Notes

TURNER V. SAFLEY AND ITS PROGENY: A GRADUAL RETREAT TO THE "HANDS-OFF" DOCTRINE?

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INTRODUCTION

"There was a time, not so very long ago, when prisoners were regarded as 'slaves[s] of the State,' having 'not only forfeited [their] liberty, but all [their] personal rights ....'"[1] States and correctional facilities passed severe laws and regulations governing prison conditions and discipline. Additionally, the courts were content to maintain a "hands off"[2] attitude toward inmate complaints that alleged that prison regulations abridged their constitutional rights.[3]

Eventually, the courts began to recognize that inmates do retain some personal rights upon which prison regulations may not absolutely infringe.[4] It

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1. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 139 (1977) (quoting Ruffin v. Commonwealth, 62 Va. 790, 796 (1871)) (Marshall, J., dissenting).

2. *See, e.g.*, Bethea v. Crouse, 417 F.2d 504, 505 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands off' policy in matters of prison administration ...."); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("The courts have no supervisory jurisdiction over the conduct of the various institutions provided by law for the confinement of federal prisoners committed to the custody of the Attorney General ...."); Stroud v. Swope, 187 F.2d 850, 851–52 (9th Cir. 1951) ("We think that ... it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.") *See also* Ramos v. Lamm, 485 F. Supp. 122, 131 (D. Colo. 1979); Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950); Emily Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219 (1977); Thomas O. Sargentich, Comment, *Two Views of a Prisoner's Right to Due Process:* Meachum v. Fano, 12 HARV. C.R.-C.L. L. REV. 405 (1977).

3. Procunier v. Martinez, 416 U.S. 396, 404 (1973). The courts, however, have long protected inmates' right to challenge the *legality*, as opposed to the conditions, of their confinement. *See, e.g., Stroud*, 187 F.2d at 851–52. In *Ex parte* Hull, 312 U.S. 546 (1940), the United States Supreme Court struck down a regulation prohibiting inmates from filing petitions for writ of habeas corpus unless they were approved by the legal investigator for the parole board. *Id.* at 549. The Court held that the state and its officers may not abridge or impair an inmate's right to apply for a writ of habeas corpus. *Id. See also* Bounds v. Smith, 430 U.S. 817, 818 (1977) (reaffirming *Younger v. Gilmore*); Younger v. Gilmore, 404 U.S. 15 (1971) (requiring prisons to protect inmates' right to court access by providing law libraries or alternative sources of legal knowledge); Johnson v. Avery, 393 U.S. 483, 490 (1969) (holding unconstitutional a regulation prohibiting inmates from assisting one another in the preparation of writs or other legal matters).

4. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221 (1990) (inmates retain a liberty interest in being free of forced medication); Turner v. Safley, 482 U.S. 78, 85 (1987) (inmates

was not until 1987, in *Turner v. Safley*,[5] however, that the United States Supreme Court articulated the standard of review to be used in determining the extent to which inmates retain these rights.[6]

The first part of this Note provides a brief look at the history of inmate rights. This section explains the "hands off" doctrine, traces its demise, and examines the courts' approach to early inmate cases decided on the merits. The second part of this Note analyzes the *Turner* case. It sets forth the *Turner* test, a four-pronged rational basis test, and examines how the United States Supreme Court applied the test to the challenged regulations in that case. The third part of this Note examines a recent Supreme Court case, *Washington v. Harper*,[7] which applied the *Turner* test to determine the validity of a regulation authorizing the forcible administration of antipsychotic drugs to competent but mentally ill inmates. The fourth part of this Note critiques the *Turner* test using *Harper* to illustrate the test's shortcomings. This section argues that the *Turner* test is incorrectly formulated, shows how the Court has misapplied the test in subsequent decisions, and asserts that the test does not adequately protect inmate rights in all circumstances. This Note attempts to illustrate that the *Turner* test is a step backwards toward the historical "hands off" approach.

I. THE "HANDS OFF" APPROACH AND ITS DEMISE: THE RECOGNITION OF PRISONER RIGHTS

The federal courts traditionally employed a "hands off" approach to prison administration and inmate complaints alleging the deprivation of constitutional rights.[8] In fact, this doctrine "was a near absolute jurisdictional bar to federal court review of alleged violations of prisoners' asserted constitutional rights."[9] Courts assumed they had no power to supervise prison administration or interfere with prison rules or regulations, even in the face of a possible constitutional violation.[10] Some courts, however,

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retain First Amendment rights); Lee v. Washington, 390 U.S. 333, 333 (1986) (inmates are protected from invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment). These retained rights are often defined as rights that are consistent with the penological objectives of the institution. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974).

5. 482 U.S. 78 (1987).

6. That standard is a rational basis standard. *See infra* notes 32–47 and accompanying text. The Court had alluded to this standard in several earlier cases. *Turner*, 482 U.S. at 78. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoner's Union, 433 U.S. 119 (1977); *Pell*, 417 U.S. at 817. The courts of appeals, however, interpreted these decisions as being confined to cases involving "'time, place or manner' regulations, or regulations restricting 'presumptively dangerous' inmate activities." *Turner*, 482 U.S. at 87.

7. 494 U.S. 210 (1990).

8. *See supra* note 2 and accompanying text. This approach, based on the idea that "courts are ill-equipped to deal with the ... problems of prison administration," assumed that judicial review of administrative decisions would subvert prison discipline and the accomplishment of penological objectives. Procunier v. Martinez, 416 U.S. 396, 404–05 (1974).

9. Ramos v. Lamm, 485 F. Supp. 122, 130 (D. Colo. 1979).

10. *See supra* note 2 and accompanying text. For example, in Banning v. Looney, 213 F.2d 771 (10th Cir. 1954), an inmate appealed from an adverse judgment, asserting that the prison authorities violated his constitutional rights because they refused to allow him "to process directly an invention with the U.S. Patent Office." *Id.* at 771. The court, *without considering whether the inmate's rights were violated*, affirmed the district court's judgment. *Id.* The court found it unnecessary to cite authority for the proposition that it was without power to interfere with such a prison regulation. *Id. But see* Bethea v. Crouse, 417 F.2d 504, 506 (10th Cir. 1969) (the Tenth Circuit discussed its past decisions involving inmate complaints and insisted

would review a prison regulation to determine if it was arbitrary or capricious.[11]

The decision in *Powell v. Hunter*[12] exemplifies this "hands off" approach. In that case, the Tenth Circuit Court of Appeals affirmed an order discharging a writ of habeas corpus. The inmate brought the writ on the grounds that he was unlawfully deprived of his "good time"[13] allowance and thus was being illegally held. The court noted the trial court's lack of power to interfere with the conduct of the prison or its discipline.[14] The trial court had found that the prison board did not act arbitrarily, capriciously, or fraudulently in deciding to deprive the inmate of his "good time" credit. The court of appeals concluded this finding was supported by substantial evidence and held that the writ was properly discharged.[15]

The Tenth Circuit also employed the "hands-off" approach in *Graham v. Willingham*.[16] *Graham* involved an inmate allegation of "cruel and unusual punishment ... because of prolonged and unreasonable segregated confinement in the maximum security facilities at Leavenworth."[17] The court of appeals upheld the trial court's decision denying relief to the inmate.[18] The court noted the Attorney General has responsibility for managing penal institutions and the exercise of that responsibility is not subject to judicial review unless it is exercised in a clearly arbitrary or capricious manner.[19] The court concluded the inmate's confinement was constitutional because it was not arbitrary and was the result of the "considered judgment" of the prison officials.[20]

The federal courts started to reject the "hands off" approach in the 1960's, and thus began to review inmate challenges to regulations regarding

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that it had "never turned a deaf ear to a bona fide claim for relief based upon the deprivation of a constitutional right ....").

11. *See, e.g., Bethea*, 417 F.2d at 505–06 ("[T]he basic responsibility for the control and management of penal institutions ... lies with the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon [sic] the part of prison officials."). A decision is not arbitrary or capricious if it is the result of the prison authority's "considered judgment," Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967), or if it "is supported by 'some facts ....'" Smith v. Rabalais, 659 F.2d 539, 545 (5th Cir. 1981).

12. 172 F.2d 330 (10th Cir. 1949).

13. *Id.* at 331. "Good time" allowance is a deduction from the length of an inmate's sentence that is given to an inmate who follows all prison rules and has not been punished by prison officials. *Id.*

14. *Id.* "The prison system is under the administration of the Attorney General, ... and not of the district courts. The court has no power to interfere with the conduct of the prison or its discipline." *Id.* (citation omitted).

15. *Id.* Other courts dealing with "good time" credit issues have based similar decisions on the rationale that this "good time" credit is an entitlement rather than a right. Due process is only required when a constitutional or state-created right is at stake. *See, e.g*, Vitek v. Jones, 445 U.S. 480, 488 (1980) (although "there is no 'constitutional or inherent right' to parole, ... once a State grants ... conditional liberty ... dependent on the observation of ... parole restrictions, due process projections attach to the [parole revocation decisions]."). For a more detailed discussion of this "entitlement" approach, see Sargentich, *supra* note 2, at 405.

16. 384 F.2d 367 (10th Cir. 1967).

17. *Id.* at 367–68.

18. *Id.* at 368.

19. *Id.*

20. *Id.*

conditions of confinement.[21] In *Cooper v. Pate*,[22] the United States Supreme Court reversed a lower court decision dismissing an inmate's complaint alleging that prison officials deprived him of privileges because of his religious beliefs.[23] Although the Court did not reach the merits of the complaint, the Court's decision recognized that inmates retain certain rights and privileges and may seek redress in court for their unlawful deprivation.[24]

The first United States Supreme Court case to decide on the merits issues involving inmate challenges to prison regulations was *Procunier v. Martinez*.[25] Interestingly, the Court did not frame the issue in terms of inmates' rights.[26] Instead, the Court considered the non-inmate rights the regulation implicated.[27] The *Martinez* Court considered the appropriate standard of review for a prison regulation allowing censorship of inmates' mail. The Court refused to frame the issue in terms of the extent to which free speech survives incarceration.[28] Rather, the Court considered the issue in terms of the implicated non-inmate rights.[29] In light of the non-inmate First Amendment rights involved, the Court employed a strict standard of scrutiny and found the regulation to be unconstitutional.[30] The Court emphasized that it was not determining the proper standard of review to apply to cases exclusively involving *inmates'* rights.[31] That determination was not made until *Turner v. Safley*.

II. ESTABLISHING A STANDARD OF REVIEW FOR REGULATIONS INFRINGING ON INMATES' RETAINED CONSTITUTIONAL RIGHTS

A. Background to Turner v. Safley

In *Turner*, the Supreme Court developed the standard to determine the constitutionality of prison rules implicating only inmates' constitutional

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21. *See supra* note 4 and accompanying text.
22. 378 U.S. 546 (1964).
23. *Id.* Cooper claimed prison officials denied him "permission to purchase certain religious publications and denied" him other unspecified privileges. *Id.*
24. *Id.*
25. 416 U.S. 396 (1974).
26. *Id.* at 408.
27. *Id.*
28. *Id.* "[W]e have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand." *Id.*
29. *Id.* The Court focused on the rights of individuals outside the prison to communicate freely with the inmates. "The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id.* at 409.
30. *Id.* at 415. The Court required that the regulation further "one or more of the substantial governmental interests of security, order and rehabilitation." *Id.* at 413. Second, the regulation must be narrowly tailored so as not to restrict the First Amendment freedoms more "than is necessary or essential to the protection of the particular governmental interest involved." *Id.* The challenged regulations allowed censorship of statements that "unduly complain" or "magnify grievances." *Id.* at 415. They also authorized censorship of "inflammatory political, racial, religious or other" expression as well as censorship of "defamatory" or "otherwise inappropriate" matter. *Id.* The Court found the prison officials were unable to show that "these broad restrictions ... were in any way necessary to the furtherance of a governmental interest unrelated to the suppression of expression." *Id.*
31. *Id.* at 408. *See supra* note 28 and accompanying text.

rights.[32] *Turner* involved an inmate class action suit brought for injunctive relief and damages.[33] The inmates challenged two prison regulations relating to inmate-to-inmate correspondence and inmate marriages.[34]

The United States District Court for the Western District of Missouri, in reliance upon *Martinez*, applied a strict scrutiny standard and found both regulations unconstitutional.[35] The Court of Appeals for the Eighth Circuit affirmed.[36]

B. The Formulation of the Turner *Test*

The Supreme Court refused to strictly scrutinize the regulations, stating that regulations that infringe on inmates' retained constitutional rights are valid if they are "reasonably related to legitimate penological interests."[37] The Court reasoned that such a low standard of review is necessary in light of the difficulty in managing a prison.[38] The Court outlined various factors for determining the reasonableness of a regulation.

To begin with, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest ... justify[ing] it."[39] In other words, the policy must not be arbitrary or irrational.[40] Second, it is relevant "whether there are alternative means of exercising the right" even in the face of the restriction.[41] Thus, if other means of exercising the right remain

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32. Turner v. Safley, 482 U.S. 78, 89 (1987). *See also* Washington v. Harper, 494 U.S. 210, 223 (1990) ("In *Turner v. Safley* ... we held that the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'") (citations omitted).

33. *Turner*, 482 U.S. at 81.

34. *Id.* The regulation pertaining to inmate-to-inmate correspondence permitted correspondence between family members who were inmates at other institutions. *Id.* It also allowed correspondence between inmates if that correspondence pertained to legal matters. *Id.* The regulation permitted all other inmate-to-inmate correspondence only if deemed to be "in the best interest of the parties involved." *Id.* at 81–82. As a rule, the decision was based on the inmate's "progress reports, conduct violations, and psychological reports ... rather than on individual review of each piece of mail." *Id.* at 82.

The marriage regulation permitted an inmate to marry only with the permission of the prison superintendent and only when there was a "compelling" reason, such as a pregnancy or the birth of an illegitimate child. *Id.* at 82. The regulation did not distinguish between marriages between two inmates and marriages between an inmate and a non-inmate.

35. *Id.* at 83.

36. *Id.*

37. *Id.* at 89. The Court rejected the strict scrutiny standard as the standard to be applied in cases implicating inmate rights. *Id.* at 81.

38. *Id.* at 84, 89. Although the *Turner* Court did not specifically address the difficulties of prison administration, the *Martinez* Court did. According to that Court:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating ... the inmates placed in their custody. The Herculean obstacles to effective discharge of those duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.

Procunier v. Martinez, 416 U.S. 396, 404–05 (1974).

39. *Turner*, 482 U.S. at 89.

40. *Id.*

41. *Id.* at 90. The Court made it clear, however, that this is not a "least restrictive alternative" test. "[P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90–91.

despite the restriction, the "court[] should be particularly conscious" of the deference owed to prison officials.[42] A third factor is "the impact [that] accommodation of the asserted constitutional right will have on" guards, other inmates, and prison resources.[43] According to the *Turner* Court, when accommodation of an asserted right will have a significant "ripple effect"[44] on fellow inmates or prison staff, courts should be especially deferential to the decision of prison officials.[45] Finally, a court should consider the "absence of ready alternatives [as] evidence of the reasonableness of a prison regulation."[46] Alternatively, "the existence of [ready] alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."[47]

C. Application of the Turner *Test in* Turner *Itself*

1. The Correspondence Regulation

In *Turner*, prison security was the governmental objective underlying the correspondence regulation.[48] According to prison officials, the mail sent between prisons "can be used to communicate escape plans and to arrange assaults and other violent acts."[49] Prison officials believed that a rule hindering communication of such plans would reduce the number of occurrences.[50] The Court found this to be a legitimate objective and found the correspondence regulation to be logically connected to this security objective.[51]

Second, although no alternate means existed by which the inmates could correspond with inmates in other institutions, the Court noted the asserted right, that of expression, could be exercised with other people.[52] In other words, the regulation did not bar all means of expression; it only barred expression with a limited group of people.[53]

Third, the Court considered the impact of unrestricted inmate-to-inmate correspondence on prison guards, other inmates, and prison resources. The

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42. *Id.* at 90.
43. *Id.*
44. Lower courts have interpreted a "ripple effect" as an impact that effects the prison as a whole. *See* Young v. Lane, 922 F.2d 370, 377 (7th Cir. 1991) ("Because a nonuniform headgear would limit the effectiveness of defendants' attempt to limit the existence and effectiveness of gangs, the Jewish inmates' right to wear yarmulkes comes at the cost of less liberty for the entire Dixon community, both inmates and guards."); Goodwin v. Turner, 908 F.2d 1395, 1400 (8th Cir. 1990) (accommodation of the right to procreate would force the Bureau to grant its female inmates expanded medical services, which would impact the prison by taking resources away from security and other legitimate penological objectives). Although the United States Supreme Court's opinion in *Turner* indicates that the Court intended a definition such as that adopted by the lower courts, the Court's decision in *Harper* calls the above definition into question. *See infra* notes 115–19 and accompanying text.
45. *Turner*, 482 U.S. at 90.
46. *Id.*
47. *Id.*
48. *Id.* at 91.
49. *Id.*
50. *Id.* Officials also testified that restricting correspondence would help combat the prison gang problem by making it more difficult for gang members to make plans. *Id.*
51. *Id.* "Undoubtedly, communication with other felons is a potential spur to criminal behavior: this sort of contact frequently is prohibited even after an inmate has been released on parole." *Id.* at 91–92.
52. *Id.* at 91.
53. *Id.* at 92.

Court accepted the prison officials' assertions that inmate "correspondence between institutions facilitates the development of informal organizations that threaten" the internal security of the institution.[54] Thus, the Court found that allowing inmates to correspond with inmates at other prisons would result in a significantly less safe prison environment for everyone.[55]

Finally, the Court noted that there were "no obvious, easy alternatives" to the correspondence regulation.[56] The Court accepted the testimony of prison officials that "it would be impossible to read all inmate-to-inmate" mail.[57] Further, officials testified that inmates could write in secret jargon so that the officials could not understand their true message.[58] Consequently, the Court validated the regulation prohibiting inmate-to-inmate correspondence because it was "reasonably related to valid penological goals." [59]

2. The Marriage Regulation

Before applying the *Turner* test to the marriage regulation, the Court had to find the inmates possessed a constitutionally protected right to marry.[60] The *Turner* Court acknowledged that the right to marry is a fundamental constitutional right retained by inmates.[61]

The Court then applied its test to determine the extent to which this right may be limited in prison contexts. The Court first considered the security and rehabilitation purposes underlying the marriage regulation. Prison officials testified that they were concerned "that 'love triangles' might lead to violent confrontations between inmates."[62] They also believed the marriage prohibition would promote rehabilitation of female inmates by encouraging the women to be more self-sufficient.[63] The Court, however, found that the regulation was "not reasonably related to these penological interests"[64] but rather was an "exaggerated response to the proposed objectives.[65] The Court noted that

54. *Id.*
55. *Id.* "As a result, the correspondence rights asserted by respondents ... can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike. Indeed, the potential 'ripple effect' is even broader here than in *Jones* [v. North Carolina Prisoner's Union, 433 U.S. 119 (1977)], because exercise of the right affects the inmates and staff of more than one institution." *Turner*, 482 U.S. at 92.
56. *Id.* at 93.
57. *Id.*
58. *Id.*
59. *Id.*
60. The Court, in Zablocki v. Redhail, 434 U.S. 374 (1978), held that the right to marry is a fundamental, constitutionally-protected right. *Id.* at 383. *Turner* was the first case to acknowledge this right for incarcerated individuals. The Court did not include this step in its analysis of the correspondence regulation, presumably because it had already determined that inmates retain First Amendment rights, even though it had not determined the *extent* to which they retain this right. *See* Procunier v. Martinez, 416 U.S. 396, 418 (1974) ("The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment, even though qualified of necessity by the circumstances of imprisonment.").
61. *Turner*, 482 U.S. at 95.
62. *Id.* at 97.
63. *Id.*
64. *Id.*
65. *Id.* at 98. The Court noted, however, that there might be legitimate security concerns that would support the imposition of restrictions on an inmate's right to marry and the requirement of the superintendent's approval. *Id.* at 97. The Court did not elaborate on what these legitimate security concerns might be.

inmate rivalries were just as likely to occur without a formal marriage ceremony as with one.[66] The Court also recognized the existence of easy, obvious alternatives such as generally allowing inmates to marry unless the warden finds the marriage presents a threat to prison security or public safety.[67]

Finally, the Court found no "ripple effect" to justify such a broad restriction on the inmates' rights.[68] Thus, the Court found the marriage regulation did not satisfy the reasonable relationship standard and was unconstitutional.[69]

As applied in *Turner* itself, the *Turner* test might appear to present a sensible means of accommodating both inmate rights and correctional concerns. The Court's formulation and the use of the test is, however, not without objection. The test, as formulated, does not necessarily serve its purpose of invalidating prison regulations that prevent inmates from exercising those constitutional rights which are consistent with the institution's objectives.[70] Secondly, the test too easily lends itself to judicial manipulation in an effort to defer to prison officials' judgment.[71] Third, by insisting that the *Turner* test, which provides for a low standard of review, is applicable in *all* inmate cases, the Court is insensitive to the heightened importance of some constitutional rights, such as the right to be free from bodily restraint.[72]

To illustrate these objections to the Court's present approach to inmate rights, this Note considers next a recent inmate case, *Washington v. Harper*.[73] *Harper* is of interest because it is one of the few Supreme Court cases applying the *Turner* test. Further, the nature of the inmate interest involved in *Harper* perhaps best illustrates the above arguments.

III. ANALYSIS OF *WASHINGTON V. HARPER*

A. Background

Walter Harper was an inmate in the Special Offender Center (SOC), a Washington Department of Corrections institution used to diagnose and treat inmates with serious mental disorders.[74] The prison officials diagnosed him as schizophrenic and proposed to treat him with antipsychotic drugs.[75]

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66. *Id.* at 98.
67. *Id.* at 97.
68. *Id.* at 98.
69. *Id.* at 91.
70. *See infra* notes 108–14 and accompanying text.
71. *See infra* notes 115–24 and accompanying text.
72. *See infra* notes 125–44 and accompanying text.
73. 494 U.S. 210 (1990).
74. *Id.* at 214.
75. *Id.* Antipsychotic drugs are frequently used to treat schizophrenia. These drugs have many serious side effects. Nonneurological side effects include dry mouth, stuffy nose, urinary retention, constipation, blurred vision, low blood pressure and postural hypotension—"a faintness or dizziness upon standing due to a decrease in blood pressure." Dennis E. Cichon, *The Eighth Circuit and Professional Judgment: Retrenchment of the Constitutional Right to Refuse Antipsychotic Medication*, 22 CREIGHTON L. REV. 889, 894 (1989). Antipsychotic drugs also cause neurological disorders involving unusual body movements due to the effect of the drugs on the nonvoluntary nervous system. *Id.* at 894–96. The most serious side effect related to the administration of antipsychotic drugs is tardive dyskinesia. *Id.* This disorder is characterized by uncontrollable repetitive movements of the face, mouth, tongue, trunk and

Harper at first consented to treatment with antipsychotics but eventually refused to take them.[76] Subsequently, the treating physician sought to medicate Harper against his will pursuant to SOC Policy 600.30.[77] That policy authorized the forced administration of antipsychotic drugs to a competent[78] but mentally ill[79] inmate upon demonstration that the inmate suffers from a mental disorder and as a result of that disorder constitutes a likelihood of serious harm[80] to himself, others or property and/or is gravely disabled.[81]

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extremities. *Id.* In severe cases, patients may have trouble swallowing, breathing or communicating. *Id.*

76. *Harper*, 484 U.S. at 214. It appears that Harper refused to take the drugs due to the side effects. Harper claimed "Haldol [an antipsychotic] paralyzed my [sic] right side of my body. ... You are burning me out of my life. ... You are burning me out of my freedom." *Id.* at 239 n.4 (Stevens, J., concurring in part and dissenting in part).

77. *Id.* at 214.

78. For an excellent discussion of what it means to be "competent" to make medical treatment decisions, see Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945 (1991). In brief, "the concept of competency to make treatment decisions has received little attention in the law." *Id.* at 977. Few cases have actually articulated and applied a standard of medical decision-making competency. *Id.* One formulation of the standard requires the patient to have "sufficient mind to reasonably understand [his] condition, the nature and effect of the proposed treatment, attendant risks in pursuing the treatment, and not pursuing the treatment." *In re* Schiller, 372 A.2d 360, 367 (N.J. Super. 1977). *See also* K.S. v. Winnebago County, 433 N.W.2d 291 (Wis. Ct. App. 1988) (offering an example of a statutory standard of competency). Other courts, however, have chosen to follow another model of incompetency. For a more detailed discussion of that model, see James C. Beck, *Right to Refuse Antipsychotic Medication: Psychiatric Assessment and Legal Decision-Making*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 368 (1987). To be competent under that model, one must (1) be aware of one's mental disorder; (2) have sufficient knowledge about the medication and the mental disorder; and (3) not refuse medication based on delusional beliefs. *Id.* at 369. For an application of this model, see Matter of Peterson, 446 N.W.2d 669, 673 (Minn. Ct. App. 1989).

Incompetency and mental illness are not synonymous. Jones v. Gerhardstein, 416 N.W.2d 883, 890 (Wis. 1987). *See also* Davis v. Hubbard, 506 F. Supp. 915, 935 (N.D. Ohio 1980). Courts often take the position that an individual is competent to make treatment decisions absent a judicial determination to the contrary. *See, e.g.*, Rivers v. Katz, 495 N.E.2d 337, 341–42 (N.Y. 1986) ("[N]either the fact that appellants are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being"). *See also* Keyhea v. Rushen, 223 Cal. Rptr. 746 (Ct. App. 1986) (California prisoners have a statutory right to refuse long-term treatment with antipsychotic drugs absent a judicial determination that they are incompetent to do so).

79. According to the Washington Code, "mentally ill person" means: "[A]ny person who ... as a result of a mental disorder presents a likelihood of serious harm to others or himself or is gravely disabled." WASH. REV. CODE ANN. § 72.23.010 (West 1992).

80. According to the policy, "likelihood of serious harm" means

> either (i) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (ii) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused harm or which places another person or persons in reasonable fear of sustaining such harm, or (iii) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others.

Harper, 494 U.S. at 215 n.3. *See also* Record, Book 9, Policy 600.30, p.1. Revised Policy 620.200, effective January 18, 1985, retained these substantive definitions. Record, Book 9, Policy 629.200, p.1.

81. *Harper*, 494 U.S. at 215. "Gravely disabled" means:

> a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifests severe deterioration in routine

After a hearing, a committee approved the involuntary administration of antipsychotics to Harper based on the finding that he was a danger to others.[82] The involuntary treatment continued for approximately one year.[83] Harper was then transferred from SOC but returned a month later.[84] The involuntary treatment with antipsychotics continued for approximately three more years.[85]

Harper then filed a suit in state court.[86] After a bench trial, the court held that Harper had a liberty interest in being free of the involuntary administration of antipsychotics but that the procedures in the Policy met the requirements of due process.[87] On appeal,[88] the Washington Supreme Court agreed that Harper had a liberty interest in refusing the administration of antipsychotic medication[89] and held that the state could only administer antipsychotic medication to an inmate if the state proved by "clear, cogent, and convincing" evidence that the administration of such medication was necessary and effective for furthering a compelling state interest.[90] The State of Washington then appealed to the United States Supreme Court, which granted certiorari.

B. The United States Supreme Court's Analysis

The United States Supreme Court framed the substantive issue in *Harper* in terms of the necessary circumstances under which a state may forcibly administer antipsychotic drugs to a competent but mentally ill inmate.[91]

The Court found that, as a matter of state law, the prison policy itself conferred upon Harper a right to be free of the *arbitrary* administration of antipsychotic medication.[92] The *Harper* court also recognized a liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.[93] The Court found this interest to be a qualified one, however.[94] In order to determine whether the regulation *unduly* infringed on Harper's right, the Court applied the *Turner* test.

The Court considered prison safety and security to be the state's primary interest in forcibly administering antipsychotics to inmates. The Court main-

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functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health and safety.

Id. at 215 n.3. *See also* Record, Book 9, Policy 600.30, p.1. The policy's definition of the term "gravely disabled" is identical to the definitions of the term as it is used in the state involuntary commitment statute. WASH. REV. CODE ANN. § 71.05.020(1) (West 1992).

82. *Harper*, 494 U.S. at 217. Prior to involuntary treatment, the policy required a hearing before a committee composed of a psychologist, a psychiatrist, and the associate superintendent of the center, none of whom could be presently involved in the inmate's treatment. *Harper*, 484 U.S. at 215. Harper appealed the committee's finding, but the Superintendent upheld that finding. *Id.* at 217.

83. *Id.* at 217.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 218.

88. Harper v. State, 759 P.2d 358 (Wash. 1988).

89. *Id.* at 361.

90. *Id.* at 365.

91. *Harper*, 494 U.S. at 220.

92. *Id.* at 221.

93. *Id.* at 221–22.

94. *Id.*

tained that the state's interest in treating inmates was a secondary interest that necessarily stemmed from the state's primary interest in security.[95]

According to the Court, the policy in question was a rational, nonarbitrary means of furthering the state's security objective because it only applied to gravely disabled mentally ill inmates or those representing a substantial risk to themselves or others.[96] To buttress its position, the Court pointed to the psychiatric community's acceptance of antipsychotic drugs as an effective means of treating and controlling mental illness resulting in violent behavior.[97]

The Court then considered the alternatives Harper offered. Harper suggested a scheme by which the state must first judge him incompetent and then receive court approval before forcibly medicating him.[98] The Court summarily dismissed this alternative.[99] The Court also rejected the alternatives of physical restraints or seclusion.[100] The Court noted that physical restraints are only effective in the short term and can result in side effects when inmates resist.[101] Thus, physical restraints or seclusion were not acceptable substitutes for antipsychotics in terms of their medical effectiveness or their toll on limited prison resources.[102]

The Court concluded that, although a competent inmate has a liberty interest in refusing treatment with antipsychotic drugs, this liberty interest bows to the state's interest in maintaining safe prisons.[103] Consequently, this interest does not protect an inmate from forced administration of antipsychotics when the inmate is gravely disabled or a danger to himself, others or property.[104]

IV. THE UNITED STATES SUPREME COURT'S RETREAT TOWARD THE "HANDS-OFF" DOCTRINE

In brief, there are three basic problems with the Court's articulation of the appropriate test to apply in cases involving inmate challenges to prison regulations that allegedly infringe on their constitutional rights. This part of the Note analyzes these problems and suggests possible solutions. The first problem involves the Court's original formulation of the *Turner* test. Although the test

95. *Id.* at 225–26. The Court considered the security interest legitimate because "[w]here an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness." *Id.*

96. *Id.* at 226. The court specifically neglected to mention that the policy also applies to inmates who only pose such a risk to prison property. *See supra* note 80.

97. *Id.* at 226.

98. *Id.* Such a scheme was approved by the New York Court of Appeals in Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986) (involuntarily confined mentally ill inmate must be judged incompetent before antipsychotic may be forcibly administered when the forced administration is not based on the state's police power).

99. According to the Court, this alternative ignored the state's interest in treating inmates when necessary to reduce the danger they pose. Therefore, this alternative was "in no way responsive" to the state's legitimate interest in treating Harper, where medically appropriate, for the purpose of reducing the danger he posed. *Harper*, 494 U.S. at 226.

100. *Id.*

101. *Id.* at 226–27. The Court also emphasized the risk of staff injury while putting the restraints on or tending to a restrained inmate. *Id.*

102. *Id.* at 227.

103. *Id.*

104. *Id.*

is intended to protect inmate rights to the extent the exercise of these rights is consistent with penological objectives,[105] the test unnecessarily restricts the scope of inmate rights in some instances.[106] Second, assuming the *Turner* test is correctly formulated, the *Harper* Court's application of it illustrates how the Court has subsequently weakened the already meager constitutional protection it affords inmates. Finally, the Supreme Court insists on applying the *Turner* test in all inmate cases regardless of the nature of the asserted right or the consequences resulting from its deprivation. The result is that a penal institution may as easily justify requiring an inmate to suffer physical side effects from drugs as to justify forcing an inmate to conform to a grooming or dress code.[107] It is difficult to discern why a penal institution should not be required to better justify its actions when the consequences are more onerous.

A. Why the Turner *Test Is Incorrectly Formulated*

The Supreme Court has insisted that inmates retain those constitutional rights not inconsistent with their prisoner status or with the correction system's legitimate penological interests.[108] Presumably, the Court developed the *Turner* test as a means of determining when the exercise of a retained right is or is not inconsistent with an inmate's status or the system's objectives. Application of the *Turner* test as originally formulated, however, results in inmates being denied the exercise of rights that could otherwise be exercised consistent with the institution's objectives.

The discrepancy between the Court's broad formulation of those rights an inmate retains and the extent to which those retained rights may be exercised under the *Turner* test results from an incorrect formulation of the fourth prong of that test. The fourth prong of the *Turner* test, which provides that the presence of alternatives "may" be evidence that a regulation is overbroad, appears to be a half-hearted attempt by the Court to insure that a challenged regulation is not an overly restrictive means of accomplishing a legitimate goal.[109] Although the absence of alternatives is considered "evidence" that the regulation is reasonable, the test, as now formulated, gives little guidance to courts as to the weight such evidence should be given.[110] Consequently, it is rare for the courts to acknowledge that an alternative is reasonable and even more rare for them to find a regulation unreasonable simply because a reasonable alternative

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105. *See supra* note 37 and accompanying text.

106. In other words, the *Turner* test may be used to invalidate inmate rights that are not inconsistent with legitimate penological objectives.

107. *See, e.g.*, Friedman v. Arizona, 912 F.2d 328, 331–33 (9th Cir. 1990), *cert. denied* 111 S. Ct. 996 (1991) (regulation prohibiting facial hair upheld); Fromer v. Scully, 874 F.2d 69, 73–76 (2d Cir. 1989) (regulation regarding beard length upheld); Standing Deer v. Carlson, 831 F.2d 1525, 1527–29 (9th Cir. 1987) (dress regulation upheld).

108. Turner v. Safley, 482 U.S. 78, 89 (1987). *See supra* note 37 and accompanying text.

109. The Court has made it clear this is not a "least restrictive alternative" test. *See supra* note 41 and accompanying text.

110. The Court's subsequent decisions indicate that very little, if any, consideration need be given to proposed alternatives. For example, in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Court, in upholding the regulation, partly relied on the fact that *in the prison official's judgment*, accomodation of the asserted right would have an adverse impact on the institution. *Id.* at 352.

exists.[111] In order to insure that inmates may exercise their constitutional rights to the extent consistent with the correctional institution's objectives, the fourth prong must be modified so that the presence of alternatives[112] is considered rebuttable proof that the regulation is overbroad.[113]

Consider, for example, the forced medication of a "dangerous" inmate. If an alternative to forced medication is available that allows an inmate to exercise his or her right to refuse medication but also allows the institution to maintain security, then the regulation authorizing forcible administration of antipsychotics, in that situation, should be found unconstitutional because it denies the inmate the ability to exercise a right that is not inconsistent with the institution's objectives.[114] Of course, if prison officials provide proof that the alternative is not acceptable, for example because it cannot be provided within the confines of the prison's budget or manpower, then the regulation may not be found to be unconstitutional.

In summary, the *Turner* test does not *require* the Court to consider viable alternatives as proof that the regulation unduly infringes on inmate rights. The result is that courts are given much latitude to uphold prison regulations that severely restrict inmate rights even when there are viable, less intrusive alternatives. In order to remedy this problem, the fourth prong must state that the presence of reasonable and available alternatives is rebuttable proof that the regulation is unconstitutional.

B. After the United States Supreme Court's Decision in Harper, *the* Turner *Test Provides Inmates with Significantly Less Constitutional Protection*

Even assuming the *Turner* test, as originally stated, is correctly formulated, *Harper* has diluted the test so that it provides significantly less protection of inmate rights than it originally did.

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111. In Theriault v. Magnusson, 698 F. Supp. 369, 372 (D. Maine 1988), an inmate objected to a regulation requiring a prison stamp on outgoing business correspondence. The inmate proposed as an alternative that inmate mail directed to businesses be submitted unsealed for inspection. The court found that the existence of this alternative, which was previously upheld as constitutional by the Court of Appeals for the Second Circuit, *see* Rodriguez v. James, 823 F.2d 8 (1989), did not show that the challenged regulation was unconstitutional. *See also* Kahey v. Jones, 836 F.2d 948, 951 (5th Cir. 1988) (Rubin, J., specially concurring) (although the inmate had provided a practicable alternative, the courts must nevertheless defer to prison officials' authority). *Cf.* Whitney v. Brown, 882 F.2d 1068, 1077 (6th Cir. 1989) (the court found inmates presented a persuasive argument that their proposed alternative fully accommodated their right at de minimus costs to the institution's interests; however, the regulation was found invalid because it failed *all four* prongs of the *Turner* test).

112. Of course, this argument assumes that the proposed alternative reasonably accommodates the institution's objectives. It also assumes that the alternative is reasonably available to the institution. Finally, in recognition of the difficulty of maintaining a correctional facility and the limited financial resources available to such a facility, the proposed alternative must not place a significantly greater financial burden on the institution.

113. This prong is an important one because, as the *Turner* dissent noted, the "valid, rational connection" prong of this test is very easy for the state to meet. For example, there's a logical connection between prison security and bullwhipping prisoners. Turner v. Safley, 482 U.S. 78, 101 (Stevens, J., dissenting in part).

114. One alternative proposed by Harper was physical restraints. Washington v. Harper, 494 U.S. 210, 226 (1990). In considering this possibility, the Court noted there was a possibility of harm to prison staff in attempting to physically restrain an inmate. *Id.* at 227. However, in cases where there is no reason to fear harm to prison staff, perhaps because an inmate does not vigorously resist, restraints would serve to maintain the security of the prison.

1. By no longer requiring evidence that accommodation of an asserted right will result in a "significant" impact or "ripple effect," the Turner *test is unduly deferential to prison officials' judgment.*

First, under the third prong of the original test, courts were to determine whether accommodation of the asserted right would have a *significant* impact on other inmates, guards or prison resources. If so, courts were to be "especially deferential" to the decisions of prison officials.[115]

The *Harper* Court acknowledged this prong of the test,[116] yet it did not specifically apply it. The Court noted that one of the regulation's purposes was to protect others in the prison,[117] implying, perhaps, an impact on other inmates' and guards' safety absent the challenged regulation.[118] However, the Court could not point to *any* evidence that accommodation of Harper's right to be free of unwanted treatment would result in a significant impact or "ripple effect." Unlike in *Turner*, where the security of the entire prison was at stake,[119] Harper only posed a threat to those individuals who happened to be in the same room with him when he became violent. This danger could have easily been curtailed through solitary confinement. Thus, by looking for *any* impact, rather than a significant prison-wide impact, the *Harper* Court modified the third prong of the test so that prison officials need not accommodate an inmate's constitutional rights any time such accommodation will have *some* effect on the prison and those in it. Evidence of such a slight effect is much easier for prison officials to produce. The result is undue deference to prison officials' judgment regarding prison regulations.

2. The Harper *Court's misapplication of the fourth prong of the* Turner *test encourages lower courts to unduly defer to prison official's judgment*

Second, assuming the correct formulation of the fourth prong of the reasonable relationship test, which states that the availability of alternatives may be evidence that a regulation is an exaggerated response to a problem, the *Harper* Court's misapplication of this prong, again, encourages lower courts to unduly defer to prison officials' judgment.

When a prison policy or regulation only has one main objective, such as security, it is quite easy for a court to determine whether an inmate's alternative is a viable one. The court need only consider whether the proposed alternative adequately fulfills that particular policy objective.

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115. *Turner*, 482 U.S. at 90. *See supra* note 45 and accompanying text. For example, the *Turner* Court found that inmate-to-inmate correspondence could result in prison-wide riots. *Id.*

116. *Harper*, 494 U.S. at 225.

117. "Prison administrators have not only an interest in ensuring safety of prison staffs and administrative personnel, ... but the duty to take reasonable measures for the prisoners' own safety." *Id.* (citation omitted). The Court also emphasized that the regulation applies when an inmate represents a significant danger to others. *Id.*

118. This proposition, however, does not necessarily follow. For example, the prison officials could have accommodated Harper's right to refuse medication without endangering guards or other inmates by putting him in solitary confinement.

119. *See supra* notes 54–55 and accompanying text.

The assessment of a proposed alternative becomes more complicated when there are two or more main objectives underlying a prison policy.[120] In order for the fourth prong of the *Turner* test to be properly applied, a court must consider whether one or more than one of those objectives are implicated in a given situation and assess the proposed alternatives only in light of the implicated objectives.

The Court's assessment of Harper's proposed alternatives, however, clearly illustrated to lower courts that in such situations they may disregard proposed alternatives if they do not satisfy any possible underlying policy objective, even if that objective is not implicated in that particular case.

For example, both treatment and security were objectives underlying the policy in *Harper*. However, the committee voted to administer the antipsychotics to Harper on the basis of his dangerousness to others, *not* because he was gravely disabled and, thus, in need of medical treatment.[121] Nonetheless, the *Harper* Court dismissed Harper's proposed alternatives of physical restraints or seclusion because they were not *medically* effective.[122] The Court refused to consider whether restraints reasonably accommodated the institution's *security* objectives.

In cases where an inmate does not resist (and thus does not pose a danger to prison staff trying to restrain him), restraints present a means of preventing the danger the inmate poses. Assuming restraints are a viable alternative, in light of the side effects of antipsychotics,[123] it is not difficult to conclude that forced medication with antipsychotic drugs is an "exaggerated response" to the threat posed by inmates like Harper.

Clearly, the Court's assessment of the alternatives in *Harper* sends a message to lower courts that they may assess proposed alternatives in any manner they please in an attempt to defer to prison official's judgment.[124] The result is that, after *Harper*, inmate rights are afforded even less constitutional protection.

C. The Turner *Test Cannot Adequately Protect* All *Inmate Rights*

The *Harper* Court emphasized that the *Turner* standard of review applies in all cases where prison needs infringe on inmates' constitutional rights, and the Court made it clear that it considered *Harper* such a case.[125] However,

120. For example, underlying the challenged policy in *Harper* were the objectives of treatment and security. *See supra* note 95 and accompanying text.

121. *Harper*, 494 U.S. at 217.

122. Harper was forcibly administered drugs because the committee found he was a danger to others as a result of his mental disorder. *Id.* at 217. There was no finding that he was "gravely disabled" and therefore medically in need of treatment with antipsychotics. Thus, only the prison's security objective was implicated.

123. *See supra* note 75.

124. For example, in Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989), Jewish inmates protested a grooming regulation which prohibited them from practicing their religious beliefs. The purpose behind the regulations was to insure easy identification of escaped prisoners and to prevent prisoners from hiding weapons. The court found that the alternatives of rephotographing inmates at their own expense and searching their beards for contraband did not serve *all* of the institution's objectives and thus these alternatives did not prove the regulation unreasonable. The court did not, however, indicate what these other objectives were. *Id.* at 76.

125. *Harper*, 484 U.S. at 223. The right at stake was the right to avoid the unwanted administration of antipsychotic drugs. *See supra* notes 92–93 and accompanying text.

there is a strong argument that a different standard should apply in cases involving qualitatively different inmate interests.[126]

For example, the right to be free from bodily restraint imposed by arbitrary government action is the "core of liberty" recognized by due process.[127] As the *Harper* dissent noted, when the forced administration of antipsychotics alters the will and mind of an inmate, there is a deprivation of liberty "in the most literal and fundamental sense."[128] Further, not only does the forced administration of antipsychotics "deprive" an inmate of an abstract idea called "liberty," it subjects an inmate to very real and onerous physical side effects.[129] In this sense, although freedom of religion or expression are certainly fundamental rights, the immediate consequences of their deprivation, in an inmate's view, are much less significant.

Courts have recognized the significance of one's interest in refusing medication when the state justifies its actions based on its *parens patriae* interest in providing treatment.[130] Consequently, some courts have applied standards that greatly restrict the state's ability to forcibly administer antipsychotic drugs for treatment purposes.[131]

Common sense dictates that a court should more closely scrutinize the state's action when it seeks to forcibly administer medication based on the less benevolent exercise of its police power.[132] Some state courts have done just

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126. Prior to *Turner*, some federal courts did apply different levels of scrutiny in inmate rights cases depending on the circumstances. For example, Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985), established three different standards to be applied depending on the nature of the right involved. Where the asserted right was inherently inconsistent with the established penological objective, the court required almost absolute deference to the correction officials' judgment. *Id.* at 1033. Where the assertion of the right was presumptively dangerous, the court required broad, although not categorical, deference. *Id.* Where the assertion of the right was not presumptively dangerous, the court required "prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved." *Id.*

127. Youngsberg v. Romeo, 457 U.S. 307, 316 (1982); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part); United States v. Dise, 763 F.2d 586, 588 (3d Cir. 1985).

128. *Harper*, 494 U.S. at 238 (Stevens, J., dissenting in part).

129. *See supra* note 75.

130. *See, e.g.*, Rogers v. Okin, 478 F. Supp. 1342, 1369 (D. Mass. 1979). States have *parens patriae* authority to care for citizens who are unable to care for themselves. Rennie v. Klein, 462 F. Supp. 1131, 1145 (D.N.J. 1978).

In Bee v. Greaves, 744 F.2d 1387, 1395 (10th Cir. 1984), the Tenth Circuit recognized a pre-trial detainee's right to refuse antipsychotics when administered for purposes of treatment. As the court explained:

> Medical treatment is designed to ensure that the conditions of pretrial detention do not amount to the imposition of punishment .... This constitutional requirement cannot be turned on its head to mean that if a competent individual chooses not to undertake the risks or pains of a potentially dangerous treatment, the jail may force him to accept it.

Id. (citation omitted).

131. *See In re* Schuoler, 723 P.2d 1103, 1108 (Wash. 1986) (involuntarily committed mental patient may refuse medical treatment with electroconvulsive therapy absent a compelling state interest and a narrowly drawn regulation); Jarvis v. Levine, 418 N.W.2d 139, 148 (Minn. 1988) (absent extraordinary circumstances, a competent person has the right to refuse treatment with antipsychotic drugs).

132. The state has a police power interest in preventing the mentally ill from harming themselves or others. *Rogers*, 478 F. Supp. at 1368–69; *Rennie*, 462 F. Supp. at 1145. Courts have recognized the potential abuse of this power. *See* Rogers v. Commissioner, 458

that. For example, in *Large v. Superior Court*, the Arizona Supreme Court considered whether the state can infringe on an inmate's right to refuse antipsychotics in order to pursue its goals of institutional order and security.[133] The court recognized that the freedom from bodily restraint, including chemical restraint, has long been recognized as the core of the liberty protected by due process.[134] The Arizona court found that the Arizona Constitution's Due Process Clause requires a substantial, as opposed to a reasonable, relationship between the government's objective and the deprivation of the inmate's liberty.[135] It also noted that the deprivation of liberty must not be excessive in light of the purpose of the deprivation.[136] Applying this test, the court held that the state may not involuntarily medicate prisoners for security purposes absent an emergency.[137]

Similarly, in *People v. Woodall*,[138] the California Court of Appeals established a workable scheme for determining when the state may forcibly medicate an inmate due to his dangerousness to others. This scheme provides inmates much more protection than the *Turner* test. The *Woodall* court held that to forcibly administer antipsychotics to a competent but dangerous inmate, the state must prove the inmate is dangerous by clear and convincing evidence.[139] The state then has the burden of proving there are no less intrusive means of providing for institutional security.[140]

Finally, in *Bee v. Greaves*,[141] the Tenth Circuit, in a pre-*Harper* decision, considered the standard to be used in determining whether a pre-trial detainee's constitutional rights had been violated by the forced administration of antipsychotics. The court began with the premise that absent an emergency, the forcible administration of antipsychotics is not reasonably related to the state's legitimate goals of institutional safety and security.[142] Secondly, the court applied a least-restrictive-alternative test and attempted to distinguish Supreme Court precedent rejecting such a test.[143] According to the *Bee* court, "[i]n view of the severe effects of antipsychotic drugs, forcible medication cannot be viewed as a reasonable response to a safety or security threat if there exist 'less

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N.E.2d 308, 320 (Mass. 1983) (noting the widespread use of antipsychotic drugs for purposes of punishment and staff convenience); Davis v. Hubbard, 506 F. Supp. 915, 926 (N.D. Ohio 1980) (same). Interestingly, however, some courts afford greater protection against the state's exercise of its *parens patriae* power than its police power. *See, e.g., Bee*, 744 F.2d at 1395 (involuntary medication may amount to unconstitutional punishment absent an interest in maintaining the detainee's competence to stand trial or the state's interest in maintaining security and preventing injury).

133. 148 Ariz. 229, 714 P.2d 399 (1986).

134. *Id.* at 236, 714 P.2d at 406.

135. *Id.* at 236–37, 714 P.2d at 406–07.

136. *Id.* at 237, 714 P.2d at 407.

137. *Id.* at 237–38, 714 P.2d at 407–08. The court did not define "emergency." However, one author has suggested that "emergency authority is limited to situations where the threat of physical violence is current or imminent." Cichon, *supra* note 75, at 902. An "emergency" standard restricts the state's police power more than a "dangerousness" standard, such as that employed in Harper. *Id.* at 903. A "dangerousness" standard considers whether a patient will present a *future* threat of violence. *Id.*

138. 257 Cal. Rptr. 601 (Ct. App. 1989).

139. *Id.* at 609.

140. *Id.* at 607. The *Woodall* court rejected the state's argument that physical restraints and seclusion are more intrusive than treatment with antipsychotic drugs. *Id.*

141. 744 F.2d 1387 (10th Cir. 1984).

142. *Id.* at 1395.

143. *Id.* at 1396 n.7.

drastic means for achieving the same basic purpose.'"[144] The court thus reversed the lower court's summary judgment in favor of the prison and its officials.

The *Large*, *Woodall*, and *Bee* courts correctly recognized the heightened importance of the right of competent individuals—including inmates—to refuse treatment with antipsychotic drugs. By requiring prison officials to show that they cannot accomplish their security objectives by any other less intrusive means, these courts struck a proper balance between an inmate's right to refuse treatment with antipsychotics and the prison's need for security, thereby sufficiently protecting inmates from being medicated out of convenience rather than necessity.

CONCLUSION

There is often little sympathy for inmates who complain about their conditions of confinement. After all, inmates are in prison for, among other reasons, punishment. And, it is true that inmates do at times file complaints over very trivial matters.[145] However, it is important to remember that inmates are human beings who should, and do, retain certain fundamental liberties.

The *Turner* test does not adequately strike a balance between these retained liberties and the legitimate penological objectives of prisons. First, as originally formulated, the test does not give enough weight to the presence of available alternatives to a challenged regulation. Second, assuming the original test was correctly formulated, the test, as modified by the United States Supreme Court two years later in *Harper*, gives inmates even less protection of their constitutional rights. The test has been diluted to give less weight to viable alternatives and to require deference to prison officials' judgment when accommodation of the asserted inmate right would result in any impact, rather than a significant impact, on guards, other inmates or prison resources. Finally, one test is not adequate to fully accommodate the assertion of all possible inmate rights. There is no doubt that some inmate rights are more compelling and fundamental than others. What is needed is a test that places greater weight on the presence of viable alternatives and places a greater burden on prison officials to justify the regulation depending on the nature of the asserted right. Only then will inmates truly retain those rights not inconsistent with the legitimate objectives of the penal institution.

144. *Id.* at 1396 (quoting Shelton v. Tucker, 364 U.S. 479 (1960)).

145. *See* Burnette v. Phelps, 621 F. Supp. 1157 (D.C. La. 1985) (inmates alleged their lockers were smaller than those at other prisons, that prison policies on personal property, including that inmates only wear white underwear, were more restrictive than other prisons, and that they were not provided racks for hanging wet towels).