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Not a Part of Her Sentence: Applying the Supreme Court's *Johnson v. California* to Prison Abortion Policies

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NOTES

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APPLYING THE SUPREME COURT'S *JOHNSON V. CALIFORNIA* TO PRISON ABORTION POLICIES

I. INTRODUCTION

Much of the mainstream reproductive rights movement is framed around the concept of choice: the choice to use birth control, the choice to have children, and the choice to terminate a pregnancy. Although the freedom to choose abortion is central to a woman's right to control her body, for many women reproductive freedom is not a matter of choice.[1] Each year, thousands of women in the United States cannot choose abortion because considerations such as high costs, lack of access, and restrictions on welfare present major obstacles to the exercise of their reproductive rights. Nowhere is access to abortion more precarious, however, than in prison. Most prisons and jails either deny women access to abortion outright, or place regulations and restrictions on access that effectively deny inmates freedom of choice. Because there are few national or state-wide prison abortion policies, the reproductive rights of women in prison are subject to the whim of politicians, prison administrators, judges, and prison doctors, who decide whether to allow female inmates to terminate their pregnancies, or whether the inmates will carry their pregnancies to term. As the population of women in prisons grows exponentially each year, the lack of reproductive freedom for prisoners becomes increasingly problematic.

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[1] *See* Jael Silliman, *Introduction* to POLICING THE NATIONAL BODY: RACE, GENDER AND CRIMINALIZATION, at xi (Jael Silliman & Anannya Bhattacharjee eds., South End Press 2002).

Prison regulations that deny or restrict inmate abortions violate inmates' right to an abortion under *Roe v. Wade*, and do not pass the *Planned Parenthood v. Casey* prohibition against an "undue burden" on abortion rights.[2] These regulations also violate the Supreme Court's requirement of an exception for the life and health of the mother.[3] Unfortunately, challenging these policies in the judicial system is of little help when courts follow the Supreme Court's *Turner v. Safley*[4] standard for evaluating a prison regulation that restricts an inmate's constitutional rights. Under *Turner*, courts are highly deferential towards prison administrators' choices in policy-making: a prison regulation that infringes on a constitutional right is valid if it is "reasonably related to legitimate penological interests."[5] By requiring nothing more than a logical connection between a prison regulation and a penological interest, the Supreme Court has made this standard into a rational basis review, allowing prison administrators great leeway in restricting prisoner rights.

Two cases challenging prison abortion policies in federal circuit court, *Monmouth County Correctional Institution Inmates v. Lanzaro*[6] and *Victoria W. v. Larpenter*,[7] have applied the *Turner* deferential standard. These two circuits, however, came to opposite holdings after applying *Turner*, resulting in a circuit split over whether restrictive prison abortion policies

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[2] *See* Roe v. Wade, 410 U.S. 113, 163 (1973) (finding a state cannot prohibit abortion in the first trimester of pregnancy); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (reaffirming the right to an abortion in the first trimester under *Roe*; finding state cannot place an undue burden on a woman's right to choose abortion before viability).

[3] *See Casey*, 505 U.S. at 879 (in which the Court reaffirmed Roe v. Wade's holding that the state can regulate abortion before viability except where it is necessary for the preservation of the life or health of the mother); *see also* Sternberg v. Carhart, 530 U.S. 914, 914-16 (2000) (in which the Court struck Nebraska's ban on so-called "Partial Birth Abortions" because the law did not include an exception for the life and health of the mother).

[4] *See* Turner v. Safley, 482 U.S. 78 (1987). In addition, the Prison Litigation Reform Act of 1995 may make it even more difficult for an inmate to reach federal court to challenge prison abortion policies, because the Act requires an inmate to exhaust all avenues of administrative relief in the prison before they may sue in federal court. *See* 42 U.S.C. § 1997e(a) (1980).

[5] *Turner*, 482 U.S. at 89.

[6] Monmouth County Corr. Inst'l Inmates v. Lanzaro, 834 F.2d 326, 338 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

[7] Victoria W. v. Larpenter, 369 F.3d 475, 484 (5th Cir. 2004).

are constitutional.[8] In *Monmouth*, New Jersey inmates brought a class action suit in federal court challenging a prison policy that required a court order to obtain an abortion.[9] Applying *Turner*, the Third Circuit found the policy was unconstitutional because it was not reasonably related to a legitimate penological interest and so did not satisfy the *Turner* standard and violated the inmates' Fourteenth and Eighth Amendment rights.[10] In *Victoria W.*, decided in May of 2004, the Fifth Circuit came to an almost opposite conclusion evaluating a very similar abortion policy.[11] In *Victoria W.*, an individual inmate argued that an analogous policy requiring a court order to obtain an abortion violated her Fourteenth and Eighth Amendment rights by denying her access to abortion.[12] The Fifth Circuit found that the policy was constitutional because it satisfied the *Turner* standard.[13] As a result of these two precedents, inmates housed in prisons in the Third Circuit have a categorical right to choose abortion, while inmates in the Fifth Circuit and other Circuits do not.

Because the Supreme Court has yet to consider a case evaluating a prison abortion policy,[14] lower courts are not entirely clear as to how and where *Turner* applies. Presumably, Circuit Courts would evaluate a prison abortion policy similarly to the *Monmouth* or *Victoria W.* courts, by using the *Turner* standard. Upholding an abortion restriction under *Turner*, however, may have an enormous effect on inmates seeking to terminate their pregnancies. A woman in prison may be forced to carry her child to term, thereby

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[8] It is important to note, however, one critical difference between these two cases. In the *Monmouth* case, the plaintiff inmates applied for injunctive relief to order the prison to allow abortions for inmates, and to declare the prison's court order policy unconstitutional. *Monmouth*, 834 F.2d at 328. In contrast, the inmate in *Victoria W.* sued the jail for civil damages stemming from their denial of her abortion rights due to the court order policy. *Victoria W.*, 369 F.3d at 480-81. A court may be more likely to give injunctive relief to an inmate that needs an abortion immediately, than to award civil damages to an inmate who was previously denied an abortion because of a prison policy. There are two reported decisions in which district courts provided an emergency injunction ordering a prison to allow an inmate access to abortion, and there may be numerous unreported cases. Roe v. Crawford, 396 F. Supp. 2d 1041, 1042 (W.D. Mo. 2005); Roe v. Leis, 2001 WL 1842459 (S.D. Ohio 2001).

[9] *Monmouth*, 834 F.2d at 328.

[10] *Id.* at 344.

[11] *Victoria W.*, 369 F.3d at 485.

[12] *Id.* at 481.

[13] *Id*. at 478.

[14] In *Monmouth*, the Supreme Court denied the government's petition for *certiorari*, [*Monmouth*, 486 U.S. at 1006] while in *Victoria W.*, the inmate's lawyers chose not to apply for *certiorari* to the Supreme Court.

changing her and the child's life forever, in order to conform to what a prison administrator regards as a legitimate penological interest. This is contrary to the Supreme Court's abortion jurisprudence under *Planned Parenthood v. Casey*, which prohibits regulations on abortions that place an undue burden on the right to choose before the fetus attains viability.[15] For women in prison, the burdens on obtaining an abortion that are imposed by prison regulations are too high to be constitutional under *Casey*. For this reason, abortion restrictions should not be evaluated under the *Turner* deferential standard, but held to the *Casey* "undue burden" standard instead.

The long-established *Turner* standard is not impenetrable. In 2005, the Supreme Court declined to use *Turner* in a remarkable prisoner rights case that may leave room for advocates to argue that applying the deferential *Turner* standard is not constitutional in all situations. In *Johnson v. California*,[16] a case originating in the Ninth Circuit, the Supreme Court found that *Turner* should not be used to evaluate a prison's racial segregation policy, but that instead a court should use the strict scrutiny standard it would employ for all invidious discrimination based on race.[17] Noting that the Court applies *Turner* "*only* to rights that are 'inconsistent with proper incarceration,'"[18] the *Johnson* decision explicitly dispelled the notion that courts must necessarily be deferential to prison administrators in all cases. In fact, the *Johnson* court ordered courts to evaluate whether a right "need necessarily be compromised for the sake of proper prison administration," a threshold inquiry that will liberate many cases from the *Turner* test.

This note submits that, similar to the decision in *Johnson*, *Turner* should not be used to evaluate prison regulations that restrict inmates' abortion rights. Just as racial segregation in prisons should be subject to strict scrutiny, prison abortion policies should not be evaluated under *Turner*; instead, they should be evaluated under the *Casey* "undue burden" standard. *Turner* should not be applied because abortion is more similar to rights not evaluated under *Turner* and less similar to rights that are; and because the Supreme

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[15] Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992).

[16] Johnson v. California, 125 S. Ct. 1141 (2005).

[17] *Id*. at 1148-49.

[18] *Id*. at 1149 (citing Overton v. Bazzetta, 539 U.S. 126, 131 (2003) (emphasis in original)).

Court's *Johnson* decision dictates that *Turner* should not be applied to abortion policies.

To provide the reader with context, Part II will present an overview of women in prison, outline abortion policies in federal and state prisons, and explain how these policies affect female inmates. Part III will describe *Turner* and its progeny, and the standard for evaluating prison regulations that restrict constitutional rights. Part III will also consider *Johnson v. California*, in which the Supreme Court chose not to follow *Turner* in favor of a stricter standard of review. Part IV will closely examine *Monmouth* and *Victoria W.,* the two Court of Appeals cases in which inmates challenged abortion policies. Part V will argue that *Turner* should not be applied to review prison abortion policies. Finally, Part VI will submit that courts should evaluate prison abortion policies under the *Casey* undue burden standard, and describe how *Victoria W.* would have been decided under *Casey*.

Although incarceration necessarily involves punishment, the Supreme Court has recognized that inmates do retain certain constitutional rights while in prison.[19] The delicate balance between an inmate's right to an abortion and a prison's need for security and stability makes evaluating prison abortion policies difficult. However, denying an inmate access to abortion is a form of punishment that affects female inmates and their families for the rest of their lives. Therefore, forcing an inmate to give birth in prison against her wishes is unconstitutional, and should not be a part of her sentence.

II. BACKGROUND: FEMALE INMATES AND PRISON ABORTION POLICIES

Although women are the fastest growing inmate population in the country today,[20] prisons are still built according to a male model in many ways.[21] Not only are many

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[19] *See generally* Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue,* 77 OR. L. REV. 1229 (1998) (describing the history of prisoner rights cases in the Supreme Court); *see also* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("[N]o iron curtain [is] drawn between the Constitution and the prisons of this country.").

[20] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PRISON AND JAIL INMATES AT MIDYEAR 2004 5 (2004), *available at* http://www.ojp.usdoj.gov/bjs/prisons.htm.

[21] *See* Jennifer Arnett Lee, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 252-54 (2000); *see also* Deborah LaBelle and Sheryl

inmates denied medical care that responds to their particular needs as women,[22] most federal and state prisons have policies that restrict or deny abortion access to inmates.[23] Part II of this note describes state and federal prison abortion policies, and the effect these policies have on women in prison and children born to incarcerated mothers.

There are currently more than 180,000 female inmates in state or federal correctional institutions in the United States.[24] The number of female inmates has been increasing rapidly in the past decade: between 1990 and 2000, the number of women in prison increased by 114 percent.[25] Women in prison are disproportionately drawn from economically and politically disadvantaged populations:[26] African-American and Hispanic women are far more likely than white women to be incarcerated;[27] female inmates often do not have a high school education when they enter prison;[28] they have frequently been physically or sexually abused before incarceration;[29] and they were likely unemployed, or on government assistance, at the time of their arrest.[30]

Pimlott Kubiak, *Balancing Gender Equity for Women Prisoners*, 30 FEMINIST STUDIES 2, 416-20 (2004) ("This article explores how the legal right to "substantially equivalent" treatment and facilities for female prisoners was jeopardized by an administrative interpretation of [] policy as gender neutral, thereby minimizing the gender differences the case sought to protect."); *see also* NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS AND SOCIAL CONTROL xii, 195-207 (1997).

[22] Ellen Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16-SPG CRIM. JUST. 39, 39 (2001).

[23] *See generally* Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUDIES 353 (2004) [hereinafter Roth, *Do Prisoners*].

[24] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PRISON AND JAIL INMATES AT MIDYEAR 2004 5, 8 (2004), *available at* www.ojp.usdoj.gov/bjs/prisons.htm (stating that the number of women in prison is over 103,000 and the number of women in jails is over 86,000). For this Note, references to state and federal correctional institutions include both prisons and jails. Jails are locally operated correctional facilities that confine persons before or after adjudication, often for less than one year. Prisons house inmates with longer sentences until they are released on parole or probation. *Id.* at 7.

[25] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PRISON AND JAIL INMATES AT MIDYEAR 2001, 5 (2001), *available at* www.ojp.usdoj.gov/bjs/prisons.htm.

[26] Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1, 12 (2003).

[27] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PRISON AND JAIL INMATES AT MIDYEAR 2004, 11 (2004), *available at* www.ojp.usdoj.gov/bjs/prisons.htm.

[28] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: EDUCATION AND CORRECTIONAL POPULATIONS, 5 (2003), *available at* www.ojp.usdoj.gov/bjs/prisons.htm.

[29] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PROFILE OF JAIL INMATES 2002, 10 (2004), *available at* www.ojp.usdoj.gov/bjs/prisons.htm.

[30] DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: INCARCERATED PARENTS AND THEIR CHILDREN, 10 (2000), *available at* www.ojp.usdoj.gov/bjs/prisons.htm.

An estimated six to ten percent of women enter prison or jail pregnant.[31] Other women become pregnant while they are in prison via illegal relationships with guards, or because male guards have raped them.[32] For the women in prison whose abusers are corrections officers who work at the prison, the rate of sexual assault has been estimated to be as high as one in four in some facilities.[33] Although there are some news articles and reports exposing these violations, they are highly under-reported by the media.[34]

There is no national policy for inmates who wish to discontinue their pregnancies, and access to abortion varies according to where a woman is incarcerated. The Federal Bureau of Prisons governs federal prisons; state governments create state prison policies via their state Departments of Correction; and jails are run by local municipalities. Federal,

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[31] Bruce Tomaso, *Full Term Babies; For Women Who Give Birth in Prison, It's A Hard Time*, CHI. TRIB., Apr. 14, 1999, at 10.

[32] *See generally, e.g.*, AMNESTY INT'L, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody,* (Mar. 1, 1999), *available at* http://web.amnesty.org/library/Index/engAMR510011999 (a report that details the sexual abuse of female inmates in all fifty states) [hereinafter AMNESTY INTERNATIONAL]; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1 (1996) (describing the sexual abuse of female inmates in California, the District of Columbia, Georgia, Illinois, Michigan and New York); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RESEARCH 3, 5 (Aug. 2002), *available at* http://www.spr.org/pdf/Struckman021.pdf. There are also multiple federal court cases that detail sexual abuse of inmates by guards: Beers-Capitol v. Whetzel, 256 F.3d 120, 124-25 (3d Cir. 2001); Downey v. Denton County, Texas, 119 F.3d 381, 383-84 (5th Cir. 1997); Everson v. Michigan Dep't of Correct., 391 F.3d 737, 739-41 (6th Cir. 2004); Williams v. Prudden, 67 Fed. Appx. 976, 977 (8th Cir. 2003); Berry v. Oswalt, 143 F.3d 1127, 1129 (8th Cir. 1998); Giron v. Correct. Corp. of America, 191 F.3d 1281, 1284 (10th Cir. 1999); Barney v. Pulsipher, 143 F.3d 1299, 1304-1305 (10th Cir. 1998); Women Prisoners of the D. C. Dept. Correct. v. D. C., 93 F.3d 910, 914 (D.C. Cir. 1996).

[33] Human Rights Watch, *Editorial: Doing Something About Prison Rape*, September 26, 2003, *available at* http://www.hrw.org/editorials/2003/prison092603.htm.

[34] Gary Craig, *Suit Alleges Rampant Female Inmate Abuse*, ROCHESTER DEMOCRAT AND CHRON., Jan. 29, 2003, at 1A; Joanne Wasserman, *Prison Rapes 'Routine,'* DAILY NEWS (New York), Jan. 28, 2003, at 8; Tim Smith, *Prison Guards Indicted in Sex Scandal*, THE GREENVILLE NEWS (S.C.), Apr. 20, 2001, at 1A; Sue Anne Pressley, *Inmate Sex Scandal Roils South Carolina; 'Culture of Corruption' Alleged*, WASH. POST, Jan. 21, 2001, at A3; Steven A. Holmes, *With More Women in Prison, Sexual Abuse by Guards Becomes Greater Concern*, N.Y. TIMES, Dec. 27, 1996, at 18; Ivan Penn, *Sex Probe at Detention Center Grows; Correctional Officer Becomes Second Placed on Leave; Seven-week Inquiry; Male Officers, Female Inmate Focus of Allegations*, THE BALT. SUN, Sept. 10, 1996, at 1B; Mary A. Mitchell, *'Culture of Abuse' Forced Georgia to Close Prison*, CHI. SUN-TIMES, July 15, 1996, at 5; Toni Locy, *Officer Describes 'Auction' of Female Inmates at D.C. Jail,* WASH. POST, Mar. 9, 1995, at C01; Eric Harrison, *Nearly 200 Women Have Told of Being Raped, Abused in Georgia Prison Scandal So Broad Even Officials Say It's a 13-Year Nightmare*, L.A. TIMES, Dec. 30, 1992, at 1.

state and local legislative bodies typically delegate broad powers to prison officials in managing prisons and jails.[35] In addition, very little is known about how prisons regulate abortions because oftentimes these policies are unwritten.[36] This means that prisoners and their advocates have few ways to organize for the reproductive rights of inmates.

In the federal prison context, abortion policy is subject to congressional control and political lawmaking. Before 1987, the Federal Bureau of Prisons paid for all prisoner abortions. In 1987, however, Jesse Helms and other Republicans in Congress successfully organized to include a funding ban on abortions in a Department of Justice appropriations bill.[37] Today, because of this funding ban, Bureau of Prison policies only pay for "medically necessary" abortions, although if the inmate's life is not in danger and she chooses an "elective" abortion, federal prisons do make arrangements for travel outside the facility.[38] Women detained by immigration authorities are also under federal jurisdiction and subject to the funding ban on abortion. Therefore, women seeking asylum who request an abortion, even those who have been raped, may be impeded (or prevented) from seeking abortions.[39]

State Departments of Correction have widely varying policies on abortion access. Nine state Departments of Correction have official policies providing women with essentially unrestricted access to abortion in the first trimester.[40] Six states and the District of Columbia fund only medically necessary abortions.[41] In eight states, prisoners have

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[35] Rachel Roth, *Searching for the State: Who Governs Prisoner's Reproductive Rights?* 11 SOC. POL. 411, 418 (2004) [hereinafter Roth, *Searching for State*].

[36] Roth, *Do Prisoners*, *supra* note 23, at 354.

[37] Fiscal Year 1987 Continuing Resolution for Appropriations, Pub. L. No. 99-500, 100 STAT. 1783 (1987) (General Provisions, Department of Justice, Section 209: "None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered . . . or in the case of rape.").

[38] 28 C.F.R. § 551.23 (1999). In this Note, an "elective" abortion is one that the inmate chooses because she wishes to terminate her pregnancy. A "medically necessary" abortion is one that is necessary because the inmate's life is in danger.

[39] Roth, *Do Prisoners*, *supra* note 23, at 361.

[40] *Id.* at 364 (listing California, Connecticut, Georgia, Hawaii, New Jersey, New York, Oregon, Vermont and Washington as the states with unrestricted access).

[41] *Id.* at 366 (stating that the District of Columbia, Massachusetts, Minnesota, Nevada, New Mexico, Tennessee and West Virginia fund only medically necessary abortions). Roth notes that this language of "medically necessary" and "elective" abortions is similar to that of "therapeutic" and "non-therapeutic" abortions, descriptions used in the era of illegal abortions when doctors and hospitals had to determine whether they were breaking the law by providing abortions. *Id.* at 362.

access to abortion on the same basis as other "elective" medical care. In these cases, the inmate must put in a request to prison officials, wait for permission subject to the whim of the administration, and then pay for all transportation and security.[42] In many prisons, the inmate is required to get a court order for an abortion, even if she agrees to pay for all of the expenses.[43] In Nevada, the prisoner is required to see a psychologist before she gains permission for an abortion.[44] In Nebraska and Illinois, the inmate must be eligible for release on furlough, which places substantial obstacles for women in medium or maximum security situations.[45] And lastly, fourteen states have no official written abortion policy.[46] In states with no policy, women in different prisons in the same state may have differing access to abortion, and all inmates may have to wait for the prison to decide on its policy before they are or are not granted the procedure.

In addition, state prison abortion policies are dependent on state abortion law. Twenty-five states have laws that require mandatory waiting periods to obtain an abortion[47] and in these states inmates must make two trips out of the prison or stay overnight close to an abortion clinic. This means increased costs and additional time delays in addition to prisons' restrictive policies.

Because a female inmate's decision to have an abortion is subject to the whim of prison and jail administrators in their respective states, inmates' constitutional rights to abortion are being drastically curtailed in many situations. The rare instances in which a prison abortion restriction is challenged provide only a few examples of the myriad of cases that are not brought to litigators' attention. A few of these stories follow.

Most recently, the United States Supreme Court intervened in a case in which Missouri federal district and circuit courts ordered a state prison to allow an inmate to

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Therefore, if prison policies allow only medically necessary abortions, female inmates at these prisons are living within a pre-*Roe* world of abortion rights.

[42] *Id.* at 366-67 (listing Arkansas, Colorado, Michigan, Nebraska, South Carolina and Texas as the states with limited access).

[43] *See* Victoria W. v. Larpenter, 369 F.3d 475, 477 (5th Cir. 2004); Monmouth County Corr. Inst'l Inmates, 834 F.2d 326, 328 (3d Cir. 1987).

[44] Roth, *Do Prisoners*, *supra* note 23, at 367.

[45] *Id.* at 367.

[46] *Id.* at 368.

[47] Center for Reproductive Rights, *Mandatory Delays and Biased Information Requirements*, *available at* http://www.crpl.org/st_law_delay.html (last visited Mar. 3, 2006).

obtain an abortion despite fierce resistance from the prison.[48] The inmate was pregnant when she was sent to prison for a parole violation, and tried for seven weeks to obtain an abortion.[49] She had offered to pay for the procedure herself, but needed the prison to arrange for transportation to an abortion clinic.[50] The prison refused to do so because of a Department of Corrections policy that does not allow for transportation of inmates for abortions that are not "medically necessary."[51] After her mother frantically contacted the American Civil Liberties Union and they filed a law suit,[52] the district court ordered the state to provide transportation for the abortion.[53] The district court found that the inmate would suffer irreparable injury if she was denied the procedure, and this would impinge on her constitutional rights.[54] The prison first appealed to the Eighth Circuit, which refused to stay the district court's order, and then to the United States Supreme Court.[55] Justice Thomas, who has administrative jurisdiction over the Eighth Circuit, granted the state an emergency stay, and this blocked the abortion procedure.[56] Three days later, however, the full Supreme Court vacated Thomas's stay and allowed the procedure to go forward.[57]

Similarly, the ACLU in Arizona sued the sheriff of Maricopa County, Arizona, for an unwritten policy requiring a court order to allow transport of an inmate to obtain an abortion.[58] The court granted the plaintiffs' motion for summary judgment, finding the policy unconstitutional.[59] The

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[48] Linda Greenhouse, *Supreme Court Roundup: Prison Abortion Rights*, N.Y. TIMES, October 18, 2005, at 18.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] Erin Suess, *ACLU Attorney Takes On State Over Female Inmate's Right to Have Abortion*, KAN. CITY DAILY REC., Oct. 23, 2005.

[53] Roe v. Crawford, 396 F. Supp. 2d 1041, 1045 (W.D. Mo. 2005).

[54] *Id*. at 1044-45. The district court quoted *Roe v. Wade* as describing the detriment a state would impose upon a woman by denying her this choice; found that the prison had no legitimate penological interest in denying inmates abortions; and stated that the prison's deliberate indifference to the inmate's serious medical needs violated the Eighth Amendment. *Id*. at 1043-44.

[55] Greenhouse, *supra* note 48, at 18.

[56] *Id*.

[57] *Id*. *See* Crawford v. Roe, 126 S. Ct. 477 (2005).

[58] Doe v. Arpaio, No. CV 2004-009286, 2005 WL 2173988, at *1 (Ariz. Super. Aug. 25, 2005); *see also* Christina Leonard, *Inmates' Advocates Challenge Arpaio's Abortion Roadblocks*, ARIZ. REPUBLIC, Oct. 15, 2004, at 1A.

[59] *Arpaio*, 2005 WL 2173988 at *1.

sheriff wanted the state appellate courts to reconsider the case, stating "I don't run a taxicab service for people in jail."[60] Before the court's decision, the sheriff expressed his personal opposition to abortion on national television, saying that he would not transport female inmates to an abortion clinic, and that no prisoner would get an abortion unless a court ordered him to transport them.[61] The sheriff admitted that it was fine if the inmate had to wait a long time for a court order, for "the gal may have the baby by the time it gets through the court system. . . . But we'll take care of them [once they're pregnant] in jail, like all medical conditions."[62]

In 2002 a judge in Ohio declared in open court that she was sending a young woman to jail on a forgery charge simply because the woman stated her intention to have an abortion if she was released on parole.[63] While in jail the woman begged and pleaded with jail officials to allow her to get an abortion, but the inmate was released too late to get an abortion and gave birth.[64] The county later settled with the woman for a small amount of money damages, and suspended the judge from the bench for six months.[65]

Lastly, in the Spring of 2002, a 17-year old woman from Texas was sentenced to sixty days in boot camp.[66] When she found out she was pregnant, she was ordered to serve her time in a privately run residential treatment center.[67] After consulting with her mother, the young woman decided to have an abortion.[68] When she was told by the center that she needed a court order for an abortion, a lawyer argued her case before a state court judge.[69] The judge refused her request, saying an abortion was not in the young woman's best interest.[70] The

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[60] Michael Kiefer, *Rule on Inmate Abortion Sought*, ARIZ. REPUBLIC, Oct. 20, 1995, at 9B.

[61] *The O'Reilly Factor: Back of the Book* (FOX television broadcast Oct. 28, 2004).

[62] Leonard, *supra* note 58.

[63] John F. Hagan, *Jail OKs Altered Abortion Policy; Settlement Includes Payment to Woman Jailed by Former Judge,* PLAIN DEALER (Cleveland, OH), June 4, 2002, at B1; Press Release, ACLU, Settlement of ACLU of Ohio "Pregnant Prisoner" Case Brings New Protections for Women in Jail (June 4, 2002), *available at* www.aclu.org/prison/women/14683prs20020604.html (last visited Jan. 16, 2006).

[64] Hagan, *supra* note 63, at B1; Press Release, ACLU, *supra* note 63.

[65] Hagan, *supra* note 63, at B1.

[66] Roth, *Searching for State, supra* note 35, at 411.

[67] *Id*.

[68] *Id*.

[69] *Id.* at 411-412.

[70] *Id.* at 412.

mother contacted the National ACLU, and an ACLU attorney argued the case before a federal district court in Houston.[71] The federal judge gave a permanent injunction requiring the center to inform all their inmates of their reproductive rights.[72]

Restrictive abortion policies have a profound effect on female inmates forced to give birth inside prison. As detailed in the *Roe v. Wade* decision, the physical and mental harm that the state may impose by denying a woman the right to abortion may be extremely taxing:

> The detriment that the State would impose upon the pregnant woman by denying this choice is altogether apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the women a distressful life and future. Psychological harm may be imminent. . . . There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.[73]

These issues are only exacerbated when a women is pregnant and gives birth in prison. Most women enter prison with significant health issues because they are indigent or low-income and have limited or no access to health care,[74] and this may complicate their pregnancies greatly. Medical services specific to women, such as gynecology and obstetrics, are often not available in prison or are of poor quality.[75] Pregnant women are routinely transported to and from their pre-natal appointments in shackles.[76] In addition, women in all stages of

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[71] *Id.*

[72] Roth, *Searching for State, supra* note 35, at n.1

[73] Roe v. Wade, 410 U.S. 113, 153 (1973); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).

[74] Barry, *supra* note 22, at 40; s*ee also* Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L. J. 40, 42 (2003) ("Typically impoverished, these women have extremely limited access to preventative health care in the United States. Thus, it is not surprising that women entering prison have a high incidence of serious health concerns, including . . . HIV, Hepatitis C, and reproductive diseases.").

[75] WILLIAM C. COLLINS WITH ANDREW W. COLLINS, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, WOMEN IN JAIL: LEGAL ISSUES 4 (1996), *available at* http://nicic.org/Library/013770. *See* Mary Catherine McGurrin, *Pregnant Inmates' Right to Health Care,* 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163, 164-70 (1993) (discussing the inadequate prenatal care provided by women's prisons); Barry, *supra* note 22, at 40 (discussing health care inadequacies in California state women's prisons).

[76] Barry, *supra* note 22, at 41; Rachel Roth, *Justice Denied: Violations of Women's Reproductive Rights in the United States Prison System*, *at* http://www.prochoiceforum.org/uk/psy_ocr10.asp; AMNESTY INT'L, *supra* note 32

labor, including delivery, are shackled by their ankles to their hospital beds.[77] Babies born to inmates are routinely separated from their mothers within twelve to forty-eight hours after birth,[78] which may be traumatic for the mother and the infant.

When a child is born to an incarcerated mother, the state immediately gives them to a relative or parental guardian, or places them in foster care.[79] If the infant is given to the inmate's family, she may rarely see her child, because prisoners are increasingly isolated from population centers, their families, and their communities.[80] If the child is turned over to the foster care system, an incarcerated mother may soon permanently lose all parental rights to the child: the 1997 Adoption and Safe Families Act ("ASFA") requires that proceedings to terminate parental rights be initiated when the child has been in foster care for fifteen of the past twenty-two months.[81] The termination of parental rights is almost always permanent and irrevocable, meaning the mother has no parental, education or visitation rights to her child once terminated.[82]

In sum, although incarceration necessarily involves punishment, arbitrary prison abortion policies have serious

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(describing the shackling of pregnant inmates in Ohio, Massachusetts, Kentucky and Michigan); Nina Siegal, *Inmates Again Shackled During Birth, Critics Say*, N. Y. TIMES, Apr. 11, 1999.

[77] Barry, *supra* note 22, at 41; Kenda Weatherhead, *Cruel But Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States,* 13 HEALTH MATRIX 429, 450 (2003).

[78] Barry, *supra* note 22, at 41.

[79] Ronnie Halperin & Jennifer L. Harris, *Parental Rights of Incarcerated Mothers with Children in Foster Care: A Policy Vacuum*, 30 FEMINIST STUD. 339, 340 (2004).

[80] *See* Chandler, *supra* note 74, at 44; Kelly Bedard & Eric Helland, *The Location of Women's Prisons and the Deterrence Effect of "Harder" Time*, 24 INT'L REV. L. & ECON. 147, 152-58 (2004) (discussing the punitiveness of incarceration location and the expansion of the female penal system).

[81] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 675(5)(e) (1997)); *see also* Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L.J. 247, 249 (2004) (arguing inmates are doubly punished by ASFA because they face a disproportionate threat to their parental rights); Martha L. Raimon, *Barriers to Achieving Justice for Incarcerated Parents*, 70 FORDHAM L. REV. 421, 424 (2001) ("The enactment of [ASFA] exposes incarcerated parents to a very high risk of permanently losing their parental rights.").

[82] 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES§ 13.01, 2d. 3d. (1993). *See id.* at § 13.03 (where court found that a "clear and convincing evidence" standard was necessary because loss of parental rights is permanent, and an "irretrievable destruction of [] family life.") (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

consequences for female inmates that go beyond retribution for their crimes. Inmates and their advocates rely on courts to ensure that punishment does not become "cruel and unusual,"[83] but with federal courts' increasing deference to prison administrators' judgment, prisoner rights are drastically limited. Because the consequences for women seeking abortion are so severe, the Supreme Court's "hands off" policy as reflected in *Turner v. Safley* and its progeny is inappropriate in this context.

III. *TURNER* AND ITS PROGENY: THE SUPREME COURT'S TEST FOR PRISON RESTRICTIONS ON CONSTITUTIONAL RIGHTS

A. Any "Legitimate Penological Interest": Turner *and the Return to the Hands-Off Doctrine*

Historically, the Supreme Court utilized a position of almost complete deference to prison officials, considering prisoners to be "slave[s] of the State," having "not only forfeited [their] liberty, but all [their] personal rights . . . ."[84] The Court's "hands off" doctrine continued until the 1960's, when the Court ultimately found that prison inmates were deserving of limited constitutional rights.[85]

In *Procunier v. Martinez*, while reviewing a prison policy that infringed on inmates' freedom of speech, the Court first recognized the confusion among lower courts as to the appropriate standard of review in prisoner rights cases.[86] In this case, the Court acknowledged that courts were ill-equipped to deal with the administration of prisons, but recognized that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[87] The Court ultimately did not create a new standard for prisoner rights cases in

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[83] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[84] *See* Lorijean Golichowski Dei, *The New Standard of Review for Prisoners' Rights: A "*Turner*" For the Worse?*, 33 VILL. L. REV. 393, 399 (1988) (alteration to original) (citing Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J. dissenting)). *See also* Herman, *supra* note 19, at 1242-45.

[85] *See* Golichowski Dei, *supra* note 84, at 399.

[86] *Procunier v. Martinez*, 416 U.S. 396, 406 (1974) ("[T]he tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights has led the federal courts to adopt a variety of widely inconsistent approaches to the problem.").

[87] *Id*. at 405.

Martinez, basing their decision on the first amendment rights of the persons outside the prison with whom the inmates were corresponding.[88]

The first modern case to concretize a standard to determine the constitutionality of prison regulations that restrict constitutional rights was the 1987 case *Turner v. Safley*.[89] The Supreme Court, with Chief Justice Rehnquist at its helm, defined its task as creating a standard of review that would balance the prison's interest in maintaining safety and security, with the protection of inmates' constitutional rights.[90] The result, however, was a return to the earlier hands-off doctrine that paid vast deference to prison officials in determining prison policy, and diminished the rights of inmates because of their incarceration.

In *Turner*, Missouri inmates brought a class action suit challenging two prison regulations: one restricting inmate-to-inmate correspondence, the other prohibiting marriages between inmates.[91] Recognizing that "[p]rison walls do not form a barrier separating inmates from the protections of the Constitution,"[92] the Court nevertheless created a standard that was extremely deferential to prison administrators. The *Turner* Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[93] In focusing on the prison's interests, the Court based its test on the idea that it was necessary to defer to prison administrators' judgments in making prison policy, and wrong to unnecessarily involve the courts in prison affairs.[94] The Court explained that applying a strict scrutiny standard would require prison officials to predict which remedy was least restrictive, thereby hindering their ability to keep the prison secure.[95]

The Court considered four factors relevant in determining whether a prison regulation was reasonable. First, there must be a "valid, rational connection between the prison regulation and the legitimate governmental interest."[96]

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[88] *Id*. at 409, 413.
[89] 482 U.S. 78 (1987).
[90] *Id*. at 85.
[91] *Id*. at 81-82.
[92] *Id.* at 84.
[93] *Id.* at 89.
[94] *Id.*
[95] *Turner,* 482 U.S. at 89.
[96] *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

The regulation may not be upheld if the connection between it and the government interest is so remote that the policy is "arbitrary or irrational."[97] Second, a regulation is more likely to be deemed reasonable and thus given deference if there were alternative means open to inmates for exercising the constitutional right.[98] Third, the Court should consider the impact that accommodating this right would have on guards, prison resources, and other inmates.[99] And fourth, if there is an alternative to the policy, it must accommodate a prisoner's rights at a *minimum* cost to the prison's penological interests.[100]

In evaluating the inmates' challenge to the prison regulations, the *Turner* Court upheld the letter-writing restriction, but struck down the inmate marriage restriction.[101] Justice O'Connor, writing for the majority, found that the prohibition on inmate-to-inmate correspondence was reasonably related to the prison's concerns that mail could be used to communicate escape plans, exacerbated the growing problem of prison gangs, and compromised the prison's ability to provide protective custody to certain inmates.[102] In addition, the Court found that the restriction did not deprive inmates of all means of communicating with other inmates, and there were no ready alternatives to the policy available to the prison.[103]

In striking the prison's marriage regulation, the Court noted that the decision to marry was a fundamental right under prior Supreme Court law.[104] "It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'"[105] The majority noted that there were many valid reasons for allowing prisoners to marry: marriages are a sign of commitment and emotional support; marriages are a symbol of religious faith; prisoners may be released and want to live together as

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

[98] *Id.* at 90.

[99] *Id.*

[100] *Id* at 90-91 (emphasis added).

[101] *Turner,* 482 U.S. at 99-100.

[102] *Id.* at 91.

[103] *Id.* at 92-93.

[104] *Id.* at 95 (citing Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967)).

[105] *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

husband and wife; and many governmental benefits are conditioned on marital status.[106] Although the Missouri prison identified several security concerns in supporting the marriage prohibition,[107] the Court found the policy an "exaggerated response to [the prison's] security objectives," and that the rule swept much more broadly than necessary.[108] Lastly, the Court noted that there were "obvious, easy alternatives to the . . . regulation that accommodate the right to marry while imposing a [minimal] burden on . . . security."[109]

Justice Stevens, dissenting with three other justices, objected to the heightened deference afforded to prison authorities by the *Turner* majority's holding. The dissenting Justices found the *Turner* standard needlessly broad, and overly restrictive of prisoner's constitutional rights:

> [I]f the standard can be satisfied by nothing more than a '*logical* connection' between the regulation and any legitimate penological concern perceived by a cautious warden . . . it is virtually meaningless. [It] would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication . . . with outsiders.[110]

In addition, the Dissent found the Court's acceptance of the mail restrictions and rejection of the marriage restriction "striking and puzzling."[111] The majority upheld the ban on inmate correspondence based on the prison's ambiguous speculations about possible gang violence, escapes, and the fact that it would be impossible to read every piece of inmate correspondence to determine possible danger.[112] In contrast,

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[106] *Id*. at 95-96.

[107] The Missouri officials argued that the marriage restriction was necessary because "love triangles" may lead to violence, and because female prisoners were overly dependant on male figures and needed to concentrate on self-reliance. *Turner*, 482 U.S. at 97.

[108] *Id*. at 97-98.

[109] *Id.* at 98.

[110] *Id.* at 100-01 (internal citation omitted, emphasis in original).

[111] *Id.* at 112-13.

[112] *Id.* at 105-06. The prison argued that reading every inmate letter would be virtually impossible, despite the fact that at other Missouri prisons, where inmates were not prohibited from corresponding, the prisons managed to read each inmate's letters. *Id.* at 104.

the majority rejected the prison's explanation that marriage would cause dangerous "love triangles" and possible escape communications between married inmates.[113]

Following its decision in *Turner*, the Supreme Court immediately applied this more deferential review in *O'Lone v. Shabazz*[114] during the same term. In *Shabazz*, prisoners who were members of the Islamic faith challenged policies that restricted them from attending a weekly religious service in the prison.[115] For many years, Muslim prisoners were allowed to work inside, rather than outside, the prison building on Friday afternoons so that they could attend a prayer service that is a central tenet of the Islamic faith. The prison changed this policy in 1983, and the prisoners who were denied access to the prayer service sued.[116]

Applying the *Turner* four-factor test, the Supreme Court asserted that the prison regulations were valid because they were reasonably related to legitimate penological interests.[117] The Court defined the prison's legitimate penological interests as security, rehabilitation, and deterrence of crime.[118] The Court stated that requiring the prisoners to work outside the prison on Fridays was reasonably related to the prison's interest in security and order.[119] In addition, although the Court conceded that there were no alternative means of attending the Friday prayer service, the prisoners were given other opportunities to express their freedom of religion by participating in other Muslim religious rituals.[120]

In a dissent joined by four other Justices, Justice Brennan again criticized the majority for a too obsequious *Turner* analysis.[121] Brennan noted that the *Turner* standard was categorically deferential, and did not discriminate among degrees of rights deprivation.[122] Therefore, the dissent concluded, under *Turner*, "restricting the use of the prison library to certain hours warrants the same level of scrutiny as

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113 *Turner*, 482 U.S. at 113.
114 482 U.S. 342 (1987).
115 *Id*. at 342.
116 *Id*. at 345-46.
117 *Id*. at 350.
118 *Id*. at 348.
119 *Id*. at 350-51.
120 O'Lone v. Shabazz, 482 U.S. 341, 351-52 (1987).
121 *Id.* at 354.
122 *Id.* at 356.

preventing inmates from reading at all."[123] In addition, the dissent criticized the Court's automatic denial of the prisoner's four proposed viable alternatives to the restrictions.[124] However, as the dissent recognized, the *Turner* test does not require the prison to "shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[125] Finally, the dissent argued that a proper standard would require the prison to demonstrate that a regulation is necessary to further an important governmental interest, and the restrictions are no greater than necessary to achieve those interests.[126]

The Supreme Court later revisited the *Turner* deferential standard in 2003, in *Overton v. Bazzetta*.[127] In *Bazetta*, prison officials significantly restricted visitation for inmates: an inmate could only receive visits from individuals that were on an approved visitation list, except for attorneys or members of the clergy; children under the age of 18 were not allowed unless they were the children, stepchildren, grandchildren, or siblings of the inmate; if the parental rights of the inmate were terminated, the child could not be a visitor; a former prisoner could not visit unless they were a family member and only with warden approval; and prisoners who committed multiple substance abuse violations could not have any visitors for two years, except for attorneys and members of the clergy.[128]

The District Court in the Eastern District of Michigan and the Sixth Circuit Court of Appeals applied *Turner*, and found the restrictions unconstitutional.[129] However, the Supreme Court reversed the lower courts' holdings, finding that the regulations were rationally related to legitimate penological interests.[130] Noting that many liberties and privileges enjoyed by free persons must be surrendered in prison, the Court found that "[a]n inmate does not retain rights inconsistent with proper incarceration."[131] The Supreme Court

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[123] *Id.*

[124] *Id.* at 367.

[125] *Id.* at 363 (quoting Turner v. Safley, 482 U.S. 78, 90-91 (1987)).

[126] *Shabazz*, 482 U.S. at 354.

[127] 539 U.S. 126 (2003).

[128] *Id*. at 129-30.

[129] Bazzetta v. McGinnis, 286 F.3d 311, 316-17, 322 (6th Cir. 2002); Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 847-49, 856-57 (E.D. Mich. 2001).

[130] *Bazzetta*, 539 U.S. at 131-32.

[131] *Id.* at 131.

held that the restrictions on children's visitation were rationally related to internal security and keeping children from harm.[132] Next the Court found that communicating via letter or telephone were acceptable substitutions to visitation, because under *Turner*, the alternatives "need not be ideal . . . they need only be available."[133] In addition, the Court found the total visitation ban for drug abusers severe, but necessary to serve the valid prison goal of deterring drug use.[134]

Justice Stevens, along with three other Justices, wrote a short concurrence emphasizing that nothing in the Court's decision marked a return to the view that prisoners may only challenge restrictions under the Eighth Amendment proscription against cruel and unusual punishment.[135] Justice Thomas, however, joined by Scalia, wrote a separate concurrence asserting the opposite: that the courts should not review a prisoner rights case if there is no Eighth Amendment violation.[136] After all, Thomas noted, nineteenth century prisons did not allow any visits for prisoners, therefore if this prison wanted to return to that incarceration method, it should be free to.[137]

Critics argued that in finding the policy constitutional, the Supreme Court virtually ignored findings that were essential to the lower courts' decisions.[138] For example, the trial court found that although the Department of Corrections asserted that the restrictions were needed to control drug abuse, the Department conceded that there was no data showing that the amount of substance abuse declined because of the visitation restrictions.[139] In addition, the director of the prison admitted that his personal and philosophical belief was that prison was not a good place for children to visit; therefore the lower court found the restrictions were motivated by the directors' personal beliefs, and not legitimate prison

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[132] *Id.* at 133.

[133] *Id.* at 135.

[134] *Id.* at 134.

[135] *Id.* at 138.

[136] *Bazzetta*, 539 U.S. at 139.

[137] *Id.* at 143-45.

[138] Krysten Sinema, Note, *Overton v. Bazzetta: How the Supreme Court Used* Turner *to Sound the Death Knell for Prisoner Rehabilitation,* 36 ARIZ. ST. L.J. 471, 481-83 (2004).

[139] *Id.* at 481, citing Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 843 (E.D. Mich. 2001).

interests.[140] The lower courts also noted that if a prisoner was violent or threatening, they were not subject to a ban on visitation, and therefore the punishment for drug abusers was excessively capricious.[141] And finally, the lower court found that letters and phone calls to family members were not an equal alternative form of First Amendment expression for the inmate.

B. A Prisoners' Rights Revolution: The Johnson *Critique of* Turner

The most recent case testing the applicability of the *Turner* standard, *Johnson v. California*,[142] was decided by the Supreme Court in February of 2005. The *Johnson* case is unique in that the Court did not find that a prison regulation failed the *Turner* test, but that the *Turner* standard should not be used at all to evaluate a restrictive policy. The *Johnson* Court's decision not to apply *Turner*, as well as their compelling critique of the deferential standard, created a shift that could have a significant effect on prisoner rights litigation in the future.[143]

Johnson, an African-American inmate, sued the California Department of Corrections (CDC) challenging the prison's unwritten policy of segregating inmates by race in the first sixty days of their incarceration.[144] According to the CDC, when an inmate arrives at or transfers to a California prison, he is initially housed in a reception center for sixty days to establish his security status.[145] To determine the inmate's placement, the prison looks at many factors, including the inmate's criminal and incarceration history, and gang affiliation.[146] Although race is only one of the factors considered, the CDC admits it is the dominant factor: according to the prison, the chance of an inmate being assigned to a cell with an inmate of a different race is almost "zero percent."[147] Johnson, serving a felony conviction in state prison, had been

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[140] *Bazzetta,* 148 F. Supp. 2d at 824, 828.

[141] *Id.* at 843-44.

[142] Johnson v. California, 125 S. Ct. 1141 (2005).

[143] *See* Erwin Chemerinsky, *A Civil Rights Victory For Prisoners*, 41-MAY JTLA TRIAL 76, 77 (2005).

[144] *Johnson,* 125 S. Ct. at 1144-45.

[145] *Id.* at 1144.

[146] *Id.*; *see also* Johnson v. California, 321 F.3d 791, 794 (9th Cir. 2003).

[147] *Johnson*, 125 S. Ct. at 1144.

transferred to several different facilities, and at each he was celled with another African-American inmate for the first sixty days.[148] As a *pro se* plaintiff, Johnson filed a complaint alleging that the CDC's policy subjected him to racial discrimination in violation of his Equal Protection rights under the Fourteenth Amendment.[149] The Department of Corrections argued that the policy was necessary to reduce the threat of racial violence, and therefore the regulation passed the *Turner* test.[150]

The Ninth Circuit found that the *Turner* standard applied and upheld California's policy, concluding that it was reasonably related to legitimate penological interests.[151] After the full Ninth Circuit denied Johnson's petition for an *en banc* rehearing,[152] however, four Justices wrote a rare and scathing dissent to the denial, arguing that the *Turner* test should not control in reviewing racial segregation policies.[153] First, the dissent asserted that racial discrimination "cannot plausibly be said to be []consistent with the legitimate penological objectives of the corrections system."[154] The dissent also noted the potential for abuse in allowing prisons deference in matters of racial discrimination.[155] They lastly stated that the right to be free from state segregation is qualitatively different from other rights to which *Turner* had been applied, and therefore the policy should be subject to strict scrutiny.[156] The Supreme Court granted certiorari,[157] and the issue before the Court was whether the Court should use the strict scrutiny standard usually applied to intentional race discrimination cases, or the more deferential *Turner* standard of review.[158]

In a remarkable decision that could alter the applicability of the *Turner* standard to all prisoner rights cases, the Supreme Court found that the lower court should have evaluated the policy under strict scrutiny, instead of under

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[148] *Id*. at 1145.

[149] *Id.*

[150] *Id*. at 1144.

[151] Johnson v. California, 321 F.3d 791, 798-99, 807 (9th Cir. 2003).

[152] Johnson v. California, 336 F.3d 1117, 1117 (9th Cir. 2003) (Ferguson, J., dissenting from denial of rehearing *en banc*).

[153] *See generally id.*

[154] *Id.* at 1122.

[155] *Id.* at 1119-20.

[156] *Id.* at 1122.

[157] Johnson v. California, 124 S. Ct. 1505 (2004).

[158] Brief for Petitioner at *i,* Johnson v. California, 124 S. Ct. 1505 (2004) (No. 03-636).

Turner.[159] Though the Court noted that there were numerous "violent and murderous" incidents of racial violence in California prisons, and the warden said that if race was not used, there would surely be racial conflict in the prison,[160] the Court explicitly rejected the idea that courts owed the prison the *Turner* measure of deference in the case.[161]

Citing *Overton v. Bazzetta*, the Court emphasized that "[they] have applied *Turner*'s reasonable relationship test *only* to rights that are 'inconsistent with proper incarceration.'"[162] "The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*," and "[i]t is not a right that need necessarily be compromised for the sake of proper prison administration."[163] "On the contrary," the Court noted, "compliance with the Fourteenth Amendment is consistent with proper prison administration."[164]

The Court reiterated that strict scrutiny was necessary in *any* case that involves racial classifications, in order to ensure that these classifications are not motivated by "illegitimate notions of racial inferiority or race politics," or an "invidious purpose."[165] The Court then stated that the need for strict scrutiny was no less important in prison.[166] The Court secondarily noted that judicial review of prison policies is an important check on executive power. "In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination."[167]

The majority even went so far as to criticize the flaws in the original *Turner* holding, stating that the *Turner* standard was "too lenient" to ferret out invidious uses of race, because the policy only requires a reasonable link to "legitimate penological interests."[168] Applying *Turner* would allow prison officials the unfettered ability to use race-based policies even

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159 Johnson v. California, 125 S. Ct. 1141, 1149 (2005).

160 *Id*. at 1145.

161 *Id*. at 1149.

162 *Id*. (citing Overton v. Bazzetta, 539 U.S. 126, 131 (2003) (emphasis in original)); *see also id.* at 1167 (Thomas, J., dissenting) ("According to the majority, the question is thus whether a right 'need necessarily be compromised for the sake of proper prison administration.'").

163 *Id.* at 1149.

164 *Johnson,* 125 S. Ct. at 1149.

165 *Id*. at 1146.

166 *Id*. at 1147.

167 *Id.* at 1150.

168 *Id*. at 1151.

when it does not advance any goal, or where there are race-neutral means of accomplishing the same goal.[169] In fact, the Court noted, it would allow officials to segregate prison visiting-rooms, dining halls, yards or housing areas if they felt it caused unrest.[170] Citing Justice Ferguson's dissent in the denial of a Ninth Circuit *en banc* rehearing, the Supreme Court also stated that the burden on the prisoner was too high: "The prisoner would have the burden of proving that there would *not* be a riot."[171]

Justice Thomas's bitter dissent, joined by Justice Scalia,[172] made clear that the majority's analysis of *Turner* was a significant departure from the interpretation previously applied by the Supreme Court. "The majority's test eviscerates *Turner*," Thomas stated.[173] Justice Thomas described the majority's holding as asking whether a right "need necessarily be compromised for the sake of proper prison administration."[174] In asking this, the majority placed the burden on prison administrators to prove that a restrictive policy was necessary in order to properly operate the prison, instead of forcing the inmate to prove the policy could not possibly be rationally explained. This "threshold standard-of-review inquiry,"[175] as Thomas called it, begins with the assumption that the inmate has a constitutional right to lose, and finds that if a policy is not necessary, the right must be given to the inmate.[176] In addition, this interpretation means that every administrative decision would be subject to a court's judgment that it has a less restrictive way of solving a penological issue.[177]

The majority explicitly rejected Thomas' assertion that *Turner* should apply "across-the-board to inmates'

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[169] *Id*.

[170] *Johnson*, 125 S. Ct. at 1151.

[171] *Id*. (quoting Johnson v. California, 336 F.3d 1117, 1120 (9th Cir. 2003) (Ferguson, J., dissenting from denial of rehearing *en banc*) (emphasis in original)).

[172] Chief Justice Rehnquist did not take part in the *Johnson* decision. *See id*. at 1144.

[173] *Id.* at 1167.

[174] *Id.* at 1149; *see also id.* at 1167 (Thomas, J., dissenting).

[175] *Id.* at 1167 (Thomas, J., dissenting).

[176] This is in direct contrast to Justice Thomas' interpretation of inmates' rights. "When a prisoner makes a constitutional claim, the initial question should be whether the prisoner possesses the right at issue at all, or whether instead the prisoner has been divested of the right as a condition of his conviction and confinement." *Johnson,* 125 S. Ct. at 1160.

[177] *Id.* at 1161 (Thomas, J., dissenting).

constitutional challenges to prison policies."[178] *Turner* should apply uniformly, Thomas argued, because it is the correct balance between accommodating administrators' needs and protecting prisoner's rights.[179] The *Turner* deferential standard is necessary, Justice Thomas warned, because it is the job of prison administrators, and not courts, to make difficult decisions concerning prison operations.[180] Justice Thomas then found that the prison's racial segregation policy would, in fact, pass the *Turner* deferential standard and strict scrutiny, and so the policy was constitutional.[181]

IV. *MONMOUTH* AND *VICTORIA W.*: INMATE ABORTION RIGHTS IN THE FEDERAL COURTS

Because the Supreme Court has never heard a case that evaluates the constitutionality of prison abortion policies, there is currently a circuit split as to the application of *Turner* to restrictions on abortion rights. In two very similar cases, *Monmouth* and *Victoria W.*, the Third and Fifth Circuits, respectively, applied the *Turner* standard, yet generated vastly different decisions. In *Monmouth*, the Third Circuit found the restriction unreasonable under *Turner*, while the Fifth Circuit in *Victoria W.* found the restriction reasonably related to a legitimate penological interest. These two anomalous cases clearly illustrate the inconsistent ways that *Turner* can be applied, and also describe the barriers to abortion access that women in prison typically face from prison administrators.

A. *Upholding the Abortion Rights of Inmates:* Monmouth v. Lanzaro

In *Monmouth*, inmates originally filed a class action lawsuit against a New Jersey prison challenging overcrowding and inadequacy of prison health services.[182] In March of 1985, the prison agreed to resolve the case by consent decree, but the

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[178] *Id.* at 1160 (Thomas, J., dissenting).

[179] *Id.* at 1161 (Thomas, J., dissenting). ("If *Turner* is our accommodation of the Constitution's demands to those of a prison administration . . . we should apply it uniformly to prisoners' challenges to their conditions of confinement.").

[180] *Id.* at 1168-69 (Thomas, J., dissenting).

[181] *Id.* at 1163, 1171 (Thomas, J., dissenting).

[182] Monmouth County Corr. Inst'l Inmates v. Lanzaro, 834 F.2d 326, 328 (3d Cir. 1987).

decree did not mention access to abortion.[183] More than a year later, on or about March 3, 1986, inmate Jane Doe informed the medical staff at the prison that she wanted an abortion, but she was told that pursuant to prison policy, the prison would not allow her to have an abortion without a court order.[184] No other elective medical procedures, however, were subject to a court-order policy.[185] The original class of inmates responded by applying for injunctive relief, requesting an abortion for Doe and access to abortion services for all Monmouth inmates. Pending the resolution of the case, Doe was released to get an abortion, but the inmates continued the suit on behalf of all inmates seeking abortions.[186]

The inmates asserted that the policy was an unconstitutional infringement on their right to privacy under *Roe v. Wade*.[187] Following oral arguments for the *Monmouth* case in the Third Circuit, the Supreme Court decided *Turner v. Safley*, and the Circuit Court then applied *Turner* to *Monmouth*.[188]

Although the *Turner* standard advocates deference to prison administrators, the *Monmouth* court recognized that the policy violated the Supreme Court's abortion jurisprudence, and so found the regulations did not pass the *Turner* standard.[189] Pursuant to the *Turner* test, the *Monmouth* court paid particular attention to the prison's justification for the policy, saying that the government interests asserted by the prison were "administrative and financial burdens."[190] The court then held that the policy could not be justified on those interests: "Security is no less protected, crime is no less deterred, retribution is not undermined, and rehabilitation is not hindered, by a prisoner's right to an abortion."[191] The prison policy, therefore, was an "exaggerated response" to the prison's concerns.[192] The court emphasized that to delay an

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[183] *Id.*

[184] *Id.*

[185] *Id.* at 335.

[186] *Id.* at 328-29.

[187] *Id*. at 329. In 1987, when *Monmouth* was decided, the binding precedent was *Roe v. Wade*, holding that a state could not prohibit abortion in the first trimester of a woman's pregnancy. *Roe*, 410 U.S. at 114.

[188] *Monmouth,* 834 F.2d at 331-32.

[189] *Id*. at 338.

[190] *Id.* at 336.

[191] *Id.* at 338, (quoting Anne T. Vitale, *Inmate Abortions—The Right to Government Funding Behind Prison Gates,* 48 FORDHAM L. REV. 550, 556 (1980)).

[192] *Id*. at 344.

abortion is to deny women a choice, citing the Supreme Court's decisions that invalidate government-imposed delays.[193] The court also noted that the policy failed to consider the stage of the pregnancy at the time of the inmate's request, and deprived maximum security inmates of any opportunity to choose abortion,[194] which violated abortion rights precedent.

B. Deference to Prison Administrators: Victoria W. v. Larpenter

Victoria W. v. Larpenter[195] was the most recent challenge to a prison abortion policy, and was decided in April of 2004. Victoria, a female inmate from a Louisiana parish jail, brought a civil rights action challenging the jail's policy of requiring inmates to obtain a court order to receive an abortion at any stage of pregnancy.[196] Victoria argued the court order policy violated her Fourteenth Amendment right to an abortion, and her Eighth Amendment right to be free from cruel and unusual punishment.[197] The Fifth Circuit held that the jail's court order policy was not unconstitutional because it was "reasonably related to legitimate penological interests" under the *Turner v. Safley* standard.[198] The court also found that abortion as an elective procedure was not a serious medical need, and therefore denial of an abortion did not constitute cruel and unusual punishment.[199]

Victoria entered jail on July 28, 1999.[200] Victoria learned she was pregnant through a routine medical examination, she informed the medical administrator that she wanted an abortion, and they directed her to meet with the head nurse.[201] Despite her request, Victoria was not permitted

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[193] *Monmouth*, 834 F.2d at 339 (citing City of Akron v. Akron Center for Reprod. Health, 462 U.S. 416 (1983); Thornburgh v. Am. Coll. of Obstets., 476 U.S. 747 (1986)).

[194] *Monmouth*, 834 F.2d at 337, 340.

[195] 369 F.3d 475, 475 (5th Cir. 2004).

[196] *Id.* at 478.

[197] *Id.* at 481.

[198] *Id*. at 485.

[199] *Id.* at 486, 487, n.52. Note that this appellate court decision was made by three male Circuit Court judges: the Honorable Patrick Higginbotham, the Honorable Carl E. Stewart, and the Honorable Edward C. Prado. *Id*. at 477. Defining abortion as elective and not medically necessary may be a particularly gendered decision.

[200] *Victoria W.,* 369 F.3d at 478.

[201] *Id.*

to see the head nurse.[202] On July 31 she complained of back pain, and jail officials transported her to a local hospital where a blood test confirmed her pregnancy.[203] She again informed jail personnel that she wanted an abortion, and was told to speak to the head nurse.[204] On August 3, she was transported to the hospital for a gynecological exam, and then on August 6, she was transported to the hospital for an ultrasound.[205] The jail's medical administrator, Ed Byerly, was finally told of Victoria's request for an abortion on August 9, and alerted the warden, Joe Null.[206] It was not until August 12th that Byerly told Victoria that she needed a court order for an abortion,[207] at which time she was almost four months pregnant.[208] Victoria immediately phoned an attorney who had formerly represented her daughter and told him to obtain a court order.[209] Over the next week, Victoria did not hear from her attorney. Finally, on August 19, the sheriff's attorney William Dodd, who had been alerted to the situation, wrote Victoria a letter, in which he said that Victoria's attorney may not represent her because of moral reasons,[210] but that this was not the jail or the county's problem.[211] On August 24th, almost four weeks after Victoria initially requested an abortion, Byerly again reiterated the jail's court order policy to Victoria.[212]

Victoria's attorney finally filed a motion on her behalf on September 9th, but unbeknownst to Victoria, his motion contained a request not for transportation to obtain an abortion but rather for early release from the remainder of her sentence because of inadequate prenatal care in jail.[213] Victoria was brought to the courthouse the day of the hearing, but was

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[202] Brief of Plaintiff-Appellant at 6, Victoria W. v. Larpenter, 369 F.3d 475 (2004) (No. 02-30598).

[203] *Victoria W.,* 369 F.3d at 478.

[204] *Id.*

[205] *Id*.

[206] *Id.*

[207] *Id.* at 479.

[208] *Id.* at 478.

[209] *Victoria W.*, 369 F.3d at 479; Brief of Plaintiff-Appellant at 7, *Victoria W.* (No. 02-30598). Victoria did not have representation before this request, but searched for and contacted an attorney specifically to obtain a court order for an abortion. Brief of Plaintiff-Appellant at 7, *Victoria W.* (No. 02-30598).

[210] *Id.*

[211] Brief of Plaintiff-Appellant at 10, *Victoria W.* (No. 02-30598).

[212] *Victoria W.*, 369 F.3d at 480.

[213] *Id.*

detained in the holding area during her hearing.[214] The judge held the motion in abeyance pending a medical evaluation.[215] Victoria was told that to gain early release she would need to hire an expert to research the prenatal care at the jail at a cost of $1500. She told her attorney she could not afford this.[216] Victoria was released from jail on October 13th, too late to obtain a legal abortion in Louisiana.[217] Because of this, Victoria carried the child to term, experiencing what her lawyers described as "significant physical pain and discomfort, as well as psychological distress."[218] Her pregnancy was repeatedly designated as "high risk" in her medical file, and after an emergency cesarean section,[219] she gave birth and then immediately placed the newborn with adoptive parents.[220]

In deciding the *Victoria W.* case, the Court of Appeals noted that under *Planned Parenthood v. Casey*, government regulation of abortion was not permissible if it imposed an undue burden on a woman's ability to choose abortion.[221] The court, however, held that the policy was constitutionally permissible under the *Turner* standard, finding the policy was reasonably related to legitimate penological interests.[222]

The court found a valid, rational connection between the jail's interests of inmate security and avoidance of liability and the policy requiring inmates to obtain a court order for an abortion.[223] The court found the policy was not arbitrary because all "elective" medical care, including abortion, required a court order.[224] The court noted that heart attacks and labor

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[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] Brief of Plaintiff-Appellant at 15, *Victoria W.* (No. 02-30598).

[219] *Id.* at 15-16.

[220] *Victoria W.*, 369 F.3d at 480.

[221] *Id.* at 483 (citing Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992)).

[222] *Id.* at 485.

[223] *Victoria W.*, 369 F.3d at 486.

[224] *Id.* The court notably ignored evidence stated in the petitioner's brief that the prison proffered no proof to substantiate the claim that all elective care required a court order, and in fact administrators stated they "could not remember" the last time a court order was needed for medical care. Reply Brief of Plaintiff-Appellant at 4, Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004) (No. 02-30598) (citing Bylerly Deposition: "[t]o say that a court order is necessary to receive medical care, I've never had anything like that happen."). In addition, the court did not mention that when Victoria was having minor back-pain, she did not need a court order and was transferred to the hospital immediately, and yet she was required to wait weeks for an abortion. *Victoria W.*, 369 F.3d at 478.

pains were serious medical needs, but it declined to recognize that abortion, which is time restricted and may lead to a myriad of health issues associated with pregnancy, was a serious medical need.[225] The policy, the court noted, allowed the jail to track each time an inmate left the prison, which placed inmates in a less-secure environment, increased the chance of escape, increased jail liability and reduced jail resources.[226] In addition, the court noted that the policy did not delay abortion because it could be implemented quickly.[227]

As illustrated by these cases, *Turner* can be applied in very different ways to achieve opposite results: inmates in the Third Circuit are guaranteed a right to abortion under *Monmouth*, but those in the Fifth Circuit and elsewhere in the country are subject to the whim of prison administrators' policy decisions. It is this manipulability that makes *Turner* a faulty standard for protecting the abortion rights of female prisoners. For this reason, courts should decline to apply *Turner* to evaluating prison abortion policies, using the *Roe* and *Casey* standards to protect abortion rights in *Turner*'s place.

V. A NEW APPROACH: ARGUING AGAINST APPLYING *TURNER* TO PRISON ABORTION POLICIES

As evidenced by the *Monmouth* and *Victoria W.* decisions, courts' evaluations of prison abortion policies under *Turner* can be arbitrary and irrational. Under *Turner*, an inmate's right to abortion will always depend on whether a court defers to the prison's asserted penological interests. For this reason, it is important for reproductive rights advocates to move outside of the *Turner* framework, arguing instead that the deferential standard should not apply to a court's evaluation of prison abortion policies. The *Johnson v. California* decision, in which the Supreme Court declined to apply *Turner* to a prison policy and presented significant

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[225] *Id*. at 486 n.52.

[226] *Id*. According to the brief for the plaintiff, the district court identified these as penological interests, despite the fact that none of these interests was advanced by the prison at trial. Brief of Plaintiff-Appellant at 35, *Victoria W.* (No. 02-30598).

[227] The court found that the policy could be implemented quickly, as evidenced by the fact that the judge reviewed Victoria's request and scheduled a hearing the next day. *Victoria W.,* 369 F.3d at 486. However, the sheriff's attorney Dodd acknowledged in a deposition that it could take two weeks or longer to obtain a court hearing in the local courts, and even longer to obtain a court order. Brief of Plaintiff-Appellant at 11, n.5, *Victoria W.* (No. 02-30598).

critiques of the *Turner* standard, is critical for this type of argument.[228]

In this section, this Note argues that *Turner* should not apply to prison abortion policies for several reasons. First, the right to an abortion is similar to the Eighth Amendment right to be free from cruel and unusual punishment; Eighth Amendment claims have never been evaluated under the *Turner* test, and therefore abortion rights cases should also not be subject to *Turner*. Second, the same considerations that compelled the Supreme Court to not apply *Turner* to racial classifications in *Johnson* are also applicable to abortion rights cases. The Court's concerns about deferring to prison administrators in matters of racial classifications are equally, if not more, pertinent to the right to an abortion.

A. Abortion's Similarities to the Eighth Amendment

The Supreme Court has applied *Turner* to regulations that impinge on free speech, free association, freedom of religion and due process.[229] In contrast, inmate lawsuits under the Eighth Amendment prohibition against cruel and unusual punishment are not subject to the *Turner* standard.[230] *Turner* should not apply to abortion policies because the right to abortion can be distinguished from those rights that do fall under the *Turner* framework, and the interests at stake in abortion are similar to those reflected in the Eighth Amendment prohibition against cruel and unusual punishment.

The Eighth Amendment has become more than a proscription against cruel and unusual punishment: it also prohibits "unnecessary and wanton" infliction of pain that is without penological justification, and denial of adequate medical care.[231] In fact, in *Estelle v. Gamble*, the Supreme Court found that a withholding of adequate medical care is

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[228] *See infra*, Part III.

[229] *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (freedom of association); Shaw v. Murphy, 532 U.S. 223, 225 (2001) (freedom of association, speech); Washington v. Harper, 494 U.S. 210, 223-24 (1990) (due process of law); Thornburgh v. Abbott, 490 U.S. 401, 401-02, 404 (freedom of speech); O'Lone v. Shabazz, 482 U.S. 342, 348-51 (1987) (freedom of religion); *Turner*, 482 U.S. at 100-01 (freedom of speech, marriage).

[230] *See* Nelson v. Campbell, 541 U.S. 637 (2004) (no reference to *Turner*); Hudson v. McMillian, 503 U.S. 1 (1992) (same); Wilson v. Seiter, 501 U.S. 294 (1991) (same).

[231] *Wilson*, 501 U.S. at 294, 297-99 (citing Gregg v. Georgia, 428 U.S. 153 (1976); Estelle v. Gamble, 429 U.S. 97, 102-03 (1976)).

cruel and unusual because "in the worst cases . . . [it] may actually produce physical torture or a lingering death . . . [and in] less serious cases . . . may result in pain and suffering which no one suggests would serve any penological purpose."[232] The *Estelle* Court found that the Eighth Amendment prohibits prison officials from "deliberate indifference" to an inmate's "serious medical needs." The Supreme Court has left it to lower courts to define what is a "serious medical need." Circuit courts have found, for example, that a "serious medical need" includes a broken nose,[233] severe muscle cramps,[234] and a broken arm.[235] The Supreme Court has, however, held that a prison may not expose an inmate to a substantial risk of serious damage to their future health by acting with deliberate indifference.[236]

The type of pain that is prohibited by the Supreme Court under *Estelle* can be analogized to the denial of abortion. Abortion is clearly a "serious medical need" under the Eighth Amendment, and a prison should not be able to expose an inmate to the substantial risk of serious damage to future health by denying her the right to terminate their pregnancy. As asserted by Part II of this note, and as recognized by the Supreme Court in *Roe* and *Casey*, forcing a woman to give birth has profound, permanent, physical and emotional effects on the inmate mother and her child.[237] As the Court reaffirmed in *Casey*:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear . . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the women's role.[238]

Forcing a woman to give birth in prison against her will would have lasting physical and emotional effects on her and on the child she bears. Although First Amendment and Due Process restrictions have substantial negative consequences for prisoners' lives, they do not compromise the present and future

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[232] *Estelle*, 429 U.S. at 103 (internal citation omitted). The court found "[t]he infliction of such unnecessary suffering [] inconsistent with contemporary standards of decency . . ." *Id.*

[233] Smith-Bey v. Hosp. Adm'r, 841 F.2d 751, 759-60 (7th Cir. 1988).

[234] East v. Lemons, 768 F.2d 1000, 1001 (8th Cir. 1985).

[235] Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978).

[236] Helling v. McKinney, 509 U.S. 25, 33 (1993).

[237] *See* Roe v. Wade, 410 U.S. 113, 153 (1973); *see also* discussion *infra* Part II.

[238] Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).

bodily integrity of the inmate as compared to the denial of medical care or abortion. Abortion is different from other rights under *Turner* because, as stated in *Casey*, abortion is one of the most unique and definitional choices a woman makes over her body.[239] For this reason, inmates may not be subject to forced childbirth in the same way that they may not be left without adequate medical care.

For more than one hundred years, the Supreme Court has found that the Eighth Amendment prohibits the infliction of cruel and unusual punishment in the form of "torture" or "unnecessary cruelty," and this includes the cruelty of denying medical care to inmates.[240] Our society, and our courts, would not accept the complete denial of medical care to inmates while they are incarcerated.[241] Therefore, denying an inmate an abortion procedure and forcing her to give birth against her will is unacceptable, because it subjects her to a lifetime term of motherhood.

B. The New Johnson *Decision as Applied to Prison Abortion Policies*

With its new threshold standard of review, and its sweeping critique of the *Turner* standard, the *Johnson* decision may have profound effects on prisoner rights litigation. Advocates may escape the *Turner* deferential test by arguing that, similar to *Johnson*, a prison policy should not be evaluated under *Turner*. This type of argument is particularly salient for abortion rights advocates because the considerations which compelled the Court to not apply *Turner* to the racial segregation policies in *Johnson* are as, if not more, pertinent to prison abortion policies.

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[239] *Id.* at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[240] Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) (noting that the Eighth Amendment prohibits "torture" and "unnecessary cruelty"); *see also* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (stating that the purpose of the Eighth Amendment is to protect prisoners from barbaric forms of punishment).

[241] Gregg v. Georgia, 428 U.S. 153, 170 (1976) (noting that the original draftsmen of the Eighth Amendment were primarily concerned with proscribing torture). Unless, of course, these prisoners are "enemy combatants" in the war on terror. (Author's aside).

First, *Turner* should not apply to abortion policies in prison because the right to have an abortion is not, as the Court required in *Johnson*, "inconsistent with incarceration,"[242] and allowing an inmate to receive an abortion is more consistent with the penological goals of prisons. In *Johnson,* the Supreme Court made a surprising pronouncement that will have a fundamental effect on the way future prisoner rights cases will be litigated: "[W]e have applied Turner's reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration.'"[243] The right not to be discriminated against on the basis of race, the Court continued, "is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the criminal justice system."[244] As Justice Thomas noted in dissent, this test eviscerates *Turner* by instructing courts to first ask whether the right need necessarily be compromised, rather than later asking whether there is simply a reasonable link between the policy and a penological interest.[245]

It is clear that prohibiting female inmates from obtaining abortions, or creating delays that would hinder the exercise of this right, is not necessary for proper prison administration. As in *Monmouth* and *Victoria W.*, a prison administration may argue against allowing an abortion because of the prison's interests in ensuring security, reducing liability, or maintaining prison resources.[246] Restrictive abortion policies are inconsistent with incarceration, however, because these asserted interests are not served by delaying or denying inmates' their abortion rights.

The prison's claim that allowing abortions reduces prison resources is indefensible because the prison could allow abortions but ask that the inmate pay for the procedure and transportation themselves, something the inmate in the

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[242] *See* Johnson v. California, 125 S. Ct. 1141, 1149 (2005).

[243] *Id*. (emphasis in original).

[244] *Id*.

[245] *Id.* at 1167-68.

[246] Victoria W. v. Larpenter, 369 F.3d 475, 486 (5th Cir. 2004) (where the prison's interests were inmate security and avoidance of liability); Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 336 (3d Cir. 1987) (where the prison's interests were administrative and financial burdens on the prison).

Victoria W. case repeatedly offered to do.[247] Second, prohibiting abortions actually increases costs and security concerns for the prison. Under the Eighth Amendment the prison must pay for the pre-natal care and birth of a baby.[248] This raises costs for the prison and for the state substantially. In addition, the transportation and security risks are higher for a woman to give birth, because she will be transferred to a hospital for pre-natal care and labor far more times than is necessary for one abortion procedure.

Furthermore, the costs to the inmate, to society and to the state are higher when an inmate is denied an abortion. A child's transfer to foster care, either with relatives or an unrelated family, is a state expense until the child is eighteen years old. In addition, an inmate's trauma from giving up her baby, and then likely losing her parental rights if she is incarcerated more then eighteen months, may cost more to the prison in counseling and security, and is antithetical to the purpose of rehabilitating inmates.

Allowing prisons to deny inmate abortions raises the question of the purposes of incarceration and the penological objectives of the prison system as a whole.[249] Although inmates are punished for committing crimes, or are incarcerated for rehabilitation, prohibiting abortions achieves neither of these two objectives. First, there is no rehabilitative goal advanced in forcing a woman to give birth against her will. Second, this type of punishment does not comport with any possible theory of the correct punishment for inmates. It is a particularly gendered punishment, affecting only women and their bodies, that goes beyond the purpose of prisons.

The second reason that *Turner* should not be used to evaluate abortion policies is that, as stated in *Johnson*, the standard is too lenient to ensure that a prison policy is not furthering an illegitimate purpose, a consideration that is particularly important with regard to abortion rights.

In *Johnson*, the Supreme Court noted that they have historically been skeptical of racial discrimination, even "benign" discrimination, because "racial classifications raise special fears that they are motivated by an invidious

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[247] Brief of Plaintiff-Appellant at 7-9, *Victoria W.* (No. 02-30598).

[248] Under *Estelle v. Gamble,* 429 U.S. 97, 103 (1976), prisons are required to provide adequate medical care to prisoners and this includes paying for and providing prenatal care and birthing care for female inmates.

[249] *See* Herman, *supra* note 19, at 1233-34.

purpose."[250] Therefore, the *Johnson* court found, "*Turner* is too lenient a standard to ferret out invidious uses of race."[251] "In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination."[252] The *Turner* standard, the Court noted, would allow officials to use invidious policies when they don't advance any goal, or when there are race-neutral ways of accomplishing the same goal.[253]

The Supreme Court should be similarly concerned that the *Turner* standard would allow for unfettered restrictions on abortion based on ideological, and not penological, goals. The burden that the *Turner* test places on the inmate to prove that allowing abortion would never compromise penological goals is too high, and it allows prison officials unfettered ability to restrict abortion.[254] The Court found this type of power too unrestricted when it comes to racial segregation. Similarly, because of the controversial nature of the right to abortion, *Turner* is too lenient a standard to ensure that prison policies are not motivated by personal or state opposition to abortion. Despite, and even because of, the controversial nature of the right to abortion, the Supreme Court has consistently upheld an adult woman's autonomy in making the abortion decision, disallowing a veto by any other actor.[255]

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the state

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[250] *Johnson*, 125 S. Ct. at 1146.

[251] *Id.* at 1151.

[252] *Id.* at 1150.

[253] *Id.* at 1151.

[254] As noted in Part III, the *Turner* standard only asks whether the connection between the penological interest and the restriction was "arbitrary and irrational," which means the prison must barely justify the reasons for its policy. Turner v. Safley, 482 U.S. 78, 89-90 (1987); *see also* Johnson v. California, 336 F.3d 1117, 1119 n.2 (9th Cir. 2003) (Ferguson, J., dissenting) ("nothing in the decision's holding requires the prison to justify the policy in any real fashion."). In addition, the fourth prong of the *Turner* test places the burden on the inmate to show that an alternative policy would accommodate her rights at "*de minimis*" cost to penological interests. *Turner*, 482 U.S. at 91. Under this prong, the inmate must prove that every alternative she proposes would not in any way effect security or prison resources, an insurmountable burden.

[255] Roe v. Wade, 410 U.S. 113, 155 (1973) (finding a state may not permit another person to veto a woman's decision to have an abortion); Planned Parenthood v. Casey, 505 U.S. 833, 894 (1992) (striking down the spousal notification requirements).

> can resolve these philosophic decisions in such a definitive way that a woman lacks all choice in the matter.[256]

In fact, even though the Supreme Court has upheld legislation requiring parental consent of a minor's decision to have an abortion, it has found that the state must provide an alternative to the consent in the form of a "judicial bypass procedure," if the minor can show she is mature enough to make the decision or that the abortion would be in her best interest.[257] Under the *Turner* standard, even adult female inmates are not given this kind of emergency bypass to a prison administrator's veto over her abortion decision.

Decisions on whether to allow abortions are made by prison officials and wardens who are by and large male; they therefore may not have the best interests of the female inmate in mind when creating abortion policy.[258] Officials personally opposed to abortion may mask their beliefs behind unsubstantiated rationales for these policies. For example, a prison official might announce that no inmates could obtain abortions because carrying the child to term was more rehabilitative to women.

In addition, *Turner* allows prison officials to create restrictive abortion policies even when they don't advance any real penological goal, or when there are other ways of accomplishing the same goal while guarding an inmate's abortion rights. Under *Turner*, there would be no distinct analysis of a policy that denies an abortion to a victim of rape by guards; an inmate who was in a late stage of her pregnancy and needed an expedited track; an inmate on death row or administrative isolation; or an inmate in a medium or maximum security prison who is not permitted release on

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[256] *Casey*, 505 U.S. at 850. *See also Roe*, 410 U.S. at 116 ("We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy.").

[257] Belloti v. Baird, 443 U.S. 622, 643 (1979).

[258] *See* discussion *infra* Part II (description of judges' and prison administrators' categorical denial of inmate abortion rights); *See also* discussion *infra* Part IV (discussion of the *Victoria W.* court's definition of abortion as "elective" and not a "serious medical need," made by three male circuit court judges.). *See also* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 458 (1999) (arguing that aggressive judicial review of prisons is essential, because serious abuses of power can occur in prisons systems and the political process may not protect inmates' rights).

furlough. If the policy were reasonably related to a penological interest, all inmates could be subject to the same policy.[259]

Although the *Turner* standard was meant to allow prisons to "anticipate security problems and . . . adopt innovative solutions to the intractable problems of prison administration,"[260] the test should not give prisons a *carte blanche* to reject all alternatives, even ones that clearly allow abortion rights with a minimum cost to prison goals. The *Turner* standard allows states to create an exception to the Supreme Court's long-established abortion rights jurisprudence via their prison administration. Although the Supreme Court has consistently found restrictions such as parental consent,[261] informed consent requirements,[262] reporting and record-keeping requirements[263] and twenty-four hour waiting periods[264] constitutionally valid, it has never endorsed an outright denial of abortion for anyone, not even minors, and has always required a consideration of the health of the woman.[265] Courts should not be able to carve a prison exception into the Supreme Court's abortion jurisprudence in this way.

VI. A BETTER SOLUTION: EVALUATING PRISON ABORTION POLICIES UNDER *CASEY*

When considering whether a prison's restrictive abortion policy is constitutional, courts should not apply the *Turner* deferential standard. If courts reviewed abortion policies under the *Casey* "undue burden" standard, this would give deference to prison officials to maintain their penological interests, while still comporting with the Supreme Court's abortion jurisprudence, which prohibits regulations that place an undue burden on the right to choose, and protects the life

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[259] Justice Brennan criticized the *Turner* standard similarly in a dissent in the *Shabazz* case, saying that the standard did not consider degrees of rights deprivation, instead analyzing all restrictions on constitutional rights under the same four factors. Under this type of scheme, "restricting use of the prison library to certain hours warrants the same level of scrutiny as preventing inmates from reading at all." O'Lone v. Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting).

[260] Turner v. Safley, 482 U.S. 78, 89 (1987).

[261] *Baird*, 443 U.S. at 622, 649.

[262] *Casey*, 505 U.S. at 833; Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976).

[263] *Casey*, 505 U.S. at 901; *Danforth*, 428 U.S. at 80.

[264] *Casey*, 505 U.S. at 885.

[265] *See id.* at 885-86, 889-94.

and health of the woman.[266] This type of protection of an inmate's reproductive rights would be significantly greater than allowing inmates to be subject to the whim of prison administrators in making their abortion decisions.

Since the legalization of abortion in 1973 under *Roe*, the Supreme Court has continuously upheld state and federal laws that put restrictions on a woman's right to choose abortion. The *Casey* "undue burden" standard allows states to restrict abortion as long as state law does not have the purpose or effect of placing a "substantial obstacle" in the path of a woman seeking to abort a non-viable fetus.[267] Despite rigorous efforts by reproductive rights advocates, the *Casey* standard allows for numerous restrictions that significantly affect the abortion rights of many women and girls. For example, under *Casey*, states may impose an informed consent and twenty-four hour waiting period, parental consent requirements for minors with a judicial bypass exception, and recording and reporting of abortions by all providers.[268] In addition, under *Harris v. McRae*, states may forbid the use of public funds for abortion, eliminating access for governmental employees and Medicaid recipients.[269]

If prison abortion policies were evaluated under the *Casey* undue burden test, the Supreme Court would allow prisons to regulate abortion rights in a way that benefits state (i.e. prison) interests, as long as the prison does not place an undue burden on an inmate's right to choose. This would mean that prisons could require recording and reporting of all abortions, could impose minor delays on obtaining the procedure, could require parental consent with a judicial bypass procedure for minors, and would not have to provide prison resources for abortion. Under *Casey* the prison could not, however, unconditionally deny prisoners abortions, nor impose delays that effectively deny women the right to choose. These types of restrictions could easily comport with a prison's asserted need to maintain security, deterrence of crime and the rehabilitation of prisoners.

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[266] The author of this Note does not agree with the restrictions on abortion rights that are in place as a result of current Supreme Court abortion jurisprudence, but only argues that it may provide more protection from infringement on reproductive rights than the *Turner* deferential test.

[267] *Casey*, 505 U.S. at 877.

[268] *Id.* at 879-902.

[269] Harris v. McRae, 448 U.S. 297 (1980).

For example, if the *Victoria W.* court evaluated the prison abortion policy under the *Casey* undue burden standard, they could still defer to the prison's interests of inmate security and avoidance of liability while better protecting inmate's abortion rights. In Victoria's case, the court order requirement caused a delay of more than five weeks before Victoria saw a judge.[270] The *Victoria W.* court, however, emphasized that the policy allowed the prison to focus on every off-prison transfer, each of which compromised security and increased prison liability.[271] Under the *Casey* standard, the prison could still monitor inmate abortions, but it would have to prove that this did not present a "substantial obstacle" to a woman's right to choose.[272] The prison could still require that an inmate file a request and wait for approval from prison administrators, which would serve the state's interests in security and avoidance of liability. The prison could not, however, allow the procedure to be categorically denied to any inmate, nor could it unduly delay abortions. Because the inmate has no other avenue by which to obtain an abortion, the prison would be required to have procedures that regulate abortion transfers, while still allowing for expediency. Forcing an inmate to wait five weeks for an abortion would be seen as an undue burden on a woman's right to choose.[273]

VII. CONCLUSION

As the *Victoria W.* and *Monmouth* cases illustrate, the *Turner* deferential standard may be applied arbitrarily and illogically, with harsh results for female inmates seeking to terminate their pregnancies. Application of the *Turner*

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[270] Victoria W. v. Larpenter, 369 F.3d 445, 478, 480 (5th Cir. 2004) (Victoria first requested an abortion on July 28, 1999 and was taken to get her court order on September 8th. Granted, twelve days of this delay may have been caused by the moral apprehension of Victoria's attorney. However, the first two weeks of delay were caused by the prison. In addition, because Victoria was a charge of the state and had no outside avenue for obtaining an abortion, the fact that the prison had no alternative or expedited way to obtain an abortion created an undue delay on her right to choose.).

[271] *Victoria W.*, 369 F.3d at 486.

[272] *Casey*, 505 U.S. at 877. It might be argued that a court order requirement would be unconstitutional as applied to adult inmates, since the Supreme Court has only required a court order for minor children requesting abortions without the consent of their parents. *See id.* at 889. The reason given for these parental consent laws with judicial bypass is to encourage children to consult with their parents. *Id*. It is unclear why adult inmates should be required to ask a judge for permission to get an abortion.

[273] *See Casey*, 505 U.S. at 885-86 (The court found that the burden on women caused by a twenty-four hour delay was "troubling in some respects.").

standard to prison abortion policies is unconstitutional, because it may allow prisons to drastically delay or categorically deny inmates the right to terminate their pregnancies. Therefore, the *Turner* standard must not be applied in evaluating prison abortion policies. *Turner* should not be applied because abortion is more similar to rights not evaluated under *Turner* and less similar to rights that are, and because the same considerations that compelled the Supreme Court to not apply *Turner* to *Johnson v. California* are pertinent to inmate abortion policies. If courts applied the *Casey* "undue burden" standard to prison abortion cases, they would safeguard a woman's right to choose abortion, while allowing prisons to guard their penological interests simultaneously.

Exploring the applicability of the *Turner* deferential standard to abortion rights raises fundamental questions about the nature of punishment in prison. With courts allowing for more deference to prison administrators, how far may prisons extend punishment of inmates before they are prevented from doing so by the judiciary? Would the courts allow a prison to have a policy that denied abortion rights to every inmate under any circumstances?

The Supreme Court has recognized that courts are ill-equipped to deal with the urgent problems of prison administration and reform.[274] As prisons grow larger and punishments more severe, however, it is important for courts to continue asking whether a punishment is really necessary for a prisons' penological goal. The new *Johnson* standard, which asks whether a right need necessarily be curtailed, does just that. As this Note has demonstrated, restriction or denial of abortion rights is a form of punishment that should not be a part of an inmate's sentence. In fact, prison abortion policies are yet another way that abortion foes restrict reproductive rights for women who are most marginalized in our society-those who are in prison. Therefore, it is up to the courts to protect the abortion rights of female inmates, and not applying

[274] *Turner*, 482 U.S. at 84, citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

the *Turner* deferential standard to abortion policies is an important step in the right direction.

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