

2008

## Melting in the Hands of the Court: M&M's, Art, and a Prisoner's Right to Freedom of Expression

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### Recommended Citation

Melissa Rivero, *Melting in the Hands of the Court: M&M's, Art, and a Prisoner's Right to Freedom of Expression*, 73 Brook. L. Rev. (2008).  
Available at: <https://brooklynworks.brooklaw.edu/blr/vol73/iss2/8>

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# Melting in the Hands of the Court

## M&M'S, ART, AND A PRISONER'S RIGHT TO FREEDOM OF EXPRESSION

### INTRODUCTION

In 1980, Donny Johnson pled guilty to second degree murder for the death of John Viveiros and was sentenced to fifteen years to life imprisonment.<sup>1</sup> Nearly a decade later, Johnson was sentenced to two more terms of nine years to life for stabbing one prison guard and assaulting another.<sup>2</sup> He is currently an inmate at Pelican Bay State Prison (“PBSP”) in California.<sup>3</sup> Johnson is held in the prison’s Security Housing Unit (“SHU”), its highest-level security cell, where he is in solitary confinement for what will likely be the rest of his life.<sup>4</sup>

For all his solitude, Johnson has been in the public eye of late. While in the SHU, Johnson painted postcards by using his own hair, foil, and plastic to make paintbrushes and leeching M&M’s for paint.<sup>5</sup> Johnson sent his postcards to a

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<sup>1</sup> Adam Liptak, *Behind Bars, He Turns M&M’s into an Art Form*, N.Y. TIMES, July 21, 2006 [hereinafter Liptak, *Behind Bars*], available at [http://www.nytimes.com/2006/07/21/us/21artist.html?\\_r=1&oref](http://www.nytimes.com/2006/07/21/us/21artist.html?_r=1&oref). Johnson and two friends were involved in the murder, which took place at a San Jose party. *Id.* An argument over the sale of PCP-laced cigarettes led to the fatal stabbing. *Id.* Johnson was only twenty years old at the time of his second-degree murder plea. *Id.*

<sup>2</sup> *Id.* At trial, Johnson claimed he acted in self-defense and that he believed a gang member attacked him. *Id.*

<sup>3</sup> *Id.* The maximum-security prison sits on 275 acres of Northern California territory. According to its website, PBSP holds the state’s “most serious criminal offenders in a secure, safe, and disciplined institutional setting.” The prison currently houses 3461 inmates, with a staff of 1548. California Department of Corrections and Rehabilitation: Pelican Bay State Prison (“PBSP”), <http://www.cdcr.ca.gov/Visitors/Facilities/PBSP.html> (last visited Sept. 8, 2007).

<sup>4</sup> Liptak, *Behind Bars*, *supra* note 1. Roughly half of PBSP’s inmates are held in the SHU. California Department of Corrections and Rehabilitation, *supra* note 3. The SHU’s inmates present “serious management concerns,” and include “prison gang members and violent maximum security inmates.” *Id.*

<sup>5</sup> Liptak, *Behind Bars*, *supra* note 1; Kim Curtis, *Prison Artist Faces Disciplinary Hearing*, ASSOCIATED PRESS, Aug. 4, 2002, available at <http://www.pelicanbayprisonproject.org/features/htm> (last visited Sept. 24, 2007). Johnson’s biography appears on Wikipedia, an online encyclopedia; the biography focuses primarily on his art, its exhibit and donation to charity. See Donny Johnson, [http://en.wikipedia.org/wiki/Donny\\_Johnson](http://en.wikipedia.org/wiki/Donny_Johnson) (last visited Sept. 8, 2007). He is described

“pen-pal,” psychoanalyst Stephen Kurtz.<sup>6</sup> Impressed by the art, Kurtz displayed the postcards in a Mexican gallery in the summer of 2006.<sup>7</sup> The exhibition drew at least 500 people, and approximately twenty postcards sold for \$500 each.<sup>8</sup>

The success of Johnson’s gallery, however, did not impress everyone. In response to a *New York Times* article on Johnson’s art and the gallery, prison officials disciplined Johnson for engaging in “unauthorized business dealings” by banning him from mailing his postcards.<sup>9</sup> Such a regulation, if challenged before the Supreme Court, is likely to withstand judicial scrutiny. The Court has consistently upheld prison regulations as constitutional.<sup>10</sup> The First Amendment in particular is not absolute and is subject to certain restrictions when the speaker is an inmate.<sup>11</sup> From limitations on family visits to magazines, the Court gives great deference to prison administrators.<sup>12</sup>

In doing so, however, the Court may help a state achieve an otherwise unattainable legislative goal. For example, virtually all states and the federal government have enacted laws that limit a criminal’s right to profit from expressions of his crime.<sup>13</sup> Anti-profit legislation, commonly

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as “an American painter . . . known for his unconventional technique, which involves using a paint brush made out of his own hair and paint pigment from M&M’s dissolved in water.” *Id.* A description of his crimes is limited to two sentences. *Id.*

<sup>6</sup> Curtis, *supra* note 5. Kurtz runs the Pelican Bay Prison Project, a non-profit organization—“completely independent of and hav[ing] no connection” to California’s Department of Corrections—that is “dedicated to the men incarcerated at [PBSP].” Pelican Bay Prison Project, <http://www.pelicanbayprisonproject.org> (last visited Sept. 29, 2007); *see also* Kim Curtis, *Prison Artist in Hot Water: Officials Say He Broke Rules with M&M Creations Sold for Charity*, CHI. TRIB., Aug. 6, 2006, at 2.

<sup>7</sup> Curtis, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> Adam Liptak, *Prison Disciplines Publicized Inmate who Makes Art Using M&Ms*, N.Y. TIMES, Aug. 4, 2006, at A1 [hereinafter Liptak, *Prison Disciplines Publicized Inmate*]. Under California’s Code of Regulations, inmates cannot “actively engage in a business or profession” unless it is authorized by the head of the institution. CAL. CODE REGS. tit. 15, § 3024(a) (1995). The provision defines “business” as “any revenue generating or profit making activity.” *Id.* Prison officials can reject an inmate’s mail if it “relates to the direction of an inmate’s business or profession.” *Id.* § 3024(b).

<sup>10</sup> *See infra* Part III.A.

<sup>11</sup> *See infra* Part I.

<sup>12</sup> *See infra* Part III.

<sup>13</sup> New York enacted its first Son-of-Sam Law in 1977. Michelle G. Lewis Liebeskind, *Back to Basics for Victims: Striking Son of Sam Laws in Favor of an Amended Restitutionary Scheme*, 1994 ANN. SURV. AM. L. 29 (1994). Nearly every state and the federal government adopted some form of anti-profit legislation. 18 U.S.C. § 3681 (2006); ALA. CODE § 41-9-80 (LexisNexis 2000); ALASKA STAT. § 12.61.020 (2006); ARIZ. REV. STAT. ANN. § 13-4202 (2001); ARK. CODE ANN. § 16-90-308 (2006);

referred to as Son-of-Sam laws, have met constitutional challenges during the past fifteen years with little success for states.<sup>14</sup> The standard for withstanding constitutional muster is high—the law must be “narrowly tailored,” says the Court, to a compelling government interest.<sup>15</sup>

Nevertheless, by virtue of judicial deference, a prison regulation may accomplish the same goal that an imperfect, constitutionally defective state law cannot. Thus, judicial deference can render the state’s imperfect criminal anti-profit law irrelevant. This Note argues that recent Supreme Court decisions that defer to state prison administrators unfairly curtail prisoners’ First Amendment right to freedom of expression<sup>16</sup> while successfully supplanting the goal of an imperfect state law.

Part I of this Note describes the First Amendment and its scope. Part II briefly addresses the history of the Court’s position in reviewing prisoners’ rights cases. Part III discusses

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COLO. REV. STAT. § 24-4.1-201 (2007); CONN. GEN. STAT. ANN. § 54-218 (2001); DEL. CODE ANN. tit. 11 § 9103 (2001); FLA. STAT. ANN. § 944.512 (2001); GA. CODE ANN. § 17-14-31 (2004); HAW. REV. STAT. § 351-81 (1993); IDAHO CODE ANN. § 19-5301 (2004); IND. CODE ANN. § 5-2-6.3-3 (LexisNexis 2005); IOWA CODE ANN. § 910.15 (West 2003); KAN. STAT. ANN. § 74-7319 (1992); KY. REV. STAT. ANN. § 346.165 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 14 § 752-E (2003); MD. CODE ANN., CRIM. PROC. § 11-622 (LexisNexis 2002); MICH. COMP. LAWS ANN. § 780.768 (West 1998); MINN. STAT. ANN. § 611A.68 (West 2003); MISS. CODE ANN. § 99-38-5 (2002); MO. ANN. STAT. § 595.045 (West 2003); MONT. CODE ANN. § 53-9-104d (2007); NEB. REV. STAT. ANN. § 81-1836 (1999); N.Y. EXEC. LAW § 632-a (McKinney 2001); N.D. CENT. CODE § 32-07.1-01 (LexisNexis 2004); OHIO REV. CODE ANN. § 2969.01 (LexisNexis 2006); OKLA. STAT. ANN. tit. 22 § 17 (West 2002); OR. REV. STAT. § 147.275 (2005); 42 PA. CONS. STAT. ANN. § 8312 (West); R.I. GEN. LAWS §§ 12-25.1-18 (2002); S.C. CODE ANN. § 17-25-530 (2003); S.D. CODIFIED LAWS § 23A-28A-1 (2004); TENN. CODE ANN. § 29-13-403 (2000); UTAH CODE ANN. § 77-18-8.3 (2003); VA. CODE ANN. § 19.2-368.20 (2004); WASH. REV. CODE ANN. § 7.68.200 (West 2007); W. VA. CODE ANN. § 14-2B-2 (LexisNexis 2004); WIS. STAT. ANN. § 949.165 (West 2005); WYO. STAT. ANN. §§ 1-40-301 to -303 (2007); CAL. CIV. CODE § 2225 (West 2007) (held unconstitutional in *Keenan v. Superior Court of L.A. County*, 40 P.3d 718, 721 (Cal. 2002); see discussion *infra* Part IV.C); MASS. GEN. LAWS ANN. Ch. 258A §§ 1, 9 (West 1992) (repealed 1993); NEV. REV. STAT. § 217.007 (LexisNexis 2005) (held unconstitutional in *Seres v. Lerner*, 102 P.3d 91 (Nev. 2004)); N.J. STAT. ANN. §§ 52:4B-26 to -33 (West 2001) (repealed in 2003); N.M. STAT. ANN. § 31-22-22 (LexisNexis 2006) (repealed 2006).

<sup>14</sup> Melissa J. Malecki, *Son of Sam: Has North Carolina Remedied the Past Problems of Criminal Anti-Profit Legislation?*, 89 MARQ. L. REV. 673, 677 (2006) (“[N]o Son of Sam law challenged for constitutionality in relation to the First Amendment has been able to withstand the attack . . .”).

<sup>15</sup> *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-23 (1991).

<sup>16</sup> “Expression” is not in the First Amendment, but it is nonetheless an accepted term. MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 1 n.1 (1984). It includes all forms of expression, including those specifically mentioned in the First Amendment (free speech, press, etc.) and those that have come within its reach, including association, art, and music. *Id.*

the Supreme Court's deference to prison administration in its regulation of prisoners. Part IV focuses on how prison administration deference may accomplish the goal of an otherwise unconstitutional law by highlighting California's Son-of-Sam law. Finally, Part V focuses on Johnson's case specifically and suggests extending the scope of judicial review in prisoners' First Amendment rights cases.

## I. THE SCOPE OF THE FIRST AMENDMENT

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."<sup>17</sup> Taken literally, the First Amendment protects the spoken word exclusively.<sup>18</sup> Supreme Court cases, however, have not limited First Amendment protection to spoken or written words.<sup>19</sup> Instead, the Court construes speech to include non-verbal forms of expression, or symbolic speech, which comes within the ambit of the First Amendment.<sup>20</sup>

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<sup>17</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>18</sup> The First Amendment also protects the press, religion, assembly and the right to petition the Government. *Id.* Textually, however, the only form of individual expression it protects is speech. *Id.* Arguably the most protected speech is political speech, where only "a clear and present danger" justifies suppression. *See Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>19</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (U.S. 1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression."). Supreme Court cases "have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matter—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). Various Supreme Court cases highlight the broad range of expression protected by the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that expression by means of motion pictures is protected by the First Amendment's free speech and free press clauses); *Hurley*, 515 U.S. at 568-69 (finding that parades, in which the collective goal of marchers is to make a statement, is a form of expression protected by the First Amendment). Although recognized, certain kinds of expression merit less protection than others. Obscenity, for example, may be seen to merit a lower level of protection because its "patently offensive way" of portraying sex lacks any "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>20</sup> *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (finding that a Texas law which banned flag desecration violated the "bedrock principle" that the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (nude dancing not excluded from First Amendment protection); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (wearing an armband); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966) (silent library sit-in).

Scholars have tried to define the speech that is protected by the First Amendment.<sup>21</sup> For many, however, the real question of what comes within the First Amendment's scope lies in the values the amendment is meant to protect. Various theories attempt to pinpoint the extent of the First Amendment protection by focusing on specific values.<sup>22</sup> One example is the liberty model.<sup>23</sup> Under this model, the First Amendment protects an individual's right to expression from government restrictions.<sup>24</sup> An individual's verbal and non-verbal expressions are within the First Amendment's protection because its purpose is to further individual self-realization and self-determination.<sup>25</sup> Thus, the purpose of the First Amendment is to permit individual growth for both the speaker and the recipient by encouraging diverse viewpoints.<sup>26</sup> Moreover, any limitation on individual expression hampers society's development as a whole.<sup>27</sup>

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<sup>21</sup> For example, Professor Emerson's theory distinguishes between expression and action. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 17 (1970). Although expression and action often go hand-in-hand, the extent to which conduct is expressive determines its protection. *Id.* at 17-18. Expression is conduct that must be unbridled and encouraged. *Id.* at 17. Action, however, is controllable but not if it imposes on expression. *Id.* Thus, the government can regulate actions to protect certain societal interests, but it cannot suppress expression in the process. *Id.*

<sup>22</sup> Under the marketplace model, the rationale for free expression is the search for truth. REDISH, *supra* note 16, at 45-46 (discussing John Stuart Mill's theory that the competition of ideas leads to truth); *see also* DANIEL A. FARBER, *THE FIRST AMENDMENT* 4-5 (1998). Information is viewed as a public good, and expression fosters the exchange of that good. *Id.* at 5. Critics of the marketplace model cite media control and the inability of economically disadvantaged groups from accessing information as impediments to the model's goals. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 965-66 (1978), *reprinted in* *THE FIRST AMENDMENT: A READER* 82 (John H. Garvey & Frederick Schauer eds., 1992). Under the market-failure model, states should intervene to ensure that free speech fosters ideas and achieves beneficial societal goals. *Id.* at 966.

<sup>23</sup> Baker, *supra* note 22, at 964.

<sup>24</sup> *Id.* at 966. Freedom of expression and personal fulfillment are the cornerstone of the "self-realization" theories of the First Amendment. FARBER, *supra* note 22, at 4.

<sup>25</sup> Baker, *supra* note 22, at 966.

<sup>26</sup> FARBER, *supra* note 22, at 4 ("If people lack access to a wide range of ideas, they are prevented from imagining the full range of possibilities in their lives."). Unlike the marketplace model, however, the focus is not on the exchange of ideas to weed out falsehood. Baker, *supra* note 22, at 967 ("[T]ruth is discovered through its competition with falsehood for acceptance."). Rather, the free speech clause protects the "value of speech conduct to the individual." *Id.* at 966. For a discussion on the marketplace, market failure and liberty models of the free speech clause, *see generally* Baker, *supra* note 22.

<sup>27</sup> FARBER, *supra* note 22, at 4 (arguing that restricting expression limits "the ability of writers and artists to express their perspectives, impoverishing the national culture").

Notwithstanding the difficulties in defining the First Amendment's protected speech boundaries,<sup>28</sup> or the particular set of values it is said to protect, the government can restrict the "time, place, or manner of speech."<sup>29</sup> Any restriction, however, is subject to judicial review under a standard ranging from strict scrutiny to mere rational review.<sup>30</sup> A regulation survives strict scrutiny if its restriction on a fundamental right is narrowly tailored to serve a compelling governmental interest.<sup>31</sup> An intermediate standard of review requires that the regulation be substantially related to an important governmental interest.<sup>32</sup> A rational level of review requires only that the regulation bear a reasonable relation to a legitimate government interest.<sup>33</sup> In the free speech context, a content-based restriction must withstand strict scrutiny analysis.<sup>34</sup> Such content-based regulations include those that restrict an inmate's right to profit from crime-related expressions.<sup>35</sup> A content-neutral restriction must survive an intermediate level of review.<sup>36</sup>

Prison regulations, however, that impose upon an inmate's free speech rights are subject to the lowest level of review.<sup>37</sup> The government has a special relationship with an inmate speaker.<sup>38</sup> This relationship gives the government a unique regulatory power over the inmate that it does not have with the private individual.<sup>39</sup> The crucial issue for the Court is the extent to which a particular situation "fall[s] outside the 'normal' First Amendment rules," and its willingness to defer to

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<sup>28</sup> Articulating a workable definition is at the core of the problem. Overly simplistic definitions fail for their lack of "analytical or predictive value," whereas consistent definitions strip the freedom of rights the Amendment is intended to protect. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 275 (1981).

<sup>29</sup> FARBER, *supra* note 22, at 15.

<sup>30</sup> Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 303 (1997). The Court's three-tiered approach in reviewing free speech restrictions stems from its review of equal protection challenges, where the Court has traditionally used this approach. *Id.*

<sup>31</sup> *Id.* at 303-04.

<sup>32</sup> *Id.* at 303.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 304-05.

<sup>35</sup> See discussion on *Simon & Schuster* *infra* Part IV.B.

<sup>36</sup> Bhagwat, *supra* note 30, at 305.

<sup>37</sup> See discussion on *Turner v. Safley* *infra* Part III.B.

<sup>38</sup> FARBER, *supra* note 22, at 15.

<sup>39</sup> *Id.* at 15, 187 ("Given its custodial authority in [prisons, the government] has an unusually broad interest in controlling speech . . .").

government officials.<sup>40</sup> In the case of inmates, the strong judicial deference to prison officials resulted in the lowest-level standard of judicial review.<sup>41</sup>

## II. THE COURT'S "IRON CURTAIN"

The Court's deference to prison administrators' decisions stems from the purpose of incarceration. Imprisonment as a form of punishment became prevalent in the early nineteenth century.<sup>42</sup> It replaced the more violent forms of punishment that prevailed during colonization, including whipping and execution by hanging.<sup>43</sup> Rehabilitation became the goal of imprisonment.<sup>44</sup> Because it was believed idleness resulted in crime, rehabilitation consisted of an inmate working during the day, either alone or with other inmates, and sleeping alone at night.<sup>45</sup> Inmates were not allowed to speak to each other and could only read the Bible.<sup>46</sup> This view persisted until the twentieth century, when reformers argued that the current state of prisons further hardened a criminal.<sup>47</sup> Despite the push for reform, questions as to whether an inmate retained any constitutional rights resulted in little change.<sup>48</sup> Thus, until the mid-twentieth century, courts adhered to the "hands-off" doctrine.<sup>49</sup>

The hands-off doctrine embodied the Court's unwillingness to review prison administrators' decisions. Under the doctrine, federal courts avoided addressing whether prisoners retained any constitutional rights.<sup>50</sup> The primary function of the courts was to ensure the freedom of illegally confined individuals, not to "superintend the treatment and

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<sup>40</sup> *Id.* at 15.

<sup>41</sup> See discussion on *Turner infra* Part III.B.

<sup>42</sup> 1 MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* 6 (3d ed. 2002).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 6-7.

<sup>45</sup> *Id.* at 7.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 8. Today, however, solitary confinement, or segregation, remains a staple in prison management. The SHU is a modern-day embodiment of this traditional form of punishment, which has received criticism for its emotional and mental impact on prisoners. See generally Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 *AM. U. INT'L L. REV.* 71 (2005).

<sup>48</sup> MUSHLIN, *supra* note 42, at 10.

<sup>49</sup> *Id.* at 9.

<sup>50</sup> *Id.* at 10.

discipline of prisoners.”<sup>51</sup> Although the Court acknowledged some claims of racial discrimination and unsafe prison conditions as egregious, the hands-off doctrine prevented the Court from addressing these claims.<sup>52</sup> Because the Court believes prison administrators are better suited to make prison regulations, it avoided any judicial interference in prison administrative decisions.<sup>53</sup> Prison administrators have to deal with inmates on a daily basis.<sup>54</sup> Thus, there is a fear that judicial review may threaten prison officials’ authority.<sup>55</sup>

Despite the doctrine’s pervasiveness, the mid-twentieth century brought a change to the judiciary’s point of view. The Court became increasingly concerned with protecting the rights of “discrete and insular minorities,” which loosened its adherence to the doctrine.<sup>56</sup> It acknowledged the rights of accused individuals and inmates, irrespective of the prison walls.<sup>57</sup> Stating that there is “no iron curtain” between the Constitution and prisons, Justice White vocally ended the long-held belief that judicial intervention had no place in prison administration.<sup>58</sup> Thus, inmates have constitutional rights which federal courts have a duty to protect whenever a prison regulation “offends a fundamental constitutional guarantee.”<sup>59</sup>

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<sup>51</sup> Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951).

<sup>52</sup> See *Ex parte Pickens*, 101 F. Supp. 285, 287, 290 (D. Alaska 1951).

<sup>53</sup> Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

<sup>54</sup> The *Turner* Court explicitly mentions this concern in articulating its standard of review in prisoner rights cases. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”).

<sup>55</sup> MUSHLIN, *supra* note 42, at 11-12.

<sup>56</sup> The Court’s review of police and prosecutorial treatment of accused individuals surged in the 1960s. Larijean Golichowski Oei, *The New Standard of Review for Prisoners’ Rights: A “Turner” for the Worse?: Turner v. Safley*, 33 VILL. L. REV. 393, 399-401 (1988). For example, the Court deemed a confession inadmissible after the accused requested, but was denied, the assistance of counsel in *Escobedo v. Illinois*, 378 U.S. 478, 478 (1964), and found inadmissible the results of a search violating the Fourth Amendment in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>57</sup> See Oei, *supra* note 56, at 399-403.

<sup>58</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). (“[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”).

<sup>59</sup> *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

### III. THE SUPREME COURT'S STANDARD: *TURNER V. SAFLEY*

#### A. *The Road to Turner*

The Court's attempt to lift the iron curtain, however, may be best described as a mere parting. Because prison administrators determine both the goals of a prison and the means by which to obtain them,<sup>60</sup> the Supreme Court accords "substantial deference to [their] professional judgment."<sup>61</sup> Moreover, a prisoner bears the burden of disproving a regulation's validity.<sup>62</sup> Restrictions on First Amendment rights are permitted, so long as they are reasonably related to a legitimate penological interest.<sup>63</sup> In particular, the Court gives substantial deference to prison administrators if there is the potential for a security problem.<sup>64</sup> Thus, an inmate faces an uphill battle in challenging the constitutionality of a prison regulation.<sup>65</sup> Nevertheless, its own acknowledgment of the accused's rights and the growing recognition of inmates' rights prompted the Court to guide the lower courts by articulating a test for constitutional challenges to prison regulations.<sup>66</sup>

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<sup>60</sup> *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987). Lower courts had established their own standards. In *Carothers v. Follette*, an inmate sought to prevent prison officials from censoring correspondence to his parents, judges and attorney. 314 F. Supp. 1014, 1017 (S.D.N.Y. 1970). In holding that prison officials violated the inmate's right of expression, the court stated that "[c]ertain restrictions on expression to [outsiders]" were acceptable, including restrictions that prevent a legitimate business. *Id.* at 1024 (citing *Stroud v. Swope*, 187 F.2d 850, 850 (9th Cir. 1951) (denying a prisoner's petition to bar prison administrators from interfering in his business dealings)). According to the court, a restriction on freedom of expression must be "related both reasonably and necessarily to the advancement of some justifiable purpose of imprisonment." *Id.* (citations omitted). A restriction is acceptable if prison officials show it is reasonably and necessarily related to either prisoner rehabilitation or to maintain prison security. *Id.*

<sup>64</sup> WILLIAM C. COLLINS, SUPERMAX PRISONS AND THE CONSTITUTION: LIABILITY CONCERNS IN THE EXTENDED CONTROL UNIT 72 (2004), available at <http://www.nicic.org/pubs/2004/019835.pdf>. A court will defer to prison officials even if the absence of a regulation presents only the possibility of a security problem. *Id.* ("[I]f an official says that lack of a particular restriction 'might' create a security problem, a court will generally defer to that judgment and uphold the challenged restriction under the *Turner* test."). For a discussion on *Turner v. Safley* and its four-factor test, see *infra* Part III.B.

<sup>65</sup> An inmate faces not only substantial judicial deference, but must disprove a regulation's validity. *Bazzetta*, 539 U.S. at 132.

<sup>66</sup> Various tests existed at both the state and federal levels to determine when a prison regulation infringed on prisoners' rights. Many circuits used a strict scrutiny standard of review, requiring the state to bring forth a substantial government interest furthered by the rule and only a minimal imposition on First

### 1. The Outsider's Rights

Initially, the Supreme Court avoided delineating a prisoner's First Amendment rights.<sup>67</sup> The Court first held that the First Amendment limited a prison regulation's scope in *Procunier v. Martinez*.<sup>68</sup> Nevertheless, it failed to define a prisoner's free speech rights.<sup>69</sup> Instead, the Court focused on the rights of free citizens as opposed to those of prisoners.<sup>70</sup> In *Martinez*, California prison regulations permitted the mailroom staff to inspect prisoners' correspondence.<sup>71</sup> Particularly, the staff became watchful of any correspondence that complained about the prison, expressed "inflammatory" views, or was "otherwise inappropriate."<sup>72</sup> Whether a correspondence was inflammatory or inappropriate was for the staff to determine.<sup>73</sup>

Although the *Martinez* Court found the regulation unconstitutional, its decision focused on the rights of the recipient.<sup>74</sup> It set a two-part standard of review for regulations that violated the First Amendment rights of outsiders: the regulation cannot be over-inclusive and it must serve a specific state interest.<sup>75</sup> Because the sender and recipient had an

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Amendment rights. See Oei, *supra* note 56, at 414 n.97. The more relaxed rational standard of review prevailed in other circuits. See, e.g., *Sostre v. McGinnis*, 334 F.2d 906, 911 (2d Cir. 1964) (holding that deference to prison administrators prevails when they are addressing a real danger in the prison). To highlight the confusion among the lower courts, the same circuit often applied different tests in reviewing the regulation. The Seventh Circuit, for example, applied the lowest level of review in *Morales v. Schmidt*, where it called on the state to proffer a rational relationship between the rule and the goal. 489 F.2d 1335, 1342-43 (7th Cir. 1973); see also Oei, *supra* note 56, at 415 n.98. Fourteen years later, however, it used a strict scrutiny standard in *Rios v. Lane*, calling for the state to present an important government interest that imposed incidentally on a prisoner's First Amendment right. 812 F.2d 1032, 1036-37 (7th Cir. 1987); see also Oei, *supra* note 56, at 414 n.97.

<sup>67</sup> Oei, *supra* note 56, at 404-05. The *Martinez* Court acknowledged the lower court's confusion as to the standard of review, but nevertheless failed to provide guidance. *Procunier v. Martinez*, 416 U.S. 396, 406-08 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989); see also Oei, *supra* note 56, at 404 nn.48, 50.

<sup>68</sup> 416 U.S. at 406.

<sup>69</sup> See MUSHLIN, *supra* note 42, at 593-94.

<sup>70</sup> *Martinez*, 416 U.S. at 408 (discussing how mail censorship implicates the First Amendment rights of the non-inmates who correspond with the inmates).

<sup>71</sup> *Id.* at 399-400 (footnote omitted).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 400. The rule stated that a prisoner's personal correspondence was "a privilege, not a right." *Id.* at 399 n.1 (citing Director's Rule 2401). Under the rule, violation of the mail rules might "cause suspension of the mail privileges." *Id.*

<sup>74</sup> *Id.* at 408-09.

<sup>75</sup> *Id.* at 413. The regulation had to further an important "governmental interest unrelated to the suppression of expression," and the limits to free speech "must be no greater than is necessary" to protect that governmental interest. *Id.*

interest in the correspondence, the censorship violated the rights of both.<sup>76</sup> Regardless of the prisoner's First Amendment rights, the regulation burdened the First Amendment interests of those *outside* the prison.<sup>77</sup> By focusing on the outsider's point of view, the *Martinez* Court averted delineating prisoners' First Amendment rights.<sup>78</sup>

## 2. Alternative Means of Communication

The Court shifted its focus from the outsider to an alternative means of communication only two months later. In *Pell v. Procunier*, a California regulation barred the media from interviewing certain inmates in person.<sup>79</sup> Unlike *Martinez*, the Court did not focus on the outsider's First Amendment rights. Instead, it centered on the prison's goal in enacting the rule and the deference given to prison administrators.<sup>80</sup> Prison administrators argued that alternative means of communication were available to prisoners.<sup>81</sup> The prisoners in this case could communicate with outsiders, including media representatives, by writing to them.<sup>82</sup> The Court concluded that a regulation fell within the ambit of prison administrators' discretion if a "reasonable and effective means of

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<sup>76</sup> *Id.* at 409. The *Martinez* Court noted the "array of disparate" standards for reviewing prison regulations that restricted freedom of speech. *Id.* at 406-07; *see also supra* note 66 and accompanying text. This uncertainty not only made it difficult for prison officials to determine the appropriateness of their actions, but needlessly "perpetuate[d] the involvement of the federal courts in affairs of prison administration." *Martinez*, 416 U.S. at 407. The Court possibly decided *Martinez* on the narrower issue of the outsider's First Amendment right to avoid a flurry of free speech violation claims by prisoners. *See* MUSHLIN, *supra* note 42, at 12.

<sup>77</sup> *Martinez*, 416 U.S. at 409.

<sup>78</sup> Oei, *supra* note 56, at 406. The Court would later narrow *Martinez* in light of *Turner*: In *Thornburgh v. Abbott*, prisoners challenged Federal Bureau of Prisons ("FBP") rules which gave wardens the authority to reject publications they considered detrimental to the prison's security. 490 U.S. 401, 403 (1989). The Court of Appeals applied *Martinez* instead of *Turner* because the regulation restricted the free speech rights of publishers. *Abbott v. Messe*, 824 F.2d 1166, 1168-70 (D.C. Cir. 1987); *see Turner*, 482 U.S. at 89 (setting a rational relation standard of review for regulations that restrict a prisoner's free speech right); *see also infra* Part III.B. The Supreme Court reversed, holding that a strict scrutiny standard of review did not give "sufficient sensitivity" to prison officials' discretion. *Thornburgh*, 490 U.S. at 409-10. Moreover, unlike *Martinez*, the regulation in *Thornburgh* dealt with incoming, as opposed to outgoing, correspondence. *Id.* at 412.

<sup>79</sup> *Pell v. Procunier*, 417 U.S. 817, 820-21 (1974).

<sup>80</sup> *Id.* at 827.

<sup>81</sup> *Id.* at 823-24.

<sup>82</sup> *Id.* at 824.

communication remain[ed] open” to prisoners<sup>83</sup> and there was no discrimination as to the content involved.<sup>84</sup>

### 3. Security Concerns and the Exaggerated Response

Another justification for judicial deference centered on security concerns and whether the regulation amounted to an exaggerated prison administrative response.<sup>85</sup> The Court has been particularly deferential where the prisoner is a recipient. In *Wolff v. McDonnell*, a prisoner challenged a prison regulation that permitted the inspection of mail sent by his attorney.<sup>86</sup> Prison administrators, however, expressed concern over contraband secretly making its way to prisoners.<sup>87</sup> Although First Amendment rights may protect an outsider against “censoring of inmate mail,” it did not necessarily protect the inmate.<sup>88</sup> The Court cannot confine prison regulations to “constitutional straightjacket[s],”<sup>89</sup> but must consider a prison’s rehabilitative goals and prison security.<sup>90</sup> As it did in the past, the Court’s analysis required deference to the regulation.<sup>91</sup> The regulation did not abridge the prisoner’s rights because prison officials were merely opening, not reading, the correspondence.<sup>92</sup> Additionally, prison officials were doing so in front of the prisoner.<sup>93</sup> Moreover, prison

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<sup>83</sup> *Id.* at 824-25.

<sup>84</sup> *Id.* at 826.

<sup>85</sup> *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 127-28 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 576-77 (1974).

<sup>86</sup> *McDonnell*, 418 U.S. at 575.

<sup>87</sup> *Id.* at 577.

<sup>88</sup> *Id.* at 575-76. Under *Martinez*, the outsider’s First Amendment rights are protected from censorship, unless there is a legitimate government interest. *Procurier v. Martinez*, 416 U.S. 396, 412-13 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989). The *McDonnell* Court, however, refused to specifically recognize the prisoner’s right. *McDonnell*, 418 U.S. at 575-76. Instead, it focused on the regulation, thus avoiding a delineation of prisoners’ First Amendment rights in this context. *Id.* (“We need not decide, however, which, if any, of the asserted rights are operative here, for the question is whether, assuming some constitutional right is implicated, it is infringed by the procedure now found acceptable by the State.”).

<sup>89</sup> *McDonnell*, 418 U.S. at 563.

<sup>90</sup> *Id.* at 561-63.

<sup>91</sup> *Id.* at 568. Under the challenged prison regulation, prison officials could inspect “all incoming and outgoing mail” including mail from prisoners’ attorneys. *Id.* at 574. The Court, however, found that prison officials had “done all, and perhaps even more, than the Constitution requires” by opening marked attorney mail in front of the inmate. *Id.* at 576-77 (“[F]reedom from censorship is not equivalent to freedom from inspection or perusal.”).

<sup>92</sup> *Id.* at 577.

<sup>93</sup> *Id.* at 576-77.

officials had a valid security concern that contraband would be smuggled to prisoners, even in prisoner-attorney correspondence.<sup>94</sup>

Security concerns also contributed to the Court's deference in *Bell v. Wolfish*.<sup>95</sup> Prisoners brought a First Amendment challenge to a regulation that only allowed inmates to receive hard-cover books if they were sent directly from a publisher, book store, or book club.<sup>96</sup> As it did in *McDonnell*, prison administrators pointed to the concern over concealed contraband, this time hidden in books.<sup>97</sup> The Court again applied a rational relationship standard of review and found no First Amendment violation.<sup>98</sup> The regulation only imposed a limitation on an inmates' receipt of reading materials, a limitation which was rationally related to the government's goals.<sup>99</sup>

Prison administrators also raised security concerns when prisoners challenged an anti-union regulation. The Court again emphasized its deference in *Jones v. North Carolina Prisoners' Labor Union, Inc.*<sup>100</sup> Prisoners challenged the regulation as violating their First and Fourteenth Amendment rights.<sup>101</sup> Prison administrators expressed concern over the tension likely to emerge between the unionized prisoners and prison staff.<sup>102</sup> Prison administrators claimed that this tension, coupled with the tension likely to arise between unionized and non-unionized prisoners, would result in prison riots and

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<sup>94</sup> *Id.* at 577. The district court allowed prison officials to open incoming attorney-inmate correspondence if there was a likelihood of contraband presence. *Id.* at 574. Prison officials had to open mail marked "privileged" in front of the inmate. *Id.* The Court of Appeals further restricted prison officials' ability to open "privileged" mail by implying that any doubt as to whether the mail came from an attorney could be resolved via "a simple telephone call." *Id.* at 574-75. The Supreme Court, however, considered checking every single piece of attorney correspondence an administrative impossibility. *Id.* at 576.

<sup>95</sup> 441 U.S. 520 (1979).

<sup>96</sup> *United States ex rel. Wolfish v. United States*, 428 F. Supp. 333, 340 (S.D.N.Y. 1977), *overruled by Bell*, 441 U.S. 520 (1979).

<sup>97</sup> *Bell*, 441 U.S. at 549. They also claimed an interest in avoiding the administrative cost of conducting more thorough book inspections. *Id.*

<sup>98</sup> *Id.* at 550-51.

<sup>99</sup> Oei, *supra* note 56, at 412 (footnote omitted). Not only was the regulation content-neutral, but prisoners could still receive other reading material from any source, including soft-cover books and magazines. *Bell*, 441 U.S. at 551-52. This alternative means supported prison officials' argument that the regulation was not overly broad. *See id.* at 550-51.

<sup>100</sup> 433 U.S. 119 (1977).

<sup>101</sup> *Id.* at 122.

<sup>102</sup> *Id.* at 127.

chaos.<sup>103</sup> The Court considered these security concerns legitimate government interests rationally related to the union ban.<sup>104</sup> Unless rules constitute an exaggerated response, courts should give deference to prison administrators' expertise.<sup>105</sup>

*B. The Supreme Court Solidifies Its Deferential Stance*

Thirteen years after tip-toeing around prisoners' First Amendment rights in *Martinez*,<sup>106</sup> the Court solidified its deferential stance in prison regulation challenges. In *Turner v. Safley*, the Court laid out the four factors courts should use to determine the constitutionality of a prison regulation.<sup>107</sup> In *Turner*, prisoners challenged two Missouri prison rules as violating their First and Fourteenth Amendment rights.<sup>108</sup> The first prevented inmate-to-inmate correspondence.<sup>109</sup> The second regulation prevented inmates from marrying without the superintendent's approval.<sup>110</sup> After setting out and applying its new standard, the Court upheld the first but struck down the second as unconstitutional.<sup>111</sup>

Although "prison walls [may] not form a barrier separating inmates" from Constitutional protections,<sup>112</sup> the Court did not apply the *Martinez* test because *Martinez* did not "resolve the question that it framed."<sup>113</sup> In cases involving only

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<sup>103</sup> *Jones*, 433 U.S. at 127.

<sup>104</sup> *Id.* at 129.

<sup>105</sup> *Id.* at 128.

<sup>106</sup> MUSHLIN, *supra* note 42, at 592.

<sup>107</sup> *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

<sup>108</sup> *Id.* at 85.

<sup>109</sup> *Id.* An inmate could only correspond with an inmate in another prison if that inmate was an immediate family member. *Id.* The rule also allowed an inmate to correspond with another "concerning legal matters." *Id.* Otherwise, an inmate could only correspond with another if a team of experts determined it was in his best interest. *Id.* at 82 ("[T]he determination whether to permit inmates to correspond was based on [the treatment] team members' familiarity with the progress reports . . .").

<sup>110</sup> *Id.* Only a "compelling" justification warranted the superintendent's approval of an inmate's marriage. *Id.* Though the regulation did not define "compelling," prison officials testified that it generally meant pregnancy or the birth of a child. *Id.*

<sup>111</sup> *Id.* at 99-100.

<sup>112</sup> *Id.* at 84.

<sup>113</sup> *Turner*, 482 U.S. at 85; *see Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989). The regulation must "further an important or substantial governmental interest unrelated to the suppression of expression." *Id.* Prison officials must show that the regulation furthers the government's interest in prison "security, order, and rehabilitation." *Id.* The restriction cannot be "unnecessarily broad." *Id.* at 414. Rather, it must be "no greater than is necessary or essential to the protection" of the cited interest. *Id.* at 413.

prisoners' rights, the "inflexible strict scrutiny analysis" in *Martinez* would impede prison administrators' ability to take proactive steps that prevent security problems.<sup>114</sup> Moreover, adopting the standard in cases concerning only prisoners' rights would make courts "the primary arbiters of what [is] the best solution" to an issue specifically within prison administrators' domain.<sup>115</sup> Without the experience in planning or financial resources necessary to operate a prison, courts should defer to prison administrators.<sup>116</sup> This is further buttressed when acknowledging prison administration's role as an arm of the legislative and executive branches.<sup>117</sup>

### 1. The *Turner* Factors

Given prison administrators' expertise, the Court adopted a reasonable relationship standard of review.<sup>118</sup> Four factors determine the reasonableness of a prison regulation that restricts inmates' First Amendment rights.<sup>119</sup> A court must consider (1) if the regulation has a "valid, rational connection" to a legitimate government interest;<sup>120</sup> (2) if the prisoner can exercise the particular right via other available means; (3) the impact on guards, inmates, and other resources that an accommodation of the right would have; and (4) whether prison administrators can accomplish their goals via "ready alternatives" that do not impose on the prisoner's rights.<sup>121</sup> The "ready alternative" must not only accommodate an inmate's

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<sup>114</sup> *Turner*, 482 U.S. at 89.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 84-85.

<sup>117</sup> *Id.* Separation of powers, according to the Court, warranted a "policy of judicial restraint." *Id.* at 85. Moreover, there are inherent federalism concerns when federal courts dictate state prisoners' rights. *Id.* at 84-85 (Prison management "requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); see also MUSHLIN, *supra* note 42, at 595-96.

<sup>118</sup> *Turner*, 482 U.S. at 89 ("If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

<sup>119</sup> *Id.* at 89-91.

<sup>120</sup> *Id.* at 89 (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

<sup>121</sup> *Id.* at 90-91. Prison administrators, however, need not "set up and then shoot down" all possible alternative methods of accommodating a prisoner's right. Nevertheless, if the prisoner can show that an existing alternative accommodates his right without hampering the valid penological interest, a court may consider the existence of such an alternative as evidence that the regulation is an "exaggerated response" to the prison's concerns. *Id.*

right, but must also be obvious and bear only a de minimis impact on the penological goal.<sup>122</sup>

The Court applied each of the factors to the two rules and found that the prohibition on inmate-to-inmate mail was constitutional.<sup>123</sup> According to prison officials, by restricting prisoners' communication with each other, the regulation limited the potential for the formation of escape plans and gang communication.<sup>124</sup> Given the presence of prison gangs, the prohibition on inmate-to-inmate correspondence was "logically connected" to prison administrators' concern that the correspondence would result in "a potential spur [of] criminal behavior."<sup>125</sup> Moreover, the second factor was satisfied because the regulation only limited the "class of other people" with whom the prisoner could communicate.<sup>126</sup> According to the Court, this is a valid security concern because the class includes other Missouri prison inmates.<sup>127</sup> Thus, the regulation was not a full-fledged deprivation of prisoners' means of expression.<sup>128</sup>

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<sup>122</sup> *Id.* at 90-91.

<sup>123</sup> *Id.* at 91. According to the Court, the record indicated a reasonable relationship between the regulation and the legitimate security concern of preventing prison violence. *Id.* The Court also acknowledged that the more demanding *Martinez* test may apply to the marriage rule, since the rights of a civilian—an outsider—may be affected. *Id.* at 96-97. However, because the rule "swe[pt] much more broadly" than necessary, it was not "reasonably related" to the prison's security and rehabilitation goals. *Id.* at 98. Prison administrators argued that the rule prevented the security threat posed by "love triangles." *Id.* They ignored, however, that love triangles could exist regardless of a prisoner's marital status. *Id.* ("[S]urely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one."). Moreover, the prison had an obvious, low-cost alternative in the FBP regulations, which allow prisoners to marry so long as the warden does not deem the marriage a security threat. *Id.*; see also 3 MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* 30-37 (3d ed. 2002) (discussing marriage rights in prison).

<sup>124</sup> *Turner*, 482 U.S. at 91. Prison administrators believed that if inmates corresponded with those of other institutions, they might orchestrate escape plans and assaults. *Id.* Moreover, the regulation, coupled with placing gang members in different institutions, limited prison gang activity. *Id.*

<sup>125</sup> *Id.* at 91-92. The Court noted that even federal law conditions federal parole on "nonassociation with known criminals." *Id.* at 92; see 28 C.F.R. § 2.204(a)(5)(v) (1987) ("The releasee shall not associate with a person who has a criminal record without permission from the supervision officer."). A ban on "this sort of contact" within the prison is therefore logical. *Turner*, 482 U.S. at 91.

<sup>126</sup> *Turner*, 482 U.S. at 92.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* Not only did the restriction apply to the class of individuals with whom inmates could communicate, but it was also the state's policy of separating gang members in order to control gang activity. *Id.*

Likewise, the third factor weighed in favor of deference.<sup>129</sup> Its focus is on the accommodation's impact on the prison, its resources, guards, and other inmates.<sup>130</sup> An accommodation of the prisoners' asserted right here threatened "the core functions of prison administration, maintaining safety and internal security" by making it easier for prisoners to organize informally.<sup>131</sup> The result of striking the regulation would likely create a detrimental "ripple effect" that jeopardized the liberty and safety of prisoners and guards at multiple prisons.<sup>132</sup> In light of this tradeoff, the Court refused to disregard the prison administrators' decision, particularly given the expertise required to make such decisions.<sup>133</sup>

As to the fourth factor, the Court found no clear alternative that could serve prison administrators' interests without restricting prisoners' free speech right.<sup>134</sup> Inmates contended that prison administrators had the option of monitoring inmate-to-inmate mail.<sup>135</sup> This alternative, however, required more than "a *de minimis* cost on the [prison administrator's] pursuit of legitimate corrections goals."<sup>136</sup> Requiring staff to inspect each correspondence, coupled with the possibility of inmate-to-inmate communication via "jargon or codes," was an inadequate alternative to simply banning inmate-to-inmate correspondence altogether.<sup>137</sup> The Court found the regulation content-neutral, "reasonably related to

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 90-91.

<sup>131</sup> *Id.* at 92. Prison administrators expressed similar organizational concerns over prison unions in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); see *supra* Part III.A.3. Here, the Court finds the concern to be even greater than in *Prisoners' Labor Union*, since accommodating the right would impact the security concerns of more than one prison. *Turner*, 482 U.S. at 92.

<sup>132</sup> *Turner*, 482 U.S. at 92.

<sup>133</sup> *Id.* at 92-94 ("Where exercise of a right requires this kind of tradeoff, we think that the choice made by corrections officials—which is, after all, a judgment 'peculiarly within [their] province and professional expertise'—*should not be lightly set aside by the courts.*" (emphasis added) (citation omitted) (citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

<sup>134</sup> *Id.* at 93. The Court turned to the FBP for guidance. *Id.* The FBP, however, similarly restricted inmate-to-inmate correspondence to "protect institutional order and security." *Id.*; see 28 C.F.R. § 540.17 (1986).

<sup>135</sup> *Turner*, 482 U.S. at 93. The proffered alternative echoed that which the Court rejected in *McDonnell*. *Wolff v. McDonnell*, 418 U.S. 539, 576-77 (1974) ("If prison officials had to check in each case whether a communication was from an attorney before opening it for inspection, a near impossible task of administration would be imposed.").

<sup>136</sup> *Turner*, 482 U.S. at 93.

<sup>137</sup> *Id.* (noting that gang members in federal prison often use codes to communicate in their correspondence).

[the] valid [penological] goals” of security and safety and not “an exaggerated response” to those objectives.<sup>138</sup> Thus, the regulation did not unconstitutionally restrict inmates’ free expression right.

## 2. An Analysis of the *Turner* Factors

The *Turner* Court clearly enunciated its deference to prison administrators’ regulations. The Court, however, gave little guidance on how to apply the *Turner* test.<sup>139</sup> The first factor calls for a rational connection between the prison rule and the legitimate government interest it is said to further.<sup>140</sup> The lack of a connection or a weak link weighs in favor of striking the regulation.<sup>141</sup> While there are some exceptions,<sup>142</sup> it is arguably an easy factor for prison officials to meet.<sup>143</sup> The government’s interests in rehabilitating prisoners, prison security, and even budgetary concerns present an array of reasons for satisfying this factor.<sup>144</sup>

The application of the second factor is vague. When considering a regulation’s validity, a court must consider the “judicial deference owed to [prison] officials” if inmates can

<sup>138</sup> *Id.*

<sup>139</sup> MUSHLIN, *supra* note 42, at 28.

<sup>140</sup> *Turner*, 482 U.S. at 89 (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)); see MUSHLIN, *supra* note 42, at 36. Unlike *Martinez*, prison officials did not have to show that the regulation served a substantial government interest. Instead, *Turner* lowered the burden for prison officials. They only needed to show a reasonable relationship between the regulation and the asserted penological interest. MUSHLIN, *supra* note 42, at 598-99.

<sup>141</sup> *Turner*, 482 U.S. at 89-90 (“[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.”).

<sup>142</sup> *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1072 (W.D. Wis. 2000). A state regulation barred prisoners’ access to sexually explicit material. Prison administrators pointed to security maintenance, rehabilitation and sexual harassment prevention as “legitimate correctional goals” tied to the regulation. *Id.* at 1073, 1079. The rule, however, was so broad that one could reasonably find the absence of a “rational connection between the [goal] and the ban” without the need for scientific testimony or common sense. *Id.* at 1080; see MUSHLIN, *supra* note 42, at 31.

<sup>143</sup> See discussion on *Beard v. Banks* *infra* Part III.C.

<sup>144</sup> See MUSHLIN, *supra* note 42, at 28-29; *Powell v. Estelle*, 959 F.2d 22, 25 (5th Cir. 1992) (finding that prison regulation barring long hair and facial hair was rationally related to the legitimate government interest of preventing inmates from hiding contraband and weapons in their hair and beards as well as prisoner identification); *Allen v. Cuomo*, 100 F.3d 253, 261 (2d Cir. 1996) (upholding a five-dollar disciplinary surcharge imposed on prisoners who violated certain prison rules because the government had a legitimate interest in deterring misconduct and raising revenue).

exercise their asserted right via other available avenues.<sup>145</sup> There is uncertainty, however, as to the *type* of rights courts should consider. A court need not seek an alternative to the *specific* right, but may seek an alternative to the *general* right.<sup>146</sup> In *Turner*, the Court did not focus on whether prisoners had alternative means of communicating with other prisoners but rather on whether they “were deprived of ‘*all means of expression*.’”<sup>147</sup> Thus, a court may defer to prison administrators even where no alternative to the specific right exists.

The third factor focuses on the impact of accommodating the prisoners’ rights.<sup>148</sup> Courts should consider the effect on guards, prison resources, and other inmates.<sup>149</sup> If the accommodation results in a “significant ‘ripple effect,’” courts must give deference to the “informed discretion of corrections officials.”<sup>150</sup> Despite an analysis similar to the first factor—both factors call for a “reasonableness analysis”—the third deals with the rule’s reasonableness vis-à-vis the plaintiff’s proposed alternative for operating the prison.<sup>151</sup>

Finally, the fourth factor considers whether the prison regulation is actually an “exaggerated response” to prison administrators’ concern.<sup>152</sup> The plaintiff bears the burden of suggesting an alternative.<sup>153</sup> An inmate must show that an obvious, easy alternative exists and that, therefore, the regulation is an overreaction to prison administrators’ concern.<sup>154</sup> A proposed alternative, however, faces rejection if it

<sup>145</sup> *Turner*, 482 U.S. at 90 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)); see *Jones v. N.C. Prisoners’ Lab. Union Inc.*, 433 U.S. 119, 131 (1977).

<sup>146</sup> See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 351-52 (1987).

<sup>147</sup> *Id.* at 352 (emphasis added) (quoting *Turner*, 482 U.S. at 92). Days after deciding *Turner*, the Court addressed the constitutionality of prison policies that prevented Muslim inmates from attending Jumu’ah, a weekly religious service. *Id.* at 345. Recalling *Turner*, the Court’s evaluation of the second factor focused on whether inmates lacked all means of expression. *Id.* at 352. Although there was no alternative to attending Jumu’ah specifically, Muslim inmates could still participate in other forms of religious expression. *Id.*

<sup>148</sup> *Turner*, 482 U.S. at 90.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> MUSHLIN, *supra* note 42, at 36.

<sup>152</sup> *Turner*, 482 U.S. at 90; see e.g., *Block v. Rutherford*, 468 U.S. 576, 587 (1984) (rejecting the lower courts’ finding that disallowing contact visits for pre-trial detainees was an excessive response to the security concerns involved).

<sup>153</sup> *Turner*, 482 U.S. at 90-91 (“This is not a ‘least restrictive alternative’ test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the [inmate’s] constitutional complaint.”).

<sup>154</sup> *Id.*; see also MUSHLIN, *supra* note 42, at 38.

is likely to create a “ripple effect.”<sup>155</sup> In other words, if “changes to one area of prison administration” have negative repercussions in another, the alternative is unlikely to withstand judicial scrutiny.<sup>156</sup>

C. *Narrowing Turner to a Single Factor: Beard v. Banks*

Although the Court discussed a multifactor test in *Turner*, its subsequent application effectively condenses *Turner*'s four factors into a single-factor test.<sup>157</sup> While the Court is unlikely to revert fully to the days of the hands-off doctrine,<sup>158</sup> deference to prison administration remains the lens through which the Court analyzes a prison regulation. Such deference offers a state legislature the opportunity to attain goals via prison regulations that would otherwise remain out of its reach because of unconstitutional skeins. The Court's language in subsequent cases indicates that unless the connection between the challenged prison regulation and the interest is invalid, the Court need not address the other *Turner* factors.<sup>159</sup> This is not a challenge for prison administrators to meet. The state does not have the burden of proving a prison regulation's validity; rather, it is for the “prisoner to *disprove* it.”<sup>160</sup> As discussed in the following section, the Court's

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<sup>155</sup> *Turner*, 482 U.S. at 90.

<sup>156</sup> MUSHLIN, *supra* note 42 at 35-36.

<sup>157</sup> The Court continued to apply *Turner* in reviewing prisoner challenges to various First Amendment restrictions, including free association and exercise rights. In *Overton v. Bazzetta*, inmates and their friends and family members brought a class action against the Michigan Department of Corrections. 539 U.S. 126, 130 (2003). They argued that prison regulations violated a prisoner's First Amendment right to freedom of association because they limited visitation from children and suspended visitation privileges for substance-abuse violations. *Id.* at 131; *see also* Trevor N. McFadden, *When to Turn to Turner? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 144 (2006). In applying *Turner*, the Court refused to define the scope of the right of association and held that each visitation restriction bore a rational relationship to a legitimate penological interest. *Bazzetta*, 539 U.S. at 131-35 (“We need not attempt to explore or define the asserted right of association at any length . . . because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question.”). The Court went on to apply the remaining *Turner* factors, even though its language indicated it need not do so. *Id.* at 135-36. The Court also applied *Turner* in upholding a prison regulation that prevented Muslim inmates from attending a religious service. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-53 (1987); *see supra* note 146 and accompanying text.

<sup>158</sup> *But see generally* Owen J. Rarric, *Kirsch v. Wisconsin Department of Corrections: Will the Supreme Court Say “Hands Off” Again?*, 35 AKRON L. REV. 305 (2002) (arguing that *Turner*'s deferential standard amounts to a modern-day hands-off doctrine).

<sup>159</sup> *Beard v. Banks*, 126 S. Ct. 2572, 2579-80 (2006).

<sup>160</sup> *Bazzetta*, 539 U.S. at 132 (emphasis added).

deference to prison administrators under *Turner* creates an opportunity for a state to further a legislative goal by imposing on a prisoner's free speech right.<sup>161</sup>

Despite the Court's analysis of each factor in *Turner*, the Court's language indicates that unless the connection between the challenged regulation and the interest is invalid, the Court will not address the other factors.<sup>162</sup> Three years later, the Court declared that analyzing and balancing each *Turner* factor was unnecessary if the regulation was reasonably connected to a legitimate penological interest.<sup>163</sup> In *Beard v. Banks*, the Department of Corrections implemented a policy that banned inmates in the prison's long-term segregation unit ("LTSU") from accessing newspapers, magazines and photographs.<sup>164</sup> The LTSU has two levels of segregation, but only inmates in Level Two were denied access to newspapers, magazines, and photographs.<sup>165</sup> Level Two inmates, however, still had access to "legal and personal correspondence, religious and legal materials, two library books, and writing paper."<sup>166</sup> If after 90 days an inmate's behavior improved, he could move to Level One, where he could receive one newspaper and five magazines.<sup>167</sup>

The *Banks* Court addressed each *Turner* factor quickly and, in the end, almost superfluously. Although the Department offered several justifications for its regulation, the Court zeroed in on one *Turner* factor. A single government justification satisfied the Court: the need to motivate difficult prisoners to behave better.<sup>168</sup> The goal of eliciting better behavior from difficult prisoners by providing an incentive

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<sup>161</sup> See discussion on Son-of-Sam law *infra* Part IV.

<sup>162</sup> In *Bazzetta*, the Court analyzed the other *Turner* factors only after concluding that the regulations satisfied the first factor. *Bazzetta*, 539 U.S. at 135. Nevertheless, the analysis was unnecessary. According to the Court, the regulations bore a rational relationship to legitimate interests, which was enough to sustain them. *Id.* at 131-32. Hence, if the first factor is satisfied, there is no need to evaluate the remaining *Turner* factors. Consequently, a regulation is unlikely to withstand *Turner* if it fails to meet the first factor.

<sup>163</sup> *Banks*, 126 S. Ct. at 2580 (stating that the second, third, and fourth *Turner* factors' connection to the prison's goals "add little, one way or another, to the first factor's basic logical rationale.").

<sup>164</sup> *Id.* at 2576.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 2578.

satisfied *all* the *Turner* requirements.<sup>169</sup> Limiting the material a LTSU inmate can possess was validly, rationally connected to the penological goal of inducing inmates to behave better and discouraging Level One inmates from “backsliding.”<sup>170</sup> Therefore, the first factor weighed in favor of the “reasonableness” of the prison regulation.<sup>171</sup>

In applying the remaining *Turner* factors, the Court found that the regulation only limited a prisoner’s access to alternatives.<sup>172</sup> A prisoner is only able to access *some* magazines and newspapers if his behavior merits movement to Level One.<sup>173</sup> Even if there is no ready alternative for Level Two inmates, the absence only provides “evidence that the regulations [a]re unreasonable”<sup>174</sup>—it is not dispositive.<sup>175</sup> Moreover, accommodating the prisoner’s constitutional right would “produce worse behavior,” thus negatively affecting prison administration.<sup>176</sup> Further, no readily available alternative could accommodate the inmate’s constitutional right without bearing more than a de minimis cost to prison administrators.<sup>177</sup>

Despite the Court’s application of the *Turner* requirements, it clearly stated that its deference to the Department’s regulation lies not in the balancing of the factors.<sup>178</sup> The second, third and fourth factors “add little . . . to the first factor’s basic logical rationale.”<sup>179</sup> Rather, the “real task *in this case*”<sup>180</sup> laid in determining whether the Department showed not just a logical, but “a *reasonable* relation” between the regulation and the penological goal.<sup>181</sup>

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<sup>169</sup> *Banks*, 126 S. Ct. at 2578-79. Prison administrators offered three justifications for the regulation: to motivate inmates to behave better; to minimize inmate property; and to minimize the amount of material inmates can potentially use as a weapon. *Id.* at 2579. According to the Court, “the first rationale itself satisfies *Turner’s* requirements.” *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 2579-80.

<sup>173</sup> *Id.* at 2579.

<sup>174</sup> *Id.* at 2580 (citations omitted).

<sup>175</sup> *Id.* (citations omitted).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (emphasis added).

<sup>181</sup> *Id.* (emphasis in original).

Thus, in certain cases, satisfying the first *Turner* factor warrants judicial deference to prison administrators.

#### IV. A CASE IN POINT: CALIFORNIA'S SON-OF-SAM LAW

By deciding *Banks* on essentially one *Turner* factor, the Court gives prison administrators and their regulations ample opportunity to succeed in the courts. Such deferential treatment allows states to accomplish otherwise unreachable punitive goals. To illustrate, state laws that bar convicted criminals from profiting from their crimes have faced constitutional challenges.<sup>182</sup> It is not unreasonable for a state to prevent criminals from profiting from their crimes: not only does this show respect for the victim, but it also sends the message that crime truly doesn't pay. These so-called Son-of-Sam laws, however, have faced intense judicial scrutiny.<sup>183</sup> Although the Court's standard of review is higher when reviewing Son-of-Sam laws, a prison regulation can accomplish at least one goal of these laws without facing the same level of judicial scrutiny. If a state goal is to bar criminals from profiting from their crimes, a prison regulation that bars "any business dealing" without the warden's permission can reach virtually every profit a criminal can make.<sup>184</sup> Thus, a regulation has the potential of unfairly imposing on a criminal's right to free expression, while also accomplishing the goal of another state law. If challenged, such a regulation is likely to withstand judicial scrutiny, even though a state's Son-of-Sam law would not.<sup>185</sup>

##### A. *Preventing the Profiting from Crime: Background of the Son-of-Sam Laws*

A state has a compelling interest in preventing criminals from profiting from their crimes.<sup>186</sup> Son-of-Sam laws,

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<sup>182</sup> See *infra* Part IV.A-C.

<sup>183</sup> See *infra* Part IV.A-C.

<sup>184</sup> Victim compensation was one of the New York legislature's goals in enacting the first Son-of-Sam law. *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108-09 (1991). Another goal was to prevent criminals from profiting from their crimes. *Id.* Judicial deference to prison administrator's business-dealings regulation may not necessarily foster victims' compensation (Johnson's profits, for example, are not redirected to his victims), but it nonetheless has the potential to prevent a criminal from making any profit.

<sup>185</sup> See *infra* Part IV.B-C.

<sup>186</sup> *Simon & Schuster*, 502 U.S. at 118.

named after the notorious New York serial killer, were enacted to prevent a criminal from profiting from his or her crime.<sup>187</sup> Nearly every state has or had a Son-of-Sam law on the books.<sup>188</sup> Outraged by the possibility of a murderer profiting from his crimes,<sup>189</sup> the New York legislature passed the first Son-of-Sam law.<sup>190</sup> The law enabled the state to seize any profit a criminal made from the sale of stories related to his or her crimes and to place the profits in a fund for the crime victims.<sup>191</sup> New York's Son-of-Sam law faced constitutional challenges in *Simon & Schuster v. New York State Crime Victims Board*.<sup>192</sup>

*B. Simon & Schuster: Standard for Legitimate Curtailment of Profits*

*Simon & Schuster* highlighted the constitutional defects of New York's Son-of-Sam law.<sup>193</sup> A mobster-turned-government witness, Henry Hill, sold the story of his life in the mob to the publisher Simon & Schuster.<sup>194</sup> New York's Crime Victim's Board determined that the book fell within New York's Son-of-

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<sup>187</sup> The roots of Son-of-Sam laws lay in the media attention that followed the crimes of David Berkowitz. Sam Roberts, *Criminals, Authors, and Criminal Authors*, N.Y. TIMES, Mar. 22, 1987, § 7, at 1. Between 1976 and 1977, Berkowitz killed six and injured seven people in New York City while sending letters to authorities and the media under the pseudonym "Son of Sam." *Id.*; see also Anemona Hartocollis, *Court Hears "Son of Sam" in Dispute over Personal Mementos*, N.Y. TIMES, Jan. 31, 2006, at B4.

<sup>188</sup> See *supra* note 13 and accompanying text.

<sup>189</sup> Roberts, *supra* note 187, at 1.

<sup>190</sup> N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1991) (amended by N.Y. EXEC. LAW § 632-1(b) (McKinney Supp. 1993)). The law specifically stated that:

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative . . . of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime . . . or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representative.

N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

<sup>191</sup> N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991) (amended by N.Y. EXEC. LAW § 632-1(b) (McKinney Supp. 1993)). (Because the original law applied to convicted criminals, it had no effect on Berkowitz, who was adjudged incompetent to stand trial. Nevertheless, he voluntarily gave the royalties he received from the book *Son of Sam* to his victims. *Simon & Schuster*, 502 U.S. at 111.)

<sup>192</sup> *Simon & Schuster*, 502 U.S. at 105.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 112.

Sam law.<sup>195</sup> The Victim's Board ordered Hill to hand over the profits made under the contract and ordered Simon & Schuster to turn over any future moneys payable to Hill.<sup>196</sup>

The Supreme Court unanimously held that the statute violated the First Amendment.<sup>197</sup> Content-based restrictions, which focus on the subject of the prisoner's speech, are presumptively unconstitutional.<sup>198</sup> A financially burdensome law based on the speaker's speech content, as opposed to speech generally, is "presumptively inconsistent with the First Amendment."<sup>199</sup> Unless the statute was narrowly tailored to a compelling governmental interest, it violated the First Amendment.<sup>200</sup> Although the state had a compelling interest in victim compensation, particularly "from the fruits of [a] crime," New York's Son-of-Sam Law was not narrowly tailored to meet that goal.<sup>201</sup> The statute specifically targeted the content of speech—the author's crime—imposing a financial burden it did not impose on other types of speech.<sup>202</sup> The Court found the statute overly inclusive in two ways: (1) the subject of the work is irrelevant, so long as there is a mention, even in passing, of the author's crimes; and (2) convictions were irrelevant.<sup>203</sup>

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<sup>195</sup> *Id.* at 114.

<sup>196</sup> *Id.* at 114-15.

<sup>197</sup> *Id.* at 123.

<sup>198</sup> *Id.* at 115. Generally, the extent of the First Amendment's protection turns on whether a restriction is content-based or content-neutral. See FARBER, *supra* note 22, at 21; John B. Kopf III, Note, *City of Erie v. Pap's A.M.: Contorting Secondary Effects and Diluting Intermediate Scrutiny to Ban Nude Dancing*, 30 CAP. U. L. REV. 823, 826 (2002). A regulation is content-neutral if it "serves purposes unrelated to the content of expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A content-based regulation considers the substance of expression, such as its topic. Kopf, at 827. A content-neutral regulation, however, focuses on the "non-communicative impact of expression." *Id.* at 828. The Court reviews content-based speech legislation at a higher standard, including content-based restrictions on inmates. *Simon & Schuster*, 502 U.S. at 115-18. For a review of the content-based and content-neutral distinction, see generally Kopf, *supra* at 825-31.

<sup>199</sup> *Simon & Schuster*, 502 U.S. at 115 (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

<sup>200</sup> *Id.* at 118.

<sup>201</sup> *Id.* at 120-21.

<sup>202</sup> If an inmate profited from publishing a book on his crime, the regulation reallocated those profits to the Victims' Board. FARBER, *supra* note 22, at 24. It did not, however, prevent the inmate from publishing books. *Id.* Thus, the regulation was content-based because a "criminal could profit from writing a book on any subject except for his crimes." *Id.* at 24-25.

<sup>203</sup> *Simon & Schuster*, 502 U.S. at 121. There was no distinction between an accusation and a conviction—an author's mere admission that he committed a crime sufficed. *Id.* The Court mentioned, but did not address, the statute's potential under-inclusiveness. *Id.* at 122 n.1. A statute is under-inclusive when its reach becomes too narrow to fully serve the state's interest. Kathleen M. Timmons, *Natural Born Writers*:

C. *California's Son-of-Sam Law: An Unconstitutional Anti-Profit Statute*

Despite the constitutional challenges to New York's law, California's Son-of-Sam law exhibited constitutional flaws similar to New York's.<sup>204</sup> In *Keenan v. Superior Court*,<sup>205</sup> Frank Sinatra, Jr. sought compensation under California's then Son-of-Sam law (Section 2225(b)(1) of the California Civil Code)<sup>206</sup> after his kidnappers agreed to produce a story about the kidnapping plot with the *New Times Los Angeles*.<sup>207</sup> After selling the story to Columbia Pictures, Sinatra demanded that the studio withhold payment to the kidnappers and the *New Times Los Angeles*.<sup>208</sup>

The court applied the *Simon & Schuster* analysis after finding that Section 2225(b)(1) "impose[d] content-based financial penalties on protected speech"<sup>209</sup> similar to the defect in the New York law.<sup>210</sup> Like the New York law, Section 2225(b)(1) confiscated income "from all expressive materials,

*The Law's Continued Annoyance with Criminal Authors*, 29 GA. L. REV. 1121, 1133 (1994). Son-of-Sam laws, it is argued, are under-inclusive because they only reach profits made "from the publication of the criminal's thoughts" and not his assets overall; thus, they fail to serve the state's goal of victim compensation. Kevin S. Reed, *Criminal Anti-Profit Statutes and the First Amendment: Simon & Schuster, Inc. v. New York Crime Victims Board*, 112 S. Ct. 501 (1991), 15 HARV. J.L. & PUB. POL'Y 1060, 1067 (1992). For an argument on the under- and over-inclusiveness of Son-of-Sam laws, see Timmons, *supra*, at 1141.

<sup>204</sup> *Keenan v. Super. Ct. of L.A. County*, 40 P.3d 718, 726 n.11 (Cal. 2002) ("The New York law, like [California Son-of-Sam Law] Section 2225(b)(1), established priorities of claims against the account, including the criminal's valid claim for expenses of legal representation. Unlike Section 2225(b)(1), the New York law allowed general creditors of the criminal to reach the impounded funds, but provided that if no claims against the account were pending at the end of the five-year period, remaining funds in the account would be repaid to the criminal." (citations omitted)).

<sup>205</sup> *Id.* at 718.

<sup>206</sup> CAL. CIV. CODE § 2225(b)(1) (West 2001) ("All proceeds from the preparation for the purpose of sale, the sale of the rights to, or the sale of materials that include or are based on the story of a felony for which a convicted felon was convicted, shall be subject to an involuntary trust for the benefit of the beneficiaries set forth in this section.").

<sup>207</sup> *Keenan*, 40 P.3d at 722-23. Barry Keenan, Joseph Amsler and John Irwin conspired to and kidnapped Sinatra in 1963. *Id.* at 722. Sinatra was released after his father, Frank Sinatra, paid a ransom. *Id.* Sinatra's business and reputation took a hit when his kidnappers told the media that he himself took part in the kidnapping plot, although they later admitted this was false. *Id.* In 1998, the kidnappers agreed to produce a story with the *New Times Los Angeles*. *Id.* at 722-23. They intended to sell the story to print, broadcast, and film media. Columbia Pictures bought the rights to the story entitled "Snatching Sinatra." *Id.*

<sup>208</sup> *Id.* at 723.

<sup>209</sup> *Id.* at 725-26.

<sup>210</sup> *Id.*

whatever their general themes or subjects, that include significant discussions of their creators' past crimes."<sup>211</sup> In finding California's latest version of its Son-of-Sam law unconstitutional, the Court held that the statute "penalize[d] the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims."<sup>212</sup> The court specifically addressed an inmate's expressive activity, finding that the latest version of the statute was over-inclusive.<sup>213</sup> The Court's deference to prison administration regulations makes the constitutionality of a Son-of-Sam law irrelevant. Regardless of the expression's relation to the crime, the Court's deferential approach to prison administrators' regulations simultaneously accomplishes the state's goal of limiting an inmate's profit-making.

## V. RETHINKING *TURNER*

### A. *An Application of Turner*

Assuming that Johnson did in fact engage in an unauthorized *business* transaction,<sup>214</sup> and that prison administrators only barred him from mailing his postcards,<sup>215</sup>

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<sup>211</sup> *Id.* at 726.

<sup>212</sup> *Id.* at 721.

<sup>213</sup> *Id.* at 732. Although the court concluded that Section 2225(b)(1) was unconstitutional, it did not address Section 2225(b)(2), the "notoriety value" provision of the statute; the court specifically stated that it only addressed the "*storytelling* about the crime," and no other severable portions of the statute. *Id.* at 729 n.14.

California's Son-of-Sam law has a feature New York's did not; besides confiscating a convicted felon's income from telling his crime story, the California statute, by amendments adopted after *Simon & Schuster*, also confiscates profits earned by a convicted felon, or a profiteer, from the sale of memorabilia, property, things, or rights for a value enhanced by their felony-related *notoriety value*. (section 2225(b)(2).) Thus, it cannot be said that California's law, read as a whole, burdens income from speech as distinct from *all other crime-related income*. The Attorney General urges that this distinction between the California and New York statutes means the California law is not a content-based regulation of speech. We disagree. California's effort to reach the fruits of crime beyond those derived from storytelling about the crime might bear on whether our statute is unconstitutionally *underinclusive*, an issue we need not and do not decide.

*Id.* at 729, n.14.

<sup>214</sup> All of the proceeds from the sale of Johnson's art went to charity. Liptak, *Prison Disciplines Publicized Inmate*, *supra* note 9; Curtis, *supra* note 6.

<sup>215</sup> While prison administrators barred Johnson from mailing his postcards, it is unclear if they disciplined Johnson in other ways, such as by barring him from painting altogether. Liptak, *Prison Disciplines Publicized Inmate*, *supra* note 9 ("A prison artist [Johnson] . . . has been disciplined for what a prison official yesterday

the *Turner* factors are likely to pin the outcome of his case before a court in favor of prison administrators. Following *Banks*, a full balancing of the *Turner* factors is unnecessary.<sup>216</sup> If prison administrators can deliver to the court a valid, rational relationship between the regulation and a legitimate penological interest, there is no need for a court to consider the remaining *Turner* factors. Moreover, satisfactorily meeting the first *Turner* factor may result in an additional victory for the state—that of preventing another criminal from “profiting,” in any way, because of his status as a criminal.

*Turner*'s first factor acts as a gatekeeper for a court's further analysis. The prison regulation must bear a valid, rational relationship to a legitimate penological interest.<sup>217</sup> Prison administrators have cited security and budgetary concerns as legitimate interests for enacting a prison regulation.<sup>218</sup> These concerns provide viable arguments for prison administrators in Johnson's case. They may also cite their interest in ensuring that inmates abide by prison regulations. Making an exception in Johnson's case would encourage other inmates to engage in “unauthorized business dealings” or to break other prison rules. Should these arguments satisfy a court, there is no need for further inquiry: the analysis stops here.<sup>219</sup> Under *Banks*, so long as prison administrators present a single justification logically related to their rule, a court will defer to prison administrators.<sup>220</sup>

Moreover, analyzing the regulation under the remaining *Turner* factors would likely yield the same result. An application of the second factor demonstrates that Johnson is in fact able to exercise his right to communicate artistically via other means. Prison administrators can argue that, though Johnson's *specific* right to paint may be restricted, he can still exercise his *general* right to free expression to the extent that any prisoner can.<sup>221</sup> The Pelican Bay Prison Project's website

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called ‘unauthorized business dealings’ in the sale of his paintings. The prison has *also* barred [Johnson] from sending his paintings through the mail.” (emphasis added)).

<sup>216</sup> See *supra* Part III.C for a discussion on *Banks*.

<sup>217</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987); see *supra* Part III.B for a discussion on this factor.

<sup>218</sup> See *supra* Part III.A.2-3 for a discussion of the various concerns prison administrators presented to the Court.

<sup>219</sup> See *supra* Part III.C for a discussion on *Banks*.

<sup>220</sup> *Beard v. Banks*, 126 S. Ct. 2572, 2580 (2006).

<sup>221</sup> For an example of the specific/general right distinction, see *supra* note 146 and accompanying text.

includes a section called “Donny’s Page,” in which Johnson’s essays on various topics can be found.<sup>222</sup> Johnson has also written a book in which he describes his life in prison.<sup>223</sup> Further, Johnson could have raised money for charity via the Prison Art Project,<sup>224</sup> a not-for-profit that supports the artistic endeavors of California prisoners<sup>225</sup> and returns part of the donations to the inmate-artist.<sup>226</sup>

Additionally, a court may find that accommodating Johnson’s right will negatively impact guards and inmates. If Johnson goes unpunished, other inmates may consider it a sign that prison administrators are either giving Johnson preferential treatment or that prison administrators are unlikely to discipline inmates if they violate a prison regulation. Either outcome would lead to more prison regulation violations, subordination of prison guard authority, and a hindrance of prison guards’ ability to maintain prison security. Thus, the accommodation’s potential effects are sufficient for a court to side with prison administrators.

The problem lies in the potential likelihood of this result under *Turner*. The regulation can potentially bar Johnson from profiting from any exercise of expression, even if his artwork exhibits no relation to his crimes. Despite the constitutional invalidity of California’s Son-of-Sam laws and the challenges that these laws have faced,<sup>227</sup> *Turner* allows the state to prevent an inmate from making a profit from any form of expression. The result is contrary to one of the very purposes of incarceration and, more importantly, to the First Amendment’s right to free expression.

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<sup>222</sup> Pelican Bay Prison Project: Donny’s Page, <http://www.pelicanbayprisonproject.org/donny.htm> (last visited Nov. 8, 2006). The webpage states Johnson will write an essay monthly and includes links to his past essays. *Id.*

<sup>223</sup> Johnson’s book, *DONNY: LIFE OF A LIFER*, can be ordered through his website. Donny Johnson’s Website, [http://members.tripod.com/donnyj\\_pelican/id22.htm](http://members.tripod.com/donnyj_pelican/id22.htm) (last visited Sept. 10, 2007).

<sup>224</sup> Prison Art Project—Prisoner Made Arts and Crafts for Sale, <http://www.prisonart.org/index.htm> (last visited Sept. 10, 2007).

<sup>225</sup> Prison Art Project: Prison Art—Donations, <http://www.prisonart.org/donate.html> (last visited Sept. 10, 2007).

<sup>226</sup> Ten percent of sales proceeds are allocated to maintaining the site. E-mail from Ed Mead, Prison Art Project Director, to Melissa Rivero (Jan. 1, 2007, 18:23 EST) (on file with author). They are then distributed to inmates, who can use the proceeds for any reason, including supporting their families and purchasing art supplies. *Id.*

<sup>227</sup> See Malecki, *supra* note 14, at 681-87.

B. *The Interests Turner Ignores*

If the goals of the prison system are to both punish and rehabilitate, Johnson's right to exercise his First Amendment right to expression serves both goals.<sup>228</sup> First, Johnson's inability to mail his paintings impedes rehabilitation.<sup>229</sup> Johnson has stated that proceeds from the sale of his artwork will go to an educational fund for the children of other inmates.<sup>230</sup> Rehabilitation undoubtedly includes an inmate's beneficial contribution to society. Arguably, Johnson's ability to rehabilitate is already limited: he is confined in the SHU and is unlikely to ever leave it. There is very little he can do to either rehabilitate or contribute to society. Proceeds from his work can help children of other inmates, who are already disadvantaged by the absence of at least one parent.<sup>231</sup> Johnson's donations, therefore, may actually contribute to crime prevention.

In terms of punishment, challenges as to the constitutionality of confinement in the SHU illustrate the severity of this form of punishment.<sup>232</sup> Johnson's crimes merit some form of punishment and certainly many years of it. Aside from the death penalty, however, confinement in the SHU is as severe a punishment as can be imposed on a human being.<sup>233</sup> His years in the SHU, and the many yet to come, serve a prison's punitive function. His status, however, as a criminal should not deprive him of the very few rights he has left, particularly if they benefit others.

Furthermore, by classifying sales of an inmate's artistic expression as business dealings, the state can accomplish at least one goal that an imperfect law does not. Given the relative ease with which prison officials can meet *Turner*, such a regulation can withstand constitutional muster. The criminal notoriety associated to Johnson's art may result in a premium

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<sup>228</sup> See *supra* Part II for a discussion of rehabilitation.

<sup>229</sup> Vasiliades, *supra* note 47, at 78-79. Vasiliades discusses the findings of psychological studies conducted on inmates in Pelican Bay's SHUs. According to the studies, SHU inmates like Johnson suffer from extreme psychological trauma, including irrational anger and suicidal thoughts. *Id.*

<sup>230</sup> Liptak, *Behind Bars*, *supra* note 1.

<sup>231</sup> See ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA 82-91 (1998) (discussing various preventive measures for thwarting crime, particularly those targeted to children of high-risk families, which include single-parent households).

<sup>232</sup> See generally Vasiliades, *supra* note 47.

<sup>233</sup> *Id.*

for his artwork. As it is, many states, including California, attempt to limit a criminal's ability to profit from his crime via Son-of-Sam laws.<sup>234</sup> In Johnson's case, the business dealing regulation can prevent him from profiting from any form of expression. While some may argue that Johnson merely needed to ask the warden for permission before mailing his postcards for exhibition, a warden can conceivably deny Johnson's request for any reason.<sup>235</sup> Balancing these interests, however, is not a task that should be undertaken via *Turner* alone.

### 1. Focusing on the Outsider: Revisiting *Martinez*

A court can consider revisiting *Martinez* to prevent unwarranted judicial deference to prison administrators. Like *Martinez*, the prison regulation involved inmate correspondence.<sup>236</sup> Prison administrators disciplined Johnson by barring him from mailing his postcards.<sup>237</sup> As the Court stated in *Martinez*, it is irrelevant that the outsider is the "author or intended recipient" of a correspondence.<sup>238</sup> The First and Fourteenth Amendments protect both parties from "unjustified governmental interference with the intended communication."<sup>239</sup> Moreover, communication does not occur when one "writ[es] words on paper,"<sup>240</sup> but rather when it is read.<sup>241</sup>

While the communication in *Martinez*—a letter—is distinct from the artwork Johnson sent Kurtz, an argument can nevertheless be made as to communication. A letter effectively communicates when it is read, but a piece of art is arguably communicated when it is viewed. By denying Kurtz the opportunity to view a communication via artistic work, a prison regulation may infringe, at the very least, on his interest "in securing that result."<sup>242</sup> Moreover, if the value of self-determination is one held by every individual, the

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<sup>234</sup> See *supra* note 13 (listing the federal and states' anti-profit legislation).

<sup>235</sup> Many prison administrations cited security as a reason for a particular regulation. See *supra* Part III.A.2-3 (discussing the possible security concerns that may justify a regulation).

<sup>236</sup> *Procunier v. Martinez*, 416 U.S. 396, 398-99 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989); see also *supra* Part III.A.1.

<sup>237</sup> Liptak, *Prison Disciplines Publicized Inmate*, *supra* note 9.

<sup>238</sup> *Martinez*, 416 U.S. at 408-09.

<sup>239</sup> *Id.* at 409.

<sup>240</sup> *Id.* at 408.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

regulation deprives outsiders of the right to receive Johnson's expression. Thus, society as a whole is deprived of what could potentially be the work of a gifted artist.<sup>243</sup>

Prison administrators can argue that their choice for disciplining Johnson is the most rational way to punish him for violating the business-dealings regulation. By preventing Johnson from *mailing* his paintings, prison administrators are simply barring the means through which he engaged in the unauthorized business transaction. The argument, however, fails because it imposes unfairly on the rights of an outsider, who is not subject to the same restrictions as an inmate.<sup>244</sup>

## 2. The Retaliation Factor: *Abu-Jamal v. Price*

Another view the Court can adopt in Johnson's case is that followed by the Third Circuit in *Abu-Jamal v. Price*.<sup>245</sup> In 1982, a jury convicted Mumia Abu-Jamal for the murder of Officer Danny Faulkner.<sup>246</sup> Abu-Jamal worked as a journalist before his murder conviction.<sup>247</sup> National Public Radio ("NPR") interviewed him in 1994, and paid Abu-Jamal for the interview.<sup>248</sup> NPR intended to air segments of the interview as prison-life commentaries.<sup>249</sup> A police organization protested Abu-Jamal's ability to benefit from his crime.<sup>250</sup> In response, prison officials inspected Abu-Jamal's mail and initiated an investigation into whether he violated the prison's business rule.<sup>251</sup> Abu-Jamal brought suit, claiming the regulation violated his free speech rights.<sup>252</sup>

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<sup>243</sup> Through his studio manager, abstract artist Kenneth Noland complimented Johnson not only for having talent, but for doing "wondrous things with what he's got." Liptak, *Behind Bars*, *supra* note 1.

<sup>244</sup> See *supra* Part III.A.1 (discussing the custodial relationship between the state and the inmate).

<sup>245</sup> *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998).

<sup>246</sup> Steve Lopez, *Wrong Guy, Good Cause*, TIME, July 31, 2000, at 24. Officer Faulkner made a traffic stop on William Cook, Abu-Jamal's brother, when Abu-Jamal encountered the two. He and Officer Faulkner traded gunfire. By the time police arrived, Abu-Jamal had been shot in the chest. Officer Faulkner succumbed to his injuries. *Id.* Abu-Jamal was convicted of murder and sentenced to death. *Abu-Jamal*, 154 F.3d at 130.

<sup>247</sup> *Abu-Jamal*, 154 F.3d at 131.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 130.

In applying *Turner*, the Third Circuit found that prison officials imposed the regulation in retaliation for the content of his commentaries.<sup>253</sup> Abu-Jamal demonstrated that the business rule, as applied to him, was not reasonably related to a legitimate government interest. Contrary to *Turner*, prison officials imposed the rule based on the content of his writing.<sup>254</sup> There was no indication that Abu-Jamal's writing or broadcasted commentaries "strained prison resources," negatively impacted other prisoners, or increased danger to Abu-Jamal or others.<sup>255</sup> Moreover, prison officials had an easy, readily available alternative in merely applying the rule in a content-neutral manner.<sup>256</sup>

Johnson bears strong similarities to Abu-Jamal. Johnson's activity is an exercise of expression under the First Amendment.<sup>257</sup> Prison officials punished Johnson only after the *New York Times* published an article about his artwork and its sale to the public at a Mexican gallery.<sup>258</sup> Like Abu-Jamal, prison officials argued that Johnson violated the state's business-dealings rule,<sup>259</sup> despite previously engaging in similar activity without objection.<sup>260</sup> Unlike Abu-Jamal, however, the "content" of Johnson's expression is not words, but art, which is arguably subject to individual interpretation. Thus, like Abu-Jamal, the facts in Johnson's case may withstand a *Turner* analysis.

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<sup>253</sup> *Id.* at 134.

<sup>254</sup> *Id.* at 133. In particular, the first factor calls for the court to determine if the regulation is content-neutral. *Turner*, 482 U.S. at 90. Moreover, there was no evidence that indicated prison officials disciplined and investigated Abu-Jamal out of security concerns. *Abu-Jamal*, 154 F.3d at 135.

<sup>255</sup> *Abu-Jamal*, 154 F.3d at 134. The third *Turner* factor considers the impact an accommodation of the prisoner's right would have on prison resources, guards and inmates. *Turner*, 482 U.S. at 90. No evidence suggested that Abu-Jamal's writings "strained prison resources, contributed to unrest among the inmate population, or enhanced Jamal's stature as a prisoner" more so than writings by other inmate-authors. *Abu-Jamal*, 154 F.3d at 134.

<sup>256</sup> *Abu-Jamal*, 154 F.3d at 135. The *Abu-Jamal* court did not address the second *Turner* factor because neither party mentioned it. *Id.* at 137 n.5.

<sup>257</sup> See discussion on the First Amendment *supra* Part I.

<sup>258</sup> See *supra* note 9 and accompanying text.

<sup>259</sup> CAL. CODE REGS. tit. 15, § 3024(a) (1995); see *supra* note 9.

<sup>260</sup> Besides painting, Johnson writes for the Pelican Bay Prison Project and wrote his autobiography. See *supra* notes 222-223. Abu-Jamal continued to write articles while in prison. *Abu-Jamal*, 154 F.3d at 131. The superintendent even commended Abu-Jamal for an article published in the *Yale Law Journal*. *Id.* at 131.

## CONCLUSION

A court's analyses should not be limited to the *Turner* factors. *Turner* stands for the lowest-level of judicial review.<sup>261</sup> It is "categorically deferential, and does not discriminate among degrees of deprivation."<sup>262</sup> While in many cases the key role of prison administrators may require judicial deference,<sup>263</sup> cases like *Johnson* demand more than what *Turner* requires. *Johnson* is exercising his free expression right, which prison administrators restricted via a regulation that unfairly targets his expression. Not only is *Johnson's* right in jeopardy, but so is the free expression right of outsiders.<sup>264</sup> Moreover, *Johnson's* punishment for his crimes—solitary confinement—already limits his ability to rehabilitate.<sup>265</sup>

Under such circumstances, the Court should consider and balance other factors to ensure that prison administration decisions limit an inmate's constitutional right only to the extent necessary. The balancing should include the prison regulation's impact on those *outside* the prison.<sup>266</sup> A court should give substantial weight to any infringement of an outsider's First Amendment right. Moreover, the effect of a prison regulation, not just the purpose of enacting it, should play a role in judicial analysis.<sup>267</sup>

Additionally, if a state law addresses part of the regulation at issue—such as an inmate's profit-generating activity—courts should abstain from reviewing the issue if the state has not clearly spoken on it on its constitutionality. The business-dealings regulation potentially impinges on *every* expression made by an inmate. Son-of-Sam laws fail before the Court because they target speech-content.<sup>268</sup> While a content-neutral regulation is more likely to withstand judicial scrutiny, the effect of the business-dealings rule bars any exercise of

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<sup>261</sup> See discussion on *Turner*, *supra* Part III.B-C.

<sup>262</sup> *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting).

<sup>263</sup> *Id.* at 358 (citing *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985)).

<sup>264</sup> Kurtz and the public are deprived of his artwork.

<sup>265</sup> See generally *Vasiliades*, *supra* note 47 (discussing the U.S. prison system in the context of human rights).

<sup>266</sup> See *supra* Part V.B.1 (suggesting that courts should include *Martinez's* consideration of the outsider's right in inmate constitutional challenges to prison regulations).

<sup>267</sup> See *id.*

<sup>268</sup> See *supra* Part IV for a discussion of Son-of-Sam legislation.

expression, and thus any potential to generate profits. The reality, however, is that Son-of-Sam laws are meant to do just that—to prevent criminals from making any profits. Preventing Johnson from mailing his postcards may discipline Johnson, but it also bars him from profiting from a creation that may have a “premium” simply by his notoriety, a goal that California unsuccessfully tried to accomplish via its previous Son-of-Sam laws. If the Court considered these factors—a prison regulation’s impact on outsiders, its prohibitive effect on the free expression right of inmates, and the state’s current anti-profit legislation—in addition to the *Turner* factors, it would reach outcomes that adequately protect the already limited rights of inmates. Understandably, legislatures want to prevent criminals from profiting from their crimes. Such a goal, however, should be promulgated by statute, not by uncertain judicial inclinations favoring deference. While it is true that the relatives of Johnson’s victims would not be compensated, the goal of Son-of-Sam laws is arguably to punish criminals more so than to compensate victims. Johnson is being punished for exercising his First Amendment right, a right that is one of the few he has left and one that the Court is obliged to protect.

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