

**TURNER, THORNBURGH, AND AN INMATE’S RIGHT TO
READ: THE CHELSEA MANNING CASE AND POSSIBLE
SOLUTIONS TO BOP AND USDB REGULATION
LANGUAGE**

INTRODUCTION..... 635

I. HISTORY AND BACKGROUND 639

 A. Incoming Publications to Federal Prisons and 28 C.F.R.
 § 540.71 639

 B. The Doctrine of Judicial Deference to Prison Officials 640

 1. *Martinez* and the “No Greater Than Necessary” Test 641

 2. *Turner’s* “Reasonable Relation” Test and Extension by
 Thornburgh..... 642

 3. The Evidentiary Circuit Split 644

II. CURRENT INTERPRETATIONS OF BOP AND USDB BOOK
 REQUEST REGULATIONS 646

 A. Appealing a Book Request Denial..... 647

 B. Unequal Application of *Turner* Among Facilities 648

 C. Unequal Application of *Turner* and *Thornburgh*
 Between Prisoners in a Given Facility 650

III. UNIVERSAL BANNED PUBLICATION LIST AND PROPOSED
 28 C.F.R. WORDING 652

 A. Texas Department of Criminal Justice Policy 653

 B. Rewording § 540.71 and Other Proposed Federal Solutions 654

IV. PUBLIC UTILITY OF THE UNIVERSAL BANNED BOOK LIST..... 656

 A. Maintaining the Right to Expression 657

 B. Legal Education and Information Gathering 657

 C. Lessened Judiciary and Penological Burdens 659

 1. Improved Efficiency of Book Request Process..... 659

 2. Decreasing the Rate of Recidivism 660

V. CONCLUSIONS 661

INTRODUCTION

The United States Army Military District of Washington convicted Chelsea Manning of contravening provisions of the federal Espionage Act¹ in 2010 after Manning released classified military and diplomatic

1. Espionage Act of June 15, 1917, Pub. L. No. 24, ch. 30, 40 Stat. 217 (1917) (codified at 18 U.S.C. §§ 792–99 (2012)) (“An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.”).

documents to WikiLeaks.² While some commentators describe “the largest dump of classified information in American history” as dangerous and severely treasonous,³ others applaud Manning’s support of government transparency, prison reform, and transgender equality.⁴ Incarcerated in a maximum-security prison, Manning faced solitary confinement for keeping prohibited publications in her cell without filing a book request.⁵ Despite being commuted by President Obama in January 2017,⁶ the case represents a recent concern lodged at both the United States Disciplinary Barracks (USDB) rules and the Bureau of Prisons (BOP) regulations. The concern is the ambiguity of how prison administrators may accept or deny book requests on a case-by-case basis.

Of particular interest is 28 C.F.R. § 540.71, which governs how BOP wardens review individual book requests.⁷ The provision gives prison officials the subjective freedom to determine which materials to ban from federal inmates, resulting in inconsistencies throughout the federal prison

2. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST (Aug. 21, 2013), <http://wapo.st/19IK4tA>.

3. See, e.g., James Kirchick, *Bradley Manning Gets Off Easy*, N.Y. DAILY NEWS (July 30, 2013), <http://www.nydailynews.com/opinion/manning-easy-article-1.1413222> (Kirchick compares Manning to NSA whistleblower Edward Snowden, arguing that the conviction sends “a clear message to any soldier or government employee . . . thinking of arrogating to himself the power to determine what information the world has a ‘right to know.’”).

4. Chase Strangio, *Op-Ed: Chelsea Manning’s Plight Highlights Trans Prison Abuses*, ADVOCATE (Aug. 24, 2015), <http://www.advocate.com/commentary/2015/08/24/op-ed-chelsea-mannings-plight-highlights-trans-prison-abuses>. Strangio, a Staff Attorney at the American Civil Liberties Union, is Manning’s lawyer and a transgender advocate for prison reform. Denise Hassanzade Ajiri, *Attorney Credits Public with Sparing Chelsea Manning Solitary Confinement (+video)*, CHRISTIAN SCI. MONITOR (Aug. 19, 2015), <http://www.csmonitor.com/USA/Justice/2015/0819/Attorney-credits-public-with-sparing-Chelsea-Manning-solitary-confinement-video>; Chase Strangio, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/bio/chase-strangio> (last visited May 3, 2017).

5. Marina Koren, *The Books that Prison Officials Don’t Want Chelsea Manning to Read*, THE ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/national/archive/2015/08/chelsea-manning-books-reading-prison/401801>.

6. Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html?_r=0.

7. William Mark Roth, *Turner v. Safley: The Supreme Court Further Confuses Prisoners’ Constitutional Rights*, 22 LOY. L.A. L. REV. 667, 668–69 (1989) (noting that lower courts have leeway to manipulate the distinction between prisoners and non-prisoners as a First Amendment issue). The highest-ranking administrator of the USDB is not the “Warden,” but the 15th Military Police Brigade Commander (the “Commandant”), who serves under the direction of the Provost Marshal General of the Army Corrections Command in Washington, D.C. Jennifer Walleman, *15th MP Bde. Welcomes New Commander*, FORT LEAVENWORTH LAMP (Jul. 31, 2014), <http://www.ftleavenworthlamp.com/article/20140731/News/140739878>. For the purposes of this Note, the Commandant will be included within the general term “warden” used by the BOP.

system.⁸ Some correctional facilities keep relaxed systems that only meet the minimum requirements of § 540.71, while others refuse “to allow any books whose content includes anything legal, medical or contains violence.”⁹ Affording prison officials the freedom to decide which materials to ban from federal inmates creates inconsistencies in the interpretation of § 540.71 throughout the federal prison system. This has a significant effect on the level of First Amendment protection afforded from institution to institution, and hampers judicial guidance to administrators.

The Supreme Court keeps a doctrine of deference toward incoming publications as a First Amendment issue.¹⁰ Holdings maintain that prison administrators are in the best position to assess the reasonability of correspondence and book requests.¹¹ Approvals of these requests are largely left to the discretion of the warden, allowing individual prisons to craft their own policies within the confines of BOP and USDB regulations.¹² Institutional rules are flexible depending on individual prisoner, sentence, or behavior. The current standard from *Turner v. Safely* and *Thornburgh v. Abbott* requires regulations that bar the receipt of written materials to be reasonably related to legitimate security interests.¹³ The current BOP framework allows wardens to deny a request if it is “determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.”¹⁴ While the USDB—where Manning was incarcerated—is a military prison in Fort Leavenworth, Kansas, outside the strict purview of the BOP, the USDB contains essentially the same language as part of the Military Correctional Complex Regulations.¹⁵ This

8. Roth, *supra* note 7, at 670.

9. Andrew Losowsky, *Prison Books Ban: The Censorship Scandal Inside America's Jails*, HUFFINGTON POST (Oct. 3, 2011), http://www.huffingtonpost.com/2011/10/02/prison-books-ban_n_991494.html; see also TEX. CIVIL RIGHTS PROJECT, BANNED BOOKS IN THE TEXAS PRISON SYSTEM: HOW THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE CENSORS BOOKS SENT TO PRISONERS 52 (2011), https://www.texascivilrightsproject.org/en/wp-content/uploads/2016/04/TCRP_Prison_Books_Report.pdf (explaining that Texas censors books with content relating to prison conditions and noting that there is “no legitimate reason” prisoners should not be able to read books about prison conditions).

10. *Turner v. Safley*, 482 U.S. 78, 85 (1987) (Writing for the majority, Justice O'Connor describes prison administration as “a task that has been committed to the responsibility of [the executive and legislative] branches, and separation of powers concerns counsel a policy of judicial restraint.”).

11. *Id.* at 89 (arguing that subjecting administrators to strict scrutiny under the First Amendment “would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration”).

12. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (“The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations . . .”).

13. *Turner*, 482 U.S. at 78; *Thornburgh v. Abbott*, 490 U.S. 401, 401 (1989).

14. 28 C.F.R. § 540.71(b) (2016).

15. *Diamond v. Grey*, 2012 WL 1415527, at *3 (rejection of inmate mail or publications, “either incoming or outgoing, on the basis of content, is authorized only when it is determined to be

gives prison officials the subjective freedom to determine which materials to ban from federal inmates, resulting in inconsistencies throughout the federal prison system.

This Note sheds light on the constitutional and enforcement implications of current BOP regulations on book requests for federal inmates, and it proposes an alternative to these regulations based on a federally recognized banned publication list. It will examine the existing precedent surrounding the deference given to prison officials (the “hands-off” approach), and the historical trend toward this doctrine.¹⁶ Part I outlines the regulatory and case law histories alongside the treatment of book request rules over the past several decades. It will detail the constitutional tests used in First Amendment challenges. Part II will state the primary issues, including the lack of guidance given to wardens and the public, the arbitrary categorization of publications, and the unequal application between inmates of the same status. Part III proposes new wording to the BOP rules and the creation of a national banned book registry for federal correctional facilities. A detailed list can provide guidance, thereby evenly establishing the evidentiary burden on federal prison officials throughout the U.S. Part IV will demonstrate the public policy benefits of these changes to inmates, wardens, the public at large, and the interests of fairness and justice.

A guided, analytical approach to prison publication requests would eliminate the pressure placed on wardens and inmates to know what constitutes objectionable material. Education and open access to information in the prison system can encourage self-improvement and reduce recidivism. Lower courts will be equipped with the sense of direction necessary to rule on delicate constitutional questions. By creating a level playing field between prison policies, sentences for the same crime are served equally regardless of facility.

detrimental to the safety, security, and good order or discipline of the USDB . . .”) (quoting U.S. Disciplinary Barracks Regulation 28-1(c), previously amended and renamed as Military Correctional Complex Regulation 28-1(c) (2011)).

16. *See infra* note 31 (examining the relationship between judicial application of the hands-off doctrine and the number of constitutional challenges brought in federal court).

I. HISTORY AND BACKGROUND

A. Incoming Publications to Federal Prisons and 28 C.F.R. § 540.71

The BOP first promulgated § 540.71 in 1979, and the USDB rules were amended to include the language in 2009.¹⁷ The publication request is deemed necessary “to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity.”¹⁸ Wardens are permitted to reject a publication only on these grounds; rejections are not permitted solely based on “religious, philosophical, political, social or sexual” content, or because the content is “unpopular or repugnant.”¹⁹ Subsection (b) provides a non-exhaustive list of publications that may be rejected, including depictions of violence, drugs, escape methods, sexually explicit material, or activities that may cause group disruption.²⁰ Wardens cannot establish their own lists of excluded publications, and therefore must review requests on a case-by-case basis.²¹ In addition, the wardens must advise both the inmate and the sender of unacceptable material of the reasons for rejection.²²

Congress passed the Ensign Amendment in 1996 as part of the Omnibus Consolidated Appropriations Act of 1997.²³ The Amendment prohibits inmates from receiving “commercially published information or material that is sexually explicit or features nudity” when statutory restrictions are put in place,²⁴ with the exception of materials containing nudity “illustrative of medical, educational, or anthropological content.”²⁵ The Government asserts that the purpose of the Amendment is to further prisoner rehabilitation.²⁶ The Supreme Court has recognized the legitimacy

17. Control, Custody, Care, Treatment, and Instruction of Inmates, 44 Fed. Reg. 38,254 (June 29, 1979) (to be codified at 28 C.F.R. pts. 540, 541, and 543); *infra* note 12.

18. 28 C.F.R. § 540.70 (2016).

19. *Id.* § 540.71(b).

20. *Id.*

21. *Id.* § 540.71(c).

22. *Id.* §§ 540.71(d)–(e).

23. 28 U.S.C. § 530C(b)(6) (2012); 28 C.F.R. § 540.72(a). Federal District Court Judge Stanley Sporkin, who ruled the Ensign Amendment unconstitutional before its appeal to the D.C. Circuit, described the law as a “hastily-drafted statute tagged on to a massive budget bill,” criticizing Congress for not considering its constitutional implications. *Amatel v. Reno*, 975 F. Supp. 365, 369 (D.D.C. 1997), *overruled by* *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998).

24. 28 U.S.C. § 530C(b)(6).

25. 28 C.F.R. § 540.72(b)(3).

26. *See, e.g.*, 142 CONG. REC. H8261 (daily ed. July 24, 1996) (“Congress should not be fueling the sexual appetites of offenders, especially those who have been convicted of despicable sex offenses against women and children. Magazines that portray and exploit sex acts have no place in the

of the interest, as rehabilitation is a chief goal of the penal institution as a whole.²⁷

B. *The Doctrine of Judicial Deference to Prison Officials*

The Supreme Court affords deference to prison officials in interpreting federal prison regulations as a First Amendment issue.²⁸ The Court acknowledges that it is “ill equipped” to handle the delicate security interests necessary for a functioning and safe correctional environment.²⁹ The trend toward deference snowballed after *Turner* established the current “reasonable relationship” test for incoming prison correspondence.³⁰ Federal courts now maintain a “hands-off” policy for the purpose of guiding the public and limiting the number of First Amendment challenges.³¹ This guiding principle remains controversial to scholars and constitutional attorneys, many aiming to make “the government more responsible to the governed.”³² Considering the extensive case law surrounding this issue from *Turner* and its progeny, it seems doubtful that this trend will reverse in the near future. However, current circuit splits

rehabilitative environment of prisons, nor should we pay [BOP] staff to distribute them.”) (statement of Rep. Ensign).

27. See, e.g., *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citing *Pell v. Procunier*, 417 U.S. 817, 822–23 (1974)) (“The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security.”).

28. See *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)) (“Accommodating respondents’ demands [for visitation] would . . . impair the ability of corrections officers to protect all who are inside a prison’s walls. When such consequences are present, we are ‘particularly deferential’ to prison administrators’ regulatory judgments.”).

29. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), *overturned by Thornburgh v. Abbott*, 490 U.S. 401 (1989). *Martinez* was among the first cases to apply a deferential approach to First Amendment challenges in the prison context, despite its eventual overturning in *Thornburgh*. See *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989) (The *Thornburgh* court “recognized that *Martinez* was too readily understood as failing to afford prison officials sufficient discretion to protect prison security.”).

30. *Turner v. Safley*, 482 U.S. 78, 91 (1987).

31. See Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1196–97 (1997) (noting that the judicial hands-off attitude is not only meant to give control to prison administrators, but also to reduce the number of constitutional challenges brought by federal inmates). Instead, the Supreme Court finds that only “the type of atypical, significant deprivation” could lead to a constitutional liberty interest. *Sandin v. Conner*, 515 U.S. 472, 486 (1995).

32. Arthur S. Miller, *In Defense of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT 167, 185 (Stephen C. Halpern & Charles M. Lamb eds., 1982). See also Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1507–08 (2004) (claiming that “the culture of deference severely impinges on courts’ ability to intervene,” and prevents constitutional jurisprudence from “evolving with prison conditions.”).

regarding evidentiary burdens and the appropriate standard of review in *Turner* challenges led many to implore the Court to resume its “proper role as fact-finder.”³³ Otherwise, it may be necessary to look at the regulatory language itself and determine how to construct concrete provisions that satisfy government interests and protect the constitutional rights of inmates.³⁴

1. *Martinez* and the “No Greater Than Necessary” Test

In the late 1970s, several inmates brought a class action suit challenging the constitutionality of the California Department of Corrections’ mail censorship regulations.³⁵ Wardens rejected mail in which prisoners “unduly complain[ed], magnif[ied] grievances, or behave[d] in any way which might lead to violence.”³⁶ The Correctional Department Director’s Rules contained a particularly damning assertion: “The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges.”³⁷ The Supreme Court struggled to find a link between the State’s vague terminology and penological interests.³⁸ Justice O’Connor disagreed with the Director, and thus established the now-defunct “no greater than necessary” test to invalidate any restriction on inmate correspondence if “its sweep is unnecessarily broad.”³⁹ The scope of these Rules did not just implicate prisoners themselves; the *Martinez* opinion narrowed the constitutional concerns to the rights of outsiders sending and receiving correspondence.⁴⁰ The legal status of inmates therefore did not affect the standard of review,

33. Adam K. Spease, *Looking the Other Way: Porn, “Playhouse” Prisons, and the Culture of Judicial Deference*, 91 IOWA L. REV. 1117, 1120 (2006) (citing *Ramirez v. Pugh*, 379 F.3d 122, 131 (3d Cir. 2004)); *Amatel v. Reno*, 156 F.3d 192, 195 (D.C. Cir. 1998)).

34. See Michael J. Yaworsky, *Validity and Construction of Prison Regulation of Inmates’ Possession of Personal Property*, 66 A.L.R. 4th 800, 800 (1988) (collecting and discussing current cases involving prison regulations in general, with examples of valid regulatory wording and construction).

35. *Procunier v. Martinez*, 416 U.S. 396, 398 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

36. *Id.* at 399 n.2 (quoting Director’s Rule 1201).

37. *Id.* at 399 n.1 (quoting Director’s Rule 2401).

38. *Id.* at 416.

39. *Id.* at 413–14.

40. *Id.* at 408–09 (“The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him. In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.”).

as the Court did not consider the rights of prisoners and free persons as fundamentally different.⁴¹

The *Martinez* majority affirmed the judgment of the Northern District of California, which concluded that the prisoner mail regulations at issue swept too broadly.⁴² The Court did not understate the importance of prison security and the need for stringent correspondence policies, but found that the regulation was not narrowly drawn to reach only that material which poses a security concern.⁴³ Despite holding the regulation invalid, the *Martinez* holding in dicta introduced the theory of judicial restraint for First Amendment challenges by federal and state inmates.⁴⁴ This concern played a major part in future Supreme Court decisions, and ultimately led to the Court overturning *Martinez*.⁴⁵

2. *Turner's* "Reasonable Relation" Test and Extension by *Thornburgh*

Almost a decade after *Martinez*, Missouri inmates brought another class action suit challenging the constitutionality of regulations promulgated by the State Division of Corrections, focusing on the policies of the Renz Correctional Institution in Cedar City.⁴⁶ The State prohibited inmate-to-inmate correspondence and prevented prisoners from marrying each other in absence of "compelling reasons" in the eyes of the prison superintendent.⁴⁷ The Supreme Court disagreed with the Eighth Circuit's use of the strict scrutiny standard of review, explaining that it would "seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."⁴⁸ The majority found the marriage regulation unconstitutional, as it denied inmates the fundamental right to marry

41. *Id.* at 409.

42. *Martinez v. Procnier*, 354 F. Supp. 1092, 1097–99 (N.D. Cal. 1973), *aff'd* *Procnier v. Martinez*, 416 U.S. 396 (1974).

43. *Martinez*, 416 U.S. at 416.

44. *Id.* at 405 ("[Prisons] require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."). *See also* *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979) (holding that although prisoners do not surrender their constitutional rights upon incarceration, institutional issues of security and discipline are best addressed via the "professional expertise of corrections officials"). In *Bell*, the Court upheld a rule that prohibits incoming publications from any source except publishers, book clubs, and bookstores, finding that constitutional and statutory judgment is "confided to officials outside of the Judicial Branch of Government." *Id.* at 562. This Rule is applied—albeit less stringently—to paperback books and magazines by the BOP. 28 C.F.R. §§ 540.71(a)(1)–(4) (2016).

45. *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989).

46. *Turner v. Safley*, 482 U.S. 78, 81 (1987).

47. *Id.* at 82.

48. *Id.* at 89.

guaranteed in *Loving v. Virginia*,⁴⁹ but upheld the correspondence provision as a reasonably valid advancement of institutional security interests.⁵⁰

In the *Turner* majority opinion, Justice O'Connor severely limited the applicability of the *Martinez* standard by noting that the correspondence provision did not affect non-prisoners.⁵¹ Instead, the Court established a four-part rule for judging First Amendment challenges in the prison context.⁵² First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."⁵³ Next, courts must consider whether alternative means exist to exercise the right to free expression.⁵⁴ The majority again stressed the importance of judicial deference in order to prevent a negative "ripple effect" on inmates or prison employees; this impact is the third *Turner* factor.⁵⁵ Finally, because the correspondence regulation did not implement the rights of the non-incarcerated public and has no feasible regulatory alternatives, the Court found the restriction facially valid.⁵⁶ This four-part balancing test is used to this day by examining a challenged provision's relationship to a legitimate penological interest, its implication on inmates' rights to exercise freedom of speech, its impact on the prison system, and the existence of adequate alternative policies.⁵⁷

Another constitutional challenge soon surfaced that addressed the rights of the free public. *Turner v. Safley* only applied to the rights of prisoners to marry and the exchange correspondence, and predated major amendments to the BOP and USDB rules.⁵⁸ In *Thornburgh v. Abbott*, the Supreme Court finally addressed 28 C.F.R. § 540.71(b) and the authorization of prison officials to reject publications as a matter of institutional security.⁵⁹ Justice Blackmon explicitly overruled *Martinez*, lowering the standard of review for situations pertaining to correspondence

49. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

50. *Turner*, 482 U.S. at 93.

51. *Id.* at 85 (citing *Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974)).

52. *Id.* at 89–91.

53. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

54. *Id.* at 90.

55. *Id.*

56. *Id.* at 90–91, 99.

57. *See, e.g., McKune v. Lile*, 536 U.S. 24, 24 (2002) (sustaining constitutionality of a sexual abuse treatment program under the Fifth Amendment, finding that it does not amount to "compelled self-incrimination"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987) (holding that prison officials acted reasonably in precluding Islamic inmates from attending weekly Friday religious services); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (finding constitutional under the First and Fifth Amendments a prison regulation barring inmates with two substance abuse violations from family visitation).

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

59. *Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989) (citing 28 C.F.R. § 540.71(b) (2016)).

with non-incarcerated persons to *Turner*'s four-part "reasonable relationship" test.⁶⁰ The Court countered the "least restrictive means" analysis that was typically—and in the Court's view, incorrectly—applied by lower courts by not addressing the need for administrative discretion.⁶¹ The majority upheld the BOP regulation as content-neutral and rationally related to a legitimate government objective.⁶² The "delicate problems of prison management," in the eyes of the Court, require the expertise of prison administrators, who are the first line of defense in regulating inmates' relations with the outside world.⁶³

3. The Evidentiary Circuit Split

The judiciary inconsistently applies the *Turner* standard due to the unanswered question of its factual requirements. There is currently a circuit split regarding evidentiary burdens in *Turner* challenges, particularly as applied to the Ensign Amendment's prohibition on sexually explicit material.⁶⁴ In *Ramirez v. Pugh*, the Third Circuit held that an adequate factual basis is required to resolve a constitutional issue regarding the Ensign Amendment, stating that an evidentiary record is needed to establish the four *Turner* factors.⁶⁵ The majority found only one exception to this rule, admitting that evidence is not necessary to evaluate the four prongs when the link between the regulation and the government interest is "sufficiently obvious."⁶⁶ An individualized, limited distribution is allowed under this interpretation, as the mere "existence of a possible 'ripple effect' on the rehabilitation of prisoners legitimately targeted by the Ensign Amendment could reasonably be disputed" with an adequate factual basis and a case-by-case analysis of a prison's resources.⁶⁷ This precedent

60. *Id.* at 413–14 (holding that courts must not construe *Martinez* as distinguishing between incoming correspondence from prisoners and non-prisoners, and that the "Court accomplished much of this step when it decided *Turner*").

61. *Id.* at 410–11, 414.

62. *Id.* at 419.

63. *Id.* at 407–08.

64. *Ramirez v. Pugh*, 379 F.3d 122, 131 (3d Cir. 2004); *Amatel v. Reno*, 156 F.3d 192, 195 (D.C. Cir. 1998).

65. *Ramirez*, 379 F.3d at 130.

66. *Id.*

67. *Id.* at 131 (citing *Waterman v. Farmer*, 183 F.3d 208, 219 (3d Cir. 1999)). The *Waterman* court agreed with the defendant attorney general's contention that forcing the prison in question to find alternatives on an individualized basis is an undue financial burden. However, the court was willing to judge the merits of the suit by limiting its analysis to the correctional facility in question: The Adult Diagnostic and Treatment Center (A.D.T.C.) in Avenel, New Jersey, which houses and rehabilitates sex offenders who exhibit "repetitive and compulsive" behavior. *Waterman*, 183 F.3d at 209. Prisoner categorization as applied to *Turner* is further examined in Part II.C, *infra*.

severely limits the application of the *Turner* standard by placing a burden on prison officials to justify their policies alongside the administrative requirements of the Ensign Amendment.⁶⁸

In contrast, *Amatel v. Reno* functions as one of the most deferential opinions written by the United States Courts of Appeals by limiting the need for wardens to provide hard evidence for a reasonably constructed publication request policy under the Ensign Amendment.⁶⁹ The D.C. Circuit held that it is not necessary to provide scientific evidence of a rational link between inmate rehabilitation and application of the Ensign Amendment.⁷⁰ In this interpretation, scientific data are not necessary for a reasonably constructed policy; instead, the majority simply found that “common sense” tells the court (and prison administrators) that consuming pornography negatively affects a prisoner’s self-control and respect for others.⁷¹ The *Amatel* court believed that certain material could lead to short-term increases in angered men’s aggressiveness, instances of rape, and tolerance of violence against women,⁷² refusing to support individual assessments of prisoners’ rehabilitative needs as a matter of economic impracticality.⁷³

These staunchly different evidentiary burdens have a significant effect on a given federal inmate’s book request, whether interpreted for sexual explicitness under the Ensign Amendment, or more broadly under § 540.71(b). This circuit split may be the result of a lack of guidance due to the broad wording of *Turner*.⁷⁴ The combination of this split with the

68. *Ramirez*, 379 F.3d at 131. See also *Wolf v. Ashcroft*, 297 F.3d 305, 310 (3d Cir. 2002) (“[W]e have historically viewed these inquiries as being fact-intensive” and require “a contextual, record-sensitive analysis.”) (quoting *Dehart v. Horn*, 227 F.3d 47, 59 n.8 (3d Cir. 2000)).

69. *Amatel*, 156 F.3d at 199 (“We do not think . . . that common sense must be the mere handmaiden of social science data or expert testimonials in evaluating congressional judgments.”).

70. *Id.* (“[S]cientific studies can have a corrective effect by establishing an apparently implausible connection or refuting an apparently obvious one, but, subject to such corrections, conformity to commonsensical intuitive judgments is a standard element of both reasonableness and rationality.”).

71. *Id.* The D.C. Circuit relied on common sense in finding, as a matter of fact, that “prisoners are more likely to develop the now-missing self-control and respect for others if prevented from poring over pictures that are themselves degrading and disrespectful.” *Id.*

72. *Id.* at 199–200. The dissent strongly disagreed with these conclusions, finding them “pure conjecture” and merely corollary. *Id.* at 208 (Wald, J., dissenting) (quoting *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988)).

73. *Id.* at 200–01. The *Turner* holding established as part of the fourth prong that courts must determine whether a prisoner’s constitutional concern can be established via alternative means “at *de minimis* cost to valid penological interests.” *Turner v. Safley*, 482 U.S. 78, 91 (1987). The *Amatel* court found individual, case-by-case determinations to be “far from *de minimis*.” *Amatel*, 156 F.3d at 201.

74. Spease, *supra* note 33, at 1136–37 (quoting Stacey A. Mines, Note, *Pornography Behind Bars*, 85 CORNELL L. REV. 1702, 1729 (2000)) (arguing that the “‘reasonable connection’” prong of the *Turner* analysis easily allows “states or the federal government to pass any regulation restricting prisoners’ rights, provided they can assert some ‘legitimate penological interest’”). The “common

deferential standard employed by the Supreme Court—and the subjective application of § 540.71(b)—leads to an unequal application of the law between federal prison locations.

II. CURRENT INTERPRETATIONS OF BOP AND USDB BOOK REQUEST REGULATIONS

This Note primarily addresses the lack of guidance and clear judicial precedent in the way wardens, inmates, and the public determine which publications constitute BOP or USDB security issues. The Manning case now brings the interpretative imbalance between individual correctional facilities and prisoners into the public eye, whether applied to the USDB, the BOP, or state prison systems. The disparity between the “common sense” and “factual basis” approaches to Title 28 regulations, like the Ensign Amendment, alongside the arbitrary nature in which wardens follow § 540.71(b), lead to vastly unequal constitutional standards across the American prison system.⁷⁵ In addition, the BOP appeals process requires a complete exhaustion of administrative remedies before a court can hear a constitutional challenge.⁷⁶ This requirement holds prisoners to a much higher standard than the non-incarcerated to state a claim of relief plausible on its face. Civil rights groups criticize many state appeals processes with similarly justified provisions. For example, in the Texas Department of Criminal Justice (TCDJ), only one appeal per title is allowed in order to alleviate the burden placed on the State’s courts.⁷⁷ Finally, even prisoners of the same status (e.g., “maximum-security”) are treated differently based on their crime or public infamy, which is particularly apparent in the Manning case and the 11th Circuit’s holding in *Waterman v. Farmer*.⁷⁸

sense” approach used in *Amatel* and other Circuit cases are criticized for “substitut[ing] the rhetoric of judicial deference for meaningful scrutiny of constitutional claims” by leaving important constitutional rights “to the mercy of government officials and their predictions and risk assessments[.]” David J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 945, 969 (1999) (quoting *Block v. Rutherford*, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring)).

75. Terri L. Carver, *Administrative Law*, 50 MERCER L. REV. 827, 834 n.76 (1999) (noting that the Ensign Amendment does not actually define the term “sexually explicit,” forcing the BOP to constantly review its interpretation and “correct any mistakes it might find before the federal judiciary became involved”).

76. 42 U.S.C. § 1997e(a) (2012).

77. TEX. CIVIL RIGHTS PROJECT, *supra* note 9, at 51.

78. *Supra* note 67. See also Ed Pilkington, *Chelsea Manning Supporters Condemn Threat of Indefinite Solitary Confinement*, THE GUARDIAN (Aug. 13, 2015), <http://www.theguardian.com/us-news/2015/aug/13/chelsea-manning-indefinite-solitary-confinement-petitions> (Manning’s lawyers describe the threats of solitary confinement due to the unrequested books as a “form of harassment” due to her status as a war criminal).

A. Appealing a Book Request Denial

28 C.F.R. §§ 540.71(d)–(e) outline the BOP’s Administrative Remedy Program (ARP), which may review a federal book request denial under subsection (b).⁷⁹ The U.S. Government established the federal ARP as part of an amendment to the Prison Litigation Reform Act (PLRA), created by Congress to “take the frivolity out of frivolous inmate litigation.”⁸⁰ Congress stressed their desire to “wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society’s interests as well as the legitimate needs of prisoners.”⁸¹ The PLRA mandates that prisoners exhaust all administrative remedies before any judicial case-by-case determination is made on the merits of their case.⁸² Circuit courts agree with this contention—albeit with less fervor—due to the need for courts to “focus and clarify the issues” they are addressing.⁸³

Some civil rights attorneys see this provision as unnecessary for the low number of civil and constitutional suits filed by prisoners, especially considering the ability of the government to move for dismissal under Rule 12 of the Federal Rules of Civil Procedure.⁸⁴ Commentators criticize the PLRA as being “founded on mistaken presumptions that inmates have nothing better to do than make claims against their jailers,” instead slowing the process and preventing prisoners from bringing otherwise meritable cases to court.⁸⁵ Again, administrators are concerned with the efficiency of

79. 28 C.F.R. §§ 540.71(b), (d)–(e) (2016) (“The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Program unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.”).

80. 141 CONG. REC. S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

81. *Id.* at S14418.

82. 42 U.S.C. § 1997e(a) (2012).

83. *Alexander v. Hawk*, 159 F.3d 1321, 1326 n.11 (11th Cir. 1998).

84. Joshua S. Moskovitz, Note, *The Usual Practice: Raising and Deciding Failure to Exhaust Administrative Remedies as an Affirmative Defense Under the Prison Litigation Reform Act*, 31 CARDOZO L. REV. 1859, 1904–05 (2010); FED. R. CIV. P. 12(b)(6).

85. Darryl M. James, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465, 493 (2011) (“This requirement insulates an entire category of abusive conduct from the protections of the law, leaving inmates vulnerable to abuse without a remedy, whereas the non-incarcerated are allowed to pursue similar claims without such a prohibition.”). See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (answering the question of what a plaintiff must present to the court in order to state a meritable claim). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Id.* at 545 (alteration in original). This is significantly less demanding than the claim requirements of

the correctional system above all else. “Prisoners bring the vast majority of appeals,” thus, inmates cannot defend the approval of a request for a book they have not seen or read.⁸⁶ Legal scholars suggest that the Supreme Court should use the circuit split in the absence of clearer regulations, thus limiting the deference toward institutional book request and appeal rules.⁸⁷ However, this is becoming difficult as federal courts build upon the foundation of *Turner*.

B. Unequal Application of *Turner* Among Facilities

Beard v. Banks demonstrates the difficulty of bringing a *Turner* challenge, and provides an example of the unequal application of the *Turner* standard from prison to prison.⁸⁸ In 2013, the Pennsylvania Department of Corrections received criticism from the U.S. Department of Justice for maintaining brutal solitary confinement conditions, particularly on inmates with mental illnesses.⁸⁹ Despite the overall trend of judicial

federal prisoners, who must rely on administrators and government officials to determine the merit of their book request appeal—appeals which officials initially denied. Moskowitz, *supra* note 84, at 1902.

[F]actual disputes about exhaustion often involve the same prison officials who are the defendants in the prisoner’s underlying civil suit. Pro se prisoner plaintiffs are forced to challenge contrary assertions of the prison through depositions of the very people who have inflicted harm on them and . . . [monitor] every aspect of their daily activities.

Id.

86. TEX. CIVIL RIGHTS PROJECT, *supra* note 9, at 51. In addition, *senders* of books are barred from appealing to the Texas Department of Criminal Justice based on previous administrative rulings, unless they were the first sender of the book. *Id.* at 50–51. Ultimately, the only party with “the ability to review the publication [and] to write an intelligent appeal” is unable to do so. *Id.*

87. Spease, *supra* note 33, at 1146 (“The Court, should it choose to grant certiorari to a case raising the issue of this split, has a chance to embrace the more proper ‘factual record’ approach of *Ramirez* and reject the blind judicial deference of *Amatel*.”).

88. *Beard v. Banks*, 548 U.S. 521, 537–38 (2006).

89. Jessica Knowles, “*The Shameful Wall of Exclusion*”: *How Solitary Confinement for Inmates with Mental Illness Violates the Americans with Disabilities Act*, 90 WASH. L. REV. 893, 897 (2015) (citing Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice & David J. Hickton, U.S. Attorney, U.S. Attorney’s Office, to Tom Corbett, Governor of Pa. (May 31, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf).

Interestingly, the very concept of solitary confinement as applied to modern American prisons came from Philadelphia, based on the Quaker theory that prolonged periods of separation and isolation “would allow prisoners to reflect upon their relationship with God, and that this would promote rehabilitation.” *Id.* at 901. The State Department of Corrections quickly addressed the 2013 concerns and provided “a number of positive changes” to ensure: (1) that prisoners with serious mental illnesses are not confined to solitary confinement; (2) increased mental health staffing and care delivery for inmates; and (3) the use of specialized treatment units, among other reforms. Memorandum from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., & David J. Hickton, U.S. Attorney, U.S. Attorney’s Office, W. Dist. of Pa., to Tom Wolf, Governor of Pa. (Apr. 14, 2016), <https://www.justice.gov/crt/file/850886/download>. The use of solitary confinement is

deference towards federal and state correctional agencies, the U.S. Department of Justice investigated Pennsylvania's Cresson Correctional Institution for misusing solitary confinement as a way to warehouse mentally ill inmates.⁹⁰ Where the judicial branch examines similar civil rights issues under the lens of individualized deference, executive agencies take a "hands-on" approach to ensuring equal treatment between state and federal prisons.

Seven years prior, the Supreme Court found no First Amendment violation when state prison officials withheld almost all reading material from violent inmates.⁹¹ Those inmates in the "most restrictive level" of the prison were either denied or restricted from obtaining photographs, newspapers, phone calls, visitors, or commissary.⁹² The Court noted that the prison deprived these amenities "to 'motivat[e]' better 'behavior,'" provide an incentive to improve behavior, and to improve institutional safety.⁹³ The majority found these to be legitimate penological objectives under the first *Turner* factor.⁹⁴ Despite finding no feasible alternatives for exercising the restricted right, which provides "some evidence that the regulations [a]re unreasonable," the second *Turner* factor was not found conclusive of the policy's reasonableness.⁹⁵ This determination was particularly deferential, since alternative means to prisoner rehabilitation were not actually discussed by the *Beard* majority.⁹⁶ Despite the limited constitutional

controversial on a global scale; researchers find that prolonged confinement causes "a persistent and heightened state of anxiety and nervousness, headaches, insomnia, lethargy or chronic tiredness, nightmares, heart palpitations, fear of impending nervous breakdowns and higher rates of hypertension and early morbidity," and is largely decried by international human rights organizations as a form of torture. *Torture: The Use of Solitary Confinement in U.S. Prisons*, CTR. FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/sites/default/files/assets/CCR_PelicanBayFactsheet_20150520.pdf (last updated May 15, 2015).

90. Mark Scoloro, *Feds Say Pa. Prisons Misuse Solitary Confinement*, WASH. TIMES (Feb. 25, 2014), <http://m.washingtontimes.com/news/2014/feb/25/feds-say-pa-prisons-misuse-solitary-confinement/> (as a result of the pattern of solitary mistreatment in the Pennsylvania correctional system, the federally sanctioned DOJ probe was extended to all State prisons). After the investigation, the DOJ coordinated with Governor Tom Corbett to agree on a way to address the concerns, which may include mental health training or a change in resource allocation. *Id.*

91. *Beard*, 548 U.S. at 535–36.

92. *Id.* at 525–26.

93. *Id.* at 531 (alteration in original). The "incentive" is meant to assist inmates in graduating from Long Term Segregation Unit (LTSU) Level 2 to Level 1, or out of the LTSU entirely. *Id.* In practice, most of the Level 1 inmates never do so. *Id.* at 526.

94. *Id.* at 531–32.

95. *Id.* at 532 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003)) (alteration in original).

96. Anna C. Burns, *Beard v. Banks: Restricted Reading, Rehabilitation, and Prisoners' First Amendment Rights*, 15 J.L. & POL'Y 1225, 1255 n.195 (2007) (pointing out *Beard's* "discussion of the second factor was limited to one paragraph, simply noting that while there were no alternatives, it did not conclusively mean the regulation was not rational or reasonably related to the goal of the prison administration").

protection afforded to state and federal inmates, the reasoning applies to the non-incarcerated public through *Thornburgh* and its progeny.⁹⁷

The Court afforded great deference to the prison in its impact assessment carried out as the third *Turner* factor: “If the Policy (in the authorities’ view) helps to produce better behavior, then its absence (in the authorities’ view) will help to produce worse behavior,” which is described as “backsliding” and an unfair expenditure of resources.⁹⁸ Finally, the majority agreed with the Pennsylvania Department of Corrections’s contention that an alternative means of accommodating constitutional rights (while supporting the valid penological interest) is not at a *de minimis* cost to the institution.⁹⁹ Justice Breyer’s opinion reiterated the need for judicial deference in the matter, upholding the policies as permissible.¹⁰⁰ In her dissent, Justice Ginsburg hypothesized that, given the conclusory rationales accepted due to the wide net of deference, it is satisfactory for a correctional department to say, “in our professional judgment the restriction is warranted.”¹⁰¹ This legal failsafe demonstrates the inequality between *Turner*’s potential applications between facilities—both within and between states—and BOP regions, regardless of whether the precedent is applied to the freedom of speech via *Thornburgh*.

C. Unequal Application of Turner and Thornburgh Between Prisoners in a Given Facility

The Manning case is a prime example of the stringent barriers to reading and education placed on high-profile inmates. Manning’s supporters tweeted that the “[p]rison staff are now denying [her] access to the law library” only two days before her disciplinary board hearing.¹⁰² The confiscated items included issues of *The Advocate*, *OUT Magazine*, *Vanity*

97. *Thornburgh v. Abbott*, 490 U.S. 401, 427–28 (1989) (Justice Stevens stated in his dissent that, “[t]he *Turner* opinion 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.”). *See also, e.g.*, *Nasir v. Morgan*, 350 F.3d 366, 370 (3d Cir. 2003) (finding permissible a ban on correspondence between inmates and *former* inmates); *Prison Legal News v. Livingston*, 683 F.3d 201, 213 (5th Cir. 2012) (a Texas prison constitutionally prohibited a specific publisher from distributing books to inmates).

98. *Beard*, 548 U.S. at 547.

99. *Id.*

100. *Id.* at 535.

101. *Id.* at 556 (Ginsburg, J., dissenting) (“By elevating the summary judgment opponent’s burden to a height prisoners lacking nimble counsel cannot reach, the plurality effectively tells prison officials they will succeed in cases of this order, and swiftly, while barely trying.”).

102. Chelsea Manning (@xchelsea), TWITTER (Aug. 15, 2015, 6:10 P.M.), <https://twitter.com/xchelsea/status/632720934688944128>.

Fair, and *Cosmopolitan*.¹⁰³ Manning was not permitted counsel during her hearing, and like any federal book request denial, could not reference the prohibited books themselves during her appeal.¹⁰⁴

An additional circuit split exists regarding prisoner categorization as applied to book requests, particularly in reference to sex offender inmates. In *Waterman v. Farmer*, Third Circuit Judge and future Supreme Court Justice Samuel Alito overturned the District Court of New Jersey's contention that a State statute specifically prohibiting sex offenders from obtaining sexually explicit material is overbroad, as "the psychology field has not yet reached an agreement on how sexually oriented materials affect the treatment of sex offenders."¹⁰⁵ Instead, Judge Alito declined to weigh the science, and asked whether a logical connection exists between the statute and the institutional goal without rendering the means irrational, as required by *Turner* and *Thornburgh*.¹⁰⁶ The Circuit found that the District Court clearly erred in finding the statute irrationally and unconstitutionally constructed.¹⁰⁷

The Seventh Circuit reviewed a Central District of Illinois judgment in *Brown v. Phillips*, which concerned institutional restrictions on sex offenders' access to adult-rated movies and video games.¹⁰⁸ The opinion held that the restriction is rationally related to security, rehabilitation, and anti-recidivism, particularly where certain video game consoles are capable of accessing the internet.¹⁰⁹ However, the Circuit explained that it could not

103. Chase Strangio, *Why Is Chelsea Manning Prohibited From Having Caitlyn Jenner's Vanity Fair Issue & The Senate Torture Report?*, AM. CIVIL LIBERTIES UNION (Aug. 17, 2015), <https://www.aclu.org/blog/speak-freely/why-chelsea-manning-prohibited-having-caitlyn-jenners-vanity-fair-issue-senate>.

104. *Id.* (Strangio writes and tweets regularly on behalf of the ACLU and about his representation of Manning, whom he believes is "facing another fight that threatens to silence her.").

105. *Waterman v. Farmer*, 183 F.3d 208, 216 (3d Cir. 1999) (citing *Waterman v. Verniero*, 12 F. Supp. 2d 378, 381 (D. N.J. 1998)). Since the 1999 *Waterman* opinion, psychoanalysts conducted extensive research on the link between access to sexual material and repeat offenses. See, e.g., Paul Smith & Mitch Waterman, *Processing Bias for Sexual Material: The Emotional Stroop and Sexual Offenders*, 16 SEX ABUSE: J. RES. & TREATMENT 163, 164 (2004) (finding that there is considerable difference between "information-processing bias" depending on the specific sex crime).

106. *Waterman*, 183 F.3d at 216–17 (quoting *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998)) ("The legislative judgment is that pornography adversely affects rehabilitation. It does not matter whether we agree with the legislature, only whether we find its judgment rational. The question for us is not whether the regulation in fact advances the government interest, only whether the legislature might reasonably have thought that it would.").

107. *Id.* at 220. See also *Brown v. Phillips*, 801 F.3d 849, 855 (7th Cir. 2015) (holding that restrictions on sex offenders' access to adult-rated movies and video games was rationally related to security, rehabilitation, and anti-recidivism).

108. *Brown*, 801 F.3d at 855.

109. *Id.* "First, consoles capable of accessing the internet allow detainees to contact victims of their crimes; the ban on these consoles thus advances the state's interest in protecting the public.

grant summary judgment in favor of the respondent, Warden Larry Brown.¹¹⁰ Recognizing the necessary deference afforded to Brown, the Circuit required “some data . . . to connect the goal of reducing the recidivism of sex offenders with a ban on their possessing legal adult pornography,” conceding that a “common sense” approach could go either way.¹¹¹

While there may be legitimate, rational, or even scientific justifications for censoring certain violent and pornographic materials from sex offenders, Circuit Court precedent does not clarify which categorizations are appropriate, and whether policies based on individual prisoners’ behavior or sentence length are *per se* rational. The longstanding doctrine of *Turner* deference suggests that few categorical restrictions are unconstitutional.¹¹² Any changes to BOP or USDB regulatory language should include a provision on prisoner categorization, with guidance on which materials could permissibly be withheld from which inmates.

III. UNIVERSAL BANNED PUBLICATION LIST AND PROPOSED 28 C.F.R. WORDING

As federal courts uphold and extend the doctrine of judicial deference in these cases, the judiciary will continue to diverge in its interpretation of the proper evidentiary burden, standard of review, and *de minimis* cost-benefit analysis to use. The decades-old precedent of judicial deference established by *Turner* and *Thornburgh* is less and less likely to be reversed in the short-term, so reliance on the Court to clarify BOP and USDB book requests in that timeframe is essentially futile.

This Section proposes an unambiguous alternative that affords equal rights to inmates and the public without putting pressure on the judiciary or the prison system. An analytical approach to this issue will resolve the inevitable subjectivity of approving book requests on a case-by-case basis. A concrete, codified publication list benefits all parties by informing the public and reducing administrative and judicial burdens. 28 C.F.R. § 540.72 would be reworded to accommodate the publication list, thus removing the

Second, because these consoles permit inmates to download, manipulate, share, and store *illegal* pornography, the ban also promotes the state’s legitimate interest in preventing crime.” *Id.*

110. *Id.* at 854.

111. *Id.* “The record at this point does not contain a basis for linking the ban on media content to Rushville’s therapeutic or security goals . . . a bare assertion that Rushville’s ban on sexual material promotes treatment is insufficient to justify summary judgment on a First Amendment claim.” *Id.*

112. *Waterman v. Farmer*, 183 F.3d 208, 215 (3d Cir. 1999) (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989)) (stressing that a regulation or statute is “neutral” as long as the asserted interest is “unrelated to the suppression of expression”).

subjective “good order” standard.¹¹³ This “Universal Publication List” (UPL) can be expanded to the Military Correctional Complex Regulations, which use essentially the same wording as § 540.72. Finally, newly considered books for the list can be added by an administrative committee, which reviews the publication list on a biannual basis, taking into consideration public concerns and input from past and present inmates.

A. Texas Department of Criminal Justice Policy

We can draw inspiration for the UPL from current publication databases. Texas does not allow the public to send prisoners newspapers, magazines, or books directly, and only permits the publication’s supplier or a bookstore to do so.¹¹⁴ State prisons maintain a one-strike banned book policy; once a mailroom declines a book request, it remains on the TDCJ banned list.¹¹⁵ There are benefits and drawbacks to the TDCJ method—while the book list is in a centralized database, thus guiding wardens and mailrooms in determining whether to approve a publication, the system makes it difficult to defend a request.

Civil rights groups are concerned that appealing a denial through the TDCJ is very difficult, as less than 14% are successful.¹¹⁶ Prisoners do not get to review the book during an appeal, which prevents inmates from fully defending the request.¹¹⁷ Once the book is on the banned list, senders cannot appeal until an inmate does so successfully.¹¹⁸ The banned list is not publically available, which means senders cannot predict whether the prison will deny the publication, as it is largely to the discretion of the specific warden and mailroom.¹¹⁹ Unlike inmates in Texas, prison officials are not required to give senders a receipt of a book request denial.¹²⁰ Prison officials deny the vast majority of books for encouraging “deviant criminal sexual behavior,” a category that includes a broad range of material from

113. 28 C.F.R. § 540.71(b) (2016).

114. *Mail System Coordinators Panel*, TEX. DEP’T OF CRIMINAL JUSTICE, CORR. INSTITUTIONS DIV., https://www.tdcj.state.tx.us/divisions/cid/cid_support_ops_mscp.html (last visited May 3, 2017).

115. TEX. CIVIL RIGHTS PROJECT, *supra* note 9, at 12.

116. *Id.* at 10–11.

117. *Id.* at 11.

118. *Id.*

119. *Id.*

120. *Id.* Appeals for both senders and inmates are made difficult under the TDCJ system. The Texas Civil Rights Project notes that “[w]ithout knowing what books are acceptable and which are censored, articulating an intelligent argument becomes much more difficult, if not impossible.” *Id.* In addition, senders are barred from appealing to the TDCJ based on previous administrative rulings, unless they were the first sender of the book. *Id.* at 50–51. Ultimately, the only party with “the ability to review the publication [and] to write an intelligent appeal” is unable to do so. *Id.* at 51–52.

pornography to non-illustrative literary classics.¹²¹ Detailed reasons for denying requests have included “symbols” and “translations,” “homosexuality,” and “racial content.”¹²²

The BOP maintains 122 institutions throughout the U.S.¹²³ A comprehensive publication list partly modeled after the TDCJ system could guide administrators, inmates, senders, and publishers as to what constitutes objectionable material. Moreover, an adequate appeals process must allow inmates and senders to effectively and fairly challenge denials. This is particularly true with educational material, which could improve the quality of life and education of any given inmate,¹²⁴ whilst promoting the institutional goal of reducing recidivism. With such a large federal correctional system, a concrete list of books that pose a § 540.72 issue should be listed in an easily amended, common database.

B. Rewording § 540.71 and Other Proposed Federal Solutions

An analytical approach to this issue will resolve the inevitable subjectivity of approving book requests on a case-by-case basis. Resources to draft the list may include input from BOP and USDB leaders, current prison administrators, previous inmates, criminal defense attorneys, state prosecutors, and the public. This Section also suggests a collaborative method for adding newly published materials and a biannual administrative review of the list. Under this framework, categorical restrictions based on federal inmate status are still permitted, but their governing law will be enumerated and clarified via an amendment to 28 C.F.R. § 540.71 (and by extension, Military Correctional Complex Regulation 28–1), ultimately removing the deferential “good order” standard:

121. *Id.* at 13. Celebrated authors with works that the TDCJ banned include Shakespeare, Sinclair Lewis, Norman Mailer, Philip Roth, and Jeffrey Eugenides. Andrea Jones, *Battling Censorship Behind Bars*, THE AM. READER, <http://theamericanreader.com/battling-censorship-behind-bars> (last visited May 3, 2017).

122. TEX. CIVIL RIGHTS PROJECT, *supra* note 9, at 15.

123. *Our Locations*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations> (last visited May 3, 2017).

124. William Domnarski, *Shakespeare in the Law*, 67 CONN. BAR J. 317, 331–32 (1993). Domnarski highlights the incredible effect Shakespeare’s writing has on understanding the English language and helping lawyers and the public interpret the law. *Id.* Shakespeare himself was quoted by the North Carolina Court of Appeals in overturning a breaking and entering conviction, highlighting a peculiar irony of trial by jury: “The jury, passing on the prisoner’s life, May in the sworn twelve have a thief or two Guiltier than him they try.” *State v. Lanier*, 273 S.E. 2d 746, 749 (N.C. App. 1981) (quoting WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, Act II, Scene 1, line 19 (1623)). The public benefits of the open access to reading material are highlighted in Part IV, *infra*.

(b) The Warden may reject any publication currently on the Universal Publication List (UPL), maintained by the BOP Industries, Education, & Vocational Training (IE&VT) Division. If the material was published more than five years prior to the request and is not on the UPL, the Warden must approve the request unless:

(i) it depicts or describes graphic sexual content;

(ii) it directly describes procedures for the construction or use of weapons, ammunition, bombs, or incendiary devices;

(iii) it directly encourages or describes methods of escape from correctional facilities, or contains blueprints, drawings, or similar descriptions of Bureau of Prisons institutions;

(iv) it depicts or describes procedures for the brewing of alcoholic beverages, or the manufacturing of drugs;

(v) it is written in code; or

(vi) it directly encourages activities which may lead to the use of physical violence or group disruption.

(c) Any material not within the UPL deemed unacceptable under the above subsection must be described in a standardized form to be submitted to the IE&VT Committee on Correspondence and Book Requests.

(d) Wardens may appeal to the Committee on a case-by-case basis if the material at issue is not on the UPL and does not satisfy any of the six exceptions outlined in Subsection (b). Successful appeals are to be considered at the next Committee meeting.¹²⁵

An additional committee to the BOP could review the UPL twice a year in conjunction with amicus documents submitted by administrators and the public. A biannual review allows for regular evaluation of newly

125. *Cf.* 28 C.F.R. § 540.71(b)–(d) (2016) (the general structure of the regulation is not altered by this proposed language).

published books without placing extensive pressure on BOP resources. Instead of placing this power under the BOP's Correctional Programs Division,¹²⁶ the Industries, Education, & Vocational Training (IE&VT) Division can work alongside security experts to weigh the benefits and disadvantages of certain material, particularly of educational value.¹²⁷ Keeping with the Supreme Court's doctrine of judicial deference to experts, the BOP may appoint prison administrators, educators, and constitutional lawyers to the UPL Committee.¹²⁸

The original UPL can be constructed using a collection of currently and commonly banned books in state and federal prisons. The National Institute of Corrections collects banned lists, which are "not always easily accessible or publically available."¹²⁹ At the start of this effort, the UPL Committee can contact states with maintained book lists for input. The IE&VT Division can offer a transparent informal input platform on the BOP website, giving anyone the opportunity to comment on the UPL proceedings, including the USDB or states looking to adopt the list. Appealing a listed title should be streamlined, and the biannual review requirement allows any appeal to be adjudicated within a maximum six-month period. Unlike Texas, a publication placed on the UPL is not afforded only one appeal, and the committee can review the list as social and cultural values and expectations change over time. By allowing the entries to be continuously reviewed and commented on, the UPL reflects constantly changing societal norms without disrupting the safety of correctional facilities.

IV. PUBLIC UTILITY OF THE UNIVERSAL BANNED BOOK LIST

A universal banned book list can benefit wardens, inmates, publishers, the judiciary, and the public at large. Free expression and education in the prison context promotes learning, professional development, and civility. Inmates will be able to research and handle impending parole hearings and criminal appeals, while advancing their knowledge of the law.

126. *Correctional Programs Division*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/org_cpd.jsp (last visited May 3, 2017) (this Division currently handles processing inmate mail).

127. *Industries, Education, & Vocational Training Division*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/org_ievt.jsp (last visited May 3, 2017). The IE&VT Division "oversees the agency's leisure-time programs," because "[k]eeping inmates constructively occupied is essential to the safety of correctional staff, inmates, and the surrounding community." *Id.*

128. *Id.*

129. *Censorship and Banned Book Lists in Correctional Facilities*, NAT'L INST. OF CORR. INFO. CTR. (Nov. 6, 2014), <http://nicic.gov/topics/5192-censorship-and-banned-book-lists-in-correctional-facilities>.

A. Maintaining the Right to Expression

A UPL will curb *Thornburgh's* limitations on the right to free speech and expression by the public, while liberating First Amendment rights of both the public and prison community and respecting the doctrine of *stare decisis*.¹³⁰ The Supreme Court notes that the freedom to read and distribute publications “is obviously a part of the general freedom guaranteed[—]the expression of ideas[—]by the First Amendment.”¹³¹ Such an open forum facilitates an environment where prisoners not only learn, but also allow individual expression without jeopardizing the safety of the institution. Statesmen and writers, from Nelson Mandela to Oscar Wilde, have expressed the importance of education in correctional settings. Malcolm X believed that

reading had changed forever the course of my life. As I see it today, the ability to read awoke inside me some long dormant craving to be mentally alive My homemade education gave me, with every additional book that I read, a little bit more sensitivity to the deafness, dumbness, and blindness that was afflicting the black race in America.¹³²

Inmates require open access to reading materials that allow for self-fulfillment, perhaps to an even greater extent than society at large. Indeed, in “the quest for political and social truth,” prisoners better themselves when provided with the tools for personal advancement and innocuous expression.¹³³

B. Legal Education and Information Gathering

Inmates should have the full opportunity to learn legal advocacy and how the law applies to cases against them. They should also have the opportunity to understand their pending cases. The *Jailhouse Lawyer's Handbook* (JLH) provides a step-by-step guide to prisoners looking to study

130. *Stare decisis*, the judicial reliance on case precedent, is described as promoting “the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

131. *Martin v. City of Struthers*, 319 U.S. 141, 155 (1943).

132. Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1020 (1993) (quoting ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 179 (1965)). Kuby argues that the limitations on a prisoner's activities lead inmates to read and create artistic works as a part of their daily lives. *Id.*

133. *Id.* at 1020–21.

the *Turner* and *Thornburgh* standards and their application to political, legal, and sexually explicit material.¹³⁴ Ironically, some state correctional agencies attempted to ban the JLH itself from their libraries, including the Virginia Department of Corrections.¹³⁵ The Center for Constitutional Rights and the National Lawyers Guild settled a suit against the State for censoring the JLH, which is now “in the law library of every prison in Virginia.”¹³⁶

Scott Medlock, Director of the Texas Civil Rights Project, believes that although there are books legitimately worth censoring, many of them are still allowed, whereas other landmark works of literature are banned in certain institutions.¹³⁷ Medlock explains that

[I]literacy is probably the most important skill a prisoner can have when they are released from custody [r]eading keeps prisoners occupied while they’re incarcerated, and helps them develop the skills they need to eventually become productive members of society. Arbitrarily banning books fights against these goals.¹³⁸

These skills can also reduce the pressure already placed on the IE&VT Division by promoting professional development and education. In addition, by simply honoring First Amendment values through free expression, inmates develop a positive attitude toward society in general and have the opportunity to participate in everyday life. This satisfies major goals of the federal correctional system.¹³⁹

134. *Your First Amendment Right to Freedom of Speech and Association*, JAILHOUSE LAWYER’S HANDBOOK, <http://jailhouselaw.org/your-first-amendment-right-to-freedom-of-speech-and-association> (last visited May 3, 2017). The JLH describes itself as “a resource for prisoners who wish to file a federal lawsuit addressing poor conditions in prison or abuse by prison staff.” *About*, JAILHOUSE LAWYER’S HANDBOOK, <http://jailhouselaw.org/about-this-handbook> (last visited May 3, 2017).

135. *Your First Amendment Right to Freedom of Speech and Association*, *supra* note 134.

136. *Id.* (the JLH implores prisoners without access to the Handbook’s full text to contact the Center for Constitutional Rights or the National Lawyers Guild).

137. Losowsky, *supra* note 9.

138. *Banned Books in the Texas Prison System*, BLACK RADIO NETWORK: MINORITY NEWS, http://www.blackradionetwork.com/banned_books_in_the_texas_prison_system_ (last visited May 3, 2017) (quoting Scott Medlock, Director of the Texas Civil Rights Project).

139. Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1235–36 (1998) (“The idea of rehabilitation, or at least the reality of the prospect of parole, ha[s] a profound effect on what inmates [a]re expected to do during their prison stays.”).

C. Lessened Judiciary and Penological Burdens

The judiciary is concerned with alleviating the pressure placed on federal courts in adjudicating numerous constitutional challenges to the BOP rules. However, by simply throwing away the key by affording absolute—rather than partial—deference, potential constitutional violations are going unheard.¹⁴⁰ An analytical approach, whether it's partially deferential or not deferential, will lessen the burden on the judiciary by decreasing the number of constitutional challenges. In the event of a constitutional challenge, lower courts will be better equipped to rule on the issue. A fair administrative appeals process that benefits both inmates and wardens alleviates this burden even further. There are other valuable benefits to mailrooms, which must no longer necessarily review a book on its face or judge it by its cover. Administrators and mailroom workers would no longer need to formally evaluate each publication and issue individualized responses, respecting the goals of *Turner* and *Thornburgh* by alleviating financial strain on the facilities.

1. Improved Efficiency of the Book Request Process

Accommodating these requests, given the growing prison population, must be balanced with the need for prisons to keep their inmates safe. A federal publication list will not detrimentally affect the safety of prisoners or correctional officers. This could in fact improve the purpose of the BOP rules. Wardens not familiar with the changing landscape of constitutional jurisprudence will not risk a suit against their facilities, and instead resume their proper roles as administrators.

Western District of Wisconsin Judge Barbara Crabb held—in contrast to most American jurists faced with the issue—that the Court's *Turner* deference can only apply to federal regulations, and not statutes.¹⁴¹ This is an important distinction for prisons unaffected by the UPL, such as the USDB and state correctional facilities. The USDB and state departments of corrections could use the UPL directly or indirectly as a model for similar publication lists. If multiple states adopt the UPL as model rules, the List

140. Mary C. Meixner, *Locking Them Up and Throwing Away Their Constitutional Rights: The Court's Decision in Beard v. Banks Deprived Prisoners of First Amendment Protections*, 57 DEPAUL L. REV. 793, 821–24 (2008).

141. James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y.C. L. REV. 97, 112–13 (2006). Crabb found that statutes "are enacted and implemented by persons in the business of running prisons," who have an interest in "the efficient operation of prisons," and are thus appropriately afforded deference. *Id.* at 113 (quoting *Lewis v. Sullivan*, 135 F. Supp. 2d 954, 968 (W.D. Wis. 2001)).

will protect prisoners' First Amendment rights, regardless of whether in state or federal prisons. This promotes the efficiency of correctional facilities across the board, reducing the cost of running a prison for taxpayers.

2. Decreasing the Rate of Recidivism

While unpublished correspondence incoming from the public can—and should—still be monitored by prison officials, regular contact with families and friends can improve quality of life within prison walls and chance at parole.¹⁴² Education (legal and otherwise), through reading a wide variety of books, will allow reintegration and curb repeat offenses.¹⁴³ Reading, education, and properly monitored contact with the outside world can improve inmates' understanding of a legal situation, and promote deterrence and reintegration into society.¹⁴⁴ The American Bar Association has recognized the importance of correctional education.¹⁴⁵

Lower courts hold that education and rehabilitation are instrumental to improving the prison system as a whole by reducing recidivism.¹⁴⁶ Although there is no constitutional right to an education, district courts pose that the absence of educational training and materials “may have constitutional significance where [prisons] actually militate against reform and rehabilitation.”¹⁴⁷ Putting this demand in the context of the Eighth and

142. Eva Lee Homer, *Inmate-Family Ties: Desirable but Difficult*, 43 FED. PROB. 47, 49 (1979) (“The strong positive relationship between strength of family-social bonds and parole success has held up for more than 50 years, across very diverse offender populations and in different locales. It is doubtful if there is any other research finding in the field of corrections which can come close to this record.”).

143. See Emily Music, *Teaching Literacy in Order to Turn the Page on Recidivism*, 41 J.L. & EDUC. 723, 724 (2012) (outlining the strong correlation between illiteracy and incarceration, particularly in the juvenile context). The Prison Book Program, a grassroots organization founded in 1972 and based in Massachusetts, sends books to both state and federal prisoners in order to facilitate their “political, spiritual, and educational development.” *What We Do*, PRISON BOOK PROGRAM, <http://prisonbookprogram.org/about-us/what-does-prison-book-program-do/> (last visited May 3, 2017).

144. See generally Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 524–26 (1963) (arguing that abandoning the judicial hands-off doctrine will create an “impetus for penal reform,” supporting access to educational and vocational training).

145. Heidi L. Lawyer & Thomas D. Dertinger, *Back to School or Back to Jail?: Fighting Illiteracy to Reduce Recidivism*, CRIM. JUST., June 1991, at 16, 18. Educational services include “instruction in basic skills (adult basic education), GED (General Education Development) preparation, social skills training, training in various trade skills (vocational education), and postsecondary (two- and four-year college) programs,” among others. *Id.*

146. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970) (“If a man who is ignorant and unskilled when he goes into prison can come out with some education and some usable skill, he has an improved chance of staying out of prison in the future.”).

147. *Id.* at 379.

Fourteenth Amendments, denying access to reading materials may eventually amount to unfair and unequal treatment, as it denies inmates a chance at adequate rehabilitation.¹⁴⁸

V. CONCLUSION

The historical trend toward judicial deference, which began with *Turner* and *Thornburgh*, fogs the legal framework governing prison correspondence and book requests because of the hands-off approach. The circuit splits and discrepancies between prisons and individual inmates suggest that a new regulatory scheme is necessary to guide prison administrators, inmates, and the public toward a common and constitutional understanding of the law. An unequal incarceration experience, depending on the warden, is facially unfair and unjust, particularly between prisoners who violated the same federal laws. With prisoners like Chelsea Manning, the wide discretion afforded to wardens is becoming clear to jurists and laymen alike, which may prompt a shift in USDB and BOP rules. The UPL eliminates the heavy burden placed on all parties through its analytical and non-deferential nature, providing benefits ranging from anti-recidivism to institutional cost savings. Most importantly, because a guided approach reduces constitutional challenges and fortifies our basic constitutional rights, we deserve no less.

—*Al M. Dean*^{*†}

148. See Emily A. Whitney, Note, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 777, 790 (2009) (arguing that the absence of these programs, while not compelling judicial action on their own, may “be considered in a comprehensive judicial assessment of the acceptability of a given penitentiary’s environment”).

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