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## COMMENT

# Pornless Prisons: An Unreasonable Restriction?

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## INTRODUCTION

Prisoners file thousands of lawsuits in federal court each year.<sup>1</sup> To curb the many suits it deemed frivolous, Congress passed the Prison Litigation Reform Act in 1995 ("PLRA"), which imposes various procedural restrictions on inmate suits.<sup>2</sup> Many scholars argue that the PLRA hurts prisoners' ability to bring legitimate claims.<sup>3</sup> Today, however, many prisoners still successfully bring lawsuits fighting infringement of religious freedom.<sup>4</sup> Others still combat unlawful

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<sup>1</sup> See JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 4 (2001) (describing volume and characteristics of prison litigation); CHARLES R. RICHEY, PRISONER LITIGATION IN THE UNITED STATES COURTS, at v (1995) (emphasizing importance of understanding prison litigation dynamics because of "veritable explosion" of prisoner suits); see also U.S. BUREAU OF JUSTICE STATISTICS, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAR-END 1925-86, at 5-13 (1988) (presenting year-by-year statistics on prison litigation).

<sup>2</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, & 42 U.S.C.). The circuit split that this Comment addresses does not involve any of the PLRA's specific requirements, and the statute therefore receives little attention in the remainder of this piece. For a discussion of the PLRA, see generally Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771 (2003) (examining PLRA's requirements and their effects on prisoner litigation).

<sup>3</sup> See generally John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001) (arguing that PLRA strips prisoners' ability to bring even meritorious claims); Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483 (2001) (characterizing PLRA as over-expansive in its imposition of procedural barriers); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998) (arguing that PLRA furthered unfortunate trend of increasing restriction on prisoners' rights); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) (analyzing prisoner litigation both before and after PLRA's enactment, and criticizing PLRA's effect on legitimate claims). For more positive analyses of the PLRA, see generally Kristin L. Burns, Note, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879 (1997) (advocating PLRA as necessary for tougher prison policies); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361 (1998) (commending PLRA for curbing unnecessary prison litigation); Kathryn F. Taylor, Note, *The Prison Litigation Reform Act's Administrative Exhaustion Requirement: Closing the Money Damages Loophole*, 78 WASH. U. L.Q. 955 (2000) (describing PLRA's exhaustion requirement as step in right direction).

<sup>4</sup> See, e.g., *Lomholt v. Holder*, 287 F.3d 683, 684 (8th Cir. 2002) (per curiam) (finding allegations of punishment for religious fasting sufficient to state First Amendment claim); *Kalka v. Hawk*, 215 F.3d 90, 94 (D.C. Cir. 2000) (alleging that prison violated prisoner's right to free exercise of religion by not recognizing "humanism" as religion); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (recognizing religious importance of Native American prisoner's "sacred sweat lodge"); *Luckette v. Lewis*, 883 F. Supp. 471, 483 (D. Ariz. 1995) (enjoining prison from denying plaintiff Kosher diet and preventing him from growing beard).

deprivations of property.<sup>5</sup> Federal inmate Marc Ramirez even sought vindication of a right less famous for its constitutional significance — his First Amendment right to prison-provided pornography.<sup>6</sup> In *Ramirez v. Pugh*, Ramirez challenged the Ensign Amendment, a federal law prohibiting use of federal funds to distribute any information or material that is sexually explicit or features nudity.<sup>7</sup> Because prisoners receive materials only when prison staff deliver them, the statute functions as an outright ban of pornographic materials in prisons.<sup>8</sup> The Third Circuit Court of Appeals reversed the district court's dismissal of Ramirez's claim, creating a circuit split regarding the Ensign Amendment's constitutionality.<sup>9</sup>

The *Ramirez* holding breaks from the D.C. Circuit Court of Appeals's review of a similar prisoner challenge to the Ensign Amendment in *Amatel v. Reno*.<sup>10</sup> The *Amatel* court applied the governing test from *Turner*

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<sup>5</sup> *Edwards v. Balisok*, 520 U.S. 641, 646-47 (1997) (rejecting prisoner's claim that disciplinary proceedings that resulted in prisoner's loss of good time credits violated his due process rights); *Allen v. Thomas*, 388 F.3d 147, 148-50 (5th Cir. 2004) (allowing prisoner's due process claim to proceed after prison confiscated his word processor and radio); *Ortiz v. McBride*, 380 F.3d 649, 655 (2d Cir. 2004) (finding prisoner's allegations of abnormal confinement sufficient to state due process claim).

<sup>6</sup> *Ramirez v. Pugh*, 379 F.3d 122, 124 (3d Cir. 2004).

<sup>7</sup> The law states:

None of the funds made available in this Act to the Federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to the Federal official having authority to obligate or expend such funds that such information or material is sexually explicit or features nudity.

Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 614, 110 Stat. 3009 (1996); see also *Ramirez*, 379 F.3d at 124 (presenting Ramirez's challenge).

<sup>8</sup> *Amatel v. Reno*, 156 F.3d 192, 193 n.1 (D.C. Cir. 1998) (noting that while Ensign Amendment does not prohibit prisoners from obtaining such material at their own expense, prospect of them doing so is not realistic); see also *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 237 (D.C. Cir. 2003) (“[A] refusal to fund functions the same as an outright ban.”); Stacey A. Miness, Note, *Pornography Behind Bars*, 85 CORNELL L. REV. 1702, 1719 (2000) (noting same principle).

<sup>9</sup> *Ramirez*, 379 F.3d at 131 (holding that district court erred in determining that Ensign Amendment and its implementing regulation reasonably related to legitimate government interest of rehabilitation without adequate factual basis for so doing, and instructing district court to conduct “appropriate” proceedings before reevaluating Ensign Amendment); Shannon P. Duffy, *Suit Revived over Porn Ban in Prisons*, LEGAL INTELLIGENCER, Aug. 13, 2004, at 1.

<sup>10</sup> See Duffy, *supra* note 9; 3d Cir. *Ruling on Inmate Porn Creates Circuit Split*, NAT'L L.J., Aug. 16, 2004, at 3 [hereinafter *Ruling on Inmate Porn*]; *Porn in Prisons, What's Wrong with It?*, N.J. LAW.: WKLY. NEWSPAPER, Aug. 23, 2004, at 2 [hereinafter *Porn in Prisons*]. Compare *Ramirez*, 379 F.3d at 131 (requiring more extensive factual findings to justify Ensign Amendment's ban on pornography), with *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir.

*v. Safley*, which provides the standard of review for any prison law, regulation, or practice.<sup>11</sup> Under the *Turner* test, a prison policy is constitutional if it reasonably relates to a legitimate penological interest.<sup>12</sup> After identifying rehabilitation as the Ensign Amendment's penological interest, the *Amatel* court held that the law satisfied the *Turner* test.<sup>13</sup> Common sense, without an evidentiary record, demonstrated the reasonableness between prisoner rehabilitation and the pornography restriction.<sup>14</sup>

In contrast, the Third Circuit's *Ramirez* decision explicitly rejected the *Amatel* court's common sense reasoning.<sup>15</sup> The Third Circuit held that the district court erred by failing to create an evidentiary record justifying the Ensign Amendment.<sup>16</sup> The reasonableness of the pornography restriction's relation to prisoner rehabilitation required further evidentiary development by the court.<sup>17</sup> The split between the *Amatel* and *Ramirez* decisions creates uncertainty about the degree of evidentiary support needed to defend Ensign Amendment challenges.<sup>18</sup>

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1999) (finding that ban on pornography analogous to Ensign Amendment easily met test of having "rational" connection to jail's legitimate objectives), and *Amatel*, 156 F.3d at 199 (justifying Ensign Amendment simply with common sense).

<sup>11</sup> See *Amatel*, 156 F.3d at 199 (applying *Turner*); see also *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."); *Shakur v. Selsky*, 391 F.3d 106, 113 (2d Cir. 2004) (holding prison's confiscation of prisoner's political literature unconstitutional under *Turner* test of reasonableness); *Henderson v. Terhune*, 379 F.3d 709, 712-13 (9th Cir. 2004) (holding prison regulation of prisoner's hair length constitutional under *Turner* standard); *Lindell v. Frank*, 377 F.3d 655, 657 (7th Cir. 2004) (holding confiscation of prisoner's postcard unconstitutional under *Turner* standard).

<sup>12</sup> See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); see also cases cited *supra* note 11 (laying out *Turner's* test that determines whether prison regulations violate First Amendment). *Turner* measures reasonableness by applying four separate factors. See *infra* Part I.B.

<sup>13</sup> *Amatel*, 156 F.3d at 199 (justifying Ensign Amendment simply with common sense); see also *Mauro*, 188 F.3d at 1060 (finding that ban on pornography easily met test of having "rational" connection to jail's legitimate objectives).

<sup>14</sup> *Amatel*, 156 F.3d at 199-203; see also *Mauro*, 188 F.3d at 1060 (upholding pornography ban, without extensive evidentiary record, by finding rational connection between possession of sexually explicit materials and goals of preventing sexual harassment of female officers, inmate rehabilitation, and jail security).

<sup>15</sup> *Ramirez v. Pugh*, 379 F.3d 122, 131 (3d Cir. 2004) (rejecting *Amatel's* common sense approach).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *Duffy*, *supra* note 9; *Ruling on Inmate Porn*, *supra* note 10; *Porn in Prisons*, *supra* note 10.

This Comment argues that the Third Circuit decided *Ramirez* incorrectly and that the *Amatel* court's reasoning more accurately interpreted both prior cases and public policy.<sup>19</sup> Part I reviews the Ensign Amendment and the case law applicable to the standard of review for prison regulation, focusing on the *Turner* test.<sup>20</sup> Part II describes the circuit split that resulted from challenges to the Ensign Amendment.<sup>21</sup> Part III argues that the Third Circuit improperly applied the *Turner* test when deciding *Ramirez v. Pugh*.<sup>22</sup> It also argues that the *Ramirez* holding does not meaningfully change existing law, but serves only to unduly burden courts in achieving inevitable results.<sup>23</sup> Finally, Part III argues that the *Ramirez* decision will actually undermine legitimate prison reform by furthering the misconception that most prisoner suits are frivolous.<sup>24</sup>

### I. HISTORICAL BACKGROUND OF PRISON REGULATION REVIEW

Two basic principles frame the analysis of prisoners' constitutional claims.<sup>25</sup> First, prison walls do not separate inmates from the protections of the Constitution.<sup>26</sup> Consequently, when an inmate presents a valid constitutional claim, federal courts must recognize the claim.<sup>27</sup> A second,

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<sup>19</sup> See *infra* Part III.

<sup>20</sup> See *infra* Part I.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part III.A.

<sup>23</sup> See *infra* Part III.B.

<sup>24</sup> See *infra* Part III.C.

<sup>25</sup> *Victoria W. v. Larperter*, 369 F.3d 475, 483 (5th Cir. 2004); *Goff v. Harper*, 235 F.3d 410, 414 (8th Cir. 2000); *Hatch v. Dist. of Columbia*, 184 F.3d 846, 850 (D.C. Cir. 1999); *Felce v. Fiedler*, 974 F.2d 1484, 1494 (7th Cir. 1992); Bradford L. Thomas, *Restricting State Prisoners' Due Process Rights: The Supreme Court Demonstrates Its Loyalty to Judicial Restraint*, 22 CUMB. L. REV. 215, 216 n.7 (1991-1992).

<sup>26</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *Douglas v. DeBruyn*, 936 F. Supp. 572, 579 (S.D. Ind. 1996) (quoting *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988)) (requiring that prison meet inmates' basic human needs); *Cardenas v. Wigen*, 921 F. Supp. 286, 290 (E.D. Pa. 1996) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)) (recognizing that imprisonment does not strip inmates of constitutional rights).

<sup>27</sup> *Turner*, 482 U.S. at 84 (describing importance of recognizing constitutional claims made by prisoners). Courts have long recognized the need to protect inmates from undue harshness. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 682 nn.3-6, 687-88 (1978) (finding brutal inmate discipline, overcrowding, and use of electrical devices to shock inmates on sensitive parts of their bodies, among other cruel conditions in Arkansas prison system); *Wolff*, 418 U.S. at 565-70 (considering prison rules regarding imposition of solitary confinement for certain rule violations, and finding numerous due process rights including: (1) right to advance written notice of violations that could result in solitary confinement, (2) right to written statement of fact findings, and (3) right to call witnesses and present documentary

countervailing principle recognizes that prison administration and reform present difficult issues that courts cannot easily manage.<sup>28</sup> This means that the legislative and executive branches of government should control prison policymaking due to the expertise, planning, and resources required.<sup>29</sup> In the last century, these conflicting principles created confusion surrounding the review of prison regulations by encouraging constitutional tests with wavering deference to policymakers.<sup>30</sup>

#### A. Early Standards of Review in Prison Jurisprudence

Prior to the 1960s, federal courts adopted a hands-off doctrine that embraced the administrative efficiency principle.<sup>31</sup> This doctrine maintained that enforcing prisoners' rights did not fall within the discretion of the federal judiciary.<sup>32</sup> The courts' approach softened

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evidence where it would not unreasonably endanger institutional safety or correctional goals); *Johnson v. Avery*, 393 U.S. 483, 485-87, 489 (1969) (stressing need to allow writs of habeas corpus, and invalidating prison regulation prohibiting inmates from assisting other inmates in preparation of legal documents); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (declaring that Alabama statute violated Fourteenth Amendment to extent that it required segregation of races in prisons and jails, and affirming schedule for desegregation); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1286-89, 1299, 1328, 1332 (S.D. Tex. 1980) (describing overcrowding, lack of security and supervision, staff brutality against inmates, and grossly insufficient medical and psychiatric care in Texas prison system); Jill Riepenhoff, *Lorain Prison, 300% Full, Puts Folks Everywhere*, COLUMBUS DISPATCH, June 11, 1993, at 2C (reporting that three-year-old local prison designed to house 750 actually contained 2280).

<sup>28</sup> *Turner*, 482 U.S. at 84 (noting relative inability of courts to manage expanding problems of prison administration and reform); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) (“[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.”).

<sup>29</sup> *Turner*, 482 U.S. at 84-85; *Mauro v. Arpaio*, 188 F.3d 1054, 1058 (9th Cir. 1999); *Jamieson v. Robinson*, 641 F.2d 138, 142 (3d Cir. 1981); *Mann v. Reynolds*, 828 F. Supp. 894, 903 (W.D. Okla. 1993); see also MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 47 (Alfred Blumstein & David Farrington eds., 1998) (describing modern discretion afforded by Judiciary to Congress and Executive in prison policymaking).

<sup>30</sup> See *infra* Part I.A-B.

<sup>31</sup> See, e.g., *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952) (rejecting prisoner's constitutional claim on grounds that federalism required only state courts to hear claim); *Price v. Johnston*, 334 U.S. 266, 285 (1948) (recognizing that incarceration requires forfeiture of certain rights and privileges); *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951) (“[I]t is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.”).

<sup>32</sup> FEELEY & RUBIN, *supra* note 29, at 30-34; FLITER, *supra* note 1, at 64-65 (discussing “hands-off” doctrine that dominated prison litigation prior to 1960s); 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:3 (3d ed. 2002) (detailing “hands-off” doctrine); Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1175-78 (1996-1997) (discussing “hands-off” doctrine adopted by many early courts).

during the latter half of the twentieth century as the importance of prisoners' rights gained acknowledgement.<sup>33</sup>

In the 1960s and 1970s, federal judges rejected the hands-off doctrine as they recognized the need to protect prisoners' constitutional rights.<sup>34</sup> This led to a variety of inconsistent approaches within the federal courts. Some courts maintained a hands-off posture, mostly deferring to policymakers like Congress and prison administrators.<sup>35</sup> Another court went to the extreme of requiring a compelling state interest to justify prison regulations.<sup>36</sup>

The U.S. Supreme Court in 1974 created the first uniform test to review prison regulations and policies in *Procunier v. Martinez*.<sup>37</sup> In *Procunier*, the prison adopted security rules that censored all inmate mail and limited access to legal services.<sup>38</sup> The Court adopted a strict scrutiny standard of review, strengthening prisoners' rights.<sup>39</sup> In such cases, strict scrutiny requires that prisons use the least restrictive means to achieve a substantial government interest.<sup>40</sup> This review also presumes that the restriction is unconstitutional.<sup>41</sup> The Court struck down the prison regulations because alternative security measures that were less restrictive existed.<sup>42</sup> *Procunier's* application of strict scrutiny, however, applied only to prison regulations that infringed freedom of speech

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<sup>33</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (rejecting idea that "iron curtain" separates prisoners from constitution); *Procunier*, 416 U.S. at 405-06 (realizing importance of recognizing valid constitutional claims); MUSHLIN, *supra* note 32, § 1:4 (chronicling demise of "hands off" doctrine).

<sup>34</sup> See sources cited *supra* note 33.

<sup>35</sup> See, e.g., *Lee v. Tahash*, 352 F.2d 970, 972 (8th Cir. 1965) (upholding prison mail censorship except insofar as rules are applied to discriminate against particular racial or religious groups); *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964) (allowing administrative controls over prisoners' ability to circulate anti-Semitic propaganda).

<sup>36</sup> See *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968) (requiring compelling state interest to justify mail censorship regulation).

<sup>37</sup> *Procunier*, 416 U.S. at 405-06.

<sup>38</sup> *Id.* at 407-14, 419-22.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The court gave security, order, and rehabilitation as examples of substantial government interests. *Id.* For further definition and discussion of strict scrutiny analysis, see *PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004) (defining elements of strict scrutiny in First Amendment challenge of statute criminalizing dissemination of material harmful to minors over Internet); *ACLU v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003) (applying strict scrutiny to First Amendment challenge to Child Online Protection Act); *Williams v. Pryor*, 240 F.3d 944, 947 (11th Cir. 2001) (applying strict scrutiny to constitutional challenge of Alabama statute outlawing sex toys).

<sup>41</sup> *PSINet*, 362 F.3d at 233; *ACLU*, 322 F.3d at 251; *Williams*, 240 F.3d at 947.

<sup>42</sup> *Procunier*, 416 U.S. at 416-17. Specifically, the Court reasoned that the prison could have used methods with better procedural safeguards. *Id.*

between both prisoners and nonprisoners.<sup>43</sup> The Supreme Court expressly reserved the question of the proper standard of review in cases that infringed speech among inmates only.<sup>44</sup>

Thirteen years later in *Turner v. Safley*, the Supreme Court specifically addressed that question.<sup>45</sup> The Court tried to strike the proper balance between administrative efficiency and prisoners' rights.<sup>46</sup> It rejected *Procunier's* least restrictive means test in favor of a four-part test of reasonableness that is more deferential to prison policymakers.<sup>47</sup> The *Turner* decision reemphasized the value of administrative efficiency and slowed the prisoners' rights movement of the 1960s and 1970s.<sup>48</sup> Today, *Turner* provides the framework for the judicial review of all constitutional challenges to prison regulations and policies.<sup>49</sup>

### B. *Turner v. Safley's Reasonableness Standard*

In *Turner*, the Supreme Court clarified the case law and enunciated a new standard of review centered on reasonableness.<sup>50</sup> At issue in *Turner*

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<sup>43</sup> The mail and legal services regulations affected persons outside the prison, not prisoners alone. *Turner v. Safley*, 482 U.S. 78, 85-86 (1987); *Procunier*, 416 U.S. at 408 (expressly reserving question of proper standard of review for intraprisson cases); *Miness*, *supra* note 8, at 1708 (discussing historical role of *Procunier*).

<sup>44</sup> *Turner*, 482 U.S. at 85-86; *Procunier*, 416 U.S. at 408; *Miness*, *supra* note 8, at 1717.

<sup>45</sup> See *Turner*, 482 U.S. at 85 (describing Court's task as formulation of standardized test that responds to both principles); Malcom M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION* 13 (John J. DiIulio, Jr. ed., 1990) (describing role of courts in balancing administrative efficiency with individual liberty).

<sup>46</sup> See sources cited *supra* note 45.

<sup>47</sup> *Turner*, 482 U.S. at 89-90; *DeHart v. Horn*, 390 F.3d 262, 268 (3d Cir. 2004); *Russell v. Richards*, 384 F.3d 444, 447 (7th Cir. 2004); *Demery v. Arpaio*, 378 F.3d 1020, 1029 n.2 (9th Cir. 2004); see *infra* Part I.A.

<sup>48</sup> *Turner*, 482 U.S. at 85 (espousing need for judicial restraint in field of prison regulation review); see also FEELEY & RUBIN, *supra* note 29, at 46-47 (describing retreat of prison reform movement after 1986); FLITER, *supra* note 1, at 155-59 (criticizing *Turner* for narrowing prisoners' First Amendment protections).

<sup>49</sup> See *Amatel v. Reno*, 156 F.3d 192, 195 (D.C. Cir. 1998) (describing *Turner* as case that provides framework for modern prison regulation cases); see also Jennifer Ellis, *DeHart v. Horn: Extending First Amendment Free Exercise Protections to Prisoners' Individually Held Religious Beliefs*, 11 GEO. MASON U. CIV. RTS. L.J. 357, 360 (2001) (referencing *Turner* as seminal case for prison regulation review); Bradley A. Sultan, *Transsexual Prisoners: How Much Treatment Is Enough?*, 37 NEW ENG. L. REV. 1195, 1213 n.121 (2003) (citing *Turner* as modern foundation for prison law); Jeffrey Welty, *Restrictions on Prisoners' Religious Freedom as Unconstitutional Conditions of Confinement: An Eighth Amendment Argument*, 48 DUKE L.J. 601, 607 (1998) (pointing to *Turner* for current standard); Eric J. Zogry, *Orthodox Jewish Prisoners and the Turner Effect*, 56 LA. L. REV. 905, 905 (1996) (chronicling *Turner's* role in prison regulation review).

<sup>50</sup> *Turner*, 482 U.S. at 89 (defining valid regulation as one that reasonably relates to

was the constitutionality of two regulations of the Missouri Division of Corrections.<sup>51</sup> The first regulation restricted inmate-to-inmate mail correspondence.<sup>52</sup> The second required the superintendent's permission for inmates to marry.<sup>53</sup>

The mail regulation allowed inmate-to-inmate correspondence only with immediate family members or for legal purposes.<sup>54</sup> At trial and on appeal, prison officials argued that the mail restriction helped prevent inmate conspiracies to escape, arrange violent acts, or foster gang activity.<sup>55</sup> Prison officials, therefore, justified the regulation as furthering the substantial interest of security.<sup>56</sup>

The marriage regulation provided that inmates could marry only with the permission of the superintendent.<sup>57</sup> The superintendent would grant permission only if there were compelling reasons to do so.<sup>58</sup> In practice, the superintendent found compelling reasons to marry only in the case of pregnancy or birth of an illegitimate child.<sup>59</sup> Prison officials argued that this regulation also furthered security by preventing "love triangles" that might lead to violent inmate confrontations.<sup>60</sup>

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legitimate penological interests). Throughout its discussion, the Court framed its decision as being the natural consequence of its prior decisions. *Id.* It concluded: "If *Pell, Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now . . ." *Id.*

<sup>51</sup> *Id.* at 81.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 81-82. Under the regulation, officials permitted other correspondence, but only if the inmate's supervisor deemed it in the best interest of the parties involved. *Id.* Supervisors made such determinations after reviewing progress reports, conduct violations, and psychological reports, rather than on the basis of the restricted mail's content. *Id.* at 82. The district court found that, as a practical matter, the rule prohibited correspondence with any inmate other than an immediate family member. *Id.*; *Safley v. Turner*, 586 F. Supp. 589, 591 (W.D. Mo. 1984).

<sup>55</sup> *Turner*, 482 U.S. at 79, 91.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 82. Interestingly, prison officials did not implement the marriage regulation at the same time as the mail restriction. *Id.* Instead, officials promulgated it during the litigation over the mail restriction. *Id.*

<sup>58</sup> *Id.* The prison regulation did not define the term "compelling." *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 79. The prison officials also submitted that they needed the regulation to promote the rehabilitation of female prisoners. *Id.* at 97. Officials testified that male figures often had previously abused female prisoners at home and that female prisoners were overly dependent on male figures. *Id.* It was the superintendent's belief that women prisoners needed to concentrate on developing skills of self-reliance and that the prohibition on marriage furthered that goal. *Id.*

Relying on *Procunier v. Martinez*, the district court applied strict scrutiny analysis and ruled that both provisions were unconstitutional.<sup>61</sup> The Eighth Circuit Court of Appeals affirmed.<sup>62</sup> Evaluating the mail provision, the court held that a less restrictive mail regulation could serve the prison's security interest.<sup>63</sup> The prison officials could, for example, open and read all prisoner mail to scan for problems.<sup>64</sup> The Eighth Circuit reasoned that the marriage provision also failed strict scrutiny review because "love triangles" were likely to occur regardless of whether inmates could marry.<sup>65</sup> Both regulations failed strict scrutiny analysis because officials did not narrowly tailor them to achieve the government's security interest.<sup>66</sup>

The Supreme Court granted certiorari to clarify the standard of review applicable to prison regulations.<sup>67</sup> It began by noting that the lower courts improperly relied on *Procunier v. Martinez*.<sup>68</sup> In *Procunier*, the Supreme Court expressly reserved the question of the proper standard of review applicable to laws or policies that affect only intraprisoon speech.<sup>69</sup> The *Procunier* Court applied strict scrutiny because the restriction infringed the constitutional rights of noninmates.<sup>70</sup> *Procunier* was therefore inapposite because the regulation at issue in *Turner* affected inmates only.<sup>71</sup>

Creating a new test, the Supreme Court held that a prison regulation is valid if it reasonably relates to a legitimate and neutral penological interest.<sup>72</sup> Legitimate penological interests include security, order, and

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<sup>61</sup> *Safley v. Turner*, 586 F. Supp 589, 591 (W.D. Mo. 1984), *aff'd* 777 F.2d 1307, 1316 (8th Cir. 1985), *aff'd in part, rev'd in part* 482 U.S. 78 (1987).

<sup>62</sup> *Turner*, 777 F.2d at 1316, *aff'g* 586 F. Supp at 591.

<sup>63</sup> *Id.* at 1315-16.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* Moreover, officials could have more easily dealt with the problems of love triangles through counseling, rather than a complete ban on marriage. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Turner v. Safley*, 482 U.S. 78, 85-86 (1987).

<sup>68</sup> *Id.*

<sup>69</sup> *Turner*, 482 U.S. at 85-86; *Procunier v. Martinez*, 416 U.S. 396, 408 (1974) (expressly reserving question of proper standard of review for prisoner-only cases); *Minness*, *supra* note 8, at 1708-11 (discussing historical role of *Procunier*).

<sup>70</sup> See sources cited *supra* note 69.

<sup>71</sup> *Turner*, 482 U.S. at 85-86; *Procunier*, 416 U.S. at 408.

<sup>72</sup> *Turner*, 482 U.S. at 89 (defining valid regulation as one that reasonably relates to legitimate penological interests); *cf. Procunier*, 416 U.S. at 405-06 (creating two-part strict scrutiny analysis used earlier by Court when evaluating restrictions affecting both prisoners and nonprisoners).

rehabilitation.<sup>73</sup> Neutrality requires an interest unrelated to the suppression of expression.<sup>74</sup> In support of this test, the Court reviewed four previous prisoners' rights cases that suggested this standard.<sup>75</sup>

The Court established a four-factor test to determine reasonableness.<sup>76</sup> First, there must be a valid, rational connection between the government's interest and the regulation.<sup>77</sup> Second, a court must consider whether an inmate is able to exercise the constitutional right at issue through some alternative means.<sup>78</sup> Third, a court must consider the adverse effects on prison guards and other inmates if the court invalidates the regulation.<sup>79</sup> Finally, a court must determine that the prison officials cannot accomplish their goals in a less restrictive manner without more than a de minimis burden.<sup>80</sup> A court balances these factors to determine a prison policy's constitutionality.<sup>81</sup>

The Supreme Court applied this test and held that the restriction on mail correspondence was constitutional but that the marriage restriction was not.<sup>82</sup> The correspondence restriction satisfied each prong of the test. First, it was logically connected to the prison's legitimate security concerns.<sup>83</sup> Second, it did not bar all mail, but only mail to other

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<sup>73</sup> *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 240 (D.C. Cir. 2003); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995); *Siddiqi v. Leak*, 880 F.2d 904, 911 n.2 (7th Cir. 1989).

<sup>74</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 469-71 (4th Cir. 1999); *Amatel v. Reno*, 156 F.3d 192, 197 (D.C. Cir. 1998). These later cases had to clarify the meaning of "neutrality" because *Turner* failed to accurately define it. See *Amatel*, 156 F.3d at 197 (reversing district court's application of neutrality requirement, and identifying requirement's proper meaning).

<sup>75</sup> *Turner*, 482 U.S. at 86-87; see *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (deferring to "sound discretion" of prison administrators when judging ban on contact visits); *Bell v. Wolfish*, 441 U.S. 520, 551 (1979) (relying on "considered judgment" of prison officials when evaluating restriction on receipt of hardback books, unless mailed directly from publishers, book clubs, or bookstores); *Jones v. N.C. Prisoners' Union, Inc.*, 433 U.S. 119, 125 (1977) (criticizing lower court for not affording "appropriate deference" to decisions of prison administrators when evaluating restriction on union meetings and bulk mailings); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (deferring to judgment of prison officials when evaluating prison regulation prohibiting media interviews).

<sup>76</sup> *Turner*, 482 U.S. at 89-90; *DeHart v. Horn*, 390 F.3d 262, 268 (3d Cir. 2004); *Russell v. Richards*, 384 F.3d 444, 447 (7th Cir. 2004); *Demery v. Arpaio*, 378 F.3d 1020, 1028 n.2 (9th Cir. 2004); see also RICHEY, *supra* note 1, at 161 (laying out *Turner* test's factors).

<sup>77</sup> See sources cited *supra* note 76.

<sup>78</sup> See sources cited *supra* note 76.

<sup>79</sup> See sources cited *supra* note 76.

<sup>80</sup> See sources cited *supra* note 76.

<sup>81</sup> See sources cited *supra* note 76.

<sup>82</sup> *Turner v. Safley*, 482 U.S. 78, 91 (1987).

<sup>83</sup> *Id.* at 91-92. See generally GEORGE M. CAMP & CAMILLE GRAHAM CAMP, U.S. DEP'T OF JUSTICE, PRISON GANGS: THEIR EXTENT, NATURE AND IMPACT ON PRISONS 47-53 (1985)

inmates.<sup>84</sup> Third, the prisoners could exercise their right to correspondence only at significant risk to other inmates and prison personnel.<sup>85</sup> Finally, there were no easy alternatives to the mail ban because scanning every piece of mail presented more than a de minimis burden.<sup>86</sup> The mail ban was, therefore, constitutional because it served a legitimate goal through reasonable means.<sup>87</sup> The Court emphasized that prison officials created the restriction using their particular expertise with prison administration.<sup>88</sup>

In contrast, the Court found that the marriage restriction unconstitutionally infringed on prisoners' rights because it failed the first and fourth factors.<sup>89</sup> The Supreme Court agreed with both lower courts that love triangles were just as likely to occur absent marriage.<sup>90</sup> Therefore, the marriage restriction did not further security by preventing violent confrontations between inmates. Because it failed the first factor, the Court determined that there was no rational justification for the marriage restriction.<sup>91</sup> The restriction failed the fourth factor because an obvious alternative existed that presented a de minimis burden.<sup>92</sup> Prison officials could have prohibited marriage only when the marriage presented a clear security threat.<sup>93</sup> Thus, although *Turner's* test was more deferential than was *Procunier's*, the Supreme Court demonstrated that the test would still invalidate unconstitutional prison policies.<sup>94</sup>

Compared to a strict scrutiny analysis, the *Turner* test provides much more deference to policymakers.<sup>95</sup> The prison officials in *Turner* did not

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(discussing prison security threat that prison gangs commonly posed).

<sup>84</sup> *Turner*, 482 U.S. at 92.

<sup>85</sup> *Id.*; see *CAMP & CAMP*, *supra* note 83, at 50-52. For such security reasons, regulations often prohibit contact between a felon and inmates even after a parole board has released a felon. See, e.g., 28 C.F.R. § 2.40(a)(10) (1986) (requiring nonassociation with known criminals as condition of parole).

<sup>86</sup> *Turner*, 482 U.S. at 93. Moreover, prison officials might miss some dangerous messages. *Id.*

<sup>87</sup> *Id.* at 91.

<sup>88</sup> *Id.* at 92-93.

<sup>89</sup> *Id.* at 97-98.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Compare *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987) (describing laxer requirements of *Turner* test), and *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (applying less strict *Turner* reasonableness requirement), and *Giano v. Senkowski*, 54 F.3d 1050, 1054 (2d Cir. 1995) (applying less rigorous *Turner* standard), and *Hause v. Vaught*, 993 F.2d 1079, 1082 (4th Cir. 1993) (applying, similarly, lesser

need to demonstrate a compelling government interest or show that they narrowly tailored either restriction.<sup>96</sup> Instead, the new test required only that the challenged law or policy rationally relate to a legitimate penological interest.<sup>97</sup> Moreover, the Court did not presume infringement, but instead placed the burden on the prisoner to demonstrate unreasonableness.<sup>98</sup> The Court acknowledged that subjecting prison officials to rigorous strict scrutiny analysis would seriously hamper prison administration.<sup>99</sup> Strict scrutiny would impair prison officials' ability both to anticipate security problems and to adopt innovative solutions to the problems of prison administration.<sup>100</sup> Despite its deference, the *Turner* test still invalidates a law or policy when alternative means can accomplish the same end at a de minimis burden.<sup>101</sup>

## II. CURRENT LAW: THE CIRCUIT SPLIT OVER THE REASONABLENESS OF RESTRICTING PORNOGRAPHY IN PRISONS

The *Turner v. Safley* Court attempted to resolve the inconsistent approaches that lower federal courts previously employed when reviewing prison regulations.<sup>102</sup> *Turner* is now the leading case in prison regulation review.<sup>103</sup> The *Turner* test, however, failed to yield consistent results even between cases challenging the same provision of federal

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requirements of *Turner*), and *Abdullah v. Gunter*, 949 F.2d 1032, 1035 (8th Cir. 1991) (applying *Turner* rational connection requirement), with *PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004) (applying more stringent strict scrutiny analysis), and *ACLU v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003) (applying strict scrutiny), and *Williams v. Pryor*, 240 F.3d 944, 947 (11th Cir. 2001) (applying strict scrutiny).

<sup>96</sup> Compare *supra* notes 76-81 and accompanying text (detailing requirements imposed in *Turner*), with *supra* notes 40-41 and accompanying text (describing more stringent requirements of strict scrutiny).

<sup>97</sup> *Turner*, 482 U.S. at 89.

<sup>98</sup> *O'Lone*, 482 U.S. at 350; *Turner*, 482 U.S. at 90; *Jones*, 433 U.S. at 128; *Giano*, 54 F.3d at 1054; *Hause*, 993 F.2d at 1082; *Abdullah*, 949 F.2d at 1035.

<sup>99</sup> *Turner*, 482 U.S. at 89; *Gilmore-Bey v. Coughlin*, 929 F. Supp. 146, 151 (S.D.N.Y. 1996).

<sup>100</sup> See cases cited *supra* note 99.

<sup>101</sup> *Turner*, 482 U.S. at 98.

<sup>102</sup> *Id.* at 85-89.

<sup>103</sup> See *Amatel v. Reno*, 156 F.3d 192, 195 (D.C. Cir. 1998) (describing *Turner* as case that provides framework for modern prison regulation cases); see also *Ellis*, *supra* note 49, at 360 (referencing *Turner* as seminal case for prison regulation review); *Sultan*, *supra* note 49, at 1213 n.121 (noting *Turner* as controlling test); *Welty*, *supra* note 49, at 607 (recognizing *Turner's* controlling law); *Zogry*, *supra* note 49, at 905 (referencing *Turner* as standard-setting case).

law.<sup>104</sup> Specifically, two cases challenging the constitutionality of the Ensign Amendment — *Amatel v. Reno* and *Ramirez v. Pugh* — resulted in conflicting holdings.<sup>105</sup> The *Amatel* court dismissed the case, whereas the *Ramirez* court instructed the district court to establish an evidentiary record weighing the effects of pornography.<sup>106</sup> This section introduces the Ensign Amendment and then presents the differing rationales of *Amatel* and *Ramirez*.<sup>107</sup>

#### A. *The Ensign Amendment*

Congress enacted the Ensign Amendment as part of the Omnibus Consolidated Appropriations Act of 1997.<sup>108</sup> The Ensign Amendment prohibits prisons from using federal funds to distribute any information or material that is sexually explicit or features nudity.<sup>109</sup> The Bureau of Prisons later implemented the statute through regulations that provide narrow definitions of “nudity,” “features,” and “sexually explicit.”<sup>110</sup> Despite the pornography ban, the law exempts any nudity featured for purposes of medical, educational, or anthropological content.<sup>111</sup>

Representative John Ensign characterized the pornography ban as a long overdue, common sense proposal.<sup>112</sup> Sexually explicit material, he argued, has no place in the rehabilitative environment of prisons.<sup>113</sup> He believed prisoners must learn to conform to acceptable standards of behavior and civility.<sup>114</sup> Representative Ensign warned that pornography

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<sup>104</sup> Compare *Ramirez v. Pugh*, 379 F.3d 122, 131 (3d Cir. 2004) (requiring more extensive factual findings to justify Ensign Amendment’s ban on pornography), with *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (finding that ban on pornography analogous to Ensign Amendment easily met test of having “rational” connection to jail’s legitimate objectives), and *Amatel*, 156 F.3d at 199 (justifying Ensign Amendment simply with common sense).

<sup>105</sup> See *infra* Part II.B-C.

<sup>106</sup> See *infra* Part II.B-C.

<sup>107</sup> See *infra* Part II.A.

<sup>108</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 614, 110 Stat. 3009-66 (1996); see *supra* note 7 and accompanying text.

<sup>109</sup> Omnibus Consolidated Appropriations Act § 614; see sources cited *supra* note 7.

<sup>110</sup> 28 C.F.R. § 540.72(b) (2002). “Nudity” means a pictorial depiction that exposes genitalia or female breasts. *Id.* “Features” means that the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself as such. *Id.* “Sexually explicit” means a pictorial depiction of actual or simulated sexual acts, including sexual intercourse, oral sex, or masturbation. *Id.*

<sup>111</sup> *Id.* § 540.72(b)(3).

<sup>112</sup> 142 CONG. REC. H8261 (daily ed. July 24, 1996) (statement of Rep. Ensign).

<sup>113</sup> *Id.*

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

would hamper the rehabilitation not only of sexual offenders, but also of prisoners convicted of violent crimes against women.<sup>115</sup> Two other Congressmen spoke in sponsorship of the Ensign Amendment, and all representatives present at its proposal agreed to it without objection.<sup>116</sup>

B. *Amatel v. Reno's Deference to Congress and Prison Administrators*

In *Amatel v. Reno*, the D.C. Circuit held that the Ensign Amendment passed the *Turner* test.<sup>117</sup> Three inmates filed separate lawsuits, which they later consolidated in the District Court for the District of Columbia, challenging the Ensign Amendment.<sup>118</sup> They argued that the Ensign Amendment violated their First Amendment right to freedom of speech by denying access to publications.<sup>119</sup>

The district court agreed with the plaintiffs and enjoined the prison's enforcement of the Ensign Amendment.<sup>120</sup> The court ruled that the law failed the *Turner* test's first factor, which requires a legitimate and neutral government interest.<sup>121</sup> Although the government's interest in rehabilitation was legitimate, it was not neutral.<sup>122</sup> The district court reasoned that the Ensign Amendment focused solely on the sexual nature of the material it prohibited.<sup>123</sup> The Ensign Amendment therefore failed the First Amendment's content-neutrality requirement.<sup>124</sup> The

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<sup>115</sup> *Id.* ("If we do not adopt my amendment, we are sending the message that it is OK to provide sexually explicit magazines and books to the very prisoners who have committed violent acts against women.")

<sup>116</sup> *Id.* Representatives Christensen and Rogers recognized the Ensign Amendment as a major accomplishment and achievement. *Id.*

<sup>117</sup> *Amatel v. Reno*, 156 F.3d 192, 194 (D.C. Cir. 1998). Importantly, the D.C. Circuit's *Amatel* decision actually reviewed the constitutionality of the Ensign Amendment's implementing regulations — 28 C.F.R. § 540.72(b). *Id.* The court noted that suit over the statute itself would be a pre-enforcement challenge because the prison had only actually enforced the implementing regulations, not the underlying law. *Id.* at 195. However, this was only a technical observation because the effect of the statute and the regulations is the same, as is their constitutional analysis. *Id.* Any references in this Comment to cases about the Ensign Amendment refer to the statute's implementing regulation.

<sup>118</sup> See *Amatel v. Reno*, 975 F. Supp. 365, 365-66 (D.D.C. 1997), *rev'd* 156 F.3d 192.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 366.

<sup>121</sup> *Id.* at 368; see *supra* Part I.B.

<sup>122</sup> *Amatel*, 975 F. Supp. at 368.

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

<sup>124</sup> *Id.* For a discussion of the First Amendment's general neutrality requirement, see *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 384 (1990); *Thomas v. Review Board. of Indiana Employment Security Division*, 450 U.S. 707, 717 (1981); *Commission for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973); *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

district court ruled that the law violated the First Amendment because it failed strict scrutiny — the standard that applies to content-based restrictions.<sup>125</sup>

The D.C. Circuit reversed, reasoning that the district court improperly applied the neutrality requirement.<sup>126</sup> Despite the apparent similarity in terms, the *Turner* test's "neutrality" requirement differs from First Amendment neutrality in nonprison cases.<sup>127</sup> In the prison context, "neutral" means only that the law or practice in question furthers a legitimate government interest unrelated to the suppression of expression.<sup>128</sup> Applying this definition, the government's interest in rehabilitation was neutral.<sup>129</sup> Proceeding with the *Turner* test, the D.C. Circuit held that the Ensign Amendment passed constitutional muster because it rationally connected to a legitimate penological interest.<sup>130</sup> The court accepted the government's claim that the goal of the Ensign Amendment was the rehabilitation of prisoners.<sup>131</sup> The D.C. Circuit held that rehabilitation was indeed a legitimate penological interest under *Turner*.<sup>132</sup> The court also held that the pornography restriction satisfied

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<sup>125</sup> *Amatel*, 975 F. Supp. at 370; *see also* *Amatel v. Reno*, 156 F.3d 192, 197 (D.C. Cir. 1998) (describing difference between prison-context neutrality requirement and First Amendment's general neutrality requirement). For an explanation of strict scrutiny's application to content-based statutes, *see World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1191 (9th Cir. 2004); *Kraimer v. City of Schofield*, 342 F. Supp. 2d 807, 815 (W.D. Wis. 2004); *Grove v. City of York*, 342 F. Supp. 2d 291, 301 (M.D. Pa. 2004).

<sup>126</sup> *Amatel*, 156 F.3d at 197 (analyzing error in district court's application of neutrality requirement).

<sup>127</sup> *Id.*; *see also* *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989) (discussing *Turner*'s neutrality requirement); *Abu-Jamal v. Price*, 154 F.3d 128, 133-34 (3d Cir. 1998) (explaining how neutrality in prison context differs from content-neutrality in nonprison context).

<sup>128</sup> *Amatel*, 156 F.3d at 197; *see also* *Thornburgh*, 490 U.S. at 415 (describing prison-context neutrality requirement); *Abu-Jamal*, 154 F.3d at 133-34 (describing difference between prison context neutrality requirement and First Amendment's general content-neutrality requirement). *Thornburgh* provides an example of a prison law that the Court deemed neutral under *Turner*. *Thornburgh*, 490 U.S. at 415. In *Thornburgh*, the prison censored publications mailed to inmates by individually screening and withholding those publications that officials deemed dangerous to prison security. *Id.* at 403. The restriction necessarily required the prison to look at a publication's content, but was still neutral because screeners based censorship decisions on security interests. *Id.*

In contrast, *Proconier v. Martinez* provides an example of a non-neutral regulation. *Proconier v. Martinez*, 416 U.S. 396, 414-15 (1974). In *Proconier*, a prison regulation barred writings that unduly complained of or magnified grievances. *Id.* This invited prison authorities to use their own personal prejudices and opinions, instead of the penological interest, as standards for prisoner mail censorship. *Id.*

<sup>129</sup> *Amatel*, 156 F.3d at 197.

<sup>130</sup> *Id.* at 201-03.

<sup>131</sup> *Id.* at 196.

<sup>132</sup> *Id.* at 196-97; *see also* *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 240 (D.C. Cir.

the final three factors of the *Turner* test.<sup>133</sup> Importantly, the court emphasized the government's broad discretion to promote the development of values within the prison system.<sup>134</sup> The court acknowledged that prisons may, within limits, infringe or exclude speech when exercising that discretion.<sup>135</sup>

No clearly established precedent details the level of rigor in *Turner's* rational connection requirement.<sup>136</sup> The D.C. Circuit determined, however, that the standard is either the same as, or very similar to, rational basis review.<sup>137</sup> Under rational basis review, a court strongly presumes a policy or statute's validity.<sup>138</sup> It must uphold the policy or statute as long as any reasonably conceivable set of facts could provide a rational basis for it.<sup>139</sup> Relying on rational basis review, the court held that Congress could have seen a rational connection between the pornography restriction and prisoner rehabilitation.<sup>140</sup>

The D.C. Circuit justified this holding by examining several possible rational connections between the prohibition on pornography and the rehabilitation of prisoners.<sup>141</sup> First, the court reasoned that prisoners are more likely to develop self-control and respect for others if prisons restrict their access to degrading and disrespectful pictures.<sup>142</sup> Second, the court relied on studies, which amicus briefs disclosed, showing that pornography may relate to prisoners' rate of recidivism.<sup>143</sup> Finally, the

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2003) (finding rehabilitation, security, and order to be legitimate penological interests under *Turner*); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (holding similarly that rehabilitation is legitimate penological interest); *Siddiqi v. Leak*, 880 F.2d 904, 911 n.2 (7th Cir. 1989) (listing rehabilitation as one of classic legitimate penological interests).

<sup>133</sup> *Amatel*, 156 F.3d at 201-03. The court found that prisoners retained the ability to access all written forms of erotica. *Id.* at 202. It further found that invalidating the pornography ban would pose a threat to the safety of guards and other inmates. *Id.* at 201. Finally, no alternatives existed that would impose only a de minimis burden on prison administration. *Id.*

<sup>134</sup> *Id.* at 198.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 198-99.

<sup>137</sup> *Id.*

<sup>138</sup> *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 345 (3d Cir. 2004); *Halaim v. INS*, 358 F.3d 1128, 1136 (9th Cir. 2004); *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001).

<sup>139</sup> See cases cited *supra* note 138.

<sup>140</sup> *Amatel*, 156 F.3d at 199.

<sup>141</sup> *Id.* at 199-201.

<sup>142</sup> *Id.* at 199.

<sup>143</sup> See *id.* at 199-200 (citing LARRY BARON & MURRAY A. STRAUS, *FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS* 185 (1989); EDWARD DONNERSTEIN ET AL., *THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS* 40-48 (1987)).

court noted research establishing that pornography may increase aggression, tolerance of violence, and belief in myths that women might enjoy rape.<sup>144</sup> The court acknowledged that nothing proved that the Ensign Amendment was necessary to rehabilitate prisoners, but it emphasized that *Turner* required only that Congress's conclusion be reasonable.<sup>145</sup> The court noted that the *Turner* test does not invalidate a rule for simply being less reasonable than an alternative.<sup>146</sup> Nor does it require that the restriction at issue actually advance the goal of rehabilitation.<sup>147</sup> The *Amatel* court thus held that the pornography ban satisfied the *Turner* test because Congress could reasonably have thought that the ban might promote rehabilitation.<sup>148</sup>

### C. Ramirez v. Pugh's Disagreement over Reasonableness

In *Ramirez*, the Third Circuit disagreed with the *Amatel* holding.<sup>149</sup> Federal inmate Marc Ramirez sued the government, arguing that the Ensign Amendment's implementing regulations violated his freedom of speech.<sup>150</sup> Ramirez alleged that the prison rejected magazines addressed to him because they were sexually explicit or featured nudity.<sup>151</sup>

The district court dismissed Ramirez's claim.<sup>152</sup> It ruled that the Ensign Amendment was constitutional under *Turner* because it was reasonable — it satisfied each of the four factors.<sup>153</sup> First, it was rationally connected to the government's asserted interest in prisoner rehabilitation.<sup>154</sup>

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<sup>144</sup> *Amatel*, 156 F.3d at 200 (citing Mike Allen, et al., *Exposure to Pornography and Acceptance of Rape Myths*, 45 J. COMM. 5 (1995)); RICHARD A. POSNER, *SEX AND REASON* 366-71 (1992); Neil M. Malamuth, *Aggression Against Women: Cultural and Individual Causes*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* 19, 32-39 (Neil M. Malamuth & Edward Donnerstein eds., 1984).

<sup>145</sup> *Amatel*, 156 F.3d at 200-01.

<sup>146</sup> *Ramirez v. Pugh*, 379 F.3d 122, 130 (3d Cir. 2004); *Waterman v. Farmer*, 183 F.3d 208, 213 (3d Cir. 1999); *Amatel*, 156 F.3d at 201.

<sup>147</sup> *Ramirez*, 379 F.3d at 130; *Waterman*, 183 F.3d at 213; *Amatel*, 156 F.3d at 199.

<sup>148</sup> *Amatel*, 156 F.3d at 201.

<sup>149</sup> See also Duffy, *supra* note 9 (describing circuit split); *Ruling on Inmate Porn*, *supra* note 10 (describing *Ramirez's* circuit split); *Porn in Prisons*, *supra* note 10 (describing reversal of *Ramirez* for lack of factual record). Compare *Ramirez*, 379 F.3d at 128 (rejecting *Amatel* reasoning, and requiring factual record), with *Mauro v. Arpaio*, 188 F.3d 1054, 1057 (9th Cir. 1999) (upholding restriction analogous to Ensign Amendment), and *Amatel*, 156 F.3d at 192 (upholding Ensign Amendment by common sense alone).

<sup>150</sup> *Ramirez*, 379 F.3d at 124.

<sup>151</sup> *Id.* at 125.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

Applying the second factor, the court found that Ramirez retained alternative means of accessing sexually explicit material because the ban barred only pictorial depictions, not sexually explicit text.<sup>155</sup> Third, accommodating Ramirez's right would threaten the safety of correctional staff and other inmates.<sup>156</sup> Finally, no alternative existed that would impose only a de minimis burden.<sup>157</sup> Ramirez appealed, arguing that the district court erred by failing to engage in a "contextual, record-sensitive analysis" before concluding that the pornography ban was reasonable.<sup>158</sup>

The Third Circuit reversed and remanded, ordering the district court to create a more extensive factual record before determining the pornography ban's reasonableness.<sup>159</sup> The court disagreed with the D.C. Circuit's *Amatel* holding, stating that the interest in rehabilitation was amorphous and ill-defined.<sup>160</sup> It reasoned that allowing rehabilitative goals to include any broadly defined promotion of values would subject prisoners to the whims of their custodians.<sup>161</sup> The Third Circuit wanted a more particularized identification of the existing harm that the rehabilitative efforts addressed.<sup>162</sup>

The Third Circuit also rejected the obviousness of the rational connection.<sup>163</sup> It admitted the obvious reasonableness of restricting sexual offenders' access to pornography.<sup>164</sup> It held, however, that the connection between restricting the entire prison population's access to pornography and the goal of rehabilitation was too tenuous.<sup>165</sup> The Third Circuit doubted the effect of a pornography restriction on the rehabilitation of non-sex offenders.<sup>166</sup>

Finally, the *Ramirez* court warned that the *Turner* standard of reasonableness was not a toothless one.<sup>167</sup> The court could not abdicate its responsibility to review laws by giving Congress and prison

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 128.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* This more particularized interest identification had to explain how the pornography ban related to the rehabilitation of all prisoners and not just the rehabilitation of sex offenders. *Id.*

<sup>163</sup> *Id.* at 129.

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

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

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

<sup>167</sup> *Id.* (citing *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)).

administrators complete discretion.<sup>168</sup> On remand, the Third Circuit ordered the district court first to identify with particularity the specific rehabilitative goals advanced by the government.<sup>169</sup> The district court had to allow the parties to adduce evidence sufficient for the court to determine whether the restriction rationally related to rehabilitation.<sup>170</sup> The more tenuous the connection between the restriction and rehabilitation, the more information the prison must provide to demonstrate the restriction's reasonableness.<sup>171</sup> Thus, the *Ramirez* court rejected the *Amatel* court's rationale, which had upheld the Ensign Amendment without establishing a factual record supporting its reasonableness.<sup>172</sup>

### III. ANALYSIS

The Third Circuit misapplied the *Turner* test.<sup>173</sup> It erred when it rejected rehabilitation as a legitimate penological interest.<sup>174</sup> It also erred by breaking from the *Amatel v. Reno* court's reasoning, which found that the pornography ban was reasonable under *Turner*.<sup>175</sup> The *Ramirez v. Pugh* decision unduly expends the resources of practitioners and an overburdened judicial system.<sup>176</sup> Courts should reject *Ramirez* to prevent unnecessary inquiry into judgments of Congress and prison officials.<sup>177</sup> Moreover, the *Ramirez* decision undermines the cause of prison reform by fueling the misconception that prisoner suits are mostly frivolous.<sup>178</sup>

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<sup>168</sup> *Id.* at 128-29; see also *Thornburgh*, 490 U.S. at 414; *Amatel v. Reno*, 156 F.3d 192, 206, 211 (D.C. Cir. 1998).

<sup>169</sup> *Ramirez*, 379 F.3d at 128.

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

<sup>171</sup> See *id.* at 129. The *Ramirez* court failed to identify, however, exactly what information would satisfy this requirement. *Id.*

<sup>172</sup> Compare *supra* Part II.B (presenting *Amatel* court's reasoning), with *supra* Part II.C (presenting *Ramirez* court's reasoning).

<sup>173</sup> See *infra* Part III.A.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *infra* Part III.B.

<sup>177</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989); *Turner v. Safley*, 482 U.S. 78, 85-89 (1987); see *infra* Part III.B.

<sup>178</sup> See *infra* Part III.C.

A. *The Ramirez Court's Faulty Reasoning Improperly Overstated the Rigor of the Turner Test by Providing Too Little Deference to Prison Administrators*

The *Ramirez* court erred in its application of the *Turner* test.<sup>179</sup> *Turner v. Safley* purposefully shifted judicial review of prison rules away from strict scrutiny.<sup>180</sup> Courts previously utilized stricter standards of review but found that they inappropriately burdened the administration of the prison system.<sup>181</sup> Today, *Turner's* controlling law requires only a reasonable relationship between a legitimate penological interest and the challenged restriction, measured by four factors.<sup>182</sup> The restriction need not actually advance the government's interest.<sup>183</sup> Nor does the court need to identify the policymaker's actual rationale.<sup>184</sup> Instead, the sole requirement is that the policymaker could reasonably have believed that the restriction *might* further the goal.<sup>185</sup> The *Ramirez* court failed to recognize the nature of this analysis in two ways.

First, the *Ramirez* court erred by rejecting rehabilitation as a legitimate penological interest.<sup>186</sup> Since the creation of the *Turner* test in 1986, courts have recognized rehabilitation as a legitimate penological interest.<sup>187</sup> The Third Circuit recognized this, but found that the district court and *Amatel* defined "rehabilitation" too broadly, improperly including any general promotion of values.<sup>188</sup> The *Ramirez* court ordered a more particularized identification of the rehabilitative goal that the Ensign Amendment sought to achieve.<sup>189</sup> The court erred because the *Turner* test and cases

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<sup>179</sup> See *infra* Part III.A.

<sup>180</sup> *Thornburgh*, 490 U.S. at 409-10; *Turner*, 482 U.S. at 85-89; FLITER, *supra* note 1, at 159 (criticizing leniency of *Turner* test, but recognizing its requirement that courts defer to judgments of prison administrators as much as possible).

<sup>181</sup> *Thornburgh*, 490 U.S. at 409-10; *Turner*, 482 U.S. at 85-89; *Gilmore-Bey v. Coughlin*, 929 F. Supp. 146, 151 (S.D.N.Y. 1996).

<sup>182</sup> *Turner*, 482 U.S. at 89-91; *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 751 n.16 (6th Cir. 2004); *Russell v. Richards*, 384 F.3d 444, 447 (7th Cir. 2004); RICHEY, *supra* note 1, at 161 (detailing requirements of *Turner* test).

<sup>183</sup> *Ramirez v. Pugh*, 379 F.3d 122, 130 (3d Cir. 2004); *Waterman v. Farmer*, 183 F.3d 208, 213 (3d Cir. 1999); *Amatel v. Reno*, 156 F.3d 192, 202 (D.C. Cir. 1998).

<sup>184</sup> See cases cited *supra* note 183.

<sup>185</sup> *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 345 (3d Cir. 2004); *Halaim v. INS*, 358 F.3d 1128, 1136 (9th Cir. 2004); *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001).

<sup>186</sup> *Ramirez*, 379 F.3d at 128.

<sup>187</sup> *Turner*, 482 U.S. at 84; *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 240 (D.C. Cir. 2003) (finding rehabilitation to be legitimate penological interest); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (listing rehabilitation, security, and order as legitimate government interests under *Turner*); *Siddiqi v. Leak*, 880 F.2d 904, 909 (7th Cir. 1989) (holding likewise that rehabilitation is legitimate penological interest).

<sup>188</sup> *Ramirez*, 379 F.3d at 128.

<sup>189</sup> *Id.*

interpreting it do not demand such detailed articulation of the governmental interest.<sup>190</sup> Moreover, Congress identified the goals of the pornography ban during the discussion of the Ensign Amendment on the House floor.<sup>191</sup> Representative Ensign's statement specifically identified his amendment's goals as the rehabilitation of those convicted for crimes involving sex and/or violence.<sup>192</sup> He also argued that the amendment would contribute generally to the rehabilitative environment of prisons.<sup>193</sup> The *Ramirez* court erred by not deferring to Congress's identification of and support for the Ensign Amendment's rehabilitative goals.<sup>194</sup>

Second, the *Ramirez* court erred by requiring an evidentiary record to demonstrate that the pornography restriction was not overbroad.<sup>195</sup> The court indicated that the restriction was obviously reasonable only when applied to sex offenders, a small minority of the prison population.<sup>196</sup> Restricting the entire population's access to pornography, the court reasoned, was probably unnecessary.<sup>197</sup> The court failed to recognize that Congress targeted both sex offenders *and* those convicted for violent crimes against women with the pornography ban.<sup>198</sup> Thus, the ban directly applied to a larger percentage of prisoners than the court realized. The court also failed to recognize that prisoners and some prison personnel tend to circulate contraband material throughout prisons.<sup>199</sup> Once inside the prison, a non-sex offender may give or trade his pornographic materials to a sex offender.<sup>200</sup> Therefore, to reasonably achieve its rehabilitative goals, Congress had to restrict the entire prison

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<sup>190</sup> See *supra* notes 179-85 and accompanying text.

<sup>191</sup> See *supra* notes 112-16 and accompanying text.

<sup>192</sup> See 142 CONG. REC. H8262 (daily ed. July 24, 1996) (statement of Rep. Ensign) ("The infamous serial killer Ted Bundy . . . stated before his death his belief that pornographic materials directly contributed to his violent crimes.").

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

<sup>194</sup> *Ramirez*, 379 F.3d at 128; see also *supra* notes 112-16 and accompanying text (describing congressional support for Ensign Amendment's adoption).

<sup>195</sup> *Ramirez*, 379 F.3d at 128.

<sup>196</sup> *Id.* at 129.

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

<sup>198</sup> See 142 CONG. REC. H8261-H8262 (daily ed. July 24, 1996) (statements of Reps. Ensign & Christensen); see also *supra* Part II.A (discussing Ensign Amendment).

<sup>199</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 412 (1989) (noting that dangerous materials within prisons easily circulate); *Duamutef v. Hollins*, 297 F.3d 108, 112 (2d Cir. 2002) (recognizing tendency of contraband material to circulate within prisons); *Thompson v. Patteson*, 985 F.2d 202, 207 n.1 (5th Cir. 1993) (finding similarly that dangerous materials within prisons easily circulate).

<sup>200</sup> See cases cited *supra* note 199.

population's access to pornography.

One might argue, however, that a factual record would more clearly demonstrate the reasonableness of the restriction.<sup>201</sup> Clearer demonstration could lead to better protection for prisoners' rights, which have been improperly diminished in post-*Turner* prison jurisprudence according to some critics.<sup>202</sup> Creating a factual record to justify the restriction might also balance administrative efficiency with the Constitution's protections more fairly.<sup>203</sup>

Although a factual record might be beneficial, *Turner* does not require one to justify the Ensign Amendment's pornography ban.<sup>204</sup> *Turner* requires only that Congress could reasonably have thought that the Ensign Amendment might further rehabilitation.<sup>205</sup> The fact that scholars continue to debate the harms of pornography more than fulfills this requirement.<sup>206</sup> Both sides of the debate have merit.<sup>207</sup> Congress would, therefore, be reasonable under *Turner* in endorsing either side.<sup>208</sup> The

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<sup>201</sup> *Ramirez*, 379 F.3d at 129; see also *Wolf v. Ashcroft*, 297 F.3d 305, 309 (3d Cir. 2002) (requiring factual record to identify rational connection between governmental interest and restriction on NC-17-and R-rated movies); *Waterman v. Farmer*, 183 F.3d 208, 213 (3d Cir. 1999) (rejecting argument for factual record in case involving pornography ban for inmates convicted of sexual crimes).

<sup>202</sup> See James A. Jacobs, *Prison Reform Amid the Ruins of Prisoners' Rights*, in *THE FUTURE OF IMPRISONMENT* 179, 192-93 (Michael Tonry ed., 2004) (arguing that after retreat of judiciary from prisoners' rights movement, there is no one left to ensure prisoner protection); Herman, *supra* note 3, at 1231 (criticizing modern prison jurisprudence for narrowing prisoners' rights); Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 *BROOK. L. REV.* 519, 521 (1996) (explaining that while many prisoner suits are frivolous, current approach will likely reject even meritorious claims).

<sup>203</sup> *Procunier v. Martinez*, 416 U.S. 396, 406 (1974) (describing framework for prison regulation review as need to reconcile these two conflicting principles); see also *Turner v. Safley*, 482 U.S. 78, 85 (1987) (describing Court's task as formulation of standardized test that responds to both principles); Feeley & Hanson, *supra* note 45, at 13 (explaining need to balance principles of administrative efficiency and constitutional protection).

<sup>204</sup> See *supra* notes 180-85 and accompanying text (describing leniency of *Turner* test).

<sup>205</sup> *Amatel v. Reno*, 156 F.3d 192, 202 (D.C. Cir. 1998); see also *Ramirez*, 379 F.3d at 130 (admitting leniency of *Turner* test); *Waterman*, 183 F.3d at 213 (recognizing high level of deference in *Turner's* rational connection requirement); FLITER, *supra* note 1, at 159 (criticizing *Turner* leniency, but recognizing its mandate that courts defer to prison officials as much as possible); MUSHLIN, *supra* note 32, § 1:7 (explaining that *Turner* indicates that considerable deference is in order when adjudicating claims of inmates).

<sup>206</sup> *Amatel*, 156 F.3d at 199-200; see also POSNER, *supra* note 144, at 370-71 (noting inconclusiveness of social science findings on net effects of pornography and incidence of rape); Allen, *supra* note 144, at 5 (describing arguments debating over harmfulness of pornography); Malamuth, *supra* note 144, at 32-39 (discussing scholastic debates over pornography).

<sup>207</sup> See sources cited *supra* note 206.

<sup>208</sup> That is, Congress would be reasonable if it chose to either allow or prohibit pornography. *Amatel*, 156 F.3d at 200.

court's role is not to weigh competing ideas, but rather to defer to policymakers as long as there exists a rational connection.<sup>209</sup>

Moreover, courts have routinely employed the *Turner* test to uphold analogous restrictions on nude photos.<sup>210</sup> At least two courts used the *Turner* test to uphold a ban on prisoners' receipt of nude photos of wives or girlfriends.<sup>211</sup> Another used *Turner* to uphold a pornography ban analogous to the Ensign Amendment.<sup>212</sup> The *Ramirez* court erred by failing to recognize the logic of these opinions.<sup>213</sup>

*B. The Ramirez Court's Demand for Added Procedure Unduly Burdens Practitioners' Time and Judicial Resources*

The *Ramirez* decision will not change the results of prison litigation, but only increase the time and effort needed to reach those results.<sup>214</sup> The Third Circuit ordered a more specific articulation of the Ensign Amendment's rehabilitative purpose.<sup>215</sup> The court further required a more extensive factual record to demonstrate the pornography ban's reasonableness.<sup>216</sup> The court's own opinion, however, demonstrates that despite its procedural instructions, the remand will have little substantive effect.<sup>217</sup>

The *Ramirez* court erred by imposing additional evidentiary hurdles when these hurdles will effect little or no change.<sup>218</sup> The Third Circuit

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<sup>209</sup> *Id.*; see also *supra* notes 180-85 and accompanying text (describing leniency of *Turner* test).

<sup>210</sup> See *Furrow v. Magnusson*, No. 91-1585 (1st Cir. Apr. 10, 1992) (dismissing prisoner's constitutional claims regarding prison officials' confiscation of photo album containing nude photographs), *aff'd*, 960 F.2d 143 (1st Cir. 1992); *Trapnell v. Riggsby*, 622 F.2d 290, 292-93 (7th Cir. 1980) (upholding prison policy banning nude photos of wives or girlfriends); *Davis v. Yohey*, No. 90-172 (HDM) (D. Nev. July 8, 1991) (applying *Turner* to uphold policy banning nude photos of inmate's spouse or girlfriend), *aff'd*, 981 F.2d 1257 (9th Cir. 1992).

<sup>211</sup> *Trapnell*, 622 F.2d at 292; *Davis*, No. 90-172.

<sup>212</sup> *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (upholding prison ban on pornography, analogous to Ensign Amendment)

<sup>213</sup> See *supra* notes 210-12 and accompanying text.

<sup>214</sup> See *infra* Part III.B.

<sup>215</sup> *Ramirez v. Pugh*, 379 F.3d 122, 128-29 (3d Cir. 2004)

<sup>216</sup> *Id.* at 129.

<sup>217</sup> *Id.* at 130.

<sup>218</sup> *Id.* The court conceded:

We recognize that the government has wide latitude in pursuing legitimate rehabilitative goals; courts may not substitute their own judgment in place of that of the legislative or executive branches where the position advanced by the government is not "irrational or unreasonable" but simply "less reasonable" than that of the prisoner-plaintiffs.

admitted that it could not invalidate a prison law or policy simply for being less reasonable than an alternative.<sup>219</sup> Under *Turner*, the court recognized that it could invalidate the pornography ban only if it were irrational or unreasonable.<sup>220</sup> The *Ramirez* court did not conclude that the Ensign Amendment's only legitimate targets were convicted federal sex offenders.<sup>221</sup> It simply wanted the parties to further elucidate the law's purpose and the facts supporting its effectiveness.<sup>222</sup> This holding burdens prisons with the task of compiling evidentiary support for prison restrictions despite *Turner's* purpose of avoiding evidentiary inquiries into prison policymaking.<sup>223</sup> Yet, the *Ramirez* court failed to specify what type of evidence would satisfy its demands.<sup>224</sup> The *Ramirez* decision, therefore, imposes futile and obscure procedural burdens on both courts and prison administrators.<sup>225</sup>

One could argue that added procedural safeguards properly guard against overregulation.<sup>226</sup> Before *Amatel*, scholars already criticized the *Turner* test as being too deferential to prison policymakers.<sup>227</sup> If courts routinely upheld prison regulations with little inquiry into their reasonableness, they might mistakenly allow many unreasonable restrictions.<sup>228</sup>

Although this argument has merit, it ignores two important points. Requiring prisons to compile extensive factual records impedes the *Turner* test's purpose of avoiding inquiries into prison policymaking.<sup>229</sup> Also, the argument ignores the intense burden that both the courts and prisons face when adjudicating additional and unnecessary

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*Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 129-30.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*; see also *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989); *Turner v. Safley*, 482 U.S. 78, 85-89 (1987); FEELEY & RUBIN, *supra* note 29, at 47.

<sup>224</sup> *Ramirez*, 379 F.3d at 129-30.

<sup>225</sup> See *supra* notes 218-24 and accompanying text.

<sup>226</sup> *Ramirez*, 379 F.3d at 128; *Wolf v. Ashcroft*, 297 F.3d 305, 308 (3d Cir. 2002) (warning against conclusory *Turner* rulings); see also *Waterman v. Farmer*, 183 F.3d 208, 213, 213 nn.6-7 (3d Cir. 1999) (noting, but dismissing, plaintiff's claims that prison restriction at issue was vague and overbroad).

<sup>227</sup> See Herman, *supra* note 202, at 1231; Jacobs, *supra* note 202, at 192-93; Newman, *supra* note 202, at 521.

<sup>228</sup> See sources cited *supra* note 227.

<sup>229</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989); *Turner v. Safley*, 482 U.S. 78, 85-89 (1987); see FEELEY & RUBIN, *supra* note 29, at 47.

considerations.<sup>230</sup> The *Turner* Court tried to alleviate this burden by deferring to prison administrators.<sup>231</sup> The scholarly evidence of pornography's harms makes deference to the Ensign Amendment's ban especially appropriate.<sup>232</sup> Future courts confronting challenges to the Ensign Amendment should, therefore, reject the *Ramirez* reasoning.<sup>233</sup>

C. *The Ramirez Decision Undermines the Cause of Prisoners' Rights  
Advocates by Contributing to the Misconception that Most Prisoner Claims Are  
Fivolous*

The *Ramirez* court erred by overlooking the adverse affects its decision has on legitimate prisoner claims. The court's seemingly pro-prisoner decision actually undermines the cause of prison reform advocates by contributing to the idea that prisoners' suits are frivolous. Before the PLRA, politicians and the media reported that prison litigation was not only voluminous, but also mostly frivolous.<sup>234</sup> Prisoners supposedly sued over bad haircuts, broken cookies, and most infamously, a prison's provision of chunky peanut butter when the prisoner requested smooth.<sup>235</sup> Critics of the PLRA argued that such anecdotal evidence

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<sup>230</sup> Dennis C. Vacco et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at H2; News Release, Nat'l Ass'n of Att'ys Gen., Attorneys General Seek to Curtail Frivolous Inmate Lawsuits: Call Upon U.S. Congress, States Legislatures to Respond (Aug. 1, 1995) (on file with author).

<sup>231</sup> FLITER, *supra* note 1, at 159 (criticizing *Turner* leniency, but recognizing its mandate that courts defer to prison officials as much as possible); MUSHLIN, *supra* note 32, § 1:7 (explaining that *Turner* indicates caution and considerable deference is in order when adjudicating claims of inmates).

<sup>232</sup> POSNER, *supra* note 144, at 366-71 (noting social science evidence on harmful effects of pornography on incidence of rape); Allen, *supra* note 144, at 5; Malamuth, *supra* note 144, at 32-39.

<sup>233</sup> See *supra* Part III.A-B.

<sup>234</sup> See JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS 1980-96, at 3 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfc96.pdf>; Newman, *supra* note 202, at 519. In 1995, prisoners' suits comprised 13% of the federal judiciary's workload. *Id.* This does not, of course, mean that they consumed 13% of judicial resources; courts frequently dismiss inmate suits relatively quickly. See SCALIA, *supra*, at 7 (noting that average processing time for inmate petitions terminated in 1995 was 273.9 days, with 50% disposed of in fewer than 161 days).

<sup>235</sup> See, e.g., Associated Press, *Group Seeks to Cuff Frivolous Inmate Lawsuits*, ORLANDO SENTINEL, Aug. 2, 1995, at A8 (reporting claims for bad haircuts, lost sunglasses, tight underwear, melted ice cream); Associated Press, *Is Pursuit of Prison Justice Too Trivial?*; *Rash of Legal Actions Fills California Courts*, CHI. TRIB., Oct. 29, 1995, at 17C (reporting broken cookie claim); Liz Halloran, *Others Debate What Ails Legal System*, HARTFORD COURANT, Jan. 29, 1995, at B1 (reporting peanut butter case); see also 141 CONG. REC. S14611-01 (daily ed. Sept. 29, 1995) (presenting Senator Dole's description of such frivolous cases during speech supporting PLRA and reproducing, at Senator Kyl's request, National Association of

improperly inflamed people's passions, influencing laws like the PLRA and decisions like *Amatel* and *Turner*.<sup>236</sup> Anecdotal evidence of frivolity overshadowed the legitimate claims.<sup>237</sup>

The resurrection of Marc Ramirez's First Amendment right to pornography in prison similarly overshadows the more serious prisoner claims of due process and religious freedom infringement.<sup>238</sup> Courts must be sure to recognize the *Turner* test's limits — prisoners do retain constitutional rights.<sup>239</sup> A pornography ban, however, falls within *Turner*'s limits.<sup>240</sup> The *Ramirez* court's decision to the contrary only fuels those who would like to further restrict prisoners' ability to sue.

#### CONCLUSION

The standard of review in prison litigation changed significantly in the last fifty years, creating much uncertainty.<sup>241</sup> The Supreme Court announced the current, extremely deferential standard of review in *Turner v. Safley*.<sup>242</sup> The D.C. and Third Circuits split, however, on the application of *Turner* to a prison ban on pornography.<sup>243</sup> In light of the

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Attorneys General's list of "Top 10 Frivolous Inmate Lawsuits Nationally").

<sup>236</sup> Ann H. Mathews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 537-39, 546-52 (2002); Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 59-61 (1999); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 64-69 (1997); Joshua D. Franklin, Comment, *Three Strikes and You're Out of Constitutional Rights? The Prison Litigation Reform Act's "Three Strikes" Provision and Its Effects on Indigents*, 71 U. COLO. L. REV. 191, 191-95 (2000); see also *supra* notes 3-5 and accompanying text (presenting scholarly criticism that anecdotal evidence improperly influenced restrictions on prisoners' rights).

<sup>237</sup> See *supra* notes 3-5 and accompanying text (presenting scholarly criticism that stories of frivolity overshadowed legitimate claims).

<sup>238</sup> See *supra* notes 3-5 and accompanying text.

<sup>239</sup> See *Turner v. Safley*, 482 U.S. 78, 97-98 (1986) (striking down restriction on inmates' ability to marry because obvious and easy alternatives existed); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447 (1985) (invalidating requirement of special use permit for home for mentally retarded because it was irrational); cf. *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (denial of free public education to children of undocumented aliens held unconstitutional, in part, because it is irrational to punish children for transgressions of parents).

<sup>240</sup> See *supra* Part III.A-B.

<sup>241</sup> *Supra* Part I.

<sup>242</sup> *Supra* Part I.B.

<sup>243</sup> Duffy, *supra* note 9; *Ruling on Inmate Porn*, *supra* note 10; *Porn in Prisons*, *supra* note 10; see also *Mauro v. Arpaio*, 188 F.3d 1054, 1057 (9th Cir. 1999) (upholding pornography restriction analogous to Ensign Amendment); *supra* Part II. Compare *Ramirez v. Pugh*, 379

*Turner* test's deferential nature, the D.C. Circuit's recognition of the pornography ban's rational connection to prisoner rehabilitation is correct.<sup>244</sup> In contrast, the Third Circuit improperly applied the *Turner* test.<sup>245</sup> By requiring an evidentiary record in *Ramirez v. Pugh*, the Third Circuit imposed a stricter standard than that envisioned by the *Turner* court.<sup>246</sup> This new approach will do little to change results, but will significantly burden the practice of prison litigation with unnecessary obstacles.<sup>247</sup> Moreover, the *Ramirez* decision might ultimately overshadow more legitimate prisoner claims by adding to stories of broken cookies and chunky peanut butter.<sup>248</sup> Courts should not satiate their desire to change the *Turner* test's deferential nature by misapplying the test. Instead, courts and scholars should raise awareness of what they see as *Turner*'s problems and hope that the Supreme Court adopts a new, less deferential standard.

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F.3d 122, 122 (3d Cir. 2004) (rejecting *Amatel* reasoning, and requiring factual record), *with Amatel v. Reno*, 156 F.3d 192, 192 (D.C. Cir. 1998) (upholding Ensign Amendment without factual record).

<sup>244</sup> *Supra* Part III.A.

<sup>245</sup> *Supra* Part III.A.

<sup>246</sup> *Supra* Part III.A.

<sup>247</sup> *Supra* Part III.B.

<sup>248</sup> *Supra* Part III.C.