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Gods Behind Bars: Prison Gangs, Due Process, and the First Amendment

Justin L. Sowa

Gods Behind Bars

PRISON GANGS, DUE PROCESS, AND THE FIRST AMENDMENT

I fear for the 85 who don't got a clue.

-Method Man[1]

INTRODUCTION

In 1963, Clarence Smith, at the time known as Clarence 13X, was kicked out of the Nation of Islam (NOI) for questioning the divinity of Wallace Fard Muhammad (or possibly for refusing to give up gambling, or any number of other violations).[2] The following year, after being shot in a gambling den in Harlem known as "The Hole," he changed his name to Allah (an acronym for "Arm, Leg, Leg, Arm, Head") and began gathering a group of teenagers around him and preaching his unique version of NOI theology.[3] From these humble beginnings, Allah's Nation would spread from its spiritual homeland in Harlem throughout the country by way of prisons and hip-hop, becoming a significant cultural force.[4] Allah taught that 85 percent of the people are ignorant and are subjugated by the 10 percent, the governments and corporations.[5] The

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[1] METHOD MAN, *Raw Hide*, *on* RETURN TO THE 36 CHAMBERS (Ol' Dirty Bastard, Elektra 1995).

[2] MICHAEL MUHAMMAD KNIGHT, THE FIVE PERCENTERS 37 (2007).

[3] *Id.* at xiii. The Nation of Islam, founded in roughly 1931 in Detroit by Wallace Fard Muhammad, as clarified and expanded by Elijah Muhammad, expounded a spirituality based on general Muslim principles, filtered through an African-America perspective. *See generally A Brief History on the Origin of the Nation of Islam in America*, NATION OF ISLAM, http://www.noi.org/about.shtml (last visited Jan. 16, 2011). While Allah borrowed from the NOI's emphasis on the divinity of the black man, he deemphasized the supernatural elements of Islam (and denied Wallace Fard Muhammad's divinity), while also expressing less concern than Elijah about clean lifestyles and abstaining from drugs and alcohol. KNIGHT, *supra* note 2, at 114 (discussing Allah's conflicted views of the value of drugs). *But see id.* at 60 (describing young Five Percenters abstaining from pork). The relationship between the NOI and Allah's Five Percenters is complex. *See generally id.* ch. 3 (exploring Clarence/Allah's relationship with Malcolm X and the Harlem Temple of the NOI). For a more thorough discussion of Five-Percenter beliefs, see *infra* Part II.A.

[4] KNIGHT, *supra* note 2, at xiii.

[5] *Id.* at 37.

remaining 5 percent are the poor righteous teachers, who reject the 10 percent and their "mystery god," and know that god exists in themselves, as "Asiatic" black men.[6] They devote themselves to the search for universal knowledge and truth through Allah's system of divine mathematics.[7] Allah's followers called themselves the Nation of Gods and Earths (as all male believers are "Gods" and women are "Earths"),[8] or the Five-Percent Nation, generally shortened to Five Percenters.

Meanwhile, in 1966, George Lester Jackson was serving time in San Quentin State Prison for armed robbery when he became interested in the Black Panthers and Marxist Revolutionary ideology.[9] He and several fellow revolutionary inmates formed a group called the Black Guerilla Family (BGF), a loosely organized black Marxist organization based in prison, with the goals of protecting the safety and dignity of black men in prison and, eventually, overthrowing the United States government.[10] Allah was murdered in 1969 in a Harlem housing project,[11] and Jackson was shot and killed by a prison guard during an alleged escape attempt in 1971.[12] The two share little in common beyond being espousers of different varieties of Afrocentric philosophy; but, today, the organizations are linked by their shared large presence in the American prison system. Also, many states consider both organizations dangerous prison gangs.[13]

During the 1990s, in light of high crime rates and growing public fear as urban street gangs spread across the country,[14] prison officials began turning to the problem of gang violence among prisoners.[15] In response to the nationalization of some street and prison gangs, the FBI developed a National Gang Strategy in 1993, encouraging the cooperation of law enforcement and corrections officials to control gang violence.[16]

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[6] *Id.*

[7] Ted Swedenburg, Islam in the Mix: Lessons of the Five Percent (Feb. 19, 1997) (unpublished manuscript), *available at* http://comp.uark.edu/~tsweden/5per.html.

[8] KNIGHT, *supra* note 2, at 215.

[9] IMPRISONED INTELLECTUALS 84-85 (Joy James ed., 2003).

[10] *Id.* at 85.

[11] KNIGHT, *supra* note 2, at 120.

[12] IMPRISONED INTELLECTUALS, *supra* note 9, at 85-86.

[13] *See infra* Part II.

[14] *See, e.g.*, Gary Lee, *Big-City-Style Gangs Find a New Frontier on Plains of Kansas*, L.A. TIMES, Aug. 8, 1993, at 4.

[15] *See, e.g.*, Maxine Bernstein, *Task Force on Gangs Meeting in Hartford*, HARTFORD COURANT, Aug. 30, 1995, at A11.

[16] *A Centennial History: A World of Trouble, 1989-2001*, FBI, http://www.fbi.gov/about-us/history/a-centennial-history/a_world_of_trouble_1989-2001 (last visited Jan. 13, 2012); *Spotlight: Gangs*, NAT'L CRIMINAL JUSTICE REFERENCE SERV., http://www.ncjrs.gov/spotlight/gangs/Summary.html (last visited Jan. 13, 2012).

The focus on controlling gang activity in prison was unsurprising, given the historical connection between prisons and street gangs; certain large street gangs, such as the Mexican Mafia, originated within the corrections system.[17] While states varied in their approaches to gang management, by the mid-90s, many had adopted a comprehensive "Security Threat Group" management system to control and monitor gang activity inside prison walls.[18]

The consequences of an inmate's designation as a member of a security threat group (STG) vary from state to state. But at least fourteen states, using a system of administrative (as opposed to disciplinary) segregation, isolate suspected gang members from the general prison population.[19] The process of assigning an inmate STG status also varies from state to state, but many have followed California's "gang validation" model, which assigns point values to criteria ranging from the prisoners' admission of gang membership or fraternization with known gang members, to possession of gang-affiliated tattoos, literature, or photographs.[20] In many cases, the only way for a prisoner to remove gang affiliation is to go through a "debriefing" process, in which the prisoner repudiates his or her gang activity, gives a full recounting of his or her gang activities, and, generally, names other unvalidated gang members.[21]

While STG systems inevitably restrict the constitutional rights of inmates, common sense dictates that upon being sentenced to prison, a person must expect to surrender a portion of the rights that are protected in outside society. The

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[17] Richard Valdemar, *History of the Mexican Mafia*, POLICE MAG. (July 25, 2007), http://www.policemag.com/Blog/Gangs/Story/2007/07/History-of-the-Mexican-Mafia-Prison-Gang.aspx.

[18] *See, e.g.*, DARYL R. FISCHER, NAT'L INST. OF JUSTICE, ARIZONA DEPARTMENT OF CORRECTIONS SECURITY THREAT GROUP (STG) PROGRAM EVALUATION i (2001), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/197045.pdf; *Gang and Security Threat Group Awareness*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/pub/gangs/ (last visited Jan. 13, 2012); *Security Threat Group Introduction*, MASS. EXEC. OFFICE OF PUB. SAFETY & SEC., http://www.mass.gov/eopss/law-enforce-and-cj/prisons/stg-info/security-threat-group-introduction.html (last visited Jan. 13, 2012).

[19] COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL, CHAPTER 31: SECURITY CLASSIFICATION AND GANG VALIDATION 10 (8th ed. 2009), *available at* http://www3.law.columbia.edu/hrlr/JLM/Chapter_31.pdf.

[20] CAL. DEP'T OF CORR. & REHAB., DEPARTMENT OPERATIONS MANUAL § 61020.7 (2004) (Prison Gang Identification Materials), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%20Ch%206-Printed%20Final.pdf.

[21] Scott N. Tachiki, Comment, *Indeterminate Sentences in Supermax Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CALIF. L. REV. 1115, 1119 n.4 (1995).

Supreme Court, however, has not always approached prisoners' constitutional rights through the prism of which rights prisoners retain. Rather, the Court has accepted that prisoners have constitutional rights and has considered the nature of a prisoner's particular asserted right weighed against the strong state interest in managing a prison system.[22] Although this approach seems protective of prisoners' rights, in practice, the courts show extreme deference to the prison administration in the large majority of claims.[23]

The test for infringement of prisoners' rights, based on the Due Process clauses of the Fifth and Fourteenth Amendments,[24] was clearly laid out by the Supreme Court in *Turner v. Safley*.[25] Holding that a restriction on prisoners' rights must be "related to legitimate penological interests," the Court established a four-part test to be used in analyzing claims[26]: the restriction must be reasonably related to the stated goal; it must leave alternate means for the prisoner to exercise the right in question; the risks caused by accommodation must be significant; and the prison cannot have any easily available alternatives that would achieve its goal.[27] In practice, as long as the first prong—the rational relation test—is met, courts tend to find that the others are met as well.[28]

This note will begin by examining the *Turner* test in some detail in Part I to explore the likelihood of a suspected member of an STG prevailing in a challenge of his or her STG status.[29] Because courts have uniformly found STG programs permissible under due process, prisoners can generally only prevail by showing that the prison's application of its gang validation standards was improper.[30] The discussion will then

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[22] Turner v. Safley, 482 U.S. 78, 84 (1987); *see also* Procunier v. Martinez, 416 U.S. 396, 413 (1974). Justices Thomas and Scalia, however, appear not to share this view. *See* Overton v. Bazzetta, 539 U.S. 126, 140 (2003) (Thomas, J., concurring) ("The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by ordinary, law-abiding persons.").

[23] *See, e.g.*, Bull v. City & Cnty. of S.F., 595 F.3d 964, 999 (9th Cir. 2010) ("[D]eference to prison administrators is instrumental in maintaining prison security."); *see also infra* Part II.A.

[24] U.S. CONST. amend. V; *id.* amend. XIV, § 1. While the Eighth Amendment is implicated by decisions involving prisoners' rights, this note will mostly focus on the due process aspects.

[25] *Turner*, 482 U.S. 78.

[26] *Id.* at 89.

[27] *Id.* at 89-90.

[28] *See infra* Part I.A.

[29] A full analysis of the adequacy of the due process protections afforded by prisons is beyond the scope of this note, but has been written about extensively by other commentators. *See, e.g.*, Tachiki, *supra* note 21.

[30] *See infra* Part I.B.

be narrowed, in Part II, to the more specific and unique cases of the Five Percenters and Black Guerilla Family. These groups should present a more difficult question for the courts when applying the *Turner* analysis because, as a pseudo-religious group and a political organization, respectively, the First Amendment interests at stake are considerably higher than those of traditional prison gang members. Furthermore, and warranting extra scrutiny of Five Percenters' religious rights in prison, the War on Terror has already cast the Muslim population into an unfavorable light. Because associational rights are quite understandably the First Amendment rights most limited by incarceration,[31] identification of First Amendment rights with stronger protections is essential to this analysis. Because the Five Percenters and BGF are religious and political organizations, respectively, those rights are present.

Parts II.A.1 and II.B.1 will discuss the history and ideology of the Five Percenters and Black Guerilla Family to provide a foundation for the First Amendment issues to follow. Parts II.A.2 and II.B.2 will consider the approach taken by the courts in cases involving Five Percenters and BGF members to date and will attempt to show that the *Turner* test, because it lacks any way to accommodate heightened First Amendment interests in religious and political speech, is unable to adequately protect the rights of these groups. When considered in light of the severity of the deprivations faced by inmates who find themselves tangled in the STG apparatus,[32] discussed in Part III, this flaw of the *Turner* test can lead to a severe failure of due process. Part IV will synthesize this information to illustrate the specific failings of the *Turner* test as applied to the Five Percenters and BGF and similar groups, and will suggest alternate approaches the courts could use to reach an outcome that better balances the legitimate penological interests of the prison with the legitimate First Amendment interests of the prisoners.

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[31] Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125-26 (1977).

[32] While a full examination of the implications of one such deprivation, indefinite solitary confinement, is well beyond the scope of this note, it has been the subject of much recent discussion by legal scholars. *See, e.g.*, Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008). For excellent ongoing analysis of the social and legal issues raised by the use of solitary confinement, see James Ridgeway & Jean Casella, *How Many Prisoners Are in Solitary Confinement in the United States?*, SOLITARY WATCH, http://www.solitarywatch.com (last visited Feb. 2, 2012). Part IV, *infra*, contains a brief discussion of the issue.

I. DUE PROCESS: PRISONERS' CLAIMS OF DEPRIVATION OF CONSTITUTIONAL RIGHTS

A. *The* Turner *Test*

While "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[33] courts have not been particularly friendly to claims brought by prisoners alleging a violation of their constitutional rights. *Turner v. Safley* laid out the framework for assessing prisoner claims.[34] The U.S. Supreme Court held in *Turner* that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[35] To determine if the restriction in question is "reasonably related to legitimate penological interests," *Turner* requires a four-prong analysis: first, the regulation must have a "valid, rational connection" to the penological interest used to justify it; second, the prison must show that there are "alternative means of exercising the right" available to the prisoner; third, the court weighs the potential impact on other prisoners and staff if the accommodation is allowed; and finally, the prison must not have easy alternatives available to achieve the same interest without restricting prisoners' rights.[36]

Although the *Turner* test seems protective (the right of prisoners to marry was upheld in that case),[37] in application, it has been extremely difficult for prisoners to succeed on constitutional claims. The first prong (a rational connection to a valid penological goal) seems to have considerably more weight than the other three.[38] The "alternative means of exercising" prong is subject to flexible interpretation; even in a case where there was clearly no alternative means, the Supreme Court held that while this was evidence of unreasonableness, it

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

[34] *Turner*, 482 U.S. 78. *Turner v. Safley* involved two different deprivations within prison: Missouri prisoners challenged, in a class action suit, the constitutionality of strict limits on inmate-to-inmate correspondence, and the constitutionality of a prison policy requiring approval from the superintendent before an inmate can be married. *Id.* at 81-82. The correspondence restrictions were upheld by the Court in Justice O'Connor's opinion, but the marriage restriction was held to be unreasonable. *Id.* at 81.

[35] *Id.* at 89.

[36] *Id.* at 89-90.

[37] *Id.* at 78.

[38] *See* Beard v. Banks, 548 U.S. 521, 532 (2006) ("In fact, the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor's basic logical rationale.").

was "not conclusive of the reasonableness of the Policy."[39] The fourth prong was limited by the *Turner* decision itself, which emphasized that the Court was not applying a "least restrictive alternative" test. Rather, the Court was applying a test in which the Court would only make sure the prison regulation was not an "'exaggerated response' to prison concerns."[40] Under the *Turner* test, the Supreme Court has upheld prison regulations that denied access to any "newspapers, magazines, or personal photographs,"[41] prevented Muslim prisoners from attending a religiously commanded Friday evening prayer service,[42] severely restricted visitation rights,[43] imposed up to sixteen-day delays in access to legal materials,[44] and subjected an inmate to treatment with antipsychotic drugs against his will.[45]

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[39] *Id.* (citations omitted).

[40] *Turner*, 482 U.S. at 90; *see also* Overton v. Bazzetta, 539 U.S. 126, 136 (2003).

[41] *Beard*, 548 U.S. at 526. In this case, prisoners in restricted confinement in Pennsylvania prisons challenged a prison regulation denying such prisoners access to any "newspapers, magazines, and photographs" on the grounds that it served no legitimate penal interest. *Id.* at 527. The Third Circuit agreed, *id.* at 528, but the Supreme Court reversed, finding persuasive the prison's claim that the regulations served the goal of "motivat[ing] better behavior." *Id.* at 531 (internal quotation marks omitted).

[42] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). Muslim prisoners assigned to outside work duty sued on the grounds that the security policies of the prison prevented them from attending certain Muslim religious ceremonies. *Id.* at 347. While the Third Circuit found that prison officials should have the burden to show there were no other reasonable methods available to achieve their goals, the Supreme Court refused to endorse their reasoning. *Id.* at 350. The Court found the *Turner* prongs to be met, and emphasized a refusal to allow First Amendment concerns to overcome the strong presumption against judicial involvement in prison policy decisions. *Id.* at 352-53.

[43] *Overton*, 539 U.S. 126. In 1995, Michigan revised their prison visitation policy to allow inmates to receive visits from only immediate family members and an approved list of ten other individuals. *Id.* at 129. Children were not allowed to be listed, unless they were "children, stepchildren, grandchildren, or siblings of the inmate." *Id.* While this prevented inmates from seeing nieces, nephews, or children over which the inmate no longer had parental rights, the Court found the prison's interests in maintaining security and protecting children to satisfy *Turner*. *Id.* at 133. The Court also upheld a near-complete ban on visitation for inmates with substance-abuse violations. *Id.* at 134.

[44] Lewis v. Casey, 518 U.S. 343, 362 (1996). With fairly little discussion, Justice Scalia struck down a District Court injunction. He wrote that restrictions on dangerous prisoners' access to law libraries and long delays in receiving legal mail were not problematic "so long as they are the product of prison regulations reasonably related to legitimate penological interests." *Id.* Evidencing a common train of thought in these cases, at least among a segment of the Court, Justice Scalia wrote that the "wildly-intrusive" injunction represented "the *ne plus ultra* of what our opinions have lamented as a court's in the name of the Constitution, becom[ing] . . . enmeshed in the minutiae of prison operations." *Id.* (citations omitted).

[45] Washington v. Harper, 494 U.S. 210, 225 (1990). Respondent, a mentally ill prisoner in Washington State Penitentiary, began refusing antipsychotic medication after having consented to treatment for several years. *Id.* at 214. After an administrative hearing, the prison found respondent to be dangerous and ordered treatment to continue against his will. *Id.* at 217. Respondent filed a § 1983 action alleging that the administrative hearing, without judicial review, violated his due process

Disciplinary, as opposed to regulatory, decisions are governed by the even more lenient standard of *Superintendent v. Hill*.[46] Under *Hill*, courts will not overturn a prison's decision under due process so long as "some evidence supports the decision by the prison disciplinary board."[47] The Supreme Court emphasized that an analysis under the *Superintendent v. Hill* formula "does not require examination of the entire record," but can be met as long as there is "any evidence in the record that could support the conclusion reached by the disciplinary board."[48] Depending on the court's understanding of the STG program, the *Superintendent v. Hill* standard is sometimes invoked instead of *Turner*.[49] Because of the degree of deference given under *Turner*, however, the outcome is generally substantially the same.

Under either test, the Supreme Court has emphasized that prison administrators are due considerable deference. Writing for the majority in *Overton v. Bazzetta*, Justice Kennedy stated, "We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."[50] Construing *Overton*, Justice Souter wrote for the plurality in *Beard v. Banks* that, even on summary judgment, "disputed matters of professional judgment" should be considered with "deference to the views of prison authorities."[51] Lower courts have been happy to comply.[52]

The application of *Turner*, therefore, is not nearly as protective of prisoners' rights as its plain language would

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rights. *Id.* While the Washington Supreme Court agreed, *id.* at 218, the U.S. Supreme Court reversed, finding the prison's administrative system adequate to satisfy *Turner*. *Id.* at 226.

[46] Superintendent v. Hill, 472 U.S. 445 (1985). This case involved the loss of "good-time credits" for violating prison rules. The inmate claimed that the evidence presented at the disciplinary hearing was inadequate to satisfy due process. *Id.* at 447. The Court assumed that the loss of credits implicated a liberty interest, *id.* at 450, but found the prison had presented sufficient evidence to satisfy due process, *id.* at 447.

[47] *Id.* at 455.

[48] *Id.* at 456.

[49] The Ninth Circuit has adopted this approach. *See* Bruce v. Ylst, 351 F.3d 1283, 1287 (9th Cir. 2003) ("Bruce claims he was denied due process because prison officials did not have sufficient evidence to validate him as a member of the BGF prison gang. This due process claim is subject to the 'some evidence' standard of *Superintendent v. Hill*, which the district court properly cited and applied."). As a result, challenges to gang validation in California, though extremely common, are almost always unsuccessful. It is not clear how this squares with the Supreme Court's use of *Turner*.

[50] Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

[51] Beard v. Banks, 548 U.S. 521, 529-30 (2006).

[52] *See, e.g.*, Josselyn v. Dennehy, No. 08-1095, 2009 WL 1587695, at *1 (1st Cir. June 9, 2009); Jones v. Caruso, 569 F.3d 258, 278 (6th Cir. 2009); Monroe v. Beard, 536 F.3d 198, 207 (3d Cir. 2008); Wardell v. Duncan, 470 F.3d 954, 960 (10th Cir. 2006).

suggest. Because of the Supreme Court's continued emphasis on deference to the decisions of prison authorities, much of the force of the decision has been neutered.[53] The Court's refusal to consider seriously the strength of the First Amendment interests implicated by prison policies,[54] coupled with the test's lack of an explicit mechanism to do so, has left even strong First Amendment claims with little legal precedent to hang on.

B. Turner *and Security Threat Group Designation*

Courts have largely approved STG systems under the deferential test created by *Turner*.[55] States use a variety of systems to designate inmates as STG members. In California, prisoners must be "validated" as gang members, a process which requires corrections staff to show three independent points of evidence demonstrative of gang membership, one of which is a direct link to a current validated gang member, to assign them STG status.[56] This evidence can be written material, tattoos, "hand signs," "distinctive clothing," photographs, staff monitoring of communication with other prisoners, possession of names or addresses of other gang members, information from other agencies, evidence in the prisoners' trial transcripts of gang activity, or visitors with gang ties.[57] There seems to be no specific requirement of when

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[53] *See supra* notes 40-44, 50-52.

[54] *See supra* note 39.

[55] *See, e.g.*, Bruce v. Ylst, 351 F.3d 1283, 1287 (9th Cir. 2003).

[56] CAL. CODE REGS. tit. 15, § 3378(c)(3) (2009). New inmates are investigated by a gang coordinator upon admission. *Id.* § 3378(c). Inmates are entitled to an interview, and all validation materials are disclosed to the inmate before the hearing. *Id.* § 3378(c)(6). Any information given by the inmate is added to the gang validation package, and the inmate is given a written report within fourteen days of the hearing. *Id.* § 3378(c)(6)(D). The validation package is reviewed by the chief of the Office of Correctional Safety, *id.* § 3378(c)(6), and is subsequently reviewed annually. *Id.* § 3378(c)(7).

[57] *Id.* § 3378(c)(8). Recent cases have dealt with validations based on possession of newspapers belonging to a validated gang member and a diary/autobiography mentioning the founder of a prison gang, Ellis v. Cambra, No. 1:02-cv-05646-AWI-SMS PC, 2010 WL 4137158, at *5-6 (E.D. Cal. Oct. 19, 2010); a signature on a birthday card for a validated gang member and a Meso-American symbol, allegedly used by the Mexican Mafia, drawn on a piece of paper, Treglia v. Dir. of Cal. Dep't of Corr., No. 2:09-cv-352 KJN P, 2010 WL 4905741, at *3 (E.D. Cal. Nov. 24, 2010); and perhaps more typically, a combination of anonymous informants and correspondence with validated gang members, Gray v. Woodford, Civ. No. 05-CV-1475 MMA (CAB), 2010 WL 2231805, at *8 (S.D. Cal. Feb. 10, 2010). While at least one court expressed concern that the validation hearings were perfunctory, "hollow gestures," it refused to say they are meaningless. Madrid v. Gomez, 889 F. Supp. 1146, 1276 (N.D. Cal. 1995); *see also* Aviña v. Medellin, No. CIV S-02-2661-FCD KJM P, 2010 WL 3516343, at *7 (E.D. Cal. Sept. 3, 2010) (finding that plaintiff had not received due process during the validation process).

validation proceedings may be held; claims of retaliatory validation proceedings are common.[58] Inmates may be declassified after demonstrating no gang involvement for two years, in the case of prisoners housed in the general population, or six years in the case of prisoners in Secure Housing Units.[59] While California's rules are quite developed, and New Jersey uses a similar approach,[60] other states leave prison staff essentially unfettered discretion in determining who and what constitutes a security threat group.[61]

Unsurprisingly, given the deference courts show to prisons' administrative decisions, challenging the deprivations inherent in STG designation is not often successful. The Ninth Circuit has taken a hands-off approach to California's "gang validation" process, which often leads to indefinite solitary confinement in "Secure Housing Units."[62] Concluding that the decision to assign suspected gang members to solitary confinement concerned administrative—and not disciplinary—segregation, the court has held that "the assignment of inmates within the California prisons is essentially a matter of administrative discretion."[63]

Not all challenges are unsuccessful, however. After years of litigation, a former inmate, who spent eight years in solitary confinement for gang affiliation, convinced a district court that his due process rights were violated: he never received an initial hearing before the validation process began, and the evidence used to validate him failed to meet the "some evidence" standard dictated in *Superintendent v. Hill*.[64] Where courts find for the prisoner, they generally do so based on insufficient procedural due process, not substantive grounds.[65]

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[58] *See, e.g.*, *Bruce*, 351 F.3d at 1289; Mitchell v. Skolnik, No. 2:10-cv-01339-JCM-RJJ, 2010 WL 5056022, at *2 (D. Nev. Dec. 3, 2010); Rios v. Tilton, No. 2:07-cv-0790 WBS KJN P, 2010 WL 3784703, at *1 (E.D. Cal. Sept. 24, 2010).

[59] CAL. CODE REGS. tit. 15, § 3378(d)-(e).

[60] *See* Blyther v. N.J. Dep't of Corr., 730 A.2d 396, 398 (1999).

[61] *See, e.g.*, COLO. REV. STAT. § 17-1-109(2) (2006); TEX. GOV'T CODE ANN. § 508.1141 (West 2010).

[62] *Bruce*, 351 F.3d at 1287; *see also* Michael Montgomery, *Ex-Prisoner Sues California over Years in Solitary*, NAT'L PUB. RADIO: ALL THINGS CONSIDERED (Mar. 8, 2009), http://www.npr.org/templates/story/story.php?storyId=101501841.

[63] *Bruce*, 351 F.3d at 1287 (quoting Munoz v. Rowland, 104 F.3d 1096, 1098 (9th Cit. 1997) (internal quotation marks omitted).

[64] Lira v. Cate, No. C 00-0905 SI, 2010 WL 727979, at *2 (N.D. Cal. Sept. 30, 2009).

[65] *See, e.g.*, Aviña v. Medellin, No. CIV S-02-2661-FCD KJM P, 2010 WL 3516343, at *8 (E.D. Cal. Sept. 3, 2010) (holding that, in the absence of prisoner receiving a timely hearing, the prison's showing of "some evidence" to support gang validation was "moot"); *Lira*, 2010 WL 727979, at *2.

Cases like those are the exception rather than the rule. The Third Circuit applied *Turner* to STG classification in New Jersey in *Fraise v. Terhune* and found that the first three factors "weigh[ed] strongly in favor" of the prison policy, while the fourth was close enough to pass the test.[66] The Fourth Circuit did the same in South Carolina.[67] Having found that in the case of an "individualized" decision a full adjudicative hearing may be required, New Jersey state courts apply a slightly higher level of due process protection.[68] Nonetheless, The New Jersey courts have treated STGs similarly to the Ninth Circuit in California, finding that, because the designations are administrative and nondisciplinary in nature, the prison's assignment procedures satisfy due process.[69]

C. Other Legal Approaches to STGs

Prisoners have tried—generally unsuccessfully—to challenge the STG system via other legal routes as well. Eighth Amendment claims, for example, are occasionally attempted.[70] The standard for cruel and unusual punishment claims based on prison conditions is quite high: the Supreme Court has held that, short of a showing of "deprivations denying 'the minimal civilized measure of life's necessities,'" prisoners' claims must fail.[71] In the absence of any deprivations rising to that level, claims that administrative segregation violates the Eighth Amendment have not survived summary judgment.[72] Accordingly, STG classification does not seem to raise any serious Eighth Amendment concerns, notwithstanding some creatively framed arguments to the contrary.[73]

Other prisoners have attempted to use the Fifth Amendment privilege from self-incrimination to challenge the

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[66] Fraise v. Terhune, 283 F.3d 506, 521 (3d Cir. 2002); *see also infra* notes 103-05 and accompanying text.

[67] *See In re* Admin. Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 469 (4th Cir. 1999).

[68] Jenkins v. Fauver, 528 A.2d 563, 569-70 (N.J. 1987).

[69] Blyther v. N.J. Dep't of Corr., 730 A.2d 396, 402 (N.J. Super. Ct. App. Div. 1999).

[70] *See, e.g.*, Jenkins v. Murray, No. 08-4824, 2009 WL 3963638, at *2 (3d Cir. Nov. 20, 2009).

[71] Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

[72] *See Jenkins*, 2009 WL 3963638, at *2.

[73] *See, e.g.*, Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *26 (N.D. Cal. Mar. 10, 1997) (denying Eighth Amendment claim where prisoner alleged that the "debriefing" process would put his life at risk from retaliation by other gang members).

debriefing process.[74] Although prisoners must acknowledge and repudiate gang activity to be eligible for debriefing (which is often the only way out of STG classification), the California courts have held that there is no Fifth Amendment issue because the debriefing process cannot be used in subsequent criminal proceedings.[75]

A last possible approach, which may be slightly more effective than Eighth Amendment or Fifth Amendment self-incrimination claims, is a Fourteenth Amendment equal protection challenge. In *Johnson v. California*, the Supreme Court, applying strict scrutiny, found a prison procedure that segregated all new prisoners by race to be unconstitutional.[76] Though STG members are not a protected class, prisons may not use race as a proxy for gang membership.[77] This is somewhat complicated by the reality of prison gangs; six of the largest national prison gangs have members of only one race.[78]

Turner, at least as applied to date, seems to offer little hope for prisoners challenging STG designations per se. In the absence of much willingness to find that STG procedures run

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[74] COLUM. HUM. RTS. L. REV., *supra* note 19, at 15.

[75] Griffin v. Gomez, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263, at *19 (N.D. Cal. June 29, 1995).

[76] Johnson v. California, 543 U.S. 499, 505 (2005). In a purported attempt to prevent gang violence among new inmates and transferees housed in reception centers, California adopted a de facto policy of complete racial segregation. *Id.* at 502. In striking down the regulation under strict scrutiny, Justice O'Connor cited cases that integrated prison systems. Justice O'Connor noted that, "by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions." *Id.* at 507. Justice O'Connor further noted that *Turner* was not applicable to cases involving racial segregation: "The right not to be discriminated against based on one's race . . . is not a right that need necessarily be compromised for the sake of proper prison administration." *Id.* at 510. An equal protection challenge asserting that STG apparatuses are using race as a proxy for gang membership could very well be successful under *Johnson*. Such an approach is beyond the scope of this note, however.

[77] *See* United States v. Taveras, 585 F. Supp. 2d 327, 338 (E.D.N.Y. 2008) (holding that government's use of Dominican heritage as evidence of membership in a Dominican prison gang was impermissible at the sentencing stage of a capital trial); Jimenez v. Cox, No. 3:05-CV-00638-LRH, 2008 WL 4525581, at *8 (D. Nev. Jan. 15, 2008) (denying government's summary judgment motion where government failed to present evidence showing they were not using race as a proxy for STG membership); *see also Johnson*, 543 U.S. at 511 ("When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers.").

[78] The six are: La Neta (Puerto Rican), Aryan Brotherhood (White), Black Guerilla Family (Black), and The Mexican Mafia, La Nuestra Familia, and The Texas Syndicate, all Mexican-American from different areas of Mexico. *Gang and Security Threat Group Awareness: Major Prison Gangs*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/pub/gangs/prison.html (last visited Feb. 3, 2012).

afoul of the *Turner* formula,[79] and a similar unwillingness to adjust the formula to accommodate more significant prisoner interests,[80] inmates hoping to challenge their deprivations under such systems are at a dead end. While other legal approaches are possible, none offers great possibilities, as evidenced by the paucity of attempts to use them.[81] The remainder of this note will examine the First Amendment interests at stake in the cases of the Five Percenters and the Black Guerilla Family. In turn, this note will suggest some possible approaches to better reflect the actual balance between deprivations and prison interests.

II. FIRST AMENDMENT

To understand the unique First Amendment concerns raised by the Five Percenters and Black Guerilla Family, a brief discussion of the groups' backgrounds is necessary. The ideological, religious (in the case of The Five Percenters), and political (in the case of the BGF) underpinnings of the groups are indispensable to understanding the legal implications of the group members' status in prison. The background information will be followed by a discussion of the First Amendment implications relevant to each of these groups in the prison setting to better understand how the *Turner* test fails to fully accommodate the interests of these group members in prison.

A. Five Percenters

1. Background

Founded in Harlem in the 1960s by Clarence 13X, the Five Percenters (also known as the Nation of Gods and Earths, or NGE) and the closely related Moorish Science Temple of America[82] practice a pseudo-religious, but nontheistic,

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[79] *See supra* notes 61-64 and accompanying text.

[80] *See supra* Part I.A.

[81] *See supra* Part I.C.

[82] The Moorish Science Temple of America, founded by Noble Drew Ali in Chicago in 1928, is a precursor to both the Nation of Islam and the NGE. *Moorish American History*, MOORISH SCI. TEMPLE OF AM., http://www.moorishsciencetempleofamericainc.com/MoorishHistory.html (last modified Aug. 8, 2008); *see also* KNIGHT, *supra* note 2, at 19-22. It is also a legally recognized religion in some prisons that consider Five Percenters a gang. *Id.* at 167. However, because of their affiliation with street gangs including the Vice Lords, El Rukns, and Black Gangster Disciples, their members are subject to some restrictions in

philosophy. Clarence 13X taught that black people are the original people and the "fathers and mothers of civilization,"[83] and that the black man is God. Five Percenter beliefs emphasize the teaching of knowledge via a system of Supreme Mathematics.[84] As would be expected from its membership of occasionally troubled, inner-city young men, the NGE's connection to violence and crime goes back to its very founding. Shortly after Clarence 13X became Allah, he was shot twice in the group's headquarters, possibly over a gambling debt.[85] The Five Percenters first entered law enforcement consciousness in the disturbances after the assassination of Malcolm X, when six Five Percenters, including Allah, were arrested for assaulting a police officer.[86] Within a day, the FBI had notified director J. Edgar Hoover of the group's existence.[87] Contemporary newspaper accounts referred to the Nation as a "terror group"[88] and a "hate group."[89] Nonetheless, in spite of,

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other states. *See* Morris-Bey v. Debruyn, No. 96-3027, 1997 WL 527857, at *1 (7th Cir. Aug. 21, 1997).

[83] The NGE emphasizes that it is not a racist or anti-white organization, however. *DISCLAIMER*, 5% NETWORK, http://www.bazzworks.com/an/disclaimer.html (last visited Jan. 13, 2012). There is even a Milwaukee-based group that asserts that white men can be "Gods," though this stance is generally rejected by the rest of the Nation. KNIGHT, *supra* note 2, at 237.

[84] *What We Teach*, 5% NETWORK, http://www.allahsnation.net/What.html (last visited Jan. 13, 2012). The Supreme Mathematics is a system of assigning symbolic meaning to the numbers 0 through 9. The NGE also use a system of Supreme Alphabets, which similarly applies a specific meaning to each letter. The systems are used as a basis for the practice of "breaking down," or reducing words and concepts to their most basic meanings, as provided by the Supreme Mathematics. KNIGHT, *supra* note 2, at 49-55.

[85] KNIGHT, *supra* note 2, at 57.

[86] *Id.* at 70.

[87] *Id.* at 71. This also marks the beginning of law enforcement's fundamental misunderstanding of the group; in the FBI teletype prepared and sent to J. Edgar Hoover after the New York disturbance, the group was identified as "the five percent of Muslims who smoke and drink." Memorandum from FBI on Disturbance by Group Called "Five Percenters" to Dir., FBI 3 (June 6, 1965) (from FOIA Request: Five Percenters, Part 1 of 2), *available at* http://vault.fbi.gov/5percent/Five%20Percenters%20Part%201%20of%202.

[88] James W. Sullivan, *Harlem "5 Percenters"—Terror Group Revealed*, N.Y. HERALD TRIB., Oct. 15, 1965, at 1, (from FOIA Request: Five Percenters, Part 1 of 2), *available at* http://vault.fbi.gov/5percent/Five%20Percenters%20Part%201%20of%202 at 78.

[89] Homer Bigart, *Wingate Warns of Negro Revolt if Haryou's Program Is Curbed*, N.Y. TIMES, Oct. 15, 1965, at 1, (from FOIA Request: Five Percenters, Part 1 of 2), *available at* http://vault.fbi.gov/5percent/Five%20Percenters%20Part%201%20of%202 at 84. This article contains another unique misstatement of the meaning behind the group's name, citing police reports purportedly quoting group members as saying, "85 per cent of all of the Negroes are like cattle, 10 per cent are Uncle Toms, and we are the 5 per cent who know what belongs to us." The media would struggle with the meaning of the Five Percenters' name, even after Mayor John Lindsay began working with the group, with the *Times* writing in 1967: "The Five Percenters take their name from their contention that only 5 per cent of all Negroes are militant enough to redress

and in fact because of, the earlier attempt on his life, Allah preached a philosophy of nonviolence.[90]

After Allah's murder in 1969 (by which time the group's reputation had improved to the point that Mayor John Lindsay personally expressed his condolences to the Nation),[91] the Five Percenter movement seemed on the verge of death as well.[92] Two different but connected threads would keep the NGE alive, however. In the 1980s, Allah's lessons would reach their widest audience yet through the music of New York-based hip hop artists like Rakim, Big Daddy Kane, Brand Nubian, and Poor Righteous Teachers, all of whom were practicing Five Percenters and injected NGE language and philosophy into their music.[93] In the 1990s, superstars like Nas, Digable Planets, and especially the Wu-Tang Clan would work Five Percent mythology into their lyrics.[94] Years before Raekwon would rap about "today's mathematics,"[95] however, the Nation found a sanctuary of sorts in the New York prison system.[96]

While incarcerated Five Percenters continued teaching the lessons of a group whose outside existence they were uncertain of, they also aroused the suspicions of prison administrators and the government.[97] Five Percenters' suspected involvement with the 1971 Attica prison uprising did not improve their reputation.[98] By the 1990s, as prisons became increasingly concerned about gangs, the Five Percenters came under the spotlight.[99]

2. Legal Analysis

Today, Michigan, New Jersey, North Carolina, South Carolina, and Virginia classify Five Percenters as an STG.[100] In their birthplace, New York, Five Percenters were an STG until

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their grievance against what they felt was ill treatment by whites." KNIGHT, *supra* note 2, at 97. All these misstatements are similar in making the group sound much more militant than their actual beliefs dictate.

[90] KNIGHT, *supra* note 2, at 118.

[91] *Id.* at 121.

[92] *Id.* at 129.

[93] *Id.* at 179.

[94] Swedenburg, *supra* note 7.

[95] "The Sun don't chill, Allah/What's today's mathematics, Sun?/Knowledge, God." RAEKWON, *Knowledge God*, *on* ONLY BUILT 4 CUBAN LINX (RCA Records 1995).

[96] KNIGHT, *supra* note 2, at 161.

[97] *Id.*

[98] EDWARD E. CURTIS, IV, ENCYCLOPEDIA OF MUSLIM-AMERICAN HISTORY, VOL. 1, at 203 (2010).

[99] KNIGHT, *supra* note 2, at 165.

[100] Ciempa v. Jones, 745 F. Supp. 2d 1171, 1177 n.5 (N.D. Okla. 2010).

Marria v. Broaddus was decided in 2003. In that case, the Southern District wrote, with little precedent, "For these reasons, we find that plaintiff's beliefs as a member of the Nation of God's [sic] and Earths are both sincere and 'religious in nature' and therefore entitled to RLUIPA [the Religious Land Use and Institutionalized Persons Act] and First Amendment protection under the free exercise clause."[101]

Although this line of reasoning, which focuses on sincere adherence to beliefs that are religious in nature, has not been applied by other courts,[102] the Western District of Virginia recently expressed some willingness to look more closely at the Five Percenters' classification, albeit in a different way.[103] In a section 1983 challenge[104] stemming from the confiscation of a compact disc with Five Percenter content from the petitioner, the district court denied summary judgment and remanded to the magistrate for further fact finding along both First Amendment and RLUIPA grounds.[105] In the absence of specific allegations of gang violence committed by Five Percenters, the court found it impossible to apply the *Turner* factors.[106] Having

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[101] Marria v. Broaddus, No. 97 Civ. 8297 NRB, 2003 WL 21782633, at *12 (S.D.N.Y. July 31, 2003). The *Broaddus* court also noted that Five Percenter literature specifically instructed inmate adherents to use their time in prison productively, and to follow "the rules of [their] respective prison[s] and reap what [they] sow in this righteousness." *Id.* at *3 n.6. This case was a direct challenge on New York's classification of the Five Percenters as an STG and its concurrent ban on Five Percenter literature and memorabilia. *Id.* at *4. Unlike other states, New York approached STGs via a "nonrecognition" policy, essentially refusing to acknowledge the gang's existence to reduce its influence. New York simultaneously restricted any outward displays of membership. *Id.* Finding that the NGE was a religion as far as the Free Exercise Clause was concerned, and that the inmate-plaintiff was a sincere adherent, the court found that the restrictions lacked any evidentiary support sufficient to meet the standards of the RLUIPA. *Id.* at *18. The court suggested that the prison really had very little understanding of the Five Percenters:

> Here, DOCS proposes to treat exclusively as a gang a group that has had a law-abiding existence outside prison for the better part of 40 years, that is an offshoot of another group that DOCS considers a religion, and that has practices that largely resemble those of recognized religious groups . . . .

Id. at *15. For an in-depth account of the background, proceedings, and aftermath of the *Marria* case, see KNIGHT, *supra* note 2, at 167-73.

[102] *See, e.g.*, Harbin-Bey v. Rutter, 420 F.3d 571 (6th Cir. 2005) (affirming designation of NGE as a prison gang and STG).

[103] Johnson v. Jabe, No. 7:09-CV-00300, 2010 WL 3835207 (W.D. Va. Sept. 30, 2010).

[104] Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .").

[105] *Johnson*, 2010 WL 3835207, at *1.

[106] *Id.* at *4.

found that the prison could not meet its *Turner* requirements, the court similarly found that under the "compelling interest" standard of RLUIPA,[107] the prison had not presented enough evidence to meet its summary judgment burden.[108] The court expressed concern that the prison's justification for the Five Percenters' classification as an STG was "a general statement that other NGE members have committed actions which have undermined the safety of a prison system."[109] Perhaps anticipating the potential extension of STG application to other Muslim groups, the court wrote, "Such generalized factual allegations could arguably be applied to any number of religious groups with a few extremist or violent members."[110]

The Virginia court, like many courts that have considered Five Percenter challenges, acknowledged that the group resembles a religion enough to warrant analysis as one.[111] Nonetheless, courts have often found that the penological interests at stake are sufficient to overcome the Free Exercise or RLUIPA claims. The leading case, *Fraise v. Terhune*, illustrates a fundamental problem with applying *Turner* to the Five Percenters. Judge (now Justice) Alito, holding that the New Jersey prisons demonstrated a valid penological interest in classifying Five Percenters as an STG, wrote, "Here, contrary to the suggestion of the dissent that the New Jersey scheme 'targets members of one religion,' the STG Policy is entirely neutral and does not in any way take religion into account."[112] He is not incorrect; the New Jersey STG system took into account only the group's:

> (1) . . . [H]istory and purpose; (2) its organizational structure; (3) the propensity for violence of the group and its members; (4) actual or planned acts of violence reasonably attributable to the group; (5) other illegal or prohibited acts reasonably attributable to the group; (6) the demographics of the group, including its size, location, and

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[107] RLUIPA articulates the standard:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)(1)-(2) (2006).

[108] *Johnson*, 2010 WL 3835207, at *5.

[109] *Id.*

[110] *Id.*

[111] *Id.* at *4.

[112] Fraise v. Terhune, 283 F.3d 506, 516 (3d Cir. 2002) (citations omitted).

pattern of expansion or decline; and (7) the degree of threat that the group poses.[113]

The policy does not consider religion and therefore neatly passes the *Turner* test's first prong. The *Turner* test, however, has no mechanism with which to consider what happens when an STG is also a religious organization. *Turner* only accommodates shifting conditions in one direction: a stronger penological interest makes it easier for the prison to prevail, but a stronger First Amendment claim, as is present when an entire religious group is designated a security threat, does not enter into the calculus.

Marria v. Broaddus also considers a claim under RLUIPA that was not raised in *Fraise v. Terhune*.[114] Though the First Amendment analysis of prisoners' rights claims requires only that the prison demonstrate a "valid penological interest,"[115] RLUIPA requires that any "substantial burden on the religious exercise of a person residing in or confined to an institution" be supported by a "compelling governmental interest," and that the restriction must be "the least restrictive means of furthering that compelling governmental interest."[116] Applying RLUIPA, the District Court in *Marria* easily found the state's classification of the NGE as an STG and its consequential deprivations to be impermissible.[117]

Though it predates RLUIPA,[118] the Fourth Circuit's reasoning from the 1999 case *Mickle v. Moore*[119] has been persuasive in many subsequent cases. Unlike the New York case of *Marria v. Broaddus*, where the judge was highly critical of the prison's evidence regarding the dangerousness of the Five Percenters,[120] South Carolina presented evidence, sufficient to satisfy the court, of past events involving violent

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[113] *Id.* at 509 (citations omitted).

[114] *Id.* at 515 n.5 (noting that no RLUIPA claim was raised).

[115] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 402 (1996).

[116] 42 U.S.C. § 2000cc-1(a) (2006).

[117] Marria v. Broaddus, No. 97 Civ.8297 NRB, 2003 WL 21782633, at *18 (S.D.N.Y. July 31, 2003).

[118] RLUIPA's application was arguably limited in 2005 by the Supreme Court's decision in *Cutter v. Wilkinson*: "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." Cutter v. Wilkinson, 544 U.S. 709, 722 (2005).

[119] Mickel v. Moore (*In re* Long Term Admin. Segregation of Inmates Designated as Five Percenters), 174 F.3d 464 (4th Cir. 1999). Here, Five Percenter inmates challenged South Carolina's policy of designating their group an STG, and subsequent administrative segregation. *Id.* at 466.

[120] *Marria*, 2003 WL 21782633, at *18.

behavior by members of the group.[121] In an opinion rife with deferential language,[122] the court found that the prison interests easily met *Turner*'s standards.[123] Notably, the Fourth Circuit found that there were other avenues available for the Five Percenters to practice their religion,[124] a suggestion that was expressly rejected by the *Marria v. Broaddus* court.[125] The Fourth Circuit's decision has been cited approvingly by the First,[126] Third,[127] Sixth,[128] Eighth,[129] and Tenth[130] Circuits, while *Marria v. Broaddus* has only been mentioned in passing by the Seventh Circuit on a tangential point[131] and was strongly repudiated by the Eastern District of Virginia.[132] New York's Five Percenters stand essentially alone, though it is appropriate that the only court to find convincingly in their favor is one housed in their birthplace and spiritual homeland of Manhattan.[133]

Courts, perhaps unsurprisingly, show little sympathy to claims from Five Percenters; a deliberately non-western ideology[134] with a body of young, black, male practitioners and strains of virulently anti-white sentiment will inevitably be viewed with more skepticism than a traditional religion. The First Amendment, however, applies equally regardless of the

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[121] *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d at 466-67.

[122] *Id.* at 468-69.

[123] *Id.* at 469-70.

[124] *Id.* at 470.

[125] *Marria*, 2003 WL 21782633, at *13-14. Perhaps it is relevant that the inmates in *Marria* were denied study materials, while the South Carolina inmates apparently were not, despite the severity of their confinement. *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d at 470. Or, perhaps the heightened standard of the RLUIPA was dispositive, though the *Marria* court suggests that perhaps the Five Percenters could also prevail under *Turner*. *Marria*, 2003 WL 21782633, at *14 ("Even the less restrictive test set forth in *Turner v. Safley* that governed prisoner free exercise claims prior to the enactment of [RLUIPA] recognized that deference is not warranted when a prison regulation represents an exaggerated response to security objectives.").

[126] Figueroa v. Dinitto, No. 02-1428, 2002 WL 31750158, at *1 (1st Cir. Dec. 9, 2002).

[127] Fraise v. Terhune, 283 F.3d 506, 517 (3d Cir. 2002).

[128] Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005).

[129] Goff v. Graves, 362 F.3d 543, 551 n.6 (8th Cir. 2004).

[130] Ajaj v. United States, No. 07-1073, 2008 WL 4192738, at *13 n.3 (10th Cir. Sept. 15, 2008).

[131] Lindell v. McCallum, 352 F.3d 1107, 1110 (7th Cir. 2003).

[132] Harrison v. Watts, 609 F. Supp. 2d 561, 573-74 (E.D. Va. 2009) ("Only a single district court has held that a Five Percenter's beliefs are religious in nature and therefore deserving of protection under the First Amendment and the RLUIPA, and its conclusion in this respect is neither controlling nor persuasive.").

[133] *See supra* Part II.A.1.

[134] Swedenburg, *supra* note 7.

popularity of the religion in question.[135] While Five Percenters are not Muslims in any traditional understanding of Islam, they do adopt some of the trappings and practices of Muslims.[136] Muslims are disproportionately represented in American prisons,[137] and conversion to Islam is extraordinarily popular amongst inmates.[138] Combined with the ongoing war on terror, the Muslim prison population can be expected to grow and draw intense scrutiny.[139] Given the current public and political hostility to Islam in many segments of the United States, it is foreseeable that other Muslim groups may find themselves subject to treatment similar to the Five Percenters. The United Kingdom is already experiencing problems with Muslim prison gangs.[140]

B. Black Guerilla Family

1. Background

The Black Guerilla Family was founded in prison by George Jackson.[141] Born in Chicago in 1941, Jackson first encountered racism in elementary school, when he was sent to a segregated inner-city Catholic School.[142] He began dabbling in petty crime as a teenager, when his family moved to the troubled Troop Street housing project. He moved on to more serious lawbreaking after moving to Los Angeles, where he first spent time in prison for allegedly breaking into a department store and attacking a police officer.[143] In 1960, Jackson was arrested for robbing a gas station and sentenced to one year to life;[144] while serving his indeterminate sentence,

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[135] "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." NAACP v. Button, 371 U.S. 415, 444-45 (1963).

[136] Swedenburg, *supra* note 7.

[137] Rachel Zoll, *U.S. Prisons Become Political, Religious Battleground*, ASSOCIATED PRESS (June 4, 2005, 10:16 AM), http://www.freerepublic.com/focus/f-news/1416498/posts.

[138] According to one expert, 80 percent of jailhouse converts turn to Islam. *Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base: Hearing Before the Subcomm. on Terrorism & Homeland Sec. of the S. Judiciary Comm.*, 108th Cong. (2003) (statement of J. Michael Waller, Part II).

[139] *See generally* Zoll, *supra* note 137.

[140] Ushma Mistry, *Growing Fears over Muslim Prison 'Gangs,'* BBC NEWS (Mar. 12, 2010), http://news.bbc.co.uk/2/hi/8558590.stm.

[141] Van Smith, *Black-Booked*, BALT. CITY PAPER (Aug. 5, 2009), http://www2.citypaper.com/news/story.asp?id=18474 at 3.

[142] GEORGE JACKSON, SOLEDAD BROTHER 6-7 (1994).

[143] *Id.* at 12.

[144] *Id.* at 16.

he was repeatedly denied parole for disciplinary infractions.[145] Jackson was accused of killing a prison guard in Soledad Prison in 1970, a conviction that would have resulted in a mandatory capital sentence,[146] but was killed in an apparent escape attempt at San Quentin prison in August 1971, though the details of his death were controversial.[147]

While in prison, Jackson became interested in Marxist theory, and, over his decade in prison, combined Mao with Huey Newton to develop his own brand of African-American revolutionary ideology.[148] During this period, he also organized the BGF with fellow revolutionaries W.L. Nolen and David Johnson.[149] The group was formed with two primary purposes: The first, immediate goal was to improve the conditions of incarceration for African-Americans by advocating their right to self-defense.[150] The second was to advocate the revolutionary overthrow of the racist American establishment, through violent means if necessary.[151]

Although Jackson was not shy about violence and argued for an armed revolution,[152] the original BGF, as founded by Jackson and Nolen, was indisputably a political organization. Jackson, who, spending much of his time in solitary confinement, was a voracious reader, absorbed the teachings of revolutionaries ranging from Marx and Lenin[153] to Mao,[154] Che

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[145] IMPRISONED INTELLECTUALS, *supra* note 8, at 84.

[146] JACKSON, *supra* note 142, at 16.

[147] Colin Nickerson, *Reviving a Mystery of the Radical Years*, BOS. GLOBE, Aug. 12, 1984, at 1.

[148] GEORGE JACKSON, BLOOD IN MY EYE 11-14 (1990).

[149] IMPRISONED INTELLECTUALS, *supra* note 9, at 85.

[150] *Id.* Although self-defense through violent means was likely not outside the scope of the BGF's aims, it was not the only means advocated. Nolen was in the process of filing civil rights suits on behalf of Soledad inmates when he was killed by a guard during a prison fight. *Id.* Jackson himself corresponded with Huey Newton's lawyer, Fay Stender, *id.*, in relation to the charges of killing the prison guard. JACKSON, *supra* note 142, at 206.

[151] The inscription to Jackson's first book, *Blood in My Eye*, reads:

> We must accept the eventuality of bringing the U.S.A. to its knees; accept the closing off of critical sections of the city with barbed wire, armored pig carriers crisscrossing the streets, soldiers everywhere, tommy guns pointed at stomach level, smoke curling black against the daylight sky, the smell of cordite, house-to-house searches, doors being kicked in, the commonness of death.

JACKSON, *supra* note 148, at 1.

[152] "People's war, class struggle, war of liberation means *armed* struggle." JACKSON, *supra* note 142, at 226.

[153] JACKSON, *supra* note 148, at 14.

[154] *Id.*

Guevara,[155] and Huey Newton,[156] as well as more obscure figures like Frantz Fanon[157] and John Gerassi.[158] He was also a student of history, and history to him foreclosed on the usefulness of nonviolent protest.[159] Jackson's ideas were extreme, and he acknowledged as much,[160] but the BGF's ideology was roughly in line with other revolutionary groups of the 1960s.[161]

After Jackson's death, however, the BGF's character shifted. BGF members were charged with the murder of Jackson's philosophical mentor Huey Newton in 1989.[162] In 1996, the BGF was named on a list of notorious American gangs by the Justice Department.[163] More recently, a group of two dozen Baltimore residents calling themselves BGF members were indicted on federal conspiracy charges for drug trafficking.[164]

There is some confusion as to the nature of the current incarnation of the BGF. Today, the courts generally treat it as an undisputed prison gang.[165] The group was identified by the Department of Justice as a prison gang in 1996,[166] and the Florida Department of Corrections identifies the BGF as one of

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[155] *Id.* at 25.

[156] *Id.* at 11.

[157] *Id.* at 25.

[158] *Id.* at 8.

[159] JACKSON, *supra* note 142, at 223.

[160] "I am an extremist. I call for extreme measures to solve extreme problems." *Id.* at 265.

[161] Jackson's beliefs were similar to many of the ideas espoused by the more radical elements of the New Left movement of the 1960s; for a wide sampling of this ideology, see *15 Years of Radical America: An Anthology*, 16 RADICAL AM., no. 3, May-June 1982, *available at* http://dl.lib.brown.edu/pdfs/1142526171657220.pdf, especially *World Revolution: The Way Out*, *id.* at 125. The full archive of *Radical America*, the leading journal of the New Left movement, is available at http://dl.lib.brown.edu/radicalamerica/.

[162] *Man Described as Drug Dealer Arrested in Huey Newton Death*, WASH. POST, Aug. 26, 1989, at A12.

[163] William Neikirk, *3 Chicago Gangs on Federal List: Attorney General Calls Crackdown a Tough Challenge*, CHI. TRIB., Apr. 4, 1996, at 3.

[164] Van Smith, *Black-Booked*, BALT. CITY PAPER (Aug. 5, 2009), http://www2.citypaper.com/news/story.asp?id=18474.

[165] *See, e.g.*, Harrison v. Milligan, No. C 09-4665 SI, 2010 WL 1957389, at *1 (N.D. Cal. May 14, 2010) ("[Correction officer's] description of the materials seized: 'Upon further searching I noticed two (2) white manila envelopes containing material on George L. Jackson, founder of the BGF (Black Guerilla Family) and material on the New Afrikan Nationalist movement (the term adopted by the BGF to disguise their gang activity in prison and on the streets).'"). It is worth noting that the New Afrikan movement seems to have plenty of life outside the context of prison gangs, *see, e.g.*, PROUDFLESH: NEW AFRIKAN JOURNAL OF CULTURE, POLITICS AND CONSCIOUSNESS, http://www.proudfleshjournal.com/, and within the prison context appears legitimate and not necessarily linked to the BGF, though the ideology is similar to Jackson's. *See* Sundiata Acoli, *A Brief History of the New Afrikan Prison Struggle*, GLOBALAFRICA.COM, http://www.globalafrica.com/Sundiata.htm (last visited Jan. 13, 2012).

[166] Neikirk, *supra* note 163, at 3.

the six major national prison gangs.[167] Discussion on African-American revolutionary Internet message boards, however, reveals competing theories about the nature of the BGF today. One prevailing understanding is that the group is a unified prison organization of black inmates who drop their street gang affiliations for protection in numbers, which is not far from Jackson's original intention.[168] Other posters speculate that the group is no more than a criminal gang, but uses revolutionary ideology to hide their criminal acts and create an appearance of legitimacy, which is also the government's interpretation.[169] There is also debate as to whether the street version of the BGF is the same organization as the prison version.[170]

2. Legal Analysis

Since reliable information on the group is difficult to come by, and courts are not in the habit of reading revolutionary message boards, BGF members have unsurprisingly had little success challenging STG designation on the grounds that BGF is not a gang. While some, maybe even most, self-identified BGF inmates are involved in the types of violent criminal activities that characterize a traditional prison gang, it is also entirely likely that some are involved out of solidarity with George Jackson's ideas. Since possession of Jackson's books can be evidence of STG membership,[171] it would seem that even an interest only in BGF ideology would be sufficient to warrant STG classification under the *Turner* standard.

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[167] *Gang and Security Threat Group Awareness: Major Prison Gangs*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/pub/gangs/prison.html (last visited Nov. 3, 2010). Similarly, California lists the BGF as one of seven enumerated prison gangs in its Department of Corrections Operations Manual. CAL. DEP'T OF CORR. & REHAB., OPERATIONS MANUAL § 52070.17.2 (2009), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%20Ch%205-Printed%20Final.pdf.

[168] "BGF isnt [sic] a gang—its bigger than that, u [sic] got BGF members who are lawyers and doctors, its main purpose is protection of your black brothers (and sisters)." ASSATA SHAKUR SPEAKS FORUMS: BLACK GUERILLA FAMILY, http://www.assatashakur.org/forum/share-comrades/13092-black-guerilla-family.html (last visited Feb. 3, 2012).

[169] *Id.*

[170] *Id.* The Latin Kings and Gangster Disciples, two other major prison gangs, have also taken steps to be perceived as legitimate groups, and, in the case of the Gangster Disciples, have created an out-of-prison political organization. KNIGHT, *supra* note 2, at 166-67.

[171] *See, e.g.*, Harrison v. Milligan, No. C 09-4665 SI, 2010 WL 1957389, at *1 (N.D. Cal. May 14, 2010).

This becomes problematic when one considers that political speech is historically one of the most highly valued types of speech.[172] Even speech advocating the overthrow of the United States government is protected, and cannot be restricted unless the speech is aimed at "inciting or producing imminent lawless action and is likely to incite or produce such action."[173] The nature of incarceration would seem to make it impossible for a prisoner to incite imminent lawless action.

Few courts have addressed the speech rights of prisoners. In *Rios v. Lane*, though it predates the development of the STG concept, the Seventh Circuit found that a prison violated an inmate's due process rights when he was punished for circulating a list of Spanish-language radio stations, along with socialist slogans.[174] Though he was charged with violating a rule restricting gang activity, the court found that the regulation was impermissibly vague to justify the infringement on Rios's rights.[175] Other cases involving political speech by prisoners tend to arise in the context of retaliation claims.[176] It is illegal for prisons to punish inmates for exercising their constitutional rights in the absence of a valid penological goal,[177] though the prison is entitled to "appropriate deference."[178] There is little other jurisprudence focusing on the political speech rights of prisoners; whether this is because prisoners are no longer particularly political, or because the prisons are generally respecting their speech rights, is unclear.

Prisons' ability to restrict the political expression of BGF members is sharply illustrated by cases in which the prison used the writings of George Jackson as proof of gang membership. The California Court of Appeals recently held that the prison's use of George Jackson's books as evidence of gang membership did not violate an inmate's First Amendment

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[172] "[P]olitical speech [is] at the core of what the First Amendment is designed to protect." Virginia v. Black, 538 U.S. 343, 365 (2003).

[173] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The Court's recent decision in *Holder v. Humanitarian Law Project* arguably limited (or ignored) the *Brandenburg* standard, 130 S. Ct. 2705, 2733 (2010) (Breyer, J., dissenting), though for now, at least, the holding is limited to cases involving monetary support to foreign terrorist organizations, *id.* at 2711-12 (majority opinion).

[174] Rios v. Lane, 812 F.2d 1032, 1034 (7th Cir. 1987). Note also that this case predates, albeit by a matter of months, the Supreme Court's decision in *Turner*. It is unclear if the decision would be the same under *Turner*'s due process standard.

[175] *Id.* at 1038-39. The court emphasized, however, that Rios's free speech rights were not implicated. *Id.* at 1039.

[176] *See, e.g.*, Witherow v. Cortez-Masto, No. 3:08-CV-363-LRH, 2010 WL 1292968, at *1 (D. Nev. Jan. 14, 2010).

[177] Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

[178] Sandin v. Conner, 515 U.S. 472, 482 (1995).

rights.[179] Based on "gang expert" testimony, the first prong of *Turner* was easily met, as BGF members routinely possess Jackson's writings, and, as they are a recognized prison gang, there is a prison interest in preventing prisoners from indicating their gang affiliation via possession of Jackson's work.[180] The second prong, the availability of an alternative means to exercise the restricted right, required more work by the California court. By interpreting the liberty interest as "the right to receive and read outside publications,"[181] the court found the prong met. Framed that way, the restriction on Furnace's ability to read the works of George Jackson did not foreclose his ability to read *other* things, and he therefore had alternate means to exercise his right.[182]

This view of the inmate's First Amendment interests only makes sense once the court concludes that the BGF is *necessarily* a prison gang. Here, the evidence presented as to the nature of the group came from a corrections official.[183] The court referenced "the violent courtroom escape of three California prisoners from a Marin County courtroom in 1970" as the work of the BGF,[184] as well as Jackson's failed escape attempt in 1971 that "resulted in the killing of three California correctional officers."[185] The court did not, at any point, consider the political nature of Jackson's writings or of the BGF as an organization.[186]

The degree of deference inherent to the *Turner* test would likely still make it extremely difficult for the prisoner to prevail, even if the prisoner claimed his rights to political expression were being unconstitutionally restricted. *In re Furnace* illustrates courts' willingness to defer entirely to the judgment of the prison regarding the nature of groups

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[179] *In re* Furnace, 110 Cal. Rptr. 3d. 820, 833 (Ct. App. 2010).

[180] *Id.* at 831.

[181] *Id.* at 832.

[182] *Id.*

[183] *Id.* at 827-28.

[184] *Id.* at 827. The court does not mention that Jackson's younger brother, Jonathan, was killed by police during the incident. JACKSON, *supra* note 142, at xiii.

[185] *In re Furnace*, 110 Cal. Rptr. 3d. at 827. The court similarly failed to note that Jackson himself was killed in the attempt and did not acknowledge the controversy regarding the escape. *See supra* note 147.

[186] A federal court in California recently found that prison officials went too far when they suppressed an inmate's outgoing mail for containing references to "Black August," a sort of prison memorial recognizing the deaths of Jackson and Nolen, and various "New Afrikan Nationalist" organizations, finding an insufficient link to the BGF. Harrison v. Inst. Gang of Investigations, No. C 07-3824 SI, 2010 WL 653137, at *6-7 (N.D. Cal. Feb. 22, 2010). Though prisoner mail was analyzed under the slightly tougher standard of *Procunier v. Martinez*, *id.* at *4, it would still appear (at least in California) that the line is drawn at possession of Jackson's actual books.

designated STGs, without any independent fact-finding.[187] Nonetheless, if a court starts its analysis with the presumption that the BGF is a political organization instead of a criminal gang per se, it becomes more difficult for the court to find that the prisoner retains alternative means of practicing his rights.

Like the religious rights of the Five Percenters, suppression of the political rights of the BGF should require a much greater showing than *Turner* demands. Far from suppressing the right of a gang member to associate with his fellow gang members and draw gang signs on his walls, the courts in these cases are all too willing to forcefully subdue religious and political affiliation amongst inmates. The application of *Turner* in these cases is not in error, but the very formulation of the test does not allow courts to consider the significance of the rights being invoked. A peaceful practitioner of the Divine Mathematics or a prisoner with a scholarly interest in George Jackson may be treated no differently from a member of a violent criminal gang. If the liberty interest at stake is the expression of the prisoner's political beliefs and the writings of George Jackson are foundational to his political beliefs, banning a prisoner from reading any of Jackson's books makes it extremely difficult for him to exercise his rights to political expression. Prisons understandably do not want inmates possessing written material that is used solely for the purpose of signifying their gang membership; but it is something else entirely to say that the prison interest in safety and gang control can justify suppression of the written materials essential to a prisoner's political beliefs. But because the *Turner* test has no mechanism for the court to weigh the importance of the liberty interest against the weight of the penological interest, prisons are able to suppress political expression quite easily.

III. CONSEQUENCES OF STG DESIGNATION

Much as *Turner* does not allow for consideration of heightened constitutional rights, it also fails to take into full account the severity of the deprivations inherent in the Security Threat Group context. Only the fourth prong of the test, the "absence of ready alternatives"[188] for the prison, hints at the possibility of weighing the competing interests. This

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[187] *In re Furnace*, 110 Cal. Rptr. 3d. at 827-28.

[188] Turner v. Safley, 482 U.S. 78, 90 (1987).

prong of the test is a reformulation of an earlier due process test, *Bell v. Wolfish*, which requires a showing that the prison response to the alleged penological interest was not exaggerated.[189] Though the Court in *Turner* addressed the "exaggerated response" idea, it expressed the idea in terms of "obvious, easy alternatives" that the prison could use to meet its penological goal, which the Court noted would be evidence of an exaggerated response.[190] This effectively shifts the burden; rather than requiring the prison to show that its response was proportional to the penological risks, the inmate must show that the prison had "obvious, easy alternatives" that would accomplish the same goal. The dissenters in *Turner* noted the relative meaninglessness of the Court's interpretation of the fourth prong, which led to the Court's upholding a sweeping ban on inmate correspondence while striking down a ban on inmate marriage. Justice Stevens wrote:

> The marriage rule is said to sweep too broadly because it is more restrictive than the routine practices at other Missouri correctional institutions, but the mail rule at Renz is not an "exaggerated response" even though it is more restrictive than practices in the remainder of the State . . . . Unfathomably, while rejecting the Superintendent's concerns about love triangles as an insufficient and invalid basis for the marriage regulation, the Court apparently accepts the same concerns as a valid basis for the mail regulation.[191]

In the years since *Turner* was decided, the fourth prong has not been examined in much detail by the courts and has been interpreted broadly in favor of the prison, particularly in the context of STGs.[192] It is thus useful to consider what sorts of

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[189] Bell v. Wolfish, 441 U.S. 520, 551 (1979). The *Bell* plaintiffs challenged various policies in a short-term, pretrial confinement center in New York, *id.* at 524, alleging violations of their constitutional rights "because of overcrowded conditions, undue length of confinement, improper searches, inadequate recreational, educational, and employment opportunities, insufficient staff, and objectionable restrictions on the purchase and receipt of personal items and books," *id.* at 527. Rejecting the Second Circuit's "compelling necessity" test for deprivations of detainee rights, *id.* at 531-32, the Supreme Court held that pretrial conditions must not amount to punishment, a standard that is satisfied "if a restriction or condition is . . . reasonably related to a legitimate goal." *Id.* at 539. *Turner* effectively approves *Bell v. Wolfish* and emphasizes that the "least-restrictive means" test suggested in the earlier case *Procunier v. Martinez* was not to apply to due process claims brought by inmates. *See* Beerheide v. Suthers, 286 F.3d 1179, 1184 (10th Cir. 2002).

[190] *Turner*, 482 U.S. at 90.

[191] *Id.* at 113-14 (Stevens, J., concurring in part and dissenting in part).

[192] *See, e.g.*, Holley v. Johnson, No. 7:08CV00629, 2010 WL 2640328, at *4 (W.D. Va. June 30, 2010) (finding the third and fourth prongs of *Turner* met by prison's zero-tolerance gang policy as applied to a Five Percenter, despite inmate's argument that the prison's interest could be met by only banning Five Percenter literature that was likely to incite violence).

restrictions have been found "unexaggerated" in the context of STG management systems.

A. *Lost Privileges*

The Supreme Court has upheld the deprivation of reading material and visitation rights from security risk prisoners.[193] By broadly framing the rights in question, courts have been able to find that a restriction on *some* kinds of reading material is legitimate, so long as the prisoner has access to other reading materials.[194] The loose framing of inmate rights, along with the concurrent broad sweep of banned materials, has not gone unchallenged, however. A group of plaintiffs, representing inmates and magazine publishers, along with the ACLU of Colorado, brought suit in Colorado to challenge the state policy of censoring publications that STGs purportedly distribute or that advocate joining STGs.[195] Gang expert and plaintiffs' witness Alex Alonso submitted an affidavit in the case, in which he explained that the censorship regulation was "overly broad, subjective and vague," and stated, "[T]he Colorado [Department Of Corrections] is confused over what is a gang sign and general hand signs used by non-gang members."[196] Whether because of prison officials' ignorance of African-American culture, or simply because of the traditional deference to prison decisions, the sweep of banned materials was particularly broad; among the publications censored were *VIBE*, *Rolling Stone*, and the *Source*, and the alleged "gang-affiliated" personalities in the publications—apparently based on hand signs—included Shaquille O'Neal, Chris Rock, and Derek Jeter.[197]

Books by or about George Jackson have been used as evidence of gang membership[198] and are often prohibited in prisons, as is the *Five Percenter*, a magazine published by the

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[193] Beard v. Banks, 548 U.S. 521, 525 (2006); Overton v. Bazzetta, 539 U.S. 126, 137 (2003).

[194] *In re* Furnace, 110 Cal. Rptr. 3d. 820, 832 (Ct. App. 2010).

[195] New Times, Inc. v. Ortiz, No. 00-cv-00612-RPM (D. Colo. 2000) (settled, 2004; *see* http://aclu-co.org/case/new-times-inc-v-ortiz).

[196] Report of Alex Alonso at 2, New Times, Inc. v. Suthers, No. 00-mk-00612-OES (D. Colo. 2000), *available at* http://www.streetgangs.com/laws/dec/coloradocensor2002.pdf.

[197] *Id.* at 4.

[198] *See* James Ridgeway & Jean Casella, *Prisoner Sent to Solitary Based on Reading Materials*, SOLITARY WATCH (June 16, 2010), http://solitarywatch.com/2010/06/16/prisoner-locked-up-in-solitary-based-on-reading-materials/.

Nation of Gods and Earths organization.[199] *California Prison Focus*, a newsletter put out by the non-profit group of the same name, reports that an issue of their newsletter mentioning George Jackson and "Black August," an annual event memorializing the deaths of Jackson and other black prison leaders, was used as evidence of STG membership.[200]

This sort of systematic censorship of reading materials, especially in light of evidence that prison officials do not always understand the material they are censoring, speaks to both the severity of STG designation and the invasion of First Amendment rights suffered by prisoners. Peaceful Five Percenters and George Jackson followers (or even simply inmates with an interest in the writings of either group) can suffer, at the very least, the inability to study the groups' teachings and, in some states, may lose considerably more significant privileges, including the bare amount of personal freedom possible in prison.[201]

B. Segregation

A common consequence of STG designation is limited or no contact with other group members or, in some states, placement in segregated housing or solitary confinement. Prisoners designated as STG members are often not allowed to associate with other members of their group, at least to discuss the group or partake in activities related to the group.[202] Particularly for the Five Percenters, this restriction can be extremely limiting. A major element of NGE study, based on the early days when Allah and his first followers pored over the Lost-Found Lessons together,[203] is the act of studying together. Five Percenters form a "cipher," or a group, usually in a circle, where followers quiz each other on their beliefs,[204] participate in intense one-on-one conversations known as "building,"[205] and

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[199] *See, e.g.*, Versatile v. Johnson, No. 3:09cv120, 2009 WL 5206437, at *1 (E.D. Va. Dec. 31, 2009).

[200] *The Corcoran Report on SHU Conditions*, CAL. PRISON FOCUS, no. 35, Summer 2010, at 1, *available at* http://www.prisons.org/documents/CPF-35.pdf.

[201] *See infra* Part III.B.

[202] *See, e.g.*, Ciempa v. Jones, 746 F. Supp. 2d 1171, 1183 (N.D. Okla. 2010) (discussing prison refusal to allow group meetings of Five Percenters); Fraise v. Terhune, 283 F.3d 506, 519 (3d Cir. 2002) (noting that New Jersey correctional policy prohibits "participating in any activity(ies) related to a security threat group").

[203] KNIGHT, *supra* note 2, at 49, 59-60.

[204] Charlie Ahearn, *The Five Percent Solution*, SPIN, Feb. 1991, at 55-56.

[205] KNIGHT, *supra* note 2, at 81.

hold conventions known as "parliaments."[206] Five Percenters can barely be Five Percenters without the ability to work together.[207]

STG designation can also, in some states, result in placement in solitary confinement.[208] The use of solitary confinement in the United States has attracted a large amount of legal and political attention in recent years.[209] In March 2009, Atul Gawande wrote an article for the *New Yorker* with the subtitle, "The United States holds tens of thousands of inmates in long-term solitary confinement. Is this torture?"[210] *Wired* magazine answered that question a month later in an interview with University of California, Santa Cruz psychologist Craig Haney, who said,

> I don't think correctional administrators always put people in solitary confinement just to make them feel pain. But to the extent that's done, to the extent they know that people in these environments will feel that pain, then that creeps very close to the definition of what's understood internationally as torture. I think our sloppiness, our carelessness about how this policy has been implemented, raises very severe ethical concerns about the humane treatment of prisoners by both U.S. standards and international standards.[211]

A fifty-two-year-old segregated housing unit inmate in the California prison system who has spent seventeen years in solitary confinement as a result of gang validation, writes, "If this is not torture, I don't know what is. I have seen many fall victim to isolation and sensory deprivation of the SHU environment."[212] In 2011, California prisoners in segregated housing, many of them STG members, engaged in a series of hunger strikes to protest the conditions of their confinement.[213]

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[206] *Id.* at 89.

[207] *See id.* at 5 ("Gods love to share knowledge and speak for their nation."); *id.* at 131 ("Like the father said, all they needed to do was come together.").

[208] *See supra* note 19 and accompanying text.

[209] *See supra* note 32.

[210] Atul Gawande, *Hellhole: Annals of Human Rights*, NEW YORKER, Mar. 30, 2009, at 36, *available at* http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande.

[211] Brandon Keim, *Solitary Confinement: The Invisible Torture*, WIRED: WIRED SCI. BLOG (Apr. 29, 2009, 8:30 PM), http://www.wired.com/wiredscience/2009/04/solitaryconfinement/.

[212] Jean Casella & James Ridgeway, *Voices from Solitary: Gang "Validation" and Permanent Isolation in California Prisons*, SOLITARY WATCH (Aug. 7, 2010), http://solitarywatch.com/2010/08/07/voices-from-solitary-gang-validation-and-permanent-isolation-in-california-prisons/.

[213] Sadhbh Walshe, *Why California's Prisoners Are Starving for Solitary Change*, GUARDIAN (Jan. 11, 2012, 4:27 PM), http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/11/california-hunger-strike-solitary-confinement.

Commentators have questioned the constitutionality of long-term segregation. Professor Jules Lobel writes, "The federal courts have not yet definitively addressed the question of whether confining a prisoner permanently or for very long periods of time in a supermax prison, without meaningful periodic review of his or her behavior, constitutes cruel and unusual punishment."[214] A prison's penological goals may indeed be met through an STG system, but the question remains whether indefinite solitary confinement or cutting prisoners off from other practitioners of their beliefs are proportional responses. The courts have not yet adequately addressed this issue, though language in *Turner* suggests they could.[215]

C. *Reporting to Local Law Enforcement on Release*

Security Threat Group designation does not entirely end with the end of incarceration. Even upon release, STG classification follows the person; in some states, local law enforcement must be notified when a gang member is released from prison.[216] Given the difficulty of challenging STG designation, the long-ranging consequences, sticking with the prisoner even after he has served his sentence, are significant. Reporting sincere adherents of BGF or Five Percenter beliefs to local law enforcement implicates the suppression of constitutionally protected speech outside the prison walls. Being a member of the Five Percent Nation is, of course, not illegal.[217]

D. *"Debriefing"*

In California, and likely other states, the only way to have your STG classification removed, aside from proving you have been inactive in the gang for six years, is to complete a

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[214] Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 117 (2008). The Supreme Court has held, however, that in general, the decision of where to house prisoners "is at the core of prison administrators' expertise," and does not implicate any liberty concern. McKune v. Lile, 536 U.S. 24, 26, 39-40 (2002).

[215] Turner v. Safley, 482 U.S. 78, 97-98 (1987). ("No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent. The Missouri regulation, however, represents an exaggerated response to such security objectives.").

[216] *See, e.g.*, S.C. CODE ANN. § 16-8-290 (Supp. 2010); TEX. GOV'T CODE ANN. § 499.051 (Supp. 2011).

[217] *See* Marria v. Broaddus, No. 97 Civ.8297 NRB, 2003 WL 21782633, at *9 (S.D.N.Y. July 31, 2003) ("The Nation thus appears to be in the somewhat unique position of having a legitimate existence outside prison while being classified exclusively as a security threat group within DOCS.").

debriefing process.[218] Debriefing involves renouncing the gang, providing information about all gang activity to the prison, and informing the prison of the identity of other, unvalidated gang members.[219] The debriefing process has been challenged, albeit unsuccessfully, on Eighth Amendment grounds.[220] In *Castañeda v. Marshall*, an inmate argued that reporting the names of other gang members would put his safety at risk from retaliation by his (former) gang.[221] The court rejected this reasoning, deferring to the prison's assurance that they take steps to protect debriefed former gang members from retaliation.[222] The effectiveness of prison protection for former gang members is debatable; although California provides a special unit in Pelican Bay Prison (the home of its Secure Housing Unit for STG members) for former gang members, prison advocacy groups are unconvinced that the protection is sufficient.[223] The prison also fails to provide any protection once the inmate leaves prison and returns to civilian society, where his former gang may target him on the presumption that he informed on the gang and other members.[224]

Other prisoners have challenged the debriefing process on Fifth Amendment privilege-from-self-incrimination grounds.[225] Courts have found these claims unpersuasive, as debriefing evidence cannot be used in later criminal proceedings.[226] Regardless, in light of the cultural disapproval of "snitches" in the communities that gang members tend to come from,[227] given the choice between staying in secure housing and debriefing, the large majority of inmates choose the former.[228]

The STG system denies prisoners the ability to read materials essential to their religious or political beliefs,[229] and

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218 CAL. CODE REGS. tit. 15, § 3378(C)(5) (2011).

219 *The Corcoran Report on SHU Conditions*, *supra* note 200, at 1.

220 *See, e.g.*, Castañeda v. Marshall, No. C-93-03118 CW, 1997 U.S. Dist. LEXIS 4612, at *25-26 (N.D. Cal. Mar. 10, 1997).

221 *Id.*

222 *Id.*

223 Michael Montgomery, *Locked Down: Gangs in the Supermax—Debriefing*, AM. RADIOWORKS, http://americanradioworks.publicradio.org/features/prisongangs/c3.html (last visited Feb. 3, 2012).

224 *Id.*

225 *See, e.g.*, Griffin v. Gomez, No. C-92-1236 EFL, 1995 U.S. Dist. LEXIS 9263 (N.D. Cal. June 29, 1995).

226 *Id.* at *19.

227 *See generally* Jeremy Kahn, *The Story of a Snitch*, ATLANTIC, Apr. 2007, *available at* http://www.theatlantic.com/magazine/archive/2007/04/the-story-of-a-snitch/5703/.

228 Montgomery, *supra* note 223.

229 *See supra* Part III.A.

subjects them to the harshest form of punishment available in American prisons.[230] It follows them after they have served their time,[231] and inmates can only escape it within prison by endangering their own safety.[232] Such a system deserves much stronger checks from the court than are currently in place. When coupled with the significance of the rights being claimed by Five Percenters and peaceful BGF adherents,[233] the *Turner* test and the Supreme Court's emphasis on deference runs into a perfect storm of inefficacy.

IV. PROPOSALS FOR CHANGE

A. *The Future of* Turner

The ability of a prison to impose such severe restrictions on inmates for exercising their rights to political and religious expression, with only minimal justification, raises serious constitutional concerns. As the American prison population evolves, *Turner*'s application to the Five Percenters and BGF sets a dangerous precedent for future inmates affiliated with religious or political groups deemed to be dangerous. It is fairly clear that, under current due process requirements, it is nearly impossible for a prisoner to present a strong enough liberty interest to overcome the presumption in favor of the prison staff laid out in *Turner*.[234] In the few cases where a prisoner has won a case involving his STG designation, the decisions have been based on the prison's failure to meet either the limited standard required by the Supreme Court or evidentiary flaws in the validation process.[235] *Marria v. Broaddus* overturned New York's STG system as applied to Five Percenters via RLUIPA, but the Supreme Court's later restrictions of the interpretation of the Act seem to have foreclosed that line of reasoning.[236]

The *Turner* test is not likely going anywhere. *Turner* was merely the first in an over-two-decade-long line of Supreme Court decisions that have restricted the ability of

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[230] *See supra* Part III.B.

[231] *See supra* Part III.C.

[232] *See supra* Part III.D.

[233] *See generally supra* Part II.

[234] *See supra* Part I.A.

[235] *See* Lira v. Cate, No. C 00-0905 SI, 2010 WL 727979 (N.D. Cal. Feb. 26, 2010); Aviña v. Medellin, No. CIV S-02-2661-FCD KJM P., 2010 WL 3516343, at *8 (E.D. Cal. Sept. 3, 2010).

[236] *See supra* note 18.

prisoners to remedy violations of their constitutional rights.[237] The Supreme Court, moreover, has been resistant to a facial challenge to *Turner*, with little dissent. While *Beard v. Banks*, a case involving indefinite denial of access to newspapers and magazines, drew two dissenters (Stevens and Ginsburg),[238] *Overton*'s strict limitations on visitation rights found all nine justices upholding the restriction.[239] Interestingly, four justices (Stevens, Brennan, Marshall, and Blackmun) rejected the *Turner* formula at the time of the decision, with Justice Stevens writing that the requirement that prison officials find a "logical connection" between the restriction and the penological goal was "virtually meaningless" and "would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern . . . ."[240] They would appear to be mostly right, but the courts since then have not seemed to mind.

Although courts have found for the prisoner in some cases, the standard is deferential enough that they could just as easily have found for the prison—courts on the whole err towards deference.[241] The end effect is to give prison staff effectively unfettered discretion in the STG area. The desire of the courts to take this approach is understandable; prison gang members are not particularly sympathetic figures, and the body of research on the subject seems to indicate that segregating gang members can indeed lead to a reduction in prison violence.[242] Gang affiliation has been shown to increase the incidence of nearly all types of prison misconduct.[243] Gang researcher George Knox writes:

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[237] Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L. J. 27, 33 (2009).

[238] Beard v. Banks, 548 U.S. 521, 542 (2006) (Stevens, J., dissenting).

[239] Thomas and Scalia refused to join the majority opinion because they believed that only Eighth Amendment claims are judiciable by the Supreme Court over state law. Overton v. Bazzetta, 539 U.S. 126, 141 (2003) (Thomas, J., concurring in the judgment).

[240] Turner v. Safley, 482 U.S. 78, 100-01 (1987) (Stevens, J., dissenting).

[241] *See supra* notes 50-52 and accompanying text.

[242] *See NJDOC's Gang Management Unit a National Model*, N.J. DEP'T OF CORR. (Aug. 3, 2005), http://www.state.nj.us/cgi-bin/corrections/njnewsline/view_article.pl?id=2661 ("[T]here has been a department-wide drop of 42 percent in staff assaults and an 84 percent decrease in organized violent behavior among NJDOC inmates."). Ironically, the apparently highly regarded New Jersey gang unit was dismantled in early 2010, a victim of budget constraints. Kibret Markos, *Closing Gang Unit to Save State $5M*, RECORD (Woodland Park, NJ) (May 7, 2010), http://www.northjersey.com/news/93049129_Closing_gang_unit_to_save_state__5M.html.

[243] *See* GERALD G. GAES ET AL., FED. BUREAU OF PRISONS, THE INFLUENCE OF PRISON GANG AFFILIATION ON VIOLENCE AND OTHER PRISON MISCONDUCT 38-40 (2001), *available at* http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprcrim_2br.pdf; *see also* George W. Knox, *The Problem of Gangs and Security Threat*

> Some academic authors who read and write about prison gangs without doing empirical research on the issue are prone to use the prison gang problem as a platform to criticize the status quo. A common theme in this "gang apologist" approach is to begin with a 1960's concept of prison rehabilitation and how wonderful the world would be if there were more services and a higher quality of life for inmates and better jobs upon release from prison, and then use the prison gang issue as just another topic to criticize the prison system. These are approaches that ignore the fact that correctional staff are good citizens working for a living and often are the ones brutally assaulted by prison gangs or STGs—this kind of information is not on the minds of the academic critic.[244]

Without agreeing with Mr. Knox's opinion of academic researchers, this note is not intended to argue that the STG system is inherently wrong or that it does not serve important penological interests. Moreover, the nature of imprisonment, as has been pointed out many times, necessarily includes the restriction of constitutional rights.[245] Under the current *Turner* standard, finding a penological interest that justifies restricting a prisoner's rights of association and expression is not a difficult task for the prison. The issue therefore becomes the adequacy of the *Turner* test in the face of the strong interests presented by religious and political groups, like the Five Percenters and the BGF.

The *Turner* test has two significant shortcomings: first, it does not, as generally applied, take into account the severity of the deprivation of rights; and second, as becomes important in cases involving STGs that have a religious or political nature, it contains no mechanism for adjusting its analysis in response to the significance of the right being restricted. The Five Percenters and BGF create unique cases, where the speech being restricted is religious or political (two varieties of speech classically subject to very strong protection),[246] and the

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Groups (STG's) in American Prisons Today: Recent Research Findings from the 2004 Prison Gang Survey, NAT'L GANG CRIME RESEARCH CTR. (2005), http://www.ngcrc.com/ngcrc/corr2006.html. As a caveat to these studies, it seems worthwhile to point out that the majority of research on STGs has been carried out by the prison systems themselves, or based on self-reporting by prisoners or prison staff. The focus of the studies seems to be on how to deal with the accepted problem of STGs, rather than consideration of the validity of the classifications.

[244] Knox, *supra* note 243.

[245] *See, e.g.*, Beard v. Banks, 548 U.S. 521, 528-29 (2006) ("This Court recognized in *Turner* that imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment. But at the same time the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere." (citations omitted)).

[246] Though the Supreme Court has never explicitly endorsed a hierarchy of speech, as Justice Stevens wrote in *R.A.V v. City of St. Paul*, "Our First Amendment

deprivations as a result of speech can reach the point of indefinite seclusion.[247]

The other element that *Turner* does not, but should, allow into the courts' calculus is the severity of deprivations faced by inmates subjected to the STG system, particularly solitary confinement. Decisions which casually describe long-term, or even indeterminate, isolation as "administrative segregation," and thus subject to minimal review, ignore the terrible consequences of this type of punishment, which multiple commentators have suggested should not be allowed in any circumstances.[248]

B. Proposed Approaches

Given the intractability of the *Turner* test, and the unlikeliness that the Supreme Court will add a new prong to the formula in the near future, how can the rights of inmates be adequately protected under existing due process standards? One simple solution has been proposed by Scott N. Tachiki—the prison must show individualized proof of violation of prison rules *aside from* gang membership as a predicate to STG assignment.[249] This change would take care of the issue of the "ideological" gang member who, while interested in the philosophical underpinnings of a group, is not involved with its criminal activity. A policy change of this sort, however, would likely have to come from the prison system itself, and the larger fear in the prison system today is that gangs will somehow slip by unnoticed, not that innocent inmates will be swept into the STG process.[250]

Judge Marjorie Rendell, dissenting in *Fraise v. Terhune*, proposed another means of dealing with "case[s] placing harsh

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decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . ." R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring).

[247] *See supra* Part III.B.

[248] For a thorough discussion on the impact of solitary confinement and the courts' inability to deal with it properly, see Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567 (1999).

[249] Tachiki, *supra* note 21, at 1145-46.

[250] *See, e.g.*, *Gang and Security Threat Group Awareness*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/pub/gangs/prison.html (last visited Feb. 3, 2012) ("Each group is represented in Florida's prison system population; however some are not readily recognizable . . . . Although their numbers are small in Florida prisons, if left unmonitored they could easily develop into highly predatory groups as they have in states with comparable inmate populations.").

restrictions upon inmates with certain religious beliefs."[251] Judge Rendell argued that, in these cases, the court should require "a 'tight' or 'closer' fit between the correctional system's admittedly legitimate interest and an inmate's belief."[252] While Judge Rendell felt that *Turner* allows a flexible application, and that Supreme Court precedent suggests a willingness to require a closer fit in certain circumstances, her reasoning was rejected by the majority as well as many other courts.[253]

It is possible for courts to work within *Turner* to accommodate the heightened concerns raised by groups like the Five Percenters and the BGF. The second prong of *Turner*, for example, very much turns on the framing of the right in question. To return to *In re Furnace*,[254] had the court considered the right in question to be "the right to read the works of the ideological founder of a political organization the inmate adheres to," rather than "the right to read outside material," the case would necessarily have been decided differently. Indeed, courts addressing Five Percenters' claims have occasionally struggled with the second prong; *Fraise v. Terhune* required both an extended discussion and a fairly expansive understanding of "alternative means" to conclude that even a complete ban on the Lost-Found Lessons, the foundational documents of Five Percenter ideology, was acceptable.[255] Judge Alito reasoned that because "nothing in the STG Policy restricts Five Percent Nation members from discussing or seeking to achieve self-knowledge, self-respect, responsible conduct, or righteous living," the second prong of *Turner* was met.[256] While the court was required to consider the right "sensibly and expansively,"[257] it seems fair to consider this reasoning a stretch.[258] Nonetheless, the Supreme Court has

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[251] Fraise v. Terhune, 283 F.3d 506, 525 (3d Cir. 2002) (Rendell, J., dissenting).

[252] *Id.*

[253] *Id.* Note, however, that the Southern District of New York applied a roughly analogous approach in *Marria v. Broaddus*, finding that the prison had insufficiently shown that Five Percenters were per se dangerous. *See supra* note 101.

[254] *See supra* notes 179-84 and accompanying text.

[255] *Fraise*, 283 F.3d at 519-20.

[256] *Id.* at 519.

[257] *Id.* at 518 (citations omitted).

[258] Indeed, Judge Rendell in dissent noted:

> In the course of this treatment, the FPN member is barred from the teachings, which are at the heart of the Five Percent Nation religious experience. Furthermore, to be released from close custody he must promise to never again affiliate with FPN. Thus, the desired result of the treatment is to eradicate the belief. It is difficult to see how, realistically, there are "alternate means" here.

indicated that it does not value this prong as heavily as the first.[259]

Similarly, the fourth prong is subject to a degree of judicial interpretation. While not requiring a least-restrictive-means analysis,[260] the inmate may still attempt to show that the prison had the means to solve its problem while "accommodat[ing] the prisoner's rights at de minimis cost."[261] This prong could be used to weigh the penological interest against the constitutional right at stake; a balancing test between the interests of the prison and prisoner seems to be the only way to reach just outcomes, and the fourth prong is the only part of *Turner* that could facilitate such a test. When the right involves religious or political speech and affiliation, the alternate methods for the prison (for example, restrictions on materials related to violence, as opposed to blanket bans)[262] should be subjected to closer examination. Similarly, the degree of deference granted to the prison allows the imposition of particularly severe deprivations, which should be considered when determining what alternative means are available to the prisons; surely there are ways to handle prison gangs without indeterminate, nearly indiscriminate application of long-term solitary confinement, blanket bans on literature, and isolation from fellow believers.[263]

CONCLUSION

Regardless of whether the solution is a new test, a tweaking of the interpretation of the first prong of *Turner*, or a degree of flexibility in considering the second and fourth prongs, the current approach is deeply problematic. Punishing people for political or religious views runs afoul of foundational American values,[264] and even prisoners should not be subject to such treatment. Moreover, the inability of the STG system to adequately protect religious freedom may become more problematic in light of Islamic terrorism.

Id. at 529 (Rendell, J., dissenting).

[259] *See supra* note 38 and accompanying text.

[260] Turner v. Safley, 482 U.S. 78, 90-91 (1987).

[261] *Id.* at 91.

[262] *See* Holley v. Johnson, No. 7:08CV00629, 2010 WL 2640328, at *4 (W.D. Va. June 30, 2010).

[263] *See supra* Part III.

[264] *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143 (1951) (Black, J., concurring) ("[T]he system adopted effectively punishes many organizations and their members merely because of their political beliefs and utterances, and to this extent smacks of a most evil type of censorship.").

There are tens of thousands of Muslims in American prisons, mostly black men, well out of proportion to the Muslim civilian population.[265] While Islam has long been popular in prisons, its prevalence took on a sinister air in light of the September 11 attacks; the FBI views prisons as "fertile ground for extremists."[266] As the tone of anti-Muslim discourse has ramped up recently, the treatment of the Five Percenters stands as uncomfortable precedent for religion-based prison regulations. Although the decision in *Turner* begins its analysis with the declaration that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[267] the standard it established allows courts to erect just such a barrier in the face of important constitutional protections. The courts should begin to reconsider *Turner*'s application before they are faced with attempts at even more severe restrictions.

Justin L. Sowa[†]

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[265] Zoll, *supra* note 137.

[266] *Id.*

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

[†] J.D., Brooklyn Law School, 2012; B.M., New York University, 2007. I would like to thank Professors Nelson Tebbe and Ursula Bentele for their advice and guidance, as well as Professor Ted Swedenburg of the University of Arkansas for allowing me to use his unpublished research and directing me to other indispensible resources. I would also like to thank the *Brooklyn Law Review* staff and editors for their tireless work, and for allowing me to cite the Wu-Tang Clan in a work of legal scholarship.