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A Wolf in Sheep's Clothing: Wolf v. Ashcroft and the Constitutionality of Using MPAA Ratings to Censor Films in Prison

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- By Colin Miller*

> *Censorship is an odious enterprise. We oppose censorship and classification by governments because they are alien to the American tradition of freedom. Much of this nation's strength and purpose is drawn from the premise that the humblest of citizens has the freedom of his own choice. Censorship destroys this freedom of choice.*[1]

In 2001, prisoners in Pennsylvania challenged a prison policy prohibiting them from watching films rated R, X, or NC-17. The prison policy was designed to implement the Zimmer Amendment,[2] which denies funding to any prison that shows R, X, or NC-17 films.[3] After the District Court denied the prisoners' claims in a cursory opinion, the Court of Appeals for the Third Circuit remanded for a more fact-sensitive analysis.

Ostensibly, the eventual disposition of this case may appear rather unimportant. Many may question why much attention should be paid to whether prisoners should have the right to view certain films; however, there are actually several important questions raised by this case and other cases dealing with the Zimmer Amendment. Initially, courts have traditionally held that the MPAA ratings lack any clear standards and that they are legally unenforceable. If a court upholds the provision of the Zimmer Amendment that prohibits funding to prisons showing R, X, or NC-17 films, it will essentially be saying that the MPAA ratings can be used by certain governmental agencies to censor films. This is diametrically opposed to the central purposes of the MPAA ratings: establishing self-regulation and curbing government censorship.

Despite federal courts' gradual recognition of their role in vindicating prisoners' rights in the 1960s, the courts are increasingly deferring to the government when crafting prison policies. The Zimmer Amendment, and the Pennsylvania prison policy based on it, have presented the federal courts with an opportunity to play a leading role again in vindicating prisoners' rights.[4] Both the Zimmer Amendment and the Pennsylvania policy were apparently passed to punish prisoners, despite there being no factual findings that the laws actually advanced any penological interests. While the

District Court failed to reach the right result on its initial review, it now has the opportunity on remand to hold that the government's sole reliance on the MPAA ratings was improper and that the regulations in question were unconstitutional.

Part I of this article looks at the history of the federal courts' jurisprudence in deciding prisoner's rights cases, culminating in the current test adopted in *Turner v. Safley*. Part II considers the purposes behind the Zimmer Amendment and looks at the district and appellate court rulings in the Pennsylvania prisoners' case, *Wolf v. Ashcroft*. Part III looks at the history of the MPAA ratings and cases dealing with their legal enforceability. Finally, Part IV applies *Turner*'s test to the Zimmer Amendment and the Pennsylvania policy prohibiting R, X, and NC-17 movies from being shown in prison, ultimately concluding that the Zimmer Amendment is unconstitutional because it impermissibly relies on the MPAA ratings.

FROM the drafting of the Constitution until the 1960s, federal courts applied the "Hands-Off" Doctrine, under which the courts refused to hear prisoners' claims based on the idea that courts should not interfere with the treatment of inmates in prison unless they are illegally confined.

I. Federal Courts' Review of Prison Regulation

A. From the Founding until the 1960s

> There was a time, not so very long ago, when prisoners were regarded as 'slave[s] of the State,' having 'not only forfeited [their] liberty, but all [their] personal rights.'[5]

From the drafting of the Constitution until the 1960s,[6] federal courts applied the "Hands-Off" Doctrine, under which the courts refused to hear prisoners' claims.[7] The central tenet of the "Hands Off" doctrine was that courts should not interfere with the treatment of inmates in prison unless they are illegally confined.[8] Perhaps the best illustration of the doctrine is provided by the case of *Ex parte Pickens*.[9] In that case, a prisoner in Alaska challenged his imprisonment in an overcrowded cell, with a coal stove presenting "the ever present possibility of fire" and no method of escape.[10] The Court recognized that "the place [was] not fit for human habitation" and that cramming so many prisoners into such a small and dangerous cell constituted a "fabulous obscenity."[11] Nonetheless, consistent with the Hands-Off Doctrine, the court held that "the punishment now suffered by the petitioner, while inexcusable and shocking to the sensibilities of all civilized persons, is not of such nature as… to justify discharge of the petitioner at this time."[12]

When reviewing prisoners' rights claims at the time when the "Hands Off" doctrine was still in place, courts advanced five general reasons given by courts for failing to question prison policies: "(1) separation of powers; (2) federalism; (3) judicial incompetence in prison administration; (4) fear of undermining prison disciplinary schemes; and (5) desire to avoid a flood of litigation."[13]

B. The 1960s - Early 1970s

In the 1960s, several federal district courts began to acknowledge that prisoners retained at least some Constitutional rights. More generally, courts simply recognized that "the penal system [had] failed to achieve its public protection, crime reduction, and offender rehabilitation objectives."[14] This recognition initially resulted in district courts reconsidering how they dealt with prisoners' rights and then eventually intervening in more cases dealing with prisoners' rights.[15]

The United States Supreme Court first gave prisoners' claims legal support by unofficially revitalizing 42 U.S.C. § 1983[16] in *Monroe v. Pape*.[17] Section 1983 allows civil actions for government deprivations of constitutional rights. In *Monroe*, the Court found that federal courts were obligated to hear claims that state officials were violating federal rights.[18] Even before the Supreme Court explicitly acknowledged that prisoners could bring claims under section 1983, state and federal courts had considered prisoners' claims based on the Court's opinion in *Monroe*.[19]

In the 1964 case of *Cooper v. Pate*, [20] the Court recognized that prisoners could bring claims under section 1983, explicitly legitimizing prisoners' suits.[21] In *Cooper*, the Court addressed a prisoner's claim that he had been denied "permission to purchase certain religious publications" and other unspecified privileges.[22] Although the Court did not reach the merits of Cooper's claim, it reversed the district court's dismissal of Cooper's complaint.[23] Additionally, the Court recognized that prisoners retain some rights while in prison and that courts can hear cases where prisoners allege their rights have been unlawfully violated.[24]

The Court's decision in *Cooper* was prompted by increased pressure from two primary sources. First, prisoners themselves were becoming more proactive.[25] For instance, Black Muslims launched a number of attacks against the discriminatory treatment they endured because of their religious practices.[26] Second, whereas inmates were previously forced to proceed pro se, they now were supported by new public and private funding for legal representation for prison litigants.[27] Rather than deciding to continue to deny inmates' claims, the Court responded to this pressure by recognizing that inmates could bring certain claims that their rights had been violated by the government.

C. The mid-1970s: Tearing Down the Iron Curtain

> There is no iron curtain drawn between the Constitution and the prisons of this country.[28]

In acknowledgment of lower court decisions, the Supreme Court in 1974 recognized that prisoners' rights are not categorically eviscerated when they pass through prison walls. In *Wolff v. McDonnell*, the Supreme Court specifically rejected the State's contention that "prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause."[29]

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In *Pell v. Procunier*,[30] Justice Marshall's concurrence established the "retained rights" doctrine that would eventually be adopted by the Court.[31] The Court's holding reflects the doctrine that a prisoner "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[32] This "retained rights" doctrine has guided the Court's analysis for the last several decades.[33]

The Court filled in the substance of this doctrine by establishing the standard of review for prisoner's rights cases in *Procunier v. Martinez*,[34] the first prisoner's rights case the Supreme Court decided on its merits.[35] The case concerned the constitutionality of two prison regulations. The first regulation restricted inmates' personal correspondences,[36] while the second regulation categorically prohibited lawyers from using law students and legal paraprofessionals to interview prisoners.[37] Instead of focusing on the prisoners' rights, the Court determined that the regulations unconstitutionally infringed upon the First Amendment rights of non-prisoners to communicate

freely with the prisoners.[38] As such, the Court invalidated the regulations using a strict scrutiny standard of review,[39] finding that the regulation was not narrowly tailored to advance a compelling governmental interest.

Later that year, the Court made clear that a much more deferential standard applies when a prison regulation impinges solely upon a prisoner's rights. In *Pell v. Procunier*,[40] the Court considered the constitutionality of a prison regulation restricting inmates' ability to be interviewed by the press.[41] Initially, the Court found no violation of the First Amendment rights of the press because the press has the same right of access to prisoners as the general public.[42]

Unlike in *Martinez*, *Pell* solely focused on the rights of prisoners. Rather than adopting *Martinez*'s searing strict scrutiny standard, the *Pell* decision held that prison policies impinging solely on prisoner's rights were to be judged under the more deferential reasonableness standard.[43] Using this standard, the Court should then engage in an ad hoc balancing test, measuring inmates' rights against the legitimate penological interests of the state.[44] If a court finds that the state reasonably balanced individual rights against state interests in enacting a prison policy, the policy should be held to be constitutional.[45]

D. *Turner v. Safley*[46] and the Court's Current Test

For over a decade, the Court decided prisoner's right's cases under *Pell's* deferential balancing test.[47] However, lower courts' application of the *Pell* test resulted in inconsistent reasoning and results.[48] Because of this lack of consistency across circuits, the Supreme Court granted certiorari in the Eighth Circuit case, *Turner v. Safley*.[49]

Turner involved two class action suits against Missouri prison regulations.[50] The first regulation prohibited correspondence between inmates at different penal institutions unless "the classification/treatment team of each inmate deems it in the best interest of the parties involved."[51] The inmates challenged this regulation on the ground that it abrogated First Amendment free speech rights. The second regulation prevented inmates from marrying unless they received "permission of the prison, and…such approval should be given only 'when there are compelling reasons to do so.'"[52] The prisoners challenged this regulation on the ground that it violated their right to marry under the due process clause.

The Court held that prison regulations violating prisoners' constitutional rights are valid if they are reasonably related to legitimate penological interests.[53] Several factors are relevant to determine whether a regulation is reasonable:

> First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it….A second factor…is whether there are alternative means of exercising the right that remain open to prison inmates….A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally….Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.[54]

Applying this test, the Court upheld the regulation of inmate correspondence but struck down the regulation limiting marriage. Specifically, the correspondence regulation was "content neutral, it logically advance[d] the goals of institutional security and safety… and it [wa]s not an exaggerated response to those objectives."[55] Conversely, the regulation of marriage was not based on a legitimate penological interest, and the prison's policy was an exaggerated response.[56]

This new test is substantially more deferential to the interests of the state than *Pell*'s balancing test. Under *Pell*, courts would weigh prisoners' rights directly against the state's interests. However, under *Turner*, prisoners' rights are completely subordinated to penological interests. The *Turner* test thus means that if the state can cite a rational relationship between its policy and the interests it seeks to serve, the court need not even look at the nature of the right involved. This has caused Justice Brennan to label *Turner*'s test "categorically deferential."[57] Nonetheless, despite serious questions about *Turner*'s wisdom,[58] it remains the controlling constitutional standard for prison policies.

II. The Zimmer Amendment and the Present Lawsuit

In January of 1995, Congressman Dick Zimmer first introduced the Zimmer Amendment, which I will refer to as the Amendment, also known as the "No Frills Prison Act,"[59] as part of the Republican "Contract with America." One of the provisions of the Amendment is that "none of the funds appropriated or otherwise made available to the Bureau of Prisons shall be used to provide…the viewing of R, X, and NC-17 rated movies, through whatever medium presented…."[60] Congress initially enacted the Amendment as section 611 of the Omnibus Budget Act of Fiscal Year 1997 and has re-enacted the Amendment every year.[61]

The basis for the Amendment was a belief that "'[*p*]*risons should be places of detention and punishment; prison perks undermine the concept of jails as a deterrence. They also waste taxpayer money*….'"[62] Zimmer felt that some criminals believed that life in jail was an acceptable alternative to the "real" world because of a perceived increase in available luxuries.[63] The purpose of the Amendment, therefore, was to eliminate these luxuries. Zimmer felt that the Amendment achieved this goal by requiring federal prisons to provide the minimal amount of luxuries (i.e., basic food, clothing, and other necessities) without denying them constitutional rights or causing disciplinary problems because of harsh prison conditions.[64]

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In order to comply with the Zimmer Amendment, a federal penitentiary in McKean, Pennsylvania, instituted a policy that "[n]o movies rated R, X, or NC-17 may be shown to inmates."[65] Inmates objected to the categorical nature of this prohibition and to the Zimmer Amendment. A class action suit on behalf of federal prisoners was soon filed by Jere Krakoff, an attorney with the Pennsylvania Institutional Law Project in Pittsburgh.[66] The prisoners argued that certain R-rated films such as "Schindler's List," "Amistad," "Glory," and "The English Patient'" should not be banned in prison.[67] In defense of their censorship of these films, the government pointed to several legitimate penological interests supporting a categorical ban: "that the movies posed security risks …that the absence of such movies deterred people from committing crimes, [and] that denial of such movies fosters rehabilitation."[68]

The prisoners' case was heard before the United States District Court for the Western District of Pennsylvania after a federal magistrate hearing.[69] The Magistrate had advised that the court should not make a decision under *Turner* until an evidentiary record was developed.[70] In a four page opinion contradicting the recommendation of the federal magistrate, District Judge Sean J. McLaughlin found for the government,[71] finding that legitimate penological interests supported the government's policy. However, the District Court did not state which interest it found legitimate or why it found the interest to be legitimate.[72] The District Court also declined to engage in a substantive analysis of whether the government's policy was rationally related to a legitimate interest. Instead, the District Court dismissively claimed to adopt the "common sense" approach to the *Turner* reasonableness test as had been accepted by the Third Circuit[73] in *Waterman v. Farmer*.[74]

MOVIES have been regulated in the United States for more than a century. The first recorded incident of censorship occurred in 1894, when "Dorolita's Passion Dance," an "erotic dance" kinetoscope, was withdrawn from circulation.

The prisoners appealed the decision, and Judge Marjorie Rendell delivered the opinion in which the Third Circuit Court of Appeals reversed the District Court.[75] The Third Circuit first found the District Court's opinion "deficient in that it never stated or described the interest purportedly served by the prison policy, nor did it determine whether the interest was neutral and legitimate."[76]

The Third Circuit also rejected the 'common sense' approach taken by the District Court in finding that the prison policy was rationally related to legitimate penological interests. The Third Circuit held that "while the connection may be a matter of common sense in certain instances …there may be situations in which the connection is not so apparent and does require factual development."[77] Ostensibly questioning the legitimacy of the government's interest in crime deterrence by banning R and NC-17 movies, the Third Circuit asked whether it "is a matter of common sense, as was argued here, that prohibiting movies rated R or NC-17 deters the general public from committing crimes, lest they be sent to prison where they are not permitted to watch R-rated movies?"[78] The simple answer was that the Court was "not so sure,"[79] stressing that the District Court had several questions left to answer on remand. Specifically, the District Court would have to "describe the interest served [by the policy], consider whether the connection between the policy and the interest is obvious or attenuated – and thus, to what extent some foundation or evidentiary showing is necessary."[80]

The Third Circuit further held that the District Court inappropriately applied the *Turner* test. The District Court merely held that the prison policy satisfied *Turner*'s first prong[81] and then referenced *Turner*'s final three factors without applying any of the factors to the prisoners' case.[82] The Third Circuit rejected this approach, stressing that a successful application of *Turner* must include an analysis of each of *Turner*'s four prongs.[83]

According to the Third Circuit, the first *Turner* factor can be dispositive only in favor of a prisoner challenge, for "if the connection is arbitrary or irrational, then 'the regulation fails, irrespective of whether the other factors tilt in its favor.'"[84] *Turner*'s first factor is thus only "foremost" in cases where the prison policy is truly arbitrary.[85] Judicial reasoning that satisfies the first factor in no way "subsum[es] the rest of the inquiry,"[86] and a court "must then proceed to consider the remaining *Turner* factors in order to draw a conclusion as to the policy's overall reasonableness."[87] Thus, the Zimmer Amendment could not be upheld by a court solely because it satisfies *Turner*'s first factor.

III. The Motion Picture Association of America's (MPAA) Ratings

A. The History of Movie Ratings

Movies have been regulated in the United States for more than a century. The first recorded incident of censorship occurred in 1894, when "Dorolita's Passion Dance", an "erotic dance" kinetoscope,[88] was withdrawn from circulation.[89] In 1908, New York City mayor George McClellan closed all local nickelodeons on Christmas.[90] Films were often censored under the rubric of other reasons. For example, McClellan's act was primarily motivated by both moral values and anti-Semitism, as Jewish theater owners would be hurt the most by the shutdowns.[91] A few weeks later, a group of New York clergymen attempted to prevent theater owners from showing films on Sundays.[92] This growing

tension between religion and politics led to a number of private protests. Finally, the People's Institute in New York City, a liberal-reformist group, announced a plan to establish a censorship board in March 1909.[93] Religious industry members were simultaneously meeting to create a self-regulation system at the national level,[94] called the National Board of Censorship.[95]

The Board first met on March 25, 1909, and soon became known for "reasonable administration of content censorship."[96] Despite the Board's efforts, many people still protested the modified movies. These protesters gained substantial political power, and soon directed local police to "terrorize exhibitors in defiance of the industry's self-regulatory apparatus."[97] While some of these efforts were organized by private citizens, several city and state governments had also created censorship boards by 1911.[98]

In response to these private organizers, industry members at a 1914 National Exhibitors' Convention cited local censorship as theater owners' most significant problem nationwide.[99] At the same time, it was becoming increasingly evident that the moderate National Board of Censorship lacked the clout to prevent increasing grassroots activism.[100] Consequently, the former National Board of Censorship reorganized itself as the National Board of Review and attempted to insulate the film industry from local regulation.[101]

This attempt was to no avail, as the Supreme Court made self-regulation by the film industry even more difficult in *Mutual Film Corporation v. Industrial Commission of Ohio*.[102] In *Mutual Film Corporation*, the Court upheld an Ohio statute creating a censoring board. Anyone desiring to show a film in Ohio had to screen the film before the board, which only approved those films it found to be "of a moral, educational, or amusing and harmless character."[103]

The Court held that movies are not protected as free expression under the First Amendment; rather, movies are "a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded…as part of the press of the country, or as organs of public opinion."[104] While the Court recognized that movies could be entertaining, it also cautioned that they are "capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."[105]

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After the *Mutual Film Corporation* decision, state legislatures promptly began considering how to regulate the motion picture industry. By 1922, legislatures in thirty-six states were considering bills allowing film censorship.[106] That same year, the motion picture industry decided to take drastic self-censoring measures to insulate its movies from local censorship. Thus, it formed the Motion Picture Producers and Distributors of America ("MPPDA"), the predecessor of the current Motion Picture Association of America ("MPAA").[107]

The MPPDA established the draconian Hays Office Production Code,[108] which contained a strict set of rules preventing the showing of "immoral" conduct on film.[109] The Code had many guidelines long since forgotten in contemporary Hollywood: "For example, open mouth kissing was prohibited; a man and woman in bed, whether married or not had to keep one leg on the floor; verbal profanity was not allowed; bad guys did not escape justice."[110] The Code was enforced by the Production Code Administration (PCA), an in-house agency connected with California.[111] If a film contained "forbidden" elements, the PCA would refuse to affix the film with the Production Code seal of approval.[112] While the Code system was voluntary, failure to procure a seal essentially meant that a film would not be

released because the big studios would not distribute films without the PCA seal of approval.[113]

Many complained that the Code "stifled creativity," but that was exactly the point.[114] The MPPDA was willing to enforce strict self-imposed guidelines to deter states from moving forward with legislation that would prevent completed films from being shown in different parts of the country. On this front, the Hayes Code was largely successful. By 1925, all but one of the thirty-six states considering local censorship withdrew their attempts, allowing Hayes and the MPPDA to create national standards.[115]

RATHER than upset the community by showing prohibited films or challenging the prohibitions in court, movie theaters generally capitulated to the grassroots activism.

Twenty-three years later, the Supreme Court would fundamentally change the way motion pictures are made and distributed in the United States. In *U.S. v. Paramount Pictures*,[116] the Court overturned the Court's argument in *Mutual Film Corporation* that movies were not protected by the First Amendment. Justice Frankfurter, writing for the majority, made clear that "moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[117]

After *Paramount*, filmmakers began violating the Hayes Code standards.[118] In response, many states began banning films that were not PCA approved. However, based on Douglas' opinion in *Paramount*, the Court proceeded to strike down several state board bans of certain 'offensive' films. The net result of these decisions was that state censorship of films became virtually impossible.[119]

Frustration at the state level resulted in a concomitant increase in activism at the grassroots level.[120] The reappearance of censorship at the local level was especially troublesome because local movie theaters need a positive relationship with the community to survive.[121] Rather than upset the community by showing prohibited films or challenging the prohibitions in court, movie theaters generally capitulated to the grassroots activism.[122] This local censorship put the movie industry in a worse position than when studios voluntarily adhered to PCA guidelines because local censors often targeted films that they had not even viewed.[123] Additionally, while filmmakers could appeal decisions of the PCA and have some overturned, there was no local appeals process.[124] Box office revenue steadily declined for two decades because of this external censorship. The Supreme Court then stepped in and decided two crucial cases in 1968 which allowed the MPAA to overhaul the ratings system: *Ginsberg v. New York* and *Interstate Circuit, Inc. v. City of Dallas*.[125]

In *Ginsberg v. New York*,[126] the Court considered the constitutionality of a New York statute criminalizing the sale of obscene material to minors under the age of 17. The statute prohibited sales of materials obscene to minors, even if the same materials would not be considered obscene to adults.[127] The Supreme Court upheld the statute on the basis of "*variable obscenity*, the notion that a book or film might be made available to adults that would and should otherwise be banned for minors."[128]

That same day, the Court decided *Interstate Circuit, Inc. v. City of Dallas*.[129] In *Interstate Circuit, Inc.*, the Court held a Dallas censoring board decision classifying the film "Viva Mira" as "not suitable for young persons" to be unconstitutional.[130] The Court held that the standards used by the board to classify films were too vague and that "[i]t is essential that legislation aimed at protecting children from allegedly harmful expression…be clearly drawn and that the standards adopted be reasonably precise."[131] However, Justice Marshall then immediately cautioned that it was not the Court's place to draft such legislation.[132]

The MPAA read the Court's decision in *Interstate Circuit, Inc.* as authorization to create a narrowly drawn private ratings system applicable to minors.[133] The MPAA had already been undergoing changes since 1966, when it appointed Lyndon Johnson's assistant Jack Valenti as its third President.[134] Recognizing the need for self-classification to avoid local censorship, Valenti initially auditioned the

Suggested for Mature Audiences ("SMA") rating to allow studios to experiment with more controversial topics.[135] Still, Valenti never saw this rating as anything more than an "interim solution."[136]

After 1968, Valenti had the legal precedent necessary to mobilize the movie industry into creating a universal, internal classification procedure that would largely prevent local censorship. Looking at *Interstate Circuit Inc.*, Valenti thought that it "'said something that had a seminal ring to it, and it rang like a twanging wire through the whole fabric of viewing movies: They said children could be barred from seeing movies but no one could bar adults from seeing movies.'"[137] Valenti disagreed with legal censorship via classification, but understood the importance of a responsible reputation for MPAA.[138] After *Interstate Circuit Inc.*, Valenti had the authority to create a voluntary self-classification system.[139] The MPAA and other film groups therefore created a new voluntary film rating system in November 1968.[140]

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What this rating system is not about is almost as important as what it is about. In his personal statement accompanying the adoption of the new rating system, Valenti noted that "there is 'no valid evidence…that movies have anything to do with anti-social behavior.'"[141] The system's purpose, then, is to warn parents against letting their children view a particular film. The ratings themselves do not censor or "even make a final evaluation on [the suitability of the film for minors]; except for the X-rating, the parent's decision remain[s] the key to children's attendance."[142] Valenti particularly noted that the MPAA ratings should not be the final standard used by parents in determining whether their children should see a film. Instead, Valenti recommended the ratings as merely a starting point, asserting that parents should also read magazines and local newspapers to determine what films they feel are appropriate for their children.[143]

This goal of parental notification is the only goal of the system, and "[t]he only objective of the ratings is to advise the parent in advance so he or she may determine the possible suitability or unsuitability of viewing by children."[144] Valenti explicitly argued that the ratings' relevance pertained only to minors: "Inherent in the rating system is the fact that to those 17 and over, or without children, the ratings have little if any meaning."[145]

The MPAA ratings are enforced by the MPAA-created Classification and Rating Administration (CARA). CARA is a full-time board of seven members, and no qualifications are required for board members to serve.[146] The Board reviews the film using four criteria – theme, language, nudity and sex, and violence.[147] A majority vote is required to set the rating, whether a G, PG, PG-13, R, or NC-17 rating.[148] No one criterion is weighed more heavily than any other in arriving at a rating, but the MPAA has come up with basic general descriptions of movies receiving each of the ratings.[149] While the rating system is voluntary, the great majority of producers submit their films to CARA to be rated.[150]

The movie makers may make cuts based on CARA suggestions, or they may appeal to the Ratings Appeal Board. This board consists of twenty-four members of the MPAA, the National Association of Theater Owners (NATO), and the International Film Importers & Distributors of America (IFIDA).[151] After all sides present their case, the Board votes by secret ballot and can reverse CARA's decision only by a two-thirds vote.[152] The movie industry's adoption of CARA immediately led to the decline, and ultimately the extinction, of all local censorship boards.[153] While the MPAA ratings have gone largely unchallenged in the last three decades, three plaintiffs have successfully challenged the constitutionality of the government's reliance of the ratings.

B. Cases Dealing with Movie Ratings

The first case to challenge the MPAA ratings was *Motion Picture Association of America v. Specter*.[154] *Specter* concerned a new amendment to Pennsylvania's Penal Code.[155] In finding the amendment unconstitutional, the district court noted "that the Code and Rating Administration has…no defined standards or criteria against which to measure its ratings."[156] Instead, "[f]ilms viewed are simply graded according to the individual reactions of the viewing members."[157] Consequently, the amendment was "patently vague and lacking in any ascertainable standards… and the attempted recourse to Association ratings [wa]s of no avail."[158]

To some extent, *Specter* tells us little about whether the prison policy in *Wolf* or the "No Frills Prison Act" is constitutional. *Specter* was a case involving the restriction of First Amendment rights and Pennsylvania's Amendment was thus subjected to strict scrutiny. In contrast, under *Turner*, the state only need prove that its regulation was rationally related to a legitimate penological interest. At the same time, the court was clear that, even with the MPAA ratings, the Pennsylvania Amendment in *Specter* lacked "*any* ascertainable standards."[159] It is difficult to see, then, how the Pennsylvania law in *Wolf* or the "No Frills Prison Act" – both relying exclusively on the MPAA ratings – could even bear a rational relationship to any legitimate penological interests.

A month later, a Wisconsin District Court reached a similar conclusion in *Engdahl v. City of Kenosha*.[160] Kenosha adopted an ordinance that prevented individuals under age 18 from being able to see "adult" films.[161] The ordinance defined 'adult motion pictures as "…any motion picture which is rated under the Rating Program of the Motion Picture Association of America in a category recommending that minors, unaccompanied by a parent or guardian, be denied admission.'"[162] When a movie theater denied certain minors admission to the R-rated "Woodstock" when accompanied by adults, the minors challenged the ordinance as a prior restraint on their First Amendment rights.[163] As in *Specter*, the court found that, "if the Motion Picture Association utilized any standards in reaching its judgments as to what is an 'adult' movie, the defendants are not aware of what these standards are."[164]

Later, in *Eastern Federal Corporation v. Wasson*, the Supreme Court of South Carolina considered a law that levied twenty percent license tax on all tickets sold to X rated movies.[165] The court found that the law was unconstitutional because it "impose[d] no guidelines for rating of films…leav[ing] the determination solely to the discretion of the MPAA."[166] In contrast to *Wasson*, a Wisconsin District Court in *Borger v. Bisciglia*[167] upheld a school district's reliance on MPAA ratings when the school denied a student's request to see the movie "Schindler's List." The school's principal, acting at the behest of several teachers, initially sent a letter to the superintendent requesting permission for teachers to be able to take their students to the film during school hours.[168] The superintendent denied the request solely on the basis that the MPAA had given the film an R rating. The film therefore was "banned from the curriculum" by school district policy.[169] After this rejection, a student passed a petition around school requesting that the school board reconsider its decision.[170] The School Board took no action, and the students legally challenged the board's reliance on the MPAA ratings.[171]

Because *Borger* involved school administration, the court used the rational basis test: "whether or not the defendants' decision bore a reasonable relationship to a legitimate pedagogical concern."[172] The court initially found that the school

> AS in *Spector*, the court found that, "if the Motion Picture Association utilized any standards in reaching its judgments as to what is an 'adult' movie, the defendants are not aware of what these standards are."

district presented a "legitimate pedagogical concern," namely, to prevent its students from watching films with excessive nudity, violence, and bad language.[173] The court found that reliance on the MPAA ratings was rationally related to this interest, finding that "a private organization's rating system cannot be used to determine whether a movie receives constitutional protection."[174] As opposed to the decisions of other bodies, decisions made by school boards about curriculum need only be rationally related to a legitimate pedagogical concern.[175] In *Borger*, the court held that the school board had presented enough evidence – such as MPAA press releases – to establish that reliance on MPAA ratings to ban films was rationally related to protecting school children from obscene material.[176]

Borger still stands as the only case to uphold the MPAA ratings against constitutional attack by finding that the use of the ratings bore a rational relationship to the government's purported interest. Borger, however, is inapplicable to *Wolf*. Superficially, *Borger* seems highly similar to *Wolf*. Both involve challenges to policies banning films based solely on their MPAA ratings. One of the movies cited by the *Wolf* petitioners – "Schindler's List" – was the same movie at issue in *Borger*. Finally, the standard of review in *Borger* – the rational basis test – is the same standard that is applied to the prison policy in *Wolf*. What this comparison ignores, however, is that the MPAA rating systems are intended only to guide parents in deciding what films their children should watch.[177] Any penological interest the government has, therefore, has no rational relationship to using the MPAA rating system when censoring movies before an over-16 audience. This admitted limitation on the applicability and utility of the MPAA ratings beyond situations involving children lays the foundation for the argument that the Zimmer Amendment's absolute reliance on the ratings fails under *Turner*'s rational basis test.[178]

TURNER never explicitly states the relative importance of each factor or how courts should go about implementing the test.

IV. Applying the Turner Test to Wolf v. Ashcroft

A. How to Apply *Turner*'s Four Factor Test

Turner's factors are (1) whether there is a rational relationship between the prison policy and relevant penological interests; (2) the alternative means of expressing the right left open by the policy; (3) the impact of accommodating the prisoners' rights; and (4) potential alternatives to the prison's policy. *Turner* never explicitly states the relative importance of each factor or how courts should go about implementing the test. Indeed, the Sixth Circuit has noted that "*Turner* [does not]…require a court to weigh evenly, or even consider each of these factors."[179]

The majority of courts, however, have not applied *Turner*'s test as deferentially as the Sixth Circuit. In *Wolf*, the Third Circuit remanded because "the District Court *did not apply* the factors at all."[180] The Third Circuit explicitly held that, "[o]n remand, if the District Court again concludes that the first factor is satisfied, it must then proceed to consider the remaining *Turner* factors."[181]

Previously, the Third Circuit did establish that the first factor can be dispositive, although all the factors are interrelated and incorporated into the 'reasonableness' analysis. In *Waterman v. Farmer*, the Third Circuit held that, "[a]lthough the factors are intended to serve as guides to a single reasonableness standard, 'the first factor looms especially large' because it 'tends to encompass the remaining factors, and some of its criteria are apparently necessary conditions.'"[182] However, as Judge Rendell noted in *Wolf*, the first factor is the most important only in the sense that lack of a rational connection between the prison policy and legitimate penological interests automatically means the policy is unconstitutional. Even if the state fulfills the first factor, the analysis

supporting that determination in no way subsumes the rest of the inquiry.[183]

B. The First Factor: A Rational Connection Between Policies and Interests

While some have suggested that the first factor requires heightened scrutiny, most courts have held that this factor is the equivalent of rational basis review.[184] Ostensibly, this deferential standard lends credence to the validity of Pennsylvania's law prohibiting prisoners from viewing R, X, and NC-17 rated films. An incorrect analysis would merely require that Pennsylvania's ban on R and NC-17 films be rationally related to some legitimate penological interest. In this case, however, as in other prison censorship cases, the analysis is much more akin to an equal protection analysis.

(1) *Morrison v. Hall*[185] and the Equal Protection Analysis

To satisfy the Equal Protection Clause of the Fourteenth Amendment, the state must prove it has rational reasons for its disparate treatment of R, X, and NC-17 films and G, PG, and PG-13 rated films. In *Morrison*, the Ninth Circuit found a prison policy prohibiting prisoners from receiving "bulk rate, third, or fourth class mail" to be unconstitutional.[186] In the limited sense, the policy was 'rational' in that such mail could contain illegal contraband. However, this did not explain why the prison did not similarly prohibit prisoners from receiving first and second class mail. Thus, although the prison could prove that bulk rate, third, and fourth class mail sometimes contains contraband, it could not present any evidence that such contraband appeared with any less frequency in first or second class mail.[187]

To satisfy the Equal Protection Clause of the Fourteenth Amendment, the state must prove it has rational reasons for its disparate treatment of R, X, and NC-17 films and G, PG, and PG-13 rated films. In *Morrison*, the Ninth Circuit found a prison policy prohibiting prisoners from receiving "bulk rate, third, or fourth class mail" to be unconstitutional.[188] In the limited sense, the policy was 'rational' in that such mail could contain illegal contraband. However, this did not explain why the prison did not similarly prohibit prisoners from receiving first and second class mail. Thus, although the prison could prove that bulk rate, third, and fourth class mail sometimes contains contraband, it could not present any evidence that such contraband appeared with any

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less frequency in first or second class mail.[189] In order to fulfill *Turner*'s first factor, the prison would have "to submit…evidence demonstrating a rational connection between the postage rate at which a publication is sent and the risk of contraband."[190] Similarly, in order for the Zimmer Amendment or the Pennsylvania policy to pass constitutional muster, the state must be able to prove a rational connection between a film's MPAA rating and some legitimate penological interest.

Judge Rendell (the Third Circuit judge who remanded *Wolf v. Ashcroft*), the history of the Zimmer amendment, and the Zimmer Amendment itself seem to indicate that the Amendment's main purpose is to create a harsher prison environment. However, banning certain films may not actually create a harsher prison environment. A recent comprehensive study of film profits determined that PG films are more than twice as likely to gross at least $25 million domestically than R-rated films.[191] Further, the study also found R-rated films are less profitable on average than G, PG, and PG-13 films.[192] Movie studios recognize that PG and PG-13 movies have a greater potential to yield greater profits, and thus edit movies with the highest earning potential so that they are not rated-R. Many movies, therefore, that remain rated-R are actually those with limited commercial prospects. While there might be arguments to the

contrary, neither those drafting, nor those defending, the legislation in question have presented any evidence that prisoners prefer R-rated films. Without such evidence, there is no reason to disrupt the general rule that people, as well as prisoners, on average prefer to see PG and PG-13 movies instead of R-rated movies.

SOMETIMES, many PG-13 movies can leave a worse impression on viewers than R-rated films. A war film with an R-rating such as "Glory" can show the viewer in graphic detail the atrocities that resulted from the Civil War. A similar war movie with a PG-13 rating would contain less violence, but the viewer would be left with the impression that war is less devastating and that violence has minor consequences.

According to the District Court in *Wolf,* the second potential purpose of the ban on films rated R, NC-17, or X is to facilitate the rehabilitation of prisoners.[193] The argument here is that prisoners exposed to excessive sex and violence in R, X, and NC-17 rated films may remain desensitized to pernicious behavior. However, CARA "does not rate for quality or lack of it" when giving a film a MPAA rating.[194] A movie with an excessive amount of violence will be given an R-rating, whether the movie glorifies violence or condemns it. Undoubtedly, a state can rationally argue that an R-rated movie will stunt a prisoner's rehabilitation by presenting images that glorify drug use and violence. However, PG-13 films may also glorify violence, and R-rated films may present anti-violence messages. For instance, Rob Cohen's PG-13 rated "XXX" and Stephen Spielberg's "Indiana Jones and the Temple of Doom" (the film which led to the somewhat arbitrary creation of the PG-13 rating after Spielberg's intense lobbying to the MPAA) contain numerous scenes of excessive violence, which the audience is supposed to applaud, while Terrence Malick's R-rated "The Thin Red Line" is anti-violence, showing the pernicious effects of the Battle of Guadalcanal on nature and man alike.

Sometimes, many PG-13 movies can leave a worse impression on viewers than R-rated films. A war film with an R-rating such as "Glory" can show the viewer in graphic detail the atrocities that resulted from the Civil War. A similar war movie with a PG-13 rating would contain less violence, but the viewer would be left with the impression that war is less devastating and that violence has minor consequences. However, even if there is some connection between the MPAA ratings and the state's penological interests, an absolute ban would still constitute an exaggerated response, and run counter to *Turner.*

(2) The Prison Policy Must Not Be An "Exaggerated Response"

Under *Turner*, a prison's policy must not be an "exaggerated response" to the behavior it wishes to proscribe.[195] For instance, in *Bazzetta v. McGinnis*,[196] a state passed a law preventing former inmates from visiting current prisoners. The Sixth Circuit found that the state had asserted a legitimate penological interest: "the prevention of disruption by ex-convicts"[197] However, the state impermissibly reacted to this danger by categorically prohibiting all former inmates from making non-contact visits.[198] Because this policy prohibited all visits without individualized determinations of danger, many benign visits were also prevented. The law was therefore held to be unconstitutional, as it was an impermissible "exaggerated response" to the potential problems associated with visits by ex-convicts.[199]

The absolute ban on all R, X, and NC-17 rated films constitutes a similarly exaggerated response. Some may well argue that certain films hinder the rehabilitation of certain prisoners and lead to antisocial behavior. Although unlikely, a

potential prisoner might avoid committing a crime because these movies are banned in prison, making the prison experience less enjoyable. However, many films that have neither effect are banned under this blanket policy. While a prison policy does not require an exact fit between means and ends, absolute reliance on the amorphous MPAA ratings is a particularly ill-fitting solution because MPAA ratings are irrelevant to adults.

C. The Second Factor: Alternative Means of Expressing the Right

Turner's second factor asks courts to look at whether alternative means of expressing the right in question remain open to prisoners. Courts have developed several sub-factors when applying this factor: defining the right broadly, looking at the broadness of the exclusion, focusing on the right to receive information, and holding that violation leads only to increased scrutiny.[200]

(1) Defining the Right Broadly

The first part of the analysis of *Turner's* second factor is defining the prisoners' rights. In *Turner* and its progeny, *Thornburgh v. Abbot*, the U.S. Supreme Court held that "'the right' in question must be viewed sensibly and expansively."[201] In *Thornburgh*, the Court upheld regulations giving prison officials the power to reject incoming publications they thought jeopardized institutional security[202] because officials banned only certain publications, allowing a significant number of publications to be sent and received.[203]

Using the same reasoning in *O'Lone v. Estate of Shabazz*,[204] the Supreme Court examined a policy preventing prisoners from attending a specific religious ceremony because of the amalgam of religious practices already available to the inmates.[205] In addressing this issue, first, the Court looked to the fact that during non-work hours there remained a near absolute right to congregate for prayer and discussion.[206] Second, the state provided an imam whom prisoners could freely see.[207] Finally, the state made special arrangements for Ramadan, and offered alternative meals whenever the prison served pork.[208] After examining these three separate factors, the court ultimately found no absolute violation of the prisoners' right to free exercise of religion. The Court did not even reach the *Turner* factors because of its finding that no right was violated.

Based on the analyses in these cases, it is clear that petitioners challenging the Zimmer Amendment cannot simply argue that the right at issue is their specific right to view R, X, and NC-17 movies (and not some broader right) and that this right is categorically precluded by the Amendment to the extent that it prohibits all R, X, and NC-17 movies in prison. Instead, courts have found that the right must be viewed more expansively; it cannot be defined solely according to the items that the regulation excludes.[209] Unfortunately, though, according to at least one Circuit court, the Supreme Court has never articulated a clear method for how to define the right at stake.[210]

(2) Broader Exclusions Lead to Fewer Alternatives

Despite this narrow interpretation of *Turner*'s second factor, the Court's analysis in *Thornburgh v. Abbott*[21] indicates that absolute reliance on the MPAA ratings is improper. *Thornburgh* involved a constitutional challenge to a prison policy allowing prison officials to exclude any incoming publications they felt would undermine institutional security.[212] However, under the policy, the warden had to review each publication separately, and could not simply create a list of excluded publications.[213] The Court was especially "comforted by the individualized nature of the determinations required by the regulation" and cautioned that "[a]ny attempt to achieve greater consistency by broader exclusions might itself run afoul of the second *Turner* factor, *i.e.*, the presence of 'alternative means of exercising the right' in question."[214]

The policy in *Wolf* or the Zimmer Amendment should be treated no differently than the policy in *Thornburgh*. Ostensibly, both create blanket prohibitions on R, X, and NC-17 rated films without requiring or even allowing prison officials to make individualized determinations about specific films. In this sense, *Wolf* is similar to *Kikumura v. Turner*,[215] where a prison enacted a blanket ban on all Japanese language publications. In *Kikumura*, the court found this policy to be unconstitutional in part because it categorically prohibited a class of publications without the individualized analysis the Supreme Court found essential in *Thornburgh*.[216]

(3) The Right to Receive Information

While it seems clear that the absolute prohibition in the Zimmer Amendment is overbroad, the question of how to define the right in question remains unanswered. The right could be construed as "the right to receive information,"[217] as it was in *Kikumura*. Under this definition, the justification for finding that the prisoners' right to information was violated would be the converse of the Ninth Circuit's reasoning in *Morrison v. Hall*.[218] In *Morrison*, the Court reviewed the constitutionality of a prison policy that prevented prisoners from receiving magazines in bulk rate, third, and fourth class mail. The court struck the policy down and rejected the argument that visual media are the equivalent of print media,[219] reasoning that the two cannot be conflated because prisoners have such low literacy rates.[220] Visual media are thus inadequate alternatives to printed words because they do not allow prisoners to learn the literacy skills necessary to succeed upon their reintegration into society.

WHILE it seems clear that the absolute prohibition in the Zimmer Amendment is overbroad, the question of how to define the right in question remains unanswered. The right could be construed as "the right to receive information."

The converse to this analysis should apply with equal force. If prisoners cannot read, then their only method of learning about an event of historical importance may be through viewing a movie. Illiteracy may constructively prevent these prisoners from learning about historical events through the written word. Further, only films with extreme depictions of violence may be able to accurately portray the horrors of the Holocaust, as in "Schindler's List", or of the Civil War, as in "Glory." Films with less graphic violence often water down such pernicious events, making the events seem less devastating than they actually were. Consequently, many of the best historical films receive R ratings, meaning that prisoners are prohibited from seeing them under current policy.[221]

However, to simply argue that prisoners are being denied the right to information would undercut the impact of movies on society. An individual can read about the Holocaust, but that same individual can be confronted with shocking visual depictions of the horrors of Nazi Death camps in an entirely different manner by watching "Schindler's List." Because any film portraying the horrors of a pernicious historical event is likely to receive an R rating, under current policy, prisoners are being denied the unique opportunity to vicariously experience these events and further understand what occurred. While reading a book about history gives the reader some understanding, actually seeing historical events recreated gives the viewer an entirely different perspective.

(4) Violation Leads Only to Increased Scrutiny

No single *Turner* factor is dispositive. When a court finds that the second factor has been violated, the regulation is not necessarily "presumptively unconstitutional." Instead, the reviewing court must simply look at the policy's justifications with "increased scrutiny."[222]

D. The Third Factor: Impact of Accommodation - The "Ripple Effect"

The "ripple effect" refers generally to an effect that occurs when accommodation of the right in question would negatively impact other prisoners and make the jobs of prison officials more difficult. Unfortunately, courts have implemented *Turner's* third factor in conflicting and often antithetical manners. Some circuits have held that *Turner's* third factor can only support upholding the prison's regulation. If accommodation would negatively impact prison administration, the regulation is likely rational; however, the absence of such a negative impact does

not mean that the prisoner's right should be accommodated. These courts have held that, "[r]ather than allowing prisoners to speculate that the ripple effect would *not* be great, the factor allows prison officials the opportunity to show what impact accommodating the prisoners' religious principles might have on their prisons."[223] *Turner* does not phrase this factor as an additional burden on the state, but as an element which, if proven, should lead to greater deference to the prison policy.[224]

Indeed, in *Turner*, the Supreme Court did acknowledge that, "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials."[225] Conversely, the *Turner* Court also recognized that only rare changes will have no impact on the rights of others or prison resources.[226] Based on this language, other courts have found that the state cannot prove a prison policy is constitutional merely by showing that accommodation will cause *any* impact.[227] Similarly, the Seventh Circuit has held that "[t]he obvious implication…is that a prison may not restrict a prisoner's rights without even looking to see how the rights might be accommodated and estimating the expense entailed in doing so."[228] In line with these cases, even a cursory review of the Zimmer Amendment and the Pennsylvania policy makes it evident that there would be no negative "ripple effect" by accommodating the right of prisoners to see certain R, X, or NC-17 rated movies.

As previously noted, accommodation of a right can have a "ripple effect" by negatively impacting other prisoners or by making the jobs of prison officials more difficult. An example of the former effect was found in *Waterman v. Farmer*.[229] In *Farmer*, the Third Circuit upheld a regulation on pornographic materials, reasoning that the alternative, a limited distribution to certain offenders determined not to be sexually deviant, would be ineffective because of the "ripple effect."[230] The court felt this "ripple effect" would be inevitable because, once the initial prisoners procured the pornographic material, they would be "more than likely to pass their material to other prisoners."[231]

Showing certain R-rated films would not have the same "ripple effect." Presumably, before showing R-rated films, prison officials would make an independent determination that the films did not encourage violent, sexual, or other anti-social behavior. However, if prison officials did determine that a film was not suitable for a particular inmate, they could simply prevent him from attending the screening. Unlike in *Waterman*, the inmates in *Wolf* are not asking to possess the material (i.e. by receiving a videotape); they are simply asking that specific films be shown. As long as prison officials deny access to prisoners they feel should not see certain films, the prisoners will not be exposed to any dangerous material. Additionally, prison officials do not need to work harder to maintain security to prevent the acquisition of file copies by ineligible prisoners because the issue is simply the screening, not the possession, of films. Consider the previously cited Ninth Circuit opinion in *Morrison v. Hall*.[232] In *Hall*, the Ninth Circuit looked at the potential danger that prisoners might receive illegal contraband in different types of mail.[233] This concern does not exist when prisoners are merely viewing movies.

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E. The Fourth Factor: Alternatives to the Policy

Courts have been extremely reluctant to find alternatives to prison policies that achieve the same penological interests without imposing additional burdens on prison officials. In *Amatel v. Reno*,[234] for instance, the D.C. Circuit upheld a ban on the use of Bureau of Prisons resources to purchase sexually explicit material for inmates.[235] In considering *Turner*'s

fourth factor, the D.C. Circuit held that "[t]he most obvious alternative is a detailed prisoner-by-prisoner (and presumably publication by publication) sifting to determine whether a particular publication will harm the rehabilitation of a particular prisoner. The costs of this approach seem far from *de minimus*."[236]

Similarly, the Sixth Circuit dismissed a First Amendment challenge to inmate hair-grooming regulations.[237] The Court made clear that an alternative policy is sufficient only if it is equally effective when compared to the original policy, stating that "we can imagine means of achieving the prison's stated goals with less restraint on the prisoner's rights. Nevertheless, we find it unlikely that *all* of the penological interests satisfied by the regulation could be *equally well satisfied* by any of the alternatives proposed by the prisoners."[238]

As far as such a stringent application of the fourth factor of *Turner* is concerned, the Supreme Court's own analysis in *Turner* suggests an alternative to prisons' absolute reliance on MPAA ratings when censoring certain films. Recall that in *Turner*, the Court struck down a marriage regulation "permit [ting] an inmate to marry only with the permission of the superintendent of the prison," even in light of the fact that to do so the superintendent had to present compelling reasons.[239] The Court found the policy unconstitutional, in part because of an available alternative policy which generally permitted marriages, unless "[the] warden finds that it presents a threat to security or order of [the] institution, or to public safety."[240] Clearly, this alternative policy required wardens to spend more time analyzing each potential marriage; however, under the alternative policy the Court shifted the presumption towards marriage by requiring valid reasons for its prohibition.

In the case of movies, a similar or even less intrusive alternative could be developed. As in *Turner*, the presumption could shift in favor of allowing any films to be screened, and the warden – perhaps relying on the MPAA ratings and other factors – would have to present affirmative reasons for why particular films should be censored. Alternatively, the presumption against R, X, and NC-17 movies could remain intact as long as an appeals process was in place. Thus, the warden could censor films based on their MPAA rating, but prisoners would have the opportunity to argue that some films have sufficient educational merit and lack the objectionable material prisons want to prohibit.

Additionally, several alternative ratings systems exist that prisons could easily use and that are more descriptive than the MPAA ratings. For example, the Film Advisory Board (FAB) issues film ratings closely analogous to the MPAA ratings. The Board was created in 1988 after independent video producers asked for a more descriptive film rating alternative than the MPAA.[241] The FAB, like the MPAA, reviews all released movies, but it states explicitly why films receive a certain rating, as opposed to the clandestine decision-making process of the MPAA.[242] While the MPAA now does include some content descriptions, the FAB ratings are much more thorough in describing objectionable material. Prison officials could thus use these ratings to more effectively determine which films they do not want their prisoners to see.

Another alternative would be the ratings at "Kids-in-Mind."[243] While the name suggests that the ratings are geared to children, the web site's recommendations are not age-specific.[244] Instead, the site assigns three separate ratings for (1) sex and nudity, (2) violence and gore, and (3) profanity.[245] Each of these categories receives a rating between zero and ten based on quantity and context.[246] This system would provide prison officials with much more detailed information than is provided by the MPAA ratings about whether a film has objectionable elements. The ratings systems of FAB and Kids-in-Mind are just two examples of a variety of rating systems that prison officials could use in lieu of MPAA ratings.[247]

F. Dangerous Precedent: *Kimberlin* and the Common Sense Approach

While the Third Circuit has rejected a common sense approach to the Pennsylvania prison policy and the Zimmer Amendment,[248] the District Court for the District of Columbia came to the opposite conclusion in *Kimberlin v. United States Department of Justice*.[249] This opinion is a departure from the District Court's previous mirroring of the Third Circuit's approach to *Turner*.[250]

Specifically, the court in *Kimberlin* upheld the constitutionality of a provision of the Zimmer Amendment prohibiting the expenditure of federal funds to purchase electric and electronic instruments for federal prisoners.[251] The court found that, "[w]hile banning musical instruments by itself, may not actually deter anyone [from committing a crime], it is possible

that [the Bureau of Prisons] BOP (and Congress) thought the ban would indicate to society that prison is a harsh place where one does not want to be."[252] The court concluded that even though it was optimistic to believe that excluding these instruments would have any impact, it was not necessarily irrational.[253]

IF potential criminals would not be deterred from committing crimes because they know that musical instruments are banned from prison, there is no reason that they will be deterred by the general prospect that the prison environment has become less pleasant.

If this indeed was Congress's intent when passing the Zimmer Amendment, it makes little sense. If potential criminals would not be deterred from committing crimes because they know that musical instruments are banned from prison, there is no reason that they will be deterred by the general prospect that the prison environment has become less pleasant. Clearly, the court is not persuaded by the argument that a potential criminal would be deterred because his musical talents would be stunted while in prison. But, the court has apparently accepted the argument that a potential criminal might be dissuaded from committing a crime by remembering that electric instruments are banned from prison, making prison a "harsh place" he needs to avoid.

These are tenuous arguments, yet the court urges acceptance of the latter based on "common sense."[254] According to his reading of *Amatel*, Sullivan argued that a court can find a rational link between a prison policy and a governmental interest based on "common sense" without having to rely on record evidence.[255] Yet Congress passed the Zimmer Amendment "without fact finding or consulting with prison officials and administrators."[256] Apparently using common sense, Sullivan simply concluded that because "the policy deprives plaintiffs of electrical instruments as a comfort and amenity, the prison is somewhat harsher."[257]

The court misses the point. The ban on electric instruments or any of the provisions of the Zimmer Amendment likely do make prison a harsher place. However, the dispositive question is whether potential prisoners will be deterred from committing crimes because of fewer amenities available in prison. Perhaps it was appropriate in *Amatel* to use a common sense approach because of valid reasons for precluding sexually deviant offenders from obtaining pornography. However, as Judge Rendell noted in *Wolf*, whether amenity prohibitions in prison deter potential criminals is a much more difficult social science question and requires factual findings.

The court in *Kimberlin* also improperly found that accommodation would have a negative effect on prison officials solely because the Bureau Of Prisons ("BOP") "argue[d] that it [could not] accommodate plaintiffs without contravening the Amendment's legitimate purpose of making prisons more of a deterrent."[258] If the penological interests of the prison are served by abrogating a particular right, then accommodating that right will mean the prison cannot fully achieve its interest. The BOP's argument would thus make *Turner*'s third factor a tautology.

The real purpose of *Turner*'s third factor, however, is to determine whether accommodation of the right would also have a "ripple effect." While accommodation of the right in *Kimberlin* might indirectly have resulted in prison overpopulation, there were no arguments presented as to why introducing electronic instruments into prisons would cause any harm beyond making the prison environment less harsh. In other words, the BOP never stated that allowing prisoners to have electronic instruments would directly lead to any negative consequences in prison. Similarly, nobody has presented the similar argument that allowing prisoners to view R, X, or NC-17 rated films would directly lead to any negative consequences.

V. Conclusion

Courts are currently at an impasse when dealing with prisoners' rights cases and the MPAA ratings. Federal courts had been moving toward a more active role in vindicating prisoners' rights before the Supreme Court's decision in *Turner*. After *Turner*, the question remains whether there is any significant role for federal courts to play in reviewing prison policies.

The Zimmer Amendment and prison policies resulting from it have presented federal courts with the opportunity to apply a stronger standard of review to prison policies. The provisions of the Amendment made prison conditions harsher for prisoners, yet there are no legislative findings that toughening the prison environment actually deters potential criminals. When reviewing the Amendment, district courts in D.C. and Pennsylvania have upheld the provisions based on a deferential "common sense" approach. By remanding *Wolf v. Ashcroft,* the Third Circuit has expressed its preference that prisons and Congress use a standard more protective of prisoners. The district court should now take advantage of this opportunity by finding that the Pennsylvania prison policy impermissibly relied on the MPAA ratings in censoring films because the MPAA ratings should not be used to ground a rational basis between prison policy and the state's interest.

Courts are also at an impasse in deciding the legal enforceability of the MPAA ratings. Previously, courts have found the ratings to be completely amorphous and legally unenforceable. Now, courts have held that schools and courts may completely defer to CARA and the MPAA when censoring films. If courts continue to allow governmental agencies to rely upon MPAA ratings when censoring films, courts will be giving too much power to the MPAA, a private organization, to inform government censorship decisions based on nebulous standards. This use was not historically intended by the MPAA and is not justified. In essence, unless the Zimmer Amendment is found unconstitutional, a private organization will be allowed to decide what films can and cannot be seen by the American public.

ENDNOTES

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[1] Motion Picture Association of America, The Code of Self-Regulation (1977).

[2] Pub. L. No. 107-77, 115 Stat. 800 (2001).

[3] The MPAA describes its ratings as follows:

> G:"General Audiences-All Ages Admitted."
> This is a film which contains nothing in theme, language, nudity and sex, violence, etc. which would, in the view of the Rating Board, be offensive to parents whose younger children view the film. The G rating is not a "certificate of approval," nor does it signify a children's film.
> Some snippets of language may go beyond polite conversation but they are common everyday expressions. No stronger words are present in G-rated films. The violence is at a minimum. Nudity and sex scenes are not present; nor is there any drug use content.
>
> PG:"Parental Guidance Suggested. Some Material May Not Be Suitable For Children."
> This is a film which clearly needs to be examined or inquired into by parents before they let their children attend. The label PG plainly states that parents may consider some material unsuitable for their children, but the parent must make the decision.
> Parents are warned against sending their children, unseen and without inquiry, to PG-rated movies.
> The theme of a PG-rated film may itself call for parental guidance. There may be some profanity in these films. There may be some violence or brief nudity. But these elements are not deemed so intense as to require that parents be strongly cautioned beyond the suggestion of parental guidance. There is no drug use content in a PG-rated film.
> The PG rating, suggesting parental guidance, is thus an alert for examination of a film by parents before deciding on its viewing by their children.
> Obviously such a line is difficult to draw. In our pluralistic society it is not easy to make judgments without incurring some disagreement. So long as parents know they must exercise parental responsibility, the rating serves as a meaningful guide and as a warning.

PG-13:"Parents Strongly Cautioned. Some Material May Be Inappropriate For Children Under 13."
PG-13 is thus a sterner warning to parents to determine for themselves the attendance in particular of their younger children as they might consider some material not suited for them. Parents, by the rating, are alerted to be very careful about the attendance of their under-teenage children.
A PG-13 film is one which, in the view of the Rating Board, leaps beyond the boundaries of the PG rating in theme, violence, nudity, sensuality, language, or other contents, but does not quite fit within the restricted R category. Any drug use content will initially require at least a PG-13 rating. In effect, the PG-13 cautions parents with more stringency than usual to give special attention to this film before they allow their 12-year olds and younger to attend.
If nudity is sexually oriented, the film will generally not be found in the PG-13 category. If violence is too rough or persistent, the film goes into the R (restricted) rating. A film's single use of one of the harsher sexually-derived words, though only as an expletive, shall initially require the Rating Board to issue that film at least a PG-13 rating. More than one such expletive must lead the Rating Board to issue a film an R rating, as must even one of these words used in a sexual context. These films can be rated less severely, however, if by a special vote, the Rating Board feels that a lesser rating would more responsibly reflect the opinion of American parents.
PG-13 places larger responsibilities on parents for their children's moviegoing. The voluntary rating system is not a surrogate parent, nor should it be. It cannot, and should not, insert itself in family decisions that only parents can, and should, make. Its purpose is to give prescreening advance informational warnings, so that parents can form their own judgments. PG-13 is designed to make these parental decisions easier for films between PG and R.

R:"Restricted, Under 17 Requires Accompanying Parent Or Adult Guardian."
In the opinion of the Rating Board, this film definitely contains some adult material. Parents are strongly urged to find out more about this film before they allow their children to accompany them. An R-rated film may include hard language, or tough violence, or nudity within sensual scenes, or drug abuse or other elements, or a combination of some of the above, so that parents are counseled, in advance, to take this advisory rating very seriously. Parents must find out more about an R-rated movie before they allow their teenagers to view it.

NC-17:"No One 17 And Under Admitted."
This rating declares that the Rating Board believes that this is a film that most parents will consider patently too adult for their youngsters under 17. No children will be admitted. NC-17 does not necessarily mean "obscene or pornographic" in the oft-accepted or legal meaning of those words. The Board does not and cannot mark films with those words. These are legal terms and for courts to decide. The reasons for the application of an NC-17 rating can be violence or sex or aberrational behavior or drug abuse or any other elements which, when present, most parents would consider too strong and therefore off-limits for viewing by their children.
Motion Picture Association of America, How it Works, *at* http://www.mpaa.org/movieratings/about/content5.htm (last visited Feb. 28, 2004).

[4] D.C. has similarly adopted legislation implementing the Zimmer Amendment. A challenge to that policy will be addressed *infra* section IV.f.

[5] Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J. dissenting) (quoting Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)) (alterations in original).

[6] *See* Lorijean Golichowski Dei, Note, *The New Standard of Review for Prisoners' Rights: A 'Turner' for the Worse*, 33 VILL.L. REV. 393, 399 (1988) (asserting that "[t]he courts' position of absolute deference to prison officials continued almost completely uninterrupted until the 1960's when a steady stream of cases from both state and federal courts signaled a gradual movement away from the hands-off doctrine").

[7] MICHEL MUSHLIN, RIGHTS OF PRISONERS §1.02 (2d ed. 1993); Robert A. Surrette, *Drawing the Iron Curtain: Prisoners' Rights From* Morrisey v. Brewer *to* Sandin v. Conner, 72 CHI.-KENT L. REV. 923, 924 (1997). There were, however, exceptions to the hands-off doctrine. *See, e.g.*, Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (holding that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law"). The Supreme Court would eventually incorporate this language into its "retained rights" doctrine. *See infra* note 30 and accompanying text.

[8] MUSHLIN, *supra* note 7, at §1.02

[9] 101 F. Supp. 285 (D. Alaska 1951).

[10] *Id*. at 286-87.

[11] *Id*. at 287.

[12] *Id*. at 290. The Court even recognized that its decision was simply based on courts' historically not intervening in prison cases rather than any individualized judgment about the circumstances of the case before it. *See id.* (basing its decision on the fact that "the life of the law has been not in logic but experience").

[13] Surrette, *supra* note 7, at 924. Separation of powers was relevant because "[t]he management and control of prisons are generally viewed as executive and legislative functions. That courts should tell these co-equal branches of government how to run their penal institutions was troublesome." MUSHLIN, *supra* note 7, at §1.02 Because many of the cases in federal courts were brought by state prisoners, federalism was also a concern. "Federal courts expressed the concern that, by adjudicating these claims in a way that was favorable to inmates, they would be using federal power to dictate to the states how to run their own institutions." *Id*.

Courts cited judicial incompetence because of "the assumption that the management of prison requires considerable skill, training, and experience." *Id*. Judges consequently feared that reviewing prison policies would concomitantly minimize their authority. Finally, the fear of 'a flood of litigation' resulted from the "large number of inmates potentially willing to present their complaints, and [the] large variety of claims that might be pressed…." *Id*.

[14] Surrette, *supra* note 7 at 924.

[15] *Id*.

[16] Section 1983 provides, in part, that "[e]very person who, under color of any statute, ordinance, [or] regulation…of any State…subjects, or causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law…." 42 U.S.C. § 1983 (2000).

[17] 365 U.S. 167 (1961).

[18] *Id.* at 183; *see also* Dei, *supra* note 6, at 401-02.

[19] Dei, *supra* note 6, at 402.

[20] 378 U.S. 546 (1964).

[21] Cooper v. Pate, 378 U.S. 546, 546 (1964).

[22] *Id*.

[23] *Id*.

[24] Cheryl Dunn Giles, Note, Turner v. Safley *and its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219, 222 (1993).

[25] *See* MUSHLIN, *supra* note 7, at §1.03 (stating that "prisoners were becoming increasingly militant and assertive").

[26] *Id*; *see, e.g.*, Pierce v. LaVallee, 319 F.2d 844, 844 (2d Cir. 1963).

[27] MUSHLIN, *supra* note 7, at § 1.03.

[28] Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

[29] *Id*. at 555.

[30] 417 U.S. 817 (1974).

[31] *See* GORDON HAWKINS, THE PRISON: POLICY AND PRACTICE 135 (1976); Procunier v. Martinez, 416 U.S. 396, 422-23 (1974) (Marshall, J., concurring).

[32] *Martinez*, 416 U.S. at 422-23 (Marshall, J., concurring) (quoting Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944)). That same year, a majority of the Court endorsed Marshall's view in *Pell v. Procunier*, 417 U.S. 817 (1974). Specifically, the Court held that "a prison inmate retains those rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Id*. at 822.

[33] MUSHLIN, *supra* note 7, at §1.04 (citing *Pell*, 417 U.S. at 822).

[34] 416 U.S. 396 (1974).

[35] Giles, *supra* note 24, at 222.

[36] *Martinez*, 416 U.S. at 398. The guiding principle behind this regulation was "that personal correspondence by prisoners is 'a privilege, not a right.'" *Id*.

[37] *Id*. at 419

[38] *Id*. at 408 (holding that, "[w]hatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech.").

[39] *See id*. at 413 (requiring that the regulations "further an important or substantial governmental interest unrelated to the suppression of expression" and that their "limitation of First Amendment freedoms…be no greater than is necessary….").

[40] 417 U.S. 817 (1974).

[41] *Id*. at 831. The regulation simultaneously prohibited free access for journalists to interview inmates and limited prisoner's ability to initiate interviews with the press. *Id*. at 827, 831.

[42] *Id*. at 834. And, under the regulation, journalists were treated no differently than the general public. *See id*.

[43] *Id*. at 826.

[44] *Id*. at 823-28.

[45] *Id*.

[46] 482 U.S. 78 (1987).

[47] *See, e.g.*, Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 130-33 (1977); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974); Dei, *supra* note 6, at 408-14.

[48] Dei, *supra* note 6, at 414-17 (discussing several cases where lower federal courts applied different tests).

[49] 482 U.S. 78 (1987); Dei, *supra* note 6, at 417.

[50] *Turner*, 482 U.S. at 78.

[51] *Id*. at 81-82 (quoting the prison regulation).

[52] *Id*. at 82 (quoting the prison regulation).

[53] *Id*. at 89. The Court explicitly rejected the strict scrutiny standard established in *Procunier v. Martinez*, holding that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id*.

[54] *Id*. at 89-90 (internal citations omitted).

[55] *Id*. at 93. The regulation promoted security because "[p]rison officials…stated that in their expert opinion, correspondence between prison institutions facilitates the development of informal organizations that threaten the core functions of prison administration…." *Id*. at 92. It was not an exaggerated response because there were no ready alternatives for prison officials. Those "officials testified that it would be impossible to read every piece of inmate-to-inmate correspondence, and consequently there would be an appreciable risk of missing dangerous messages." *Id*. at 93 (internal citation omitted).

[56] *Id*. at 98-99. One interest proffered by the state in denying many marriages was that "women prisoners needed to concentrate on developing skills of self-reliance…." *Id*. at 97. The Court found this purported interest suspect because "only one [marriage had been] refused on the basis of fostering excessive dependency." *Id*. at 99. The Court also found that the prohibition swept too broadly because "[t]here [we]re obvious, easy alternatives to the Missouri regulation" such as a policy where marriages are "generally permitted, but not if [the] warden finds that it presents a threat to security or order of [the] institution, or to public safety." *Id*. at 98.

[57] O'Lone v. Estate of Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting).

[58] *See id*.; *Turner*, 482 U.S. at 100-01 (Stevens, J., concurring in part and dissenting in part) (arguing that the Court's new test makes it "too easy to uphold restrictions on prisoners'…rights…"); Dei, *supra* note 6, at 236 (stating that the new test is "excessively deferential"); Giles, *supra* note 24, at 236 (asserting that "one test is not adequate to fully accommodate the assertion of all possible inmate rights").

[59] Press Release, Office of U.S. Rep. Dick Zimmer, Legislation to End Prison Perks Wins Endorsements, (Jan. 31, 1995), *available at* http://www.strengthtech.com/correct/laws/federal/luxurypr.htm (last visited Feb. 29, 2004).

[60] Pub. L. No. 107-77, 115 Stat. 748 (2001).

[61] Kimberlin v. U.S. Dep't of Justice, 150 F. Supp.2d 36, 38 (D. D.C. 2001).

[62] *Id*. at 39 (quoting 141 Cong. Rec. H7751-01 (1995)) (emphasis in original).

[63] Press Release, Office of U.S. Rep. Dick Zimmer, Zimmer's Ban on Prison Perks Approved in House, (Feb. 9, 1995), *available at* http://www.strengthtech.com/correct/laws/federal/luxurypr.htm (last visited Feb. 29, 2004).

[64] Press Release, Office of U.S. Rep. Dick Zimmer, Close the Door on Federal "Glamour Slammers," (Feb. 9, 1995), *available at* http://www.strengthtech.com/correct/laws/federal/luxurypr.htm (last visited Feb. 29, 2004).

[65] Wolf v. Ashcroft, 297 F.3d 305, 307 (3d Cir. 2002) (quoting Program Statement 5370).

[66] Shannon P. Duffy, *Case Remanded for Application of Turner Test*, Legal Intelligencer, July 25, 2003, at 3.

[67] *Wolf*, 297 F.3d at 307; Adam Liptak, *Appeals Court Reinstates Suit by Inmates Over Films Rated R*, N.Y. TIMES, July 28, 2002, at 23.

[68] Duffy, *supra* note 66.

[69] *Wolf*, 297 F.3d at 308

[70] *Id.*

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] 183 F.3d 208 (3d Cir. 1999).

[75] Whereas the prisoners challenged the constitutionality of the Zimmer Amendment and the prison's policy in District Court, "on appeal the prisoners attack[ed] only the policy." *Id*. at 307.

[76] *Id*. at 308. The government had already admitted that the policy impinged on the prisoners' right because it prevented them from viewing certain films while they were allowed to view others.

[77] *Wolf*, 297 F.3d at 308.

[78] *Id*. at 309.

[79] *Id*.

[80] *Id*.

[81] Rendell stressed that McLaughlin's "ruling turned exclusively on *Turner*'s first factor." *Id*.

[82] *Id*.

[83] Duffy, *supra* note 66.

[84] *Wolf*, 297 F.3d at 309-310 (quoting Shaw v. Murphy, 532 U.S. 223, 229-230 (2001)).

[85] *Id*. at 309.

[86] *Id*. at 310.

[87] *Id*.

[88] Kinetoscopes were "early short films featur[ing] sporting events, circus acts, and scantily clad women often depicted dancing or posing by the beach." Jon Lewis, Hollywood v. Hardcore: How the Struggle Over Censorship Saved the Modern Film Industry 328 n.1 (2000).

[89] *Id*. at 86.

[90] *Id*. at 87.

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Id*. at 88.

[95] *Id*.

[96] *Id*.

[97] *Id*.

[98] Richard M. Mosk, Symposium, *Motion Picture Ratings in the United States*, 15 Cardozo Arts & Ent. L.J. 135, 135 (1997).

[99] Lewis, *supra* note 88, at 89. "Some cities were strict but consistent; others, like Chicago, were decidedly erratic." *Id*.

[100] *Id*.

[101] *Id*.

[102] 236 U.S. 230 (1915).

[103] *Id*. at 240.

[104] *Id*. at 244.

[105] *Id*.

[106] Lewis, *supra* note 88, at 89.

[107] Mosk, *supra* note 98, at 135.

[108] The Code was "named after Will Hayes, the first President of the MPP[DA]." *Id*.

[109] Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 Colum-VLA J.L. & Arts 69, 71 (1996).

[110] *Id*.

[111] *Id*.

[112] Mosk, *supra* note 98, at 135.

[113] Septimus, *supra* note 109, at 71.

[114] Mosk, *supra* note 98.

[115] Lewis, *supra* note 89, at 89.

[116] 33 U.S. 131 (1948)

[117] *Paramount*, 33 U.S. at 166.

[118] Mosk, *supra* note 98.

[119] Lewis, *supra* note 88, at 127.

[120] *Id*.

[121] *Id*. at 127, 129.

[122] *Id*. at 129.

[123] *Id*. at 128.

[124] *Id*.

[125] *Id*. at 135.

[126] 390 U.S. 629 (1968).

[127] *Id*. at 630.

[128] Lewis, *supra* note 88, at 140 (emphasis in original); *see also Ginsberg*, 390 U.S. at 636 (holding that "the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined").

[129] 390 U.S. 676 (1968).

[130] *Id*. at 682.

[131] *Id*. at 689.

[132] *Id*. at 690.

[133] Septimus, *supra* note 109, at 72.

[134] Mosk, *supra* note 98, at 136.

[135] Septimus, *supra* note 109, at 71.

[136] *Id*.

[137] Jack Valenti, *The Movie Rating System*, *reprinted* in Swope v. Lubbers, 560 F. Supp. 1328, app. at 1335 (D. Mich. 1983).

[138] Id.

[139] Lewis, *supra* note 88, at 140.

[140] Mosk, *supra* note 98, at 136-37.

[141] Jack Valenti, Personal Statement (1968) (on file with author).

[142] Jack Valenti, *The Movie Rating System*, *reprinted* in Swope v. Lubbers, 560 F. Supp. 1328, app. at 1335 (D. Mich. 1983).

[143] Lewis, *supra* note 88, at 141.

[144] Jack Valenti, *The Movie Rating System*, *reprinted* in Swope v. Lubbers, 560 F. Supp. 1328, app. at 1335 (D. Mich. 1983).

[145] *Id*.

[146] *Id*. at 1338.

[147] *Id*. at 1337-38. The original rating system included X and M (Mature) ratings and did not include the PG, PG-13 and NC-17 ratings. The NC-17 rating eventually replaced the X rating, the PG rating eventually replaced the M rating, and the PG-13 rating was added in the 1980s in response to movies such as "Gremlins" and "Indiana Jones and the Temple of Doom."

[148] *Id*. at 1337-38. The original rating system included X and M (Mature) ratings and did not include the PG, PG-13 and NC-17 ratings. The NC-17 rating eventually replaced the X rating, the PG rating eventually replaced the M rating, and the PG-13 rating was added in the 1980s in response to movies such as "Gremlins" and "Indiana Jones and the Temple of Doom."

[149] *Id*. at 1337.

[150] *Id*. at 1338.

[151] Swope, 560 F. Supp. at 1339.

[152] *Id*.

[153] Mosk, *supra* note 99, at 137.

[154] 315 F. Supp. 824 (E.D. Pa. 1970).

[155] *Id*.

[156] *Id*. at 825

[157] *Id*.

[158] *Id*. at 826.

[159] *Id*. (emphasis added).

[160] 317 F. Supp. 1133 (E.D. Wis. 1970).

[161] *Id*. at 1134.

[162] *Id*. (quoting Kenosha Code of General Ordinances §11.111-A-2 (1970)).

[163] *Id*. at 1135.

[164] *Id*.

[165] Eastern Fed. Corp. v. Wasson, 316 S.E.2d 373 (1984).

[166] *Id*. at 452.

[167] 888 F. Supp. 97 (E.D. Wisc. 1995).

[168] *Id*. at 98.

[169] *Id*. The relevant part of the policy states that "*No films having a rating of R, NC17, or X shall be shown to students at any school*." *Id*. (quoting Kenosha School District Policy § 6161.11) (emphasis in original). The court thus properly found that, "when determining which films may be shown in school, the School District relies on the ratings established by the voluntary movie rating system of the…MPAA…." *Id*.

[170] *Id*. at 99.

[171] *Id*.

[172] *Id*. at 100.

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*. at 100-01.

[177] *See infra* note 148.

[178] Of course, there is also the question of whether the Amendment's reliance constitutes an impermissible delegation of authority and violation of the separation of powers. However, because this issue was not before the court in *Wolf*, it will not be discussed in further detail.

[179] Scott v. Mississippi Dep't of Corrections, 961 F.2d 77, 80-81 (6th Cir. 1992).

[180] Wolf v. Ashcroft, 297 F.3d 305 n.5 (3rd Cir. 2002) (emphasis in original).

[181] *Id*. at 310.

[182] Waterman v. Farmer, 183 F.3d 208, 213-14 (3rd Cir. 1999) (quoting Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998)).

[183] *See supra* notes 81-84 and accompanying text. *But see* Scott v. Mississippi Dep't of Corrections, 961 F.2d 77, 81 (5th Cir. 1992) (holding that "[f]actor one is simply a restatement of rationality review….As we have said, this is the controlling question posed by these cases; the other factors merely help a court determine if the connection *is* logical").

[184] This standard is similar to rational-basis review, under which a statutory classification can be declared unconstitutional only where the relationship of the classification to the asserted goal is 'so attenuated as to render the distinction arbitrary or irrational.' *Waterman*, 183 F.3d at 215.

[185] 261 F.3d 896 (9th Cir. 2001).

[186] *Id*. at 902.

[187] *Id*.

[188] *Id*. at 902.

[189] *Id*.

[190] Morrison v. Hall, 261 F.3d 896, 903 (9th Cir. 2001).

[191] Kerby Anderson, Film Study, *at* http://www.probe.org/docs/c-film.html (last visited Feb. 29, 2004). The study was conducted by "U.C. Irvine economics professor Arthur DeVany" and reviewed the grosses of "2015 movies released between 1985 and 1996." *Id*.

[192] *Id*.

[193] The government also cited security as an interest served by banning R, X, and NC-17 films. Because prisoners would only be viewing these films and not receiving videotapes, it is difficult to see how this interest is relevant. Unlike in cases involving incoming mail, there is no danger here that allowing prisoners to merely view movies could potentially result in the introduction of illegal contraband into the prison. Any other security concern would likely be too attenuated to be relevant.

[194] Swope v. Lubbers, 560 F. Supp. 1328, 1337 (W.D. Mich. 1983).

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

[196] 286 F.3d 311 (6th Cir. 2002).

[197] *Id*. at 320.

[198] *Id*.

[199] *Id*.

[200] Thornburgh v. Abbott, 490 U.S. 401, 417 (1989); Amatel v. Reno, 156 F.3d 192, 201 (D.C. Cir. 1998); Kikumura v. Turner, 28 F.3d 592 (7th Cir. 1994); Scott v. Mississippi Dep't of Corrections, 961 F.2d 77, 80-81 (6th Cir. 1992).

[201] Thornburgh v. Abbott, 490 U.S. 401, 417 (1989) (construing *Turner* and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)). In *Turner*, the Court viewed the right expansively as the right of expression; consequently, it "did not require that prisoners be afforded other means of communicating with inmates at other institutions…." *Id*. Thus, the second factor was satisfied solely because "other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available…." *Id*.

Similarly, in *O'Lone*, the Court did not "require that there be alternative means of attending the Jumu'ah religious ceremony." *Id*. (internal citation omitted). Instead of defining the right narrowly as the right to attend this specific ceremony, the Court looked broadly at the right to the free exercise of religion and found this factor satisfied because the "prisoners were permitted to participate in other Muslim religious ceremonies." *Id*.

[202] *Id*. at 403.

[203] *Id*. at 418.

[204] 482 U.S. 342 (1987).

[205] *Id*.

[206] *Id*. at 352.

[207] *Id*.

[208] *Id*.

[209] Amatel v. Reno, 156 F.3d 192, 201 (D.C. Cir. 1998).

[210] *Id*.

[211] Thornburgh v. Abbott, 490 U.S. 401 (1989).

[212] *Id*. at 403.

[213] *Id*. at 405.

[214] *Id*. at 416, 417 n. 15.

[215] 28 F.3d 592 (7th Cir. 1994).

[216] *Id*. at 598.

[217] *Id*.

[218] 261 F.3d 896 (9th Cir. 2001).

[219] *Id*. at 904 (holding that, "[a]lthough radio and television are alternative media by which inmates may receive information about the 'outside' world, they should not be considered a substitute for reading newspapers and magazines").

[220] *Id*. at n.7 (noting that, "[a]ccording to *The Los Angeles Times*, the 1992 National adult Literacy Survey 'found that two-thirds of adult prisoners were not able to write a letter

explaining a billing error or extract information from the average sports-page story").

[221] This presumption is supported by the fact that the majority of films winning the Oscar for Best Picture since the advent of the MPAA ratings have been historical dramas rated R.

[222] Scott v. Mississippi Dep't of Corrections, 961 F.2d 77, 80-81 (6th Cir. 1992) (interpreting the Court's holding in *Turner*).

[223] *Id*. at 81.

[224] *Id*. at 81 n.17.

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

[226] *Id*. This is because of "the necessarily closed environment of the correctional institution…." *Id*.

[227] Beerhide v. Suthers, 286 F.3d 1179, 1190 (10th Cir. 2002).

[228] Kikumura v. Turner, 28 F.3d 592, 599 (7th Cir. 1994).

[229] 183 F.3d 208 (3d Cir. 1999).

[230] *Id*. at 219-20.

[231] *Id*. at 219.

[232] 261 F.3d 896 (9th Cir. 2001).

[233] *Id*. at 902.

[234] 156 F.3d 192 (D.C. Cir. 1998).

[235] *Id*. at 194.

[236] *Id*. at 201.

[237] Scott v. Mississippi Dep't of Corrections, 961 F.2d 77, 78 (6th Cir. 1992).

[238] *Id*. at 81 (emphasis added).

[239] Turner v. Safley, 482, U.S. 78, 82 (1987).

[240] *Id*. at 98.

[241] Film Advisory Board, FAB Rating System, *available at* http://www.filmadvisoryboard.org/ratings/Default.asp (last visited Feb. 29, 2004).

[242] "If there are components of gratuitous violence, sex, nudity, substance abuse, etc., the FAB rating so advises, so you can make an informed choice in selecting entertainment…." Film Advisory Board, About FAB, *at* http://www.filmadvisoryboard.org/about/Default.asp (last visited Feb. 29, 2004).

[243] Kids-In-Mind, Movie Ratings That Actually Work, *at* http://www.kids-in-mind.com (last visited Feb. 29, 2004).

[244] Kids-In-Mind, The Idea Behind Our Rating System, *at* http://www.kids-in-mind.com/help/methodology.htm (last visited Feb. 29, 2004).

[245] *Id.*

[246] *Id*.

[247] Another example is http://psvratings.com, where films are rated on different indices based on their profanity, sexual content, and violence. *See* PSVRatings, PSVRatings FAQs, *at* http://psvratings.com/FAQs.html (last visited Feb. 29, 2004).

[248] *See infra* note 74 and accompanying text.

[249] 150 F. Supp.2d 36 (D. D.C. 2001).

[250] For instance, in Waterman v. Farmer, the Third Circuit cited with approval the District Court for the District of Columbia's decision in Amatel v. Reno several times. 183 F.3d 208, 212, 214, 215, 217, 218, 219 (3d Cir. 1999).

[251] *Kimberlin*, 150 F. Supp.2d at 38. The court did find unconstitutional on equal protection grounds an exception to the Zimmer Amendment for funding for such instruments for religious uses. *Id*. at 48-50.

[252] *Id*. at 45.

[253] *Id*.

[254] *Id*. at 46.

[255] *Id*.

[256] *Id*. at 45.

[257] *Id*.

[258] *Id*. at 47.