objective, this near-complete ban on inmate marriage swept "much more broadly" than necessary.[117] The principles of overbreadth, though not stated, did guide the Court in *Turner*.

Ignoring those principles and the doctrine of overbreadth, however, led to a serious error in *Thornburgh*. The all-or-nothing aspect of the rules permitted entire publications to be seized even though only one article or picture might be objectionable.[118] Traditional overbreadth cases support the notion that the Court

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109. *Id.* at 602.
110. *Id.* at 618.
111. *Id.* at 615.
112. *Id.*
113. City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138, 2145 (1988).
114. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).
115. Turner v. Safley, 482 U.S. 78, 97 (1987).
116. *Id.* at 98.
117. *Id.*
118. Thornburgh v. Abbott, 109 S. Ct. 1874, 1884 (1989).

can, in some instances, sever those aspects of a rule which make it overbroad.[119] The all-or-nothing rule should have been severed and struck down as overbroad. Striking at least the all-or-nothing aspect of the prison rule in *Thornburgh* also would have served another purpose behind the overbreadth doctrine—reduction of the chilling effect of overbroad rules.[120] The all-or-nothing rule deters publishers from including any references to controversial themes in publications sent to prisoners for fear that entire books and magazines will be seized as a result. It also deters prisoners from subscribing to publications that might contain such themes. The rule deters the exercise of massive amounts of protected speech.

The failure to anchor its analysis in overbreadth also caused the Court in *Thornburgh* to needlessly leave open the question of whether special evidentiary burdens or burden-shifting should be utilized when applying the *Turner* test.[121] The district court had required the prison only to "articulate" a relationship between its regulations and the goal of security or other corrections purpose. Then the court shifted the burden to the plaintiffs to prove by "substantial evidence" that the challenged action was an "exaggerated response" to the problem identified by the prison.[122] No basis in the overbreadth cases exists to support this extra burden upon prisoner plaintiffs.[123]

Finally, the absence of serious discussion of the doctrinal foundation of overbreadth caused the Court, in *Thornburgh,* to provide little direction to the trial court on remand, which must determine the validity of the publication rule as applied to the publications.

The *Thornburgh* dissent discussed an article in *Labyrinth* magazine that detailed medical malpractice claims resulting in the death of inmate Joseph Jones at the federal prison in Terre Haute, Ind.[124] A copy of the magazine containing that article was

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119. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) (term "lust" could be struck from a statute without invalidating the entire statute).

120. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 552 (1985).

121. *Thornburgh,* 109 S. Ct. at 1882 n.12.

122. *Id.*

123. Another related issue under the *Turner* standard is who decides fact questions. In Siddigi v. Leak, 880 F.2d 904, 909-10 (7th Cir. 1989), this inquiry was held to be a jury question.

124. *Thornburgh,* 109 S. Ct. at 1885.

intercepted by prison officials in Marion, Ill. The officials justified the censorship based upon that portion of the rule permitting suppression of material that "would be detrimental to the good order and discipline of this institution."[125] However, Joseph Jones' story was already available within the prison.[126] His case came before the Supreme Court in 1980, and the Court's decision was available in the prison library. The question is, if the regulation relied upon by the prison officials is facially valid under *Thornburgh,* what is the lower court supposed to consider in reviewing the regulation as applied to censorship of the *Labyrinth* article?

The Court did provide a small amount of guidance by footnote in *Thornburgh*:

> Respondents have argued that the record does not support the conclusion that the exclusions [of publications] are in fact based on particular events or conditions at a particular prison; they contend that variability in enforcement of the regulations stems solely from the censors' subjective views.... These contentions go to the adequacy of the regulations as applied, and will be considered on remand.[127]

Thus, in challenging the exclusion of a particular publication, prisoner plaintiffs in *Thornburgh* will be able to bring in past practices and inconsistent current practices. It is inconsistent, for example, for a prison to make copies of Joseph Jones' case available to prisoners in a legal publication while censoring a similar account in a magazine. Overbreadth provides a way to evaluate such an inconsistency. First, the rule as applied clearly chills free speech since the magazine was seized. Second, the material clearly was protected speech. Third, the record (consisting, *e.g.*, of evidence of the handling of this article and similar articles) demonstrates no basis for concluding that the material would be "detrimental ... to good order."[128]

Deference shown to the opinions of prison administrators must be less when the rule is challenged "as applied." The application of the rule should be justified by the actual evidence surrounding

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125. *Id.* at 1886. *See also* 28 C.F.R. § 540.71(b) (1989).

126. The lawsuit by Jones' mother was addressed by the United States Supreme Court and reported as Carlson v. Green, 446 U.S. 14 (1980).

127. *Thornburgh,* 109 S. Ct. at 1883 n.15.

128. 28 § C.F.R. 540.71(b) (1989).

the challenged action and not simply by the undocumented conclusion of prison officials.

Under this formulation, a prison rule can meet the *Turner* standard on its face but "sweep too broadly" as applied in light of the relevant past and present practices within the prison. Evidence weighed under this overbreadth standard will not be easily "manipulable."

III. POST-*TURNER* CASES IN THE SIXTH CIRCUIT COURT OF APPEALS

Most cases challenging prison rules address the application of the rule to the plaintiff. Some raise arguments that suggest facial invalidity as well. Thus, courts must be vigilant to hear evidence relating to the actual enforcement of the rule by the defendant prison officials in addition to arguments raising the application of the four *Turner* factors to a prison rule. A good example of a thoughtful and correct treatment of a First Amendment challenge after *Turner* is represented by *Whitney v. Brown*.[129] The Sixth Circuit struck down a 1985 Michigan prison policy that prohibited Jewish inmates from traveling between complexes at the State Prison of Southern Michigan to attend weekly Sabbath services and annual Passover services.[130] The Sixth Circuit issued a stern warning to prison administrators that a probing look at the evidence is required under the *Turner-O'Lone-Thornburgh* trilogy of cases:

> Perhaps the greatest weakness in the prison officials' arguments is their misunderstanding of *Turner* and *O'Lone* as holding that federal courts will uphold prison policies which can somehow be supported with a flurry of disconnected and self-conflicting points. They seem to read *Turner* and *O'Lone* as saying that anything prison officials can justify is valid because they have somehow justified it. In an argument typical of their conclusory approach to the problem, the prison officials maintain that the Passover Seders should be banned because "[a]ny time the normal routine of an institution is altered, the good order and security of that facility are potentially compromised." *The fact remains, however, that prison officials do not set constitutional standards by fiat.*[131]

129. Whitney v. Brown, 882 F.2d 1068 (6th Cir. 1989).
130. *Id.* at 1078.
131. *Id.* at 1074 (citation omitted) (emphasis added).

Both the trier of fact and the appellate court in that case took great care to evaluate the evidence in deciding whether the prison was justified in abandoning its 45-year rule permitting Sabbath services. The analysis included application of the four factors as well as a review of the history of the application of the rule in previous years.[132]

The Sixth Circuit has upheld prison regulations under *Turner* after a less thorough but nonetheless fact-based review of the issues. In *Pollock v. Marshall*,[133] the court upheld a hair-length regulation as applied to a Lakota Indian inmate.[134] In *Ward v. Washtenaw County Sheriff's Dept.*,[135] the court upheld a rule that permitted inmates to receive periodicals only from publishers.[136]

IV. FACTS—THE PROTECTION FROM A "MANIPULABLE" STANDARD

The lesson for trial courts, from the trilogy of cases and their application in this Circuit, is careful review of the evidence. Great deference will be given to the trial court's factual findings.[137] Since most of the evidence is in the hands of the prison administrators, discovery rulings must make those records available to the plaintiff. Prison rules are normally found in state statutes, state regulations, post orders (standing orders that are posted at various stations in the prison), and institution handbooks, all of which should be open to discovery.

Evidence of past practices and the application of rules generally can be ascertained from institution records. Logs are normally maintained on all ranges of activities. Count sheets normally record unusual incidents; inmate grievances and institution responses to grievances are also available. Many times, wardens maintain files on all of the complaints they have received from prisoners and their responses to these complaints.

All prison personnel have files covering all details of their employment, training, and discipline on the job. Inmates also

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132. *Id.* at 1073-74.

133. Pollock v. Marshall, 845 F.2d 656 (6th Cir. 1988).

134. *Id.* at 659-60. *See also* Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989) (upheld one-inch beard rule).

135. Ward v. Washtenaw County Sheriff's Dep't, 881 F.2d 325 (6th Cir. 1989).

136. *Id.* at 329.

137. Kendrick v. Bland, 740 F.2d 432, 434 (6th Cir. 1984).

have extensive files that include data concerning discipline, medical care, housing unit activities, employment, education, and counseling. Discipline is normally initiated with a written charge or "ticket," followed by documents from a disciplinary board that often records its hearings. All of these written records and audio tapes are discoverable under Federal Rule of Civil Procedure 26, although a protective order may be required for certain information that should not be freely available to inmates in the institution.

In addition to the records described above, evidence of past practices and pre-litigation reasons for rules can be found in accreditation surveys, studies done for administrative reasons, investigations by law enforcement agencies in related cases, responses to inquiries from legislators, and affidavits presented to courts in previous prisoner cases dealing with similar issues.

Expert witnesses are very important to the presentation of any case in this area. All four factors identified by *Turner* suggest the need for an expert, especially with respect to the question of accommodations and alternatives. Note that in *Turner* the Court compared the Missouri rules under scrutiny to those regulating similar conduct in the Federal Bureau of Prisons. Under federal regulations, correspondence was restricted in similar fashion but the right to marry was more readily exercised than in Missouri.[138]

V. CONCLUSION

In its most recent trilogy of cases, the Supreme Court has established a standard for the review of prison regulations challenged by prisoners on First Amendment grounds. The Court, confident that the standard is not "toothless," has invalidated one regulation under the standard and affirmed three others. Interestingly, however, two of those three were remanded to determine whether they were unconstitutional as applied. Some theory is needed through which courts can test all of the actual applications of these contested regulations to particular facts. This article has argued that the overbreadth doctrine serves that purpose. Further, it is evident that the *Turner* factors and the reasonableness test are merely false teeth unless a solid eviden-

138. Turner v. Safley, 482 U.S. 78, 91-98 (1987).

tiary record is presented. Trial courts must insist on such a record to ensure that First Amendment challenges to prison regulations receive the greatest scrutiny possible.