



Empathy for the Devil: How Prisoners Got a New Property Right

Marianne Sawicki*

I. INTRODUCTION

The United States Court of Appeals for the Third Circuit opened a “can of worms” when it declared “a new property right” for prisoners in *Rodney Burns v. Pennsylvania Department of Corrections*.¹ The court held that assessing a charge against the funds in an inmate account impairs a cognizable property interest even before the actual deduction.² Constitutional due-process protections attach to this newly recognized “right to security.”³ The *Burns* worms are bait for the hooks on two lines of inquiry. First, against a tide of judicial deference toward prison administrators, how did the Third Circuit reach this surprising result? Second, in its wake, what changes in prison disciplinary procedures should occur?

An analysis of the *Burns* decision will establish that the court adopted an empathetic stance toward the prisoner-appellant because it relied on an analogy to something familiar: the relation between a debtor and a judgment creditor.⁴ The court declined to demonize the prisoner rhetorically, as commonly happens when a prisoner files a complaint

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2012. The author extends heartfelt thanks to Su Ming Yeh, Esq., and Jennifer Tobin, Esq., of the Pennsylvania Institutional Law Project, who generously gave advice during the initial stages of the research for this article, and to Professors Jamison E. Colburn, Marie T. Reilly, and Thomas M. Place of the Dickinson School of Law, who offered insightful critique of earlier formulations of the analysis.

1. *Burns v. Pa. Dep’t of Corr.*, 544 F.3d 279, 291, 294 (3d Cir. 2008) (Hardiman, J., dissenting). The appeals court initially used a variant spelling of the principal defendant’s name, apparently following the Complaint as filed *pro se*. Subsequent court documents and briefs use “PA DEPARTMENT OF CORRECTIONS.” This irregularity has been adjusted here for clarity.

2. *Id.* at 281 (majority opinion).

3. *Id.* at 291, 286.

4. *Id.* at 288. See also Oral Argument at 9:35, *Burns v. Pa. Dep’t of Corr.*, 544 F.3d 279 (No. 07-1678), available at <http://www.ca3.uscourts.gov/oralargument/audio/07-1678Burnsv.PaDeptofCorrections.wma>.

about prison conditions.⁵ Empathy plays an unavoidable, if often unrecognized, role in human decision making.⁶ But empathy generates bias in legal decisions only where the court, unaware of empathy's function, allows it to work in a one-sided manner.⁷ A jurisprudence of empathy actively compensates for unfamiliarity with the perspectives and conditions of any party, especially one whose circumstances differ socially from those of judges.⁸ The *Burns* decision sheds light on other decisions where courts have rejected prisoners' assertions of constitutional claims.⁹

Before analyzing *Burns*, this Comment provides background with a survey of the landmark cases that define due process rights for prisoners. Although "[t]here is no iron curtain drawn between the Constitution and the prisons of this country,"¹⁰ incarceration brings limitations to constitutional rights. Those limits, imposed by the United States Supreme Court, bind state courts as well. Pennsylvania precedents provide part of the legal background for *Burns* because state law governs administrative procedures and regulations that affect prisoners in state correctional institutions.¹¹ While the judicial rulings and administrative law of the Commonwealth of Pennsylvania do not bind other states, there is no reason to doubt that they are comparable to those of other states. The Third Circuit's holding in *Burns* is binding precedent for federal courts within that circuit, and it may be persuasive elsewhere because it addresses "an issue of first impression across the courts of appeals."¹²

5. See *infra* Part III.C. To demonize is "[t]o make into, or like, a demon; to render demoniacal; to represent as a demon." OXFORD ENGLISH DICTIONARY ONLINE, Oxford University Press, <http://www.oed.com.ezaccess.libraries.psu.edu/view/Entry/49820?redirectedFrom=demonize> (last visited Dec. 26, 2011).

6. See *infra* Part III.A.

7. This is the thesis of Professor Dan M. Kahan. See *infra* notes 177-78 and accompanying text for a discussion of Dan M. Kahan, "Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make? 92 MARQ. L. REV. 143 (2009).

8. *Id.*

9. See *infra* Part III.D.

10. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

11. On the question of the extent to which Pennsylvania administrative law applies to the Department of Corrections, see *infra* Parts II.C. and III.D.

12. *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 286 (3d Cir. 2008). On remand, the district court held that although "[t]he Third Circuit has determined that [Burns] has a right to security in his inmate account," with "limited due process protections," Burns was entitled only to declarative relief. 2009 WL 1475274, at *17 (E.D. Pa. May 26, 2009). On a second appeal, the Third Circuit again affirmed Burns's new property right. *Burns v. Pa. Dep't of Corr.*, 642 F.3d 163, 171 (3d Cir. 2011). However, it ruled that because Burns's due-process rights were violated at the prison disciplinary hearing, the sanctions imposed must be expunged from the record. The Third Circuit underscored the novelty of the property right—"a new twist"—by finding that prison officials could not have been expected to be aware of it. *Id.* at 178-79.

The background section continues with a discussion of cases that illustrate judicial deference toward prison administrators. Two kinds of deference emerge. First, courts defer substantively in construing statutes or prison policies whenever they regard prison as a strange context where they lack expertise.¹³ Second, courts defer procedurally when they simply decline to review the outcome of a prison grievance or disciplinary action.¹⁴ However, constitutional concerns may trump deference to prison administrators where due process rights are at stake.¹⁵

An analysis follows the background. The analytic section proposes that empathy theory can explain both the courts' general tendency to defer substantively to prison administrators and the departure from that tendency in *Burns*. Empathy, as the manner in which human beings grasp the perceptions and follow the decision processes of others, has been the subject of recent philosophical and legal scholarship.¹⁶ The jurisprudence of empathy provides the lens through which to examine three instances of substantive deference.¹⁷ In each case, the prisoner-plaintiff's experience remained opaque to the court. This failure of insight, which inhibited understanding of the prisoner's perspective, betrayed itself through harshly negative descriptions of the prisoners in the courts' opinions.¹⁸ By contrast, demonization was entirely absent when a court achieved empathic access to the prisoner's predicament through something already familiar: the relationship between a debtor and a judgment creditor.¹⁹ Hence the court announced the new property right in *Burns*.²⁰

The analysis concludes with discussion of the practical import of the surprising *Burns* decision for prisons within the Third Circuit. Any proceeding in which a prisoner is found to be financially responsible for

13. For example, the Seventh Circuit Court of Appeals rejected a Wisconsin prisoner's challenge to a ban on a role-playing game because the court credited the affidavit of a single prison employee unsupported by evidence. *Singer v. Raemisch*, 593 F.3d 529, 535 (7th Cir. 2010). See *infra* notes 98-115 and accompanying text.

14. For example, the Pennsylvania Supreme Court ruled that the Commonwealth Court has no jurisdiction over decisions on disciplinary matters by the Department of Corrections. *Bronson v. Cent. Office Review Comm.*, 721 A.2d 357, 358 (Pa. 1998). See *infra* notes 139-44 and accompanying text.

15. For example, the Pennsylvania Commonwealth Court held that a prison cannot take money out of an inmate account without notice, a hearing with transcript and opportunity for cross-examination of witnesses, and a written decision. *Holloway v. Lehman*, 671 A.2d 1179, 1182 (Pa. Commw. Ct. 1996). See 2 PA. CONS. STAT. ANN. §§ 504, 505, 507 (West 2008).

16. The theories of Dan M. Kahan, Edith Stein, and Darrell A.H. Miller inform the analysis. See *infra* notes 176-85 and accompanying text.

17. See *infra* Part III.B.

18. See *infra* Part III.B.

19. *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 288 (3d Cir. 2008).

20. *Id.* at 291.

harm stemming from an infraction now must be judicially reviewable.²¹ Conversely, in jurisdictions like Pennsylvania where courts routinely decline to review prison disciplinary hearings, a hearing officer at such an unreviewable hearing no longer can assess a prisoner's account for costs incurred because of an offense.²² The practical implications of *Burns* have not immediately affected prison litigation.²³ The theoretical and explanatory value of the case for a jurisprudence of empathy may be greater than its practical impact.

II. BACKGROUND

Several landmark cases define the contours of due process rights for prisoners. Constitutional rights are limited in society and especially in prison by the interests of the government. Special limitations for prisoners arise when courts defer to prison administrators.²⁴ Two kinds of judicial deference can be distinguished.²⁵ First, courts defer substantively to the judgments of prison administrators in construing statutes and in other determinations on the premise that prison is a unique context requiring special expertise that only the administrators have.²⁶ Second, courts defer procedurally by relaxing due process requirements or by declining to review prison disciplinary proceedings entirely.²⁷ One exception to the trend of procedural deference may arise when a disciplinary board proposes to assess costs against a prisoner's account for an infraction committed during incarceration.²⁸

A. *Constitutional Rights Not Absolute*

Constitutional protections for property rights arise from the Fifth and Fourteenth Amendments.²⁹ The protections of the United States Constitution extend to prisoners.³⁰ “The Court has consistently held that

21. See *infra* Part III.D.

22. See *infra* Part III.D.

23. See *infra* Part III.D.3.

24. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

25. See *infra* Parts II.B and II.C.

26. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482-83 (1995).

27. See, e.g., *Portalatin v. Dept. of Corr.*, 979 A.2d 944, 948 (Pa. Commw. Ct. 2009) (citing *Bronson v. Cent. Office Review Comm.*, 721 A.2d 357, 358-59 (Pa. 1998)).

28. See *infra* Part III.C for discussion of *Burns v. Pennsylvania Dep't of Corr.*, 544 F.3d 279 (3d Cir. 2008).

29. “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. XIV, § 1.

30. “Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.” *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). The *Wolff* court famously remarked, “There is no

some kind of hearing is required at some time before a person is finally deprived of his property interests.”³¹ However, due-process rights are not absolute for anyone. The extent of due-process rights depends on the situation.³² The Court in *Mathews v. Eldridge*³³ summarized the Court’s earlier due-process jurisprudence into three factors:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³⁴

These circumstantial considerations limit the due-process rights of all persons, including prisoners. Using the *Mathews* test, the Court weighs the government’s interest against the individual’s interest and the likelihood of significantly reducing the risk of infringement by imposing a hearing requirement.³⁵

Besides the *Mathews* factors, which may limit due process rights in any given situation, the special situation of imprisonment brings additional curtailment of Constitutional rights.³⁶ The Court in *Wolff v. McDonnell*³⁷ held that “there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.”³⁸ That accommodation must balance the

iron curtain drawn between the Constitution and the prisons of this country.” *Id.* at 555-56.

31. *Id.* at 558.

32. ““(D)ue process’, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

33. *Id.*

34. *Id.* at 335.

35. *Id.* at 334-35.

36. “[T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.” *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

37. *Id.*

38. *Id.* at 556. *Wolff*’s protection of prisoners’ liberty interests was later reduced by *Sandin v. Conner*, 515 U.S. 472 (1995) (finding no liberty interest against a range of conditions deemed to be the normal incidents of incarceration, such as disciplinary segregation).

prison's interests against those of the prisoner.³⁹ Four "factors are relevant in determining the reasonableness" of a prison regulation.⁴⁰ The court first asks whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."⁴¹ The purpose of the regulation must not be arbitrary: "the governmental objective must be a legitimate and neutral one."⁴² Second, the court asks whether prisoners have "alternative means" to exercise the restricted right.⁴³ Third, the court considers the possibility of a "ripple effect," that is, whether "accommodation of the asserted constitutional right will [negatively affect] guards and other inmates[] and . . . the allocation of prison resources."⁴⁴ Fourth, the court finds "evidence of . . . reasonableness" of a regulation in "the absence of ready alternatives" to accomplish the stated goals of the challenged regulation.⁴⁵

Hence, the *Turner* reasonableness standard for curtailing constitutional rights of prisoners rests on four factors: (1) a rational, non-arbitrary connection between the regulation and a valid prison interest; (2) availability of alternative means for inmates to exercise the infringed right; (3) the likelihood of a harmful "ripple effect" without the regulation; and (4) the lack of a viable alternative way for the prison to achieve its stated purpose.⁴⁶

In prison, as elsewhere, a hearing is generally required before property can be taken by the state because an opportunity to challenge deductions from a prisoner's account is essential to due process.⁴⁷ Under some circumstances, however, federal courts have held that the opportunity to challenge need not precede the event that deprived the plaintiff of property.⁴⁸ The availability of a post-deprivation remedy may

39. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

40. *Id.*

41. *Id.* (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

42. *Id.* at 90.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Turner* remains good law, although subsequent decisions appear to place greater weight on the first factor. *See infra* Part III.D.

47. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). *See infra* Part II.C. for the sorts of deductions that prisons, acting in the role of banker, may take from prisoners' accounts.

48. The availability of a later remedy through a state tort action afforded sufficient process when negligent handling of mail delivery deprived a Nebraska prisoner of hobby materials. *Parratt v. Taylor*, 451 U.S. 527, 543 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). Similarly, intentional destruction of a Virginia prisoner's property by a guard during a cell search did not violate due process, inasmuch

be sufficient to satisfy due process requirements for prisoners, according to the *Parratt-Hudson* doctrine.⁴⁹ *Hudson v. Palmer*⁵⁰ held that “an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available.”⁵¹ However, the *Parratt-Hudson* doctrine may not apply when regular deductions occur in accordance with an established administrative code or policy.⁵² The doctrine pertains only to unpredictable takings of property when the taking has occurred through “random and unauthorized intentional conduct of [state] employees” or through “negligent conduct” that could not be anticipated.⁵³ When the state takes funds from inmate accounts under terms of an established policy, courts usually require that policy to provide for pre-deprivation hearings.⁵⁴

B. *Substantive Deference*

Federal courts generally defer to state prison administrators when called upon to review correctional practices that may have some bearing upon the constitutional rights of prisoners, for example, rights protected by the First Amendment.⁵⁵ “[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile

as the prisoner had access to post-deprivation remedies under state law, and because prisoners in his position generally may resort to grievance procedures and state tort actions. *Hudson v. Palmer*, 468 U.S. 517, 534-36, 536 n.15 (1984).

49. See *Brown v. Crowley*, No. 99-2216229, 2000 WL 1175615, at *2 (6th Cir. Aug 10, 2000) (finding sufficient process when a Michigan prisoner could have sued in state court after funds were wrongfully taken from his account); *Gallagher v. Lane*, 75 F. App’x 440, (6th Cir. 2003) (dismissing an Ohio prisoner’s due-process claim in part because he did not allege inadequacy of post-deprivation remedies for wrongful deductions from his account). Cf. *Wright v. Riveland*, 219 F.3d 905, 918 (9th Cir. 2000) (remanding for trial of a Washington inmate’s Eighth Amendment claim that excessive deductions had been taken).

50. *Hudson*, 468 U.S. 517.

51. *Id.* at 533.

52. See, e.g., *Gillihan v. Shillinger*, 872 F.2d 935 (10th Cir. 1989) (distinguishing the unpredictability of the property deprivations in *Parratt* and *Hudson* from the routine practice of charging a prisoner for transport without notification or a hearing). Cf. *Mahers v. Halford*, 76 F.3d 951 (8th Cir. 1996) (approving deductions from funds received as a gift by an Iowa prisoner in light of statutory provision for judicial review of the deduction plan upon request).

53. *Hudson*, 468 U.S. at 533.

54. See, e.g., *Gillihan*, 872 F.2d 935.

55. *Sandin v. Conner*, 515 U.S. 472, 482-83 (1995).

environment.”⁵⁶ Deference to prisons often surfaces when a court undertakes a *Turner* analysis of a constitutional claim.⁵⁷

1. Youngsters as Visitors

In *Overton v. Bazetta*,⁵⁸ Michelle Bazzetta and several other women prisoners asserted First Amendment rights to challenge Michigan prison regulations that restricted visits by babies and children.⁵⁹ The rules banned minor nieces and nephews from the visiting room and excluded prisoners’ own sons and daughters if parental rights had been terminated.⁶⁰ In the Court’s highly deferential analysis, the first *Turner* factor weighed in favor of the prison policy because “the regulations bear a rational relation to [the prison’s] valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury.”⁶¹ The restrictions on child visitors also had the effect of “limiting the disruption caused by children.”⁶² The court found these to be legitimate penological interests.⁶³

The three other *Turner* factors considered in the Court’s strained analysis were found to support the prison’s position as well.⁶⁴ The Court suggested that the women prisoners had alternate means to communicate with the banned babies and toddlers because the women could pass messages to them through approved visitors or could phone or write to the children.⁶⁵ The Court saw a negative impact on the prison should the banned children be allowed to visit.⁶⁶ It reasoned that providing adequate supervision of the visiting room would financially drain the

56. *Id.*

57. *See* *Turner v. Safley*, 482 U.S. 78, 89 (1987). *See also* the cases under discussion in this section: *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Beard v. Banks*, 548 U.S. 521 (2006); *Singer v. Raemisch*, 593 F.3d 529 (7th Cir. 2010).

58. *Overton*, 539 U.S. 126.

59. *Id.* The First Amendment protects freedom of association. U.S. CONST. amend. I. The Court agreed that “certain kinds of highly personal relationships” are constitutionally protected. *Overton*, 539 U.S. at 131 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984)). That protection avails “outside the prison context” but “[t]he very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.” *Id.* Ms. Bazetta challenged several other visitor restrictions besides the ban on children who were not of the immediate family.

60. *Overton*, 539 U.S. at 129-30.

61. *Id.* at 133.

62. *Id.*

63. *Id.*

64. *Id.* at 135.

65. *Id.*

66. *Id.*

prison and make it difficult to maintain secure conditions in other areas of the institution.⁶⁷ Finally, the Court found that the prisoners had suggested no alternative way for the prison to achieve its goals if it lifted the ban on certain children.⁶⁸ The Court remarked, “The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.”⁶⁹

In *Overton*, the majority offered no explicit rationale for deference to the prison administration beyond the four-factor *Turner* analysis.⁷⁰ A concurrence by Justice Thomas, in which Justice Scalia joined, suggests a more troubling line of reasoning.⁷¹ Thomas opined that states have leeway to design punishment in any manner they choose, subject to the Eighth Amendment’s prohibition against cruel and unusual punishment.⁷² This is so, he reasoned, because the United States Constitution has no “implicit definition of incarceration.”⁷³ The prison sentence imposed by a state implicitly includes all the particular regulations that the state’s corrections department may enact, and the regulations are presumed to pass muster on the *Turner* criteria, unless successfully challenged in court.⁷⁴ The concurrence went on to speculate that Michigan, acting within its prerogatives, rightfully had designed its mode of incarceration in the tradition of nineteenth century prisons, when visiting practices were conceived to be part of the punishment.⁷⁵ On that rationale, Justice Thomas joined in the deferential holding approving Michigan’s ban on visits from children whose kinship to the prisoner happened to fall outside categories narrowly defined by the state.

67. *Id.*

68. *Id.*

69. *Id.* at 131.

70. *Id.* at 135.

71. *Id.* at 139 (Thomas, J., concurring).

72. *Id.* “States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations-provided only that those deprivations are consistent with the Eighth Amendment.” *Id.* (emphasis in original).

73. *Overton*, 539 U.S. at 139.

74. *Id.* at 142 (Thomas, J., concurring). “Restrictions that are rationally connected to the running of a prison, that are designed to avoid adverse impacts on guards, inmates, or prison resources, that cannot be replaced by ‘ready alternatives’, and that leave inmates with alternative means of accomplishing what the restrictions prohibit, are presumptively included within a sentence of imprisonment.” *Id.*

75. *Id.* at 144 (Thomas, J., concurring) (“[In the nineteenth century, m]any prisons offered tours in order to increase revenues. During such tours, visitors could freely stare at prisoners, while prisoners had to obey regulations categorically forbidding them to so much as look at a visitor.”). The intent and effect of this practice, Justice Thomas remarked, was to use visitors to humiliate prisoners as part of their punishment. *Id.* “Michigan sentenced respondents against the backdrop of this conception of imprisonment.” *Id.* at 144-45.

2. Media in the LTSU

In another case involving substantive deference, Ronald Banks failed in a First Amendment class action to overturn a Pennsylvania prison ban on books, newspapers, and photographs within a restrictive housing unit.⁷⁶ The plurality in *Beard v. Banks*⁷⁷ applied a four-step *Turner* analysis to a policy that deprived “specially dangerous and recalcitrant inmates” of reading materials until they “graduate[d]” to a less restrictive level of confinement.⁷⁸ First, the Court found a valid prison interest in that the deprivation of reading material could motivate the prisoner to change his behavior.⁷⁹ The second *Turner* factor, however, weighed in favor of the prisoners. Although about one quarter of inmates subjected to the no-book regime did “graduate” to the less restrictive level within ninety days, the others had “no alternative means of exercising the right” of free expression under the First Amendment.⁸⁰ Nevertheless, this factor was not decisive.⁸¹ The Court went on to dispense with the third *Turner* factor in a single sentence, using circular reasoning to infer a likely negative impact.⁸² Without the book ban, the Court speculated, the opposite of the good effect intended by motivation (*Turner* factor one) would result: lack of motivation, continued bad behavior, longer stays in restrictive housing, and consequent increased costs for the prison.⁸³ The plurality found that it could not apply the fourth *Turner* factor because the prisoners had suggested no less restrictive way to achieve the motivational intent claimed by the prison.⁸⁴ Thus, the Court found that the second, third, and fourth *Turner* factors in this case boiled down to the first because they were “logically related” to its rationale.⁸⁵ Nevertheless, “[t]he real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a reasonable

76. *Beard v. Banks*, 548 U.S. 521 (2006).

77. *Id.*

78. *Id.* at 525-26.

79. The plurality found that the state “set forth several justifications for the prison’s policy, including the need to motivate better behavior on the part of particularly difficult prisoners. . . . We need go no further than the first justification, that of providing increased incentives for better prison behavior.” *Id.* at 530.

80. *Id.* at 532 (emphasis and internal citation omitted).

81. *Id.* “The absence of any alternative thus provides ‘some evidence that the regulations [a]re unreasonable’, but is not ‘conclusive’ of the reasonableness of the Policy.” *Id.* (citing *Overton v. Bazetta*, 539 U.S. 126, 135 (2003)).

82. *Banks*, 548 U.S. at 532.

83. *Id.* (“If the Policy (in the authorities’ view) helps to produce better behavior, then its absence (in the authorities’ view) will help to produce worse behavior, e.g., ‘backsliding’ (and thus the expenditure of more ‘resources.’”).

84. *Id.*

85. *Id.*

relation.”⁸⁶ The plurality concluded that the book-banning policy was reasonable.⁸⁷ With *Banks*, the Court may have reached the apex of its substantive deference to prison administrations.⁸⁸

Justice Thomas wrote a concurring opinion that shed light on the Court’s deferential stance.⁸⁹ He cited and amplified his *Overton* concurrence in an argument against the propriety of the *Turner* analysis itself where deprivation of privileges is at issue.⁹⁰ Deprivation as a behavior modification technique is “necessary” for the management of prisoners.⁹¹ Justice Thomas reasoned that “this legal conclusion, combined with the deference to the judgment of prison officials required under *Turner*[,] . . . would entitle prison officials to summary judgment against challenges to their inmate prison deprivation policies in virtually every case.”⁹² Therefore, any “[j]udicial scrutiny of prison regulations is an endeavor fraught with peril.”⁹³

These extreme statements of substantive deference, along with the plurality opinion, evoked rigorous criticism from Justice Stevens in a dissenting opinion joined by Justice Ginsburg.⁹⁴ The dissent pointed out that reliance upon the sheer utility of behavior modification through deprivation, without limits, was “perilously close to a state-sponsored effort at mind control.”⁹⁵ Rehabilitation, including the modification of behavior, is a “valid penological interest,”⁹⁶ but it lacks an internal limiting principle.⁹⁷ In effect, the Stevens dissent warned that the Court appeared to authorize prisons to deprive inmates of any and all constitutional rights under the pretext of rehabilitation through behavior modification.

86. *Id.* at 533.

87. *Id.*

88. Several scholars have argued that *Banks* marks the demise of the fourfold *Turner* test for permissible infringement of constitutional rights by prisons. *See infra* Part III.D.

89. Justice Scalia joined the Thomas concurrence, as he had done in *Overton*. *Banks*, 548 U.S. at 536-42 (Thomas, J., concurring).

90. *Id.* at 540.

91. *Id.* (citing *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003)).

92. *Banks*, 548 U.S. at 540 n.2 (internal citation omitted).

93. *Id.* at 535.

94. *Id.* at 542-53 (Stevens, J., dissenting).

95. *Id.* at 552.

96. *Id.* at 548. However, the dissent remarked that the state “did not introduce evidence that [its] proposed theory of behavior modification has any basis in human psychology, or that the challenged rule has in fact had any rehabilitative effect on LTSU-2 inmates.” *Id.* at 550.

97. *Id.* at 546 (“Any deprivation of something a prisoner desires gives him an added incentive to improve his behavior. This justification has no limiting principle [and would support] any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.”).

3. Dungeons and Dragons

The Supreme Court's substantive deference to prison administrators, exemplified in *Overton* and *Banks*, is reflected in a subsequent decision by the United States Court of Appeals for the Seventh Circuit, *Singer v. Raemisch*.⁹⁸ Kevin Singer was a lifelong fan of the fantasy role-playing game Dungeons and Dragons (D&D).⁹⁹ Even after he was incarcerated at Wisconsin's Waupin Correctional Institution, Singer maintained his interest with an extensive collection of D&D-related comic books, and he authored a ninety-six-page scenario for the game.¹⁰⁰ But in November 2004, the prison instituted a policy banning D&D and confiscated Singer's collection.¹⁰¹ When he brought suit in federal court on First Amendment grounds, the Seventh Circuit applied a *Turner* analysis to Singer's appeal and affirmed summary judgment in favor of the state.¹⁰² As in *Overton* and *Banks*, the court in *Singer v. Raemisch*¹⁰³ paid most attention to the first *Turner* factor: to establish a rational, non-arbitrary connection between the regulation banning D&D materials and a valid prison interest.¹⁰⁴ While purporting to review the summary judgment *de novo* and to "construe all facts and reasonable inferences in favor of the nonmoving party,"¹⁰⁵ the court nevertheless accepted the prison's assertion that D&D was a gang-related game despite affidavits from numerous prisoners that D&D was an innocent alternative to gangs.¹⁰⁶ This result rested on a distinction between plain facts and facts of "professional judgment."¹⁰⁷ The prison's gang specialist testified that "co-operative games can mimic the organization of gangs and lead to the actual development thereof" and "can 'foster an inmate's obsession with escaping from the real life, correctional environment.'"¹⁰⁸ This expert testimony was enough to tip *Turner* factor one in favor of the state.¹⁰⁹ On factor two, the court found that "Singer

98. *Singer v. Raemisch*, 593 F.3d 529, 532 (7th Cir. 2010).

99. *Id.*

100. *Id.* at 531-32.

101. *Id.* at 531.

102. *Id.* at 534-40.

103. *Id.* at 529.

104. *Id.* at 531.

105. *Id.* at 533.

106. *Id.* at 533-34.

107. *Id.* at 534 ("[W]e must distinguish between inferences relating to disputed facts and those relating to disputed matters of professional judgment.").

108. *Id.* at 535.

109. *Id.* at 536 ("The question is not whether D & D has led to gang behavior in the past [but] whether the prison officials are rational in their belief that, if left unchecked, D & D could lead to gang behavior among inmates and undermine prison security in the future.").

still has access to other allowable games, reading material, and leisure activities.”¹¹⁰ On factor three, the court predicted a negative impact on the entire prison should an exception to the D&D ban be made for Singer.¹¹¹ On factor four, Singer apparently put forth the self-defeating argument that the prison’s alternative to D&D would be actual gang activity, which already was banned under pre-existing policy.¹¹² The court concluded, after weighing the *Turner* factors, that the prison had demonstrated a rational relation of its D&D ban to a genuine state interest.¹¹³

The rationale of the *Singer* decision arguably intended the sort of “mind control” that Justice Stevens decried in his *Banks* dissent. Prison administrators conjectured that access to D&D materials would assist prisoners to imagine, for a time, that they were not incarcerated.¹¹⁴ Dangerous imagination,¹¹⁵ dangerous newspapers,¹¹⁶ and dangerous toddlers in the visiting room,¹¹⁷ all strain the limits of common-sense notions of what can be deemed non-arbitrary limitations of constitutional rights under *Turner* factor one. These cases typify an inclination to defer to prison administrators on the substance of constitutional claims.

C. Procedural Deference

Prison process for taking the property of prisoners also typically receives deferential review from courts, if reviewed at all under the Fourteenth or the Fifth Amendments.¹¹⁸ Deduction of funds from prisoner accounts may occur pursuant to a statute or an administrative policy. Statutes may empower a court to impose a fine or restitution as a component of sentencing or to order payments for indebtedness for child support or litigation filing fees.¹¹⁹ Administrative policies may empower a prison disciplinary board to impose costs as part of a punishment for an

110. *Id.* at 539.

111. *Id.* at 539 (“[I]t is clear that accommodating Singer’s or another inmate’s request for an exception to the D & D ban could have significant detrimental effects to inmates and guards alike.”).

112. *Id.*

113. *Id.* at 540 (“[Singer] has failed to demonstrate a genuine issue of material fact concerning the reasonableness of the relationship between Waupun’s D & D ban and the prison’s clearly legitimate penological interests.”).

114. *Id.* at 535.

115. *Id.*

116. *Beard v. Banks*, 548 U.S. 521 (2006).

117. *Overton v. Bazzetta*, 539 U.S. 126 (2003).

118. *See, e.g., Sickles v. Campbell Cnty., Ky.*, 501 F.3d. 726 (6th Cir. 2007). *Sickles* is discussed *infra* Part C.1.

119. For example, if a prisoner has filed a federal lawsuit *in forma pauperis*, the Prison Litigation Reform Act of 1995 requires monthly deductions of 20 percent of his income to cover deferred filing fees. 28 U.S.C.A. § 1915(b)(2) (2006).

infraction committed during incarceration.¹²⁰ Between the assessment of the cost and the actual taking of the funds, an issue of due process arises. A prisoner may seek to challenge either the correctness of the assessment itself or the calculated rate at which deductions are to be made from his account to pay down the amount assessed.¹²¹ Such a challenge typically meets procedural roadblocks in federal court.¹²² State courts simply may decline to review prison disciplinary hearings.¹²³ However, in Pennsylvania, a prison must conduct a separate, judicially reviewable adjudication before depriving a prisoner of funds for a disciplinary infraction.¹²⁴

1. Little or No Process Under *Mathews*

The Sixth Circuit used the *Mathews* balancing test as a procedural impediment in *Sickles v. Campbell Cnty., Ky.*, when a county prisoner in Kentucky argued that he should have had a hearing before the jail took his funds to cover the costs of his booking and incarceration.¹²⁵ The court balanced inmate Sickles' property interest in the 20 dollars that the jail had taken against the jail's interest in recouping incarceration costs, all in light of the minimal likelihood of an accounting error and the availability of a post-deprivation grievance procedure should an error be detected.¹²⁶ The court said that Mr. Sickles was "barking up the wrong tree" if he expected to delay the confiscation of his funds until after he had a hearing.¹²⁷

A state prisoner met a similar procedural roadblock in the Pennsylvania Supreme Court when he challenged how deductions were made to cover the \$10,000 restitution, fine, and costs that the sentencing court had ordered him to pay.¹²⁸ By statute, "the Department of Corrections shall be authorized to make monetary deductions from inmate personal accounts for the purpose of collecting restitution or any

120. For example, Pennsylvania's Inmate Discipline Procedures Manual provides that a hearing officer may assess costs against a prisoner. *Pa. Dep't of Corr., Inmate Discipline Procedures Manual*, DC-ADM 801 § 8(A)(3) (2008) [hereinafter DC-ADM 801], available at http://www.portal.state.pa.us/portal/server.pt/community/department_of_corrections/4604/doc_policies/ (last visited on Dec. 18, 2011).

121. See, e.g., *Buck v. Beard*, 583 Pa. 431 (Pa. 2005). *Buck* is discussed *infra* Part C.1.

122. See, e.g., *Sickles*, 501 F.3d 726.

123. See, e.g., *Portlatin v. Dept. of Corr.*, 979 A.2d 944, 948 (Pa. Commw. Ct. 2009) (citing *Bronson v. Cent. Office Review Comm.*, 721 A.2d 357, 358-59 (Pa. 1998)).

124. DC-ADM 801, *supra* note 120, at § 8(C).

125. *Sickles*, 501 F.3d at 730-32. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

126. *Sickles*, 501 F.3d at 730-31.

127. *Id.* at 731.

128. *Buck v. Beard*, 583 Pa. 431 (Pa. 2005).

other court-ordered obligation.”¹²⁹ The Department chose to make monthly deductions of 20 percent of the balance in the prisoner’s account.¹³⁰ The prisoner, Darryl Buck, claimed he was entitled to a hearing before deductions could be made, and the court defined the issue as “whether due process requires a specific judicial determination of ability to pay before the Department may deduct payments for fines, costs, or restitution.”¹³¹

The court answered in the negative.¹³² First, it found that the sentencing hearing already had afforded Mr. Buck an opportunity to present evidence of his ability to pay.¹³³ Next, the court conducted a *Mathews*-style analysis without citing *Mathews*.¹³⁴ It balanced the cost and inconvenience of another hearing against the negligible need to determine whether Mr. Buck was able to pay.¹³⁵ “Corrections officials know the amount of money in a prisoner’s account. They also know that he will be provided with life’s necessities. . . . There is little to be gained by holding a hearing to confirm matters that are already known.”¹³⁶ Like the Sixth Circuit, the Pennsylvania Supreme Court deferred to prison procedures by declining to require an additional hearing before court-ordered payments could be deducted from a prisoner’s account.¹³⁷

2. No Judicial Review Under *Bronson*

Pennsylvania courts decline to review disciplinary hearings for infractions alleged during incarceration.¹³⁸ In *Bronson v. Central Office Review Committee*,¹³⁹ the Pennsylvania Supreme Court ruled that the Commonwealth Court has neither original nor appellate jurisdiction over decisions on disciplinary matters by the highest level of review within the Department of Corrections, the Central Office Review Committee

129. 42 PA. CONS. STAT. § 9728(b)(5) (2007).

130. *Buck*, 583 Pa. at 433. The opinion does not specify that the deductions were monthly, but the statute is implemented through a policy that specifies monthly deductions of 20 percent. See Pa. Dep’t of Corr., Collection of Inmate Debts, DC-ADM 005 (2007), available at http://www.portal.state.pa.us/portal/server.pt/community/departament_of_corrections/4604/doc_policies/ (last visited on Dec. 30, 2010).

131. *Buck*, 583 Pa. at 436.

132. *Id.* at 436-37.

133. *Id.* at 436.

134. *Id.* at 436-27. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

135. *Buck*, 583 Pa. at 436-37.

136. *Id.* at 437.

137. *Sickles v. Campbell Cnty., Ky.* 501 F.3d 726, 730-32 (6th Cir. 2007); *Buck*, 583 Pa. at 437.

138. Prison discipline is governed by the *Inmate Discipline Procedures Manual*, DC-ADM 801, *supra* note 120.

139. *Bronson v. Cent. Office Review Comm.*, 721 A.2d 357 (Pa. 1998).

(C.O.R.C.).¹⁴⁰ The court held that the C.O.R.C. “does not function on the level of a government agency” but handles only matters “internal to the Department of Corrections.”¹⁴¹ This finding exempted C.O.R.C. from the state constitutional requirement that “[t]here shall be a right of appeal in all cases . . . from an administrative agency to a court of record or to an appellate court.”¹⁴² The *Bronson* court went on to explain that “prison officials must be allowed to exercise their judgment in the execution of policies necessary to preserve order and maintain security free from judicial interference.”¹⁴³ An exception to this deferential policy occurs if a significant constitutional right is in question, but the court found that the right of inmate Bronson to possess civilian clothing while in prison did not rise to the level of a protected constitutional right.¹⁴⁴

The *Bronson* court’s narrow construction of prisoners’ constitutional rights led to a dismissal of another inmate’s appeal against medical co-pay charges to his account.¹⁴⁵ Prisoner Portalatin pursued the grievance process to a final denial by the C.O.R.C. after he objected to charges for medical treatment of a chronic skin condition.¹⁴⁶ In *Portalatin v. Department of Corrections*,¹⁴⁷ the court declined to review the determination of the Department of Corrections that the charges conformed to the applicable statute and policy.¹⁴⁸ Citing *Bronson*, the court said that it “[did] not have appellate jurisdiction over inmate appeals of decisions by intra-prison disciplinary tribunals, such as

140. *Id.* at 359.

141. *Id.* at 358.

142. PA. CONST. art. V, § 9. Likewise, the C.O.R.C. is exempted from 42 PA. CONS. STAT. ANN. § 763 (West 2004), which provides for appeal of final orders of agencies to the Commonwealth Court.

143. *Bronson*, 721 A.2d at 358.

144. *Id.* at 359-60. *See also* *Iseley v. Beard*, 841 A.2d 168, 174 (Pa. Commw. Ct. 2004) (finding that the prisoner’s constitutional claim was outweighed by the prison’s interest in depriving him of reading material as “a non-violent form of behavior modification used to teach inmates to follow basic orders and behave in a safe and acceptable way”). The *Iseley* court also cited the *Bronson* principle that courts simply do not review prison disciplinary proceedings. *Id.* at 172.

145. *Portalatin v. Dep’t of Corr.*, 979 A.2d 944 (Pa. Commw. Ct. 2009).

146. *Id.* at 946.

147. *Portalatin*, 979 A.2d 944.

148. Prisoners are responsible for some of the costs of their medical treatment under the Prison Medical Services Act, 61 P.S. §§ 1011-17 (1999). The Department of Corrections implemented the Act through a policy that exempted some chronic conditions from co-pays. *Portalatin*, 979 A.2d at 950 (citing Pa. Dep’t of Corr., Co-Payment for Medical Services, DC-ADM 820, V(A)(1)a). The exclusive list of chronic diseases no longer appears in an updated version the policy. *See* Pa. Dep’t of Corr., Co-Payment for Medical Services, DC-ADM 820 § 1(B)(7 & 16) (2009), available at http://www.portal.state.pa.us/portal/server.pt/community/departement_of_corrections/4604/doc_policies/ (last visited on Dec. 18, 2011).

grievance and misconduct appeals.”¹⁴⁹ Although a constitutional violation might merit review, the court found that Mr. Portalatin had no constitutional right to free medical care, nor was any other constitutional right infringed.¹⁵⁰

In part because of its procedural deference to the Department of Corrections (DOC), the *Portalatin* court did not directly address one of the plaintiff’s most astute arguments:

Portalatin counters that DOC’s decision to assess him a fee for the treatment of his skin disorder constitutes an “adjudication” under the Administrative Agency Law. That act defines an “adjudication” as “[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.”¹⁵¹

This argument simply was mooted by reference to authorities stating that the C.O.R.C. is not an agency.¹⁵²

3. A Reviewable Hearing Under *Holloway*

Nevertheless, in another line of cases the Commonwealth Court held that a final decision to deprive a prisoner of property could indeed be an “adjudication” within the meaning of Pennsylvania’s Administrative Agency Law.¹⁵³ “[I]f an inmate can identify a personal or property interest which is not limited by Department regulations and which is affected by a final decision of the Department, the Department’s decision in those circumstances may constitute an adjudication subject to our appellate review.”¹⁵⁴ A 1995 pro se action by prisoner Deron Holloway satisfied that condition.¹⁵⁵

149. *Portalatin*, 979 A.2d at 948 (citing *Bronson v. Cent. Office Review Comm.*, 721 A.2d 357, 358-59 (Pa. 1998)).

150. *Id.* at 949.

151. *Id.* at 948 (emphasis added) (internal citations omitted). See Administrative Agency Law, 2 PA. CONS. STAT. ANN. §§ 101, 501-08, 701-04 (West 2008).

152. The *Portalatin* court relied on *Bronson v. Cent. Office Review Comm.*, 721 A.2d 357, 358 (Pa. 1998). See *supra* notes 139-44 and accompanying text.

153. An adjudication is “[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.” 2 PA. CONS. STAT. ANN. § 101 (West 2008). See, e.g., *Holloway v. Lehman*, 671 A.2d 1179, 1180 (Pa. Commw. Ct. 1996).

154. *Lawson v. Commonwealth*, 538 A.2d 69, 71 (Pa. Commw. Ct. 1988) (“[T]he Department’s decision [revoking pre-release status for misconduct] is not an adjudication subject to our appellate review [only] because it does not implicate any rights or privileges not limited by Department regulations.”).

155. *Holloway*, 671 A.2d 1179.

After a disciplinary hearing, Holloway was found responsible for destroying prison property.¹⁵⁶ “Thereafter, without any further opportunity for a hearing, the monetary amount of the damage . . . was administratively calculated and the business office of the [prison] directed that money be deducted from [Holloway’s] prison account to pay the damages.”¹⁵⁷ Holloway did not challenge the finding of misconduct but only the manner in which money was subsequently taken from his account, that is, with “no opportunity to challenge the amount of the assessment.”¹⁵⁸

The court reasoned that “[i]t is beyond dispute that money is property. Private property cannot be taken by the government without due process.”¹⁵⁹ The court looked to Pennsylvania administrative law to determine the nature of the process required for such an adjudication.¹⁶⁰ It held that nonconsensual deductions from an inmate’s account required notice and a hearing.¹⁶¹ Moreover,

[t]he inmate must be given an opportunity to be heard, all testimony must be recorded, and a full and complete record of the proceedings must be kept. Reasonable examination and cross-examination must be allowed. The adjudication must be in writing and contain findings of fact and reasons for the decision.¹⁶²

The formal hearing contemplated by the court would issue an adjudication to take funds from a prisoner account, and that adjudication would be subject to judicial review.¹⁶³ Thus, what came to be known as a “*Holloway* hearing” constitutes a narrow but significant exception to the procedural deference typically shown to prison administrators by Pennsylvania courts.¹⁶⁴

III. ANALYSIS

This section examines judicial deference to the managerial decisions of prison administrators. The intent is to explain both why

156. *Id.* at 1180.

157. *Id.*

158. *Id.* at 1181.

159. *Id.* (internal citations omitted).

160. *Id.* See 2 PA. CONS. STAT. ANN. § 504 (West 2008).

161. *Holloway*, 671 A.2d at 1181. See 2 PA. CONS. STAT. ANN. § 504 (West 2008).

162. *Holloway*, 671 A.2d at 1182 (internal citations omitted). See 2 PA. CONS. STAT. ANN. §§ 504, 505, 507 (West 2008).

163. *Holloway*, 671 A.2d at 1182. See 42 PA. CONS. STAT. ANN. § 763 (West 2004).

164. Two hearings are required before the prison can deduct funds for damage done by a prisoner. First, he must be found responsible in a misconduct hearing that is appealable to the Chief Hearing Examiner but is not judicially reviewable. DC-ADM 801, *supra* note 120, at §§ 3 and 5. Then, if notified that the prison proposes to assess costs against his account, the inmate may request a formal hearing. *Id.* at § 8(B).

such deference is the norm and why the Third Circuit departed from that norm when it declared a hitherto unrecognized property right for prisoners in *Burns v. Pa. Dep't of Corr.*¹⁶⁵ The interpretive lens employed here is borrowed from the discipline of philosophical hermeneutics, particularly from the work of Edith Stein.¹⁶⁶ Although the term “empathy” has fallen into disrepute in recent political rhetoric,¹⁶⁷ it is a central analytical term in contemporary theories of understanding.¹⁶⁸ Empathy (or *Einfühlung* in German) is the manner in which human beings grasp the experiences of others, and the term covers intellectual as well as emotional understanding.¹⁶⁹ Judicial deference to prison administrators predominates in opinions that depict the prison environment as alien, so different from the world of the Court that its logic is opaque.¹⁷⁰ By contrast, the *Burns* court readily analogized the infringement of the prisoner’s account funds to the familiar, transparent relations of debtor and creditor.¹⁷¹ The anomalous result in *Burns*, reached in an uncharacteristically empathetic flash of insight into prison life, requires a reassessment of administrative procedures for disciplinary actions that contemplate the taking of prisoner funds.¹⁷²

A. *Empathy as a Principle of Understanding*

As a senator, Barack Obama voted against the nomination of John G. Roberts, Jr., to be Chief Justice of the United States because he found Mr. Roberts to lack empathy.¹⁷³ Later, when President Obama nominated Sonia Sotomayor to the United States Supreme Court, he insisted “that while adhering to the rule of law, judges should also be able to see life through the eyes of those who come before the bench.”¹⁷⁴

165. *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279 (3d Cir. 2008).

166. Edith Stein (1891-1942) was a philosopher and participant in the Phenomenological Movement. SARAH R. BORDEN, *EDITH STEIN* (2004).

167. Opposition to the nomination of Sonia Sotomayor to the United States Supreme Court focused in part on the term “empathy,” used by President Obama to describe a capacity that he considered essential for a Justice. See the critical remarks of Sens. Jon Kyl and Tom Coburn during Senate debate over the Sotomayor nomination, 155 CONG. REC. S8818-25 (daily ed. Aug. 5, 2009).

168. For a discussion of the hermeneutical tradition in philosophy and a survey of its recent history, see MARIANNE SAWICKI, *BODY, TEXT, AND SCIENCE: THE LITERACY OF INVESTIGATIVE PRACTICES AND THE PHENOMENOLOGY OF EDITH STEIN* 3-43 (1997).

169. *Id.* at 145.

170. See *infra* Part III.B. for a discussion of three cases where the court displays a lack of empathy.

171. See *infra* Part III.C.

172. See *infra* Part III.D.

173. Peter Baker, *In Search for New Justice, Empathy, or at Least “Empathy,” Is Out*, N.Y. TIMES, Apr. 26, 2010, at A12.

174. *Id.*

Equating tough court decisions to a marathon, Mr. Obama said that the first 25 miles may be determined by precedent and technical understanding of the law, but “that last mile can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.”¹⁷⁵

Judges approach cases pre-equipped with “certain models in their heads . . . which have been idiosyncratically ingrained by genes, culture, education, parents and events. These models shape the way judges perceive the world.”¹⁷⁶ Professor Dan M. Kahan has suggested that differences of experience, rather than ideological differences, account for many disagreements among Justices of the Supreme Court.¹⁷⁷ Values always shape the perception of facts.¹⁷⁸

Differences of values and experiences, however, need not impede understanding. Empathy is the definitively human capacity to grasp the experiences of another person: not to live through them in the original way that the other lives them, but rather in a shared, communicated manner.¹⁷⁹ Human beings are intrinsically receptive to understanding the experience of another human, although some people are more open to

175. *Id.* The President’s remarks were controversial, and Senator Coburn criticized them in his opposition to the Sotomayor nomination: “The President’s ‘empathy’ standard is antithetical to the proper role of a judge.” 155 CONG. REC. S8823 (daily ed. Aug. 5, 2009). For discussions of empathy in Obama’s jurisprudence, see Mitchell F. Crusto, *Obama’s Moral Capitalism: Resuscitating the American Dream*, 63 U. MIAMI L. REV. 1011, 1022 (2009) (responding to “President Obama’s call for empathy in constitutional jurisprudence”); John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama’s “Empathy Standard,”* 120 YALE L.J. ONLINE 89 (2010) (parsing and praising Obama’s remarks on empathy).

176. David Brooks, *The Empathy Issue*, N.Y. TIMES, May 29, 2009, at A25. Brooks relies upon cultural cognition theory. See Kahan, *supra* note 7. Sen. Coburn took exception to that view: “Judge Sotomayor stated prior to her hearing that ‘[p]ersonal experiences affect the facts that judges choose to see’ and ‘our gender and national origins may and will make a difference in our judging.’ It seems to me . . . that the facts of a case are pretty clear and, if a judge is picking and choosing the facts they see based on their personal experiences, then they cannot possibly be impartial arbiters.” 155 CONG. REC. S8823 (daily ed. Aug. 5, 2009).

177. Kahan, *supra* note 7, at 416-17 (2009).

178. *Id.* at 417 (“The essentially factual nature of the disagreement between the majority and dissent suggests a . . . way in which values might be affecting their decisions: as a subconscious influence on cognition.”). Remarks in the same vein by Ms. Sotomayor were singled out for criticism by Sen. Kyl: “After agreeing with law professors who say that there is no objective stance, only a series of perspectives, no neutrality, Judge Sotomayor then said, ‘I further accept that our experiences as women and people of color will in some way affect our decisions.’” 155 CONG. REC. S8818 (daily ed. Aug. 5, 2009).

179. EDITH STEIN, ON THE PROBLEM OF EMPATHY 3-11 (Waltraut Stein, trans., ICS Publications 3d ed. 1989) (1917). See also SAWICKI, *supra* note 168, at 90-131.

this empathic reception than others.¹⁸⁰ Empathic experience is a kind of vicarious following of the thoughts and feelings of other persons, including their logical inferences, their perceptions of facts, their appreciation of values, and the decision processes motivated by those logical, factual, and evaluative apprehensions.¹⁸¹ In this way, understanding occurs. Conversely, to the extent that the other's experience remains so opaque that empathic following of it falters, understanding fails.

Empathy is an aid to judgment. “[E]mpathy does and should play an important, albeit limited role, in a judge’s decision making process,” according to Professor Darrell Miller.¹⁸² As “the cognitive capacity or training to imagine oneself in the position of another person,”¹⁸³ empathy has both spontaneous and acquired aspects. Thus, “empathy is easy if you share either some attribute or experience with another person,” yet human beings can also deliberately “inhibit, modify or stimulate this empathetic process.”¹⁸⁴ Judges “can choose to actively imagine themselves in the position of another as compensation for a lack of previous experience.”¹⁸⁵

B. *Rationales of Judicial Deference*

Stein’s and Miller’s empathy theories and Kahan’s thesis of cultural cognition can illuminate the substantive judicial deference that has been

180. Marianne Sawicki, *Editor’s Introduction* to EDITH STEIN, *PHILOSOPHY OF PSYCHOLOGY AND THE HUMANITIES*, xv-xix (Mary Catharine Baseheart and Marianne Sawicki, trans., ICS Publications, 2000) (1922).

181. *Id.* See also SAWICKI, *supra* note 168, at 90-108. For the contrasting view that empathy functions only in grasping socially significant ideas, see Benjamin Zipursky, *Deshaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1134 (1990) (“Empathy [is] a requirement for grasping a wide range of social and normative concepts.”).

182. Darrell A. H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1001 (2010). Miller argues that the heightened pleading standard recently announced in *Iqbal* makes empathy an indispensable “tool” if judges are to discern whether facts as pleaded are “plausible.” *Id.* at 1001, 1003. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). See also *infra* Part III.D.

183. Miller, *supra* note 182, at 1008.

184. *Id.* at 1010.

185. *Id.* Judges “can compensate for lack of personal experience with an active empathetic process, and . . . they can develop a coordinate ability to suspend the empathetic process when it begins to trigger bias.” *Id.* at 1011. On the selective empathy of judges, see also Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 138 (2009) (“Those who spend their days surrounded by people with shared backgrounds, assumptions and perspectives may mistake their own perspective for the universal. This mistake is an occupational hazard for judges.”); Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 880 (2009) (“One’s worldview determines with whose emotional reality one naturally will empathize.”).

noted in *Overton, Banks, and Singer*.¹⁸⁶ In each of those cases, the court exhibited a dearth of empathic understanding with regard to prison life.¹⁸⁷ This deficit can come to light through a careful reading of the opinions while attending to their rhetorical framing of facts and their often simplistic rationales for deference. *Overton, Banks, and Singer* all applied the *Turner* factors, which call for a modicum of imagination and common sense to distinguish between “rational” and “arbitrary” regulations.¹⁸⁸ Although “rational basis” is the least strict form of scrutiny when constitutional rights are infringed,¹⁸⁹ any degree of scrutiny without empathy leads to intolerable and sometimes risible results.¹⁹⁰

1. *Overton v. Bazetta*

In *Overton*, prisoner Michelle Bazzetta unsuccessfully sought visiting privileges for babies and children who, though they did not fit within certain familial categories, were relatives whom the prisoner desired to see.¹⁹¹ Recognition of that desire is reflected nowhere in the Court’s remarks.¹⁹² The majority characterized children primarily as disruptive elements who threatened prison security.¹⁹³ “The regulations [banning some young relatives] promote internal security . . . by limiting the disruption caused by children.”¹⁹⁴ The *Overton* majority also assumed that the non-contact visiting room was a dangerous place despite supervision by guards.¹⁹⁵ “[R]educing the number of children

186. See *supra* Part II.B.

187. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 135 (1995) (suggesting that a prisoner and an infant relative could maintain their relationship by passing messages back and forth through a third party).

188. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). The *Turner* reasonableness standard can be summarized for convenience under four points: prison interest, alternatives for prisoners, ripple effect, and alternatives for the prison. See *supra* Part II.B.

189. “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is *reasonably related* to legitimate penological interests. . . . Subjecting the day-to-day judgments of prison officials to an inflexible *strict scrutiny* analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.” *Id.* at 89 (emphasis added).

190. “Alice-in-Wonderland legal analysis” was the characterization offered by one commentator. See Stanley Wu, *Persona Non Grata in the Courts: The Disappearance of Prisoners’ First Amendment Constitutional Rights in Beard v. Banks*, 28 WHITTIER L. REV. 981, 1001 (2007).

191. See *supra* notes 58-75 and accompanying text.

192. *Overton v. Bazzetta*, 539 U.S. 126 (1995).

193. *Id.* at 133.

194. *Id.*

195. *Id.* (“Protecting children from harm is also a legitimate goal.”).

allows guards to supervise them better to ensure their safety and to minimize the disruptions they cause within the visiting areas.”¹⁹⁶ But the Court also stated that supervision of young visitors is the responsibility of adults who accompany them.¹⁹⁷ Although prisoners from large families desired to maintain relationships with nieces, nephews, and sons and daughters for whom their parental rights had been judicially terminated, the possible benefit to the children of such relationships was not considered by the Court.¹⁹⁸ “[A] line must be drawn” somewhere to contain the security threat presented by these unruly and disruptive youngsters.¹⁹⁹

The Court went on to assert that prisoners have other means to maintain their relationships with the babies and children barred from the visiting room.²⁰⁰ “[I]nmates can communicate with those who may not visit by sending messages through those who are allowed to visit.”²⁰¹ This unrealistic suggestion overestimates the communicative capacities of little children, for whom even the media of letters and phone calls may prove challenging or altogether inaccessible. The Court rejected this commonsensical, empathetic concern by stating that “[a]lternatives to visitation need not be ideal, however; they need only be available.”²⁰²

In contexts other than prison, the Court has shown solicitude for the needs of family members to stay in touch.²⁰³ However, in the prison context the Court found itself able to approve the manipulation of family relationships as a “management technique.”²⁰⁴ Two Justices, Justice Thomas and Justice Scalia, opined that states are free to design punishments that deprive children of access to incarcerated relatives.²⁰⁵ This result betrays an inability to empathically adopt either the children’s viewpoint or that of the family as a whole. Nor did the Court perceive the prisoner as a family member whose obligations to nurture the younger generation persist despite incarceration.²⁰⁶

196. *Id.*

197. *Id.* (“[I]t is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child’s best interests.”).

198. *Id.*

199. *Id.*

200. *Id.* at 135.

201. *Id.*

202. *Id.*

203. *Id.* at 131 (citing the historic family rights cases of *Moore v. East Cleveland*, 431 U.S. 494 (1977) (striking down an ordinance that forbade members of an extended family to live together) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (acknowledging natural rights to “marry, establish a home and bring up children”)).

204. *Overton*, 539 U.S. at 134.

205. *Id.* at 140 (Thomas, J., concurring). *See supra* notes 76-79.

206. In allowing states to “draw the line” to exclude nieces, nephews, and offspring with respect to whom parental rights have been terminated, the Court accepted

2. *Beard v. Banks*

The Court in *Banks*, too, based its deference to prison regulations on a construal of the facts that fails to understand the process of motivation from the viewpoint of the prisoner.²⁰⁷ Mr. Banks was incarcerated in a Long Term Segregation Unit (LTSU), whose “Level 2” inmates were forbidden newspapers, magazines, and photographs.²⁰⁸ The Court accepted several far-fetched rationales from the prison administration for this deprivation of media.²⁰⁹ The prison told the Court that a desire for news and pictures motivated LTSU prisoners to improve their behavior so as to move to a less restrictive status, while it prevented others from “backsliding.”²¹⁰ Evidence of any such motivation was largely absent, inasmuch as three-quarters of those deprived of news, photos, and most other amenities never improved enough to get them back.²¹¹ Confronting this factual discrepancy, the court made a specious distinction between “facts” and “matters of professional judgment.”²¹²

Deference to a counterfactual professional judgment is inexplicable apart from a failure of empathy. Had the plurality of the *Banks* Court imagined themselves in the place of an LTSU prisoner, they readily could have seen the negligible motivational potential of news deprivation in comparison with solitary confinement and the other harsh measures imposed.²¹³ Lacking empathic insight, the Court ignored the fact of the failure of motivation.²¹⁴

uncritically one model of the nuclear family without regard to the extended relationships that are characteristic of families in several minority ethnic groups. The Court also turned a blind eye to the many reasons why an incarcerated mother or father might have lost parental rights without necessarily having lost the emotional attachment of the child in question.

207. *Beard v. Banks*, 548 U.S. 521 (2006).

208. *See supra* notes 76-88 and accompanying text.

209. *Banks*, 548 U.S. at 530-31.

210. *Id.* at 531.

211. *Id.* at 534. The “insufficient evidentiary support” is noted by Wu, *supra* note 190, at 981.

212. *Banks*, 548 U.S. at 530 (“[W]e must distinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, our inferences must accord deference to the views of prison authorities.”). Wu paraphrases the inference permitting the substitution of professional judgment for fact: “If the prison superintendent says it is true, then it must be true. Since the prison superintendent says that the policy provides an incentive for inmates to rehabilitate, then the policy does so.” Wu, *supra* note 190, at 1002-03.

213. Writing in dissent, Justice Stevens criticized the “deprivation theory of rehabilitation” on other grounds. He pointed out that it was intrinsically unlimited and therefore potentially could justify taking away any and every constitutional right on the premise that motivation might be thus engendered. *Banks*, 548 U.S. at 547-48 (Stevens, J. dissenting).

214. The court below noted additional defects in the motivation theory. No evidence was presented to show “whether the ban was implemented in a way that could modify

Another strained argument by the prison also won uncritical acceptance from the Court. The prison administration claimed that newspapers in LTSU cells would pose a security threat because they could be used to start fires or “catapult feces at the guards.”²¹⁵ But so could many other things. Dissenting Justice Stevens took a look around an LTSU cell from a prisoner’s viewpoint, and he saw, imaginatively,

a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, . . . religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup.²¹⁶

From the viewpoint of the prisoner, which Justice Stevens empathically assumed, many of the items readily at hand in an LTSU cell lend themselves to fire-starting and feces-hurling.²¹⁷ Thus, newspapers and photos would not significantly increase the risk.²¹⁸

One striking aspect of the *Banks* plurality opinion is its demonization of prisoners housed in the LTSU.²¹⁹ Besides starting fires and launching fecal material through the air, the LTSU prisoners are depicted as “specially dangerous and recalcitrant inmates.”²²⁰ They are “most incorrigible” and they may have attacked someone “with the intent to cause death or serious bodily injury.”²²¹ They may belong to a gang,

behavior, or . . . whether the [Department of Corrections’] deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates.” *Id.* at 535 (majority opinion) (alteration in original).

215. *Id.* at 531.

216. *Id.* at 543-44 (adopting language from the opinion below).

217. As one commentator has noted, “the dissent used logic and experience to find . . . problems with the justifications put forth by the administrators [and made] a more searching inquiry behind the prison administrators’ justifications.” Jennifer N. Wimsatt, *Rendering Turner Toothless: The Supreme Court’s Decision in Beard v. Banks*, 57 DUKE L.J. 1209, 1240-41.

218. In a separate dissent, Justice Ginsburg also seems willing and able to adopt a prisoner’s-eye view to detect a certain irony. “The regulation denies The Christian Science Monitor to inmates . . . but allows them The Jewish Daily Forward, based on the determination of a prison official that the latter qualifies as a religious publication and the former does not. Prisoners are allowed to read Harlequin romance novels, but not to learn about the war in Iraq or Hurricane Katrina.” *Banks*, 548 U.S. at 555 (Ginsburg, J., dissenting). See also Wu, *supra* note 190, at 1000 (noting “the paucity of evidence proving that there were problems caused by inmates[‘] possessing magazines, newspapers, or photographs”).

219. *Banks*, 548 U.S. at 525.

220. *Id.* Although this description may be objectively accurate, the effect of this characterization and the following ones is to rhetorically construct the prisoners as fearsome and alien.

221. *Id.* at 525-26.

“exert[] negative influence,” or be “sexual predator[s].”²²² Like savages in a jungle, they fashion “spears” or “blow guns” from available materials; that is what they would do with newspapers and photos if they could get their hands on them.²²³ Given this vilification, the Justices in the plurality did not imagine that LTSU prisoners might simply want to read the news or a sports magazine, like anyone else.

The demonization of prisoners climbs toward hysteria in the concurring opinion of Justice Thomas.²²⁴ He blamed the Court for a deadly race riot in a California prison because the riot followed upon the Court’s ruling that incoming prisoners may not be racially segregated.²²⁵ Hence, Justice Thomas opened with a dire warning against any review of prison regulations at all: “Judicial scrutiny of prison regulations is an endeavor fraught with peril.”²²⁶ On that basis, he reprised his concurring opinion in *Overton* to the effect that states should have a free hand in designing the details of prison punishments.²²⁷

3. *Singer v. Raemisch*

Singer, a recent opinion in which the Seventh Circuit relied heavily on *Overton* and *Banks*, further illustrates the nexus between substantive deference to prison authorities and failure of empathic insight into prisoners’ experience.²²⁸ Mr. Singer’s fantasy books, magazines, and manuscript were confiscated after a Wisconsin prison instituted a policy

222. *Id.* at 526.

223. *Id.* at 531 (citing the statement of undisputed facts in the appendix to the Appeal).

224. *Id.* at 536-41 (Thomas, J. concurring). At the time of Justice Thomas’ appointment to the Court, many expected him to base his opinions in part on empathy. That expectation was disappointed. See Eric L. Muller, *Where But for the Grace of God Goes He? The Search for Empathy in the Criminal Justice Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225, 230 (1998) (“[Thomas] has yet to broaden the range of his empathy much beyond his own unique circumstances.”). But see Steven B. Lichtman, *Black Like Me: The Free Speech Jurisprudence of Clarence Thomas*, 114 PENN ST. L. REV. 415, 417 (2009) (“The scholarship on Thomas is complicated. . . . Little of the writing aspires to neutrality; much of it is either hagiography or polemic.”); Nicole Stelle Garnett, “*But for the Grace of God There Go I’: Justice Thomas and the Little Guy*,” 4 N.Y.U. J. L. & LIBERTY 626 (2009) (defending Thomas’ concern for the disadvantaged).

225. *Banks*, 548 U.S. at 536-37 (Thomas, J. concurring). See *Johnson v. California*, 543 U.S. 499 (2005) (remanding for strict scrutiny of a policy that segregated newly arrived inmates by race).

226. *Banks*, 548 U.S. at 536.

227. *Id.* at 536-42. See *Overton v. Bazzetta*, 539 U.S. 126, 140 (1995) (Thomas, J., concurring). See also *supra* notes 76-79.

228. *Singer v. Raemisch*, 593 F.3d 529 (7th Cir. 2010).

against the game Dungeons and Dragons (D&D).²²⁹ The court at first described the game in neutral terms:

A typical D & D game is made up of an “adventure,” or single story that players develop as a group. A related series of games and adventures becomes a “campaign.” The fictional locations in which the adventures and campaigns take place—ranging in size and complexity from cities to entire universes—are called “campaign settings.”²³⁰

But the court went on to associate the game with several violent criminal cases.²³¹ In the first case, the defendant ““was obsessed with Dungeons and Dragons’ and ‘retreat[ed] into a fantasy world of Ninja warriors’” because of his obsession.²³² In the second, “two men . . . brought a D & D adventure to life by entering the home of an elderly couple and assassinating them.”²³³ In the third selection, the defendant had “argued that . . . addiction to D & D dictated his actions and disconnected him from any consciousness of wrongdoing or responsibility for three murders.”²³⁴ The court’s final selection was a civil action brought after a teenager who was a “devoted” D&D player committed suicide because he supposedly “became absorbed by the game to the point of losing touch with reality.”²³⁵ The rhetoric of violence and danger built in a crescendo throughout the court’s recitation of these cases.²³⁶

Although the court had before it fifteen affidavits attesting to the value of D&D and its rehabilitative potential, the opinion contains barely a hint of their content, which presumably was positive and upbeat.²³⁷ “[The] eleven inmate affiants—who collectively served over 100 years in prison—all testified that they had never heard of any gang-related or other violent activity associated with D&D gameplay or paraphernalia.”²³⁸ Three of Mr. Singer’s other four affiants were experts on role-play games, but the court cited their expert views only

229. *Id.* See *supra* notes 98-113 and accompanying text.

230. *Singer*, 593 F.3d at 531 n.1.

231. *Id.* at 537 (citing *Meyer v. Branker*, 506 F.3d 358, 370 (4th Cir. 2007) and *Thompson v. Dixon*, 987 F.2d 1038, 1039 (4th Cir. 1993)).

232. See *Meyer*, 506 F.3d at 370 (cited by *Singer*, 593 F.3d at 537).

233. See *Thompson*, 987 F.2d at 1039 (cited by *Singer*, 593 F.3d at 537).

234. See *Sellers v. Ward*, 135 F.3d 1333, 1335 (10th Cir. 1998) (cited by *Singer*, 593 F.3d at 537).

235. See *Watters v. TSR, Inc.*, 904 F.2d 378, 380 (6th Cir. 1990) (cited by *Singer*, 593 F.3d at 537).

236. *Singer v. Raemisch*, 539 F.3d 529, 537 (7th Cir. 2010).

237. “Singer procured an impressive trove of affidavit testimony.” *Singer*, 593 F.3d at 536.

238. *Id.*

sparingly.²³⁹ Although the opinion adopted few of the presumably positive descriptions from Singer's affidavits,²⁴⁰ it did include the dire warnings set forth in an affidavit from the prison's local gang specialist as the prison's "sole evidence."²⁴¹

He testified that D & D can "foster an inmate's obsession with escaping from the real life, correctional environment, fostering hostility, violence and escape behavior," which in turn "can compromise not only the inmate's rehabilitation and effects of positive programming but also endanger the public and jeopardize the safety and security of the institution."²⁴²

The court remarked that the specialist, an employee of the prison, had advised Singer that D&D "promotes fantasy role playing, competitive hostility, violence, addictive escape behaviors, and possible gambling."²⁴³ All in all, the comments chosen for inclusion in the opinion serve rhetorically to amplify the court's damning identification of D&D with violence and danger.

Explaining its choice to credit the prison's one affidavit instead of the fifteen submitted by Mr. Singer, the court stated that the prisoners' experience was not relevant.²⁴⁴ It came "from the wrong side of the bars."²⁴⁵ This remark is an overgeneralization, inasmuch as four of Singer's affidavits came from knowledgeable individuals who were not incarcerated, that is, who lived on the right side of the bars.²⁴⁶ But the remark illuminates the salience of negative descriptions for the court in

239. *Id.* at 532. The court notes testimony from "Paul Cardwell, chair and archivist of the Committee for the Advancement of Role-Playing Games, an 'international network of researchers into all aspects of role-playing games,'" to the effect that "there are numerous scholarly works establishing that role-playing games can have positive rehabilitative effects on prisoners." *Id.* at 537.

240. The opinion remarks that "[s]everal of Singer's affiants . . . asserted . . . that D&D helps rehabilitate inmates and prevents them from joining gangs and engaging in other undesirable activities." *Id.* at 533.

241. *Id.* at 535. The specialist was the prison's "long-serving Disruptive Group Coordinator, Captain Bruce Muraski." *Id.* at 532. He "has spent nearly twenty years as Waupun's Disruptive Group Coordinator and Security Supervisor and belongs to both the Midwest Gang Investigators Association and the Great Lakes International Gang Investigators Coalition. Muraski also has extensive training in illicit groups ranging from nationwide street and prison gangs to small occult groups and has been certified as a gang specialist by the National Gang Crime Research Center." *Id.* at 533. In spite of that training, Muraski apparently took no action with respect to D&D until he received an anonymous letter from a prisoner suggesting its potential encouragement of gangs. *Id.* at 532.

242. *Id.* at 535.

243. *Id.* at 532.

244. *Id.* at 536.

245. *Id.*

246. *Id.* at 533.

contrast to the positive descriptions that it could have gleaned from the fifteen affiants who purported to have first-hand experience of the game and its effect on players.

That salience may be owing to “cultural cognition.”²⁴⁷ “The phenomenon of cultural cognition refers to the tendency of individuals to conform their views about risks and benefits of putatively dangerous activities to their cultural evaluations of those activities.”²⁴⁸ Facts impact upon perception selectively through a lens of cultural experience, even when judges attempt to view matters objectively.²⁴⁹

The court sought to further justify its selectivity under *Banks*’s distinction between “facts” and “matters of professional judgment.”²⁵⁰ A fact—the utter lack of evidence linking D&D to gang activity—was outweighed by a professional judgment—speculation that D&D might possibly foster gang activity in future.²⁵¹ This speculation rested on the prison expert’s observation that D&D “mimicked” gang organization, with rules and a hierarchical leadership structure.²⁵² Thus, speculation by a prison staff member carried more weight with the court than sworn factual statements about experience “from the wrong side of the bars.”²⁵³

Commonality of experience is the gateway of understanding.²⁵⁴ The *Singer* court failed to grasp any difference between the fantasy of escape in a D&D role play, on one hand, and an actual plan of escape from prison itself, on the other. It relied on a prison employee’s statement “that D & D can ‘foster an inmate’s obsession with escaping from the real life[] correctional environment, fostering hostility, violence and escape behavior.’”²⁵⁵ By discounting the prisoners’ affidavits, the court deprived itself of empathic access to prisoner experience. The threat of D&D then became a judicially recognized fact. Consequently, the court approved the prison’s effort to extinguish fantasy.

247. See *supra* notes 176-78 and accompanying text.

248. Kahan, *supra* note 177, at 417-18.

249. *Id.* at 420. Values may affect judicial decisions “as a subconscious influence on cognition.” *Id.* at 417. “[C]ultural cognition . . . creates conflict over legally consequential facts.” *Id.* at 418.

250. *Singer*, 593 F.3d at 534 (citing *Beard v. Banks*, 548 U.S. 521, 530 (2006)). The court goes on to state that “[o]ur inferences as to disputed matters of professional judgment are governed by *Overton*.” *Id.* See *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). See also *supra* note 212 and accompanying text.

251. *Singer*, 593 F.3d at 536-37.

252. *Id.*

253. See *supra* note 245 and accompanying text.

254. See *Miller*, *supra* note 182, at 1008 (“Empathy is essential to overcoming the limitations of experience. By making conscious effort to imagine themselves in the position of another, judges can arrive at better estimations of whether a set of facts, taken as true, present a plausible claim.”).

255. *Singer*, 593 F.3d at 535.

C. *Deference and Empathy in Burns*

Ironically, a certain capacity for fantasy and imagination is a prerequisite for empathic access to the life experiences of other human beings.²⁵⁶ One understands another's viewpoint by imaginatively stepping into his or her shoes. Judges do not readily imagine themselves in the place of incarcerated individuals.²⁵⁷ But aspects of prison experience can be rendered empathically accessible through analogy with experiences outside prison walls, as happened in *Burns v. Pennsylvania Dep't of Corr.*²⁵⁸ This section explores the role of judicial empathy in *Burns*, a rare decision that favored a prisoner.

1. Procedural history of *Burns*

The facts of the *Burns* case are straightforward, but its progress through the federal courts has been complex. While Rodney Burns was incarcerated in Pennsylvania's State Correctional Institution at Graterford, someone injured Charles Mobley, another prisoner, by scalding him with hot water.²⁵⁹ Mr. Mobley was elderly and somewhat frail.²⁶⁰ His identification of his assailant was tentative, and he refused to testify at the misconduct hearing where Mr. Burns was found responsible for the scalding.²⁶¹ The hearing officer relied on reports of unidentified informants, whom she did not summon to testify.²⁶² Their reports entered the record through the prison's security officer, who had received them and who indicated that he believed they were reliable.²⁶³ Videotapes of the incident, which may once have existed, were not available by the time of the hearing.²⁶⁴

256. See STEIN, *supra* note 179, at 8-11.

257. An exception that fairly proves the rule is Leland P. Anderson, *A "More Excellent Way": Moral Imagination & the Art of Judging*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399 (2008). But see Catherine Gage O'Grady, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L.J. 4 (2001). See also Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 26 VAND. L. REV. 851, 880 (2009).

258. *Burns v. Pennsylvania Dep't of Corr.*, 544 F.3d 279 (3d Cir. 2008).

259. *Burns*, 544 F.3d at 281-82. See also Appellant's Brief and Attached Appendix at 5, *Burns v. Pennsylvania Dep't of Corr.*, 544 F.3d 279 (3d Cir. 2008) (No. 07-1678).

260. Brief for Appellees at 10, *Burns v. Pennsylvania Dep't of Corr.*, 544 F.3d 279 (3d Cir. 2008) (No. 07-1678).

261. *Burns*, 544 F.3d at 282.

262. *Id.* at 282-83.

263. *Id.*

264. *Id.* at 282. See also Appellant's Brief, *supra* note 259, at 6 ("[T]he Security Captain at SCI Graterford . . . informed Burns that the assault had been recorded on videotape.").

The hearing officer determined that Mr. Burns was guilty of assaulting Mr. Mobley.²⁶⁵ She imposed a penalty of 180 days in disciplinary confinement and the forfeiture of Burns's prison job.²⁶⁶ She also "assessed" his prison account for whatever medical expenses or other expenses might result from the assault.²⁶⁷ However, no funds were actually taken.²⁶⁸

"Burns timely appealed the disciplinary conviction through all three levels of disciplinary appeals," and it was upheld at each level.²⁶⁹ He then filed a civil rights complaint *pro se* in federal court under 42 U.S.C. § 1983.²⁷⁰ Subsequently, the court appointed counsel.²⁷¹ "[T]he parties filed cross-motions for summary judgment [and] the district court denied Mr. Burns's motion for partial summary judgment and granted the defendants' motion."²⁷²

An appeal followed.²⁷³ The court below had based its judgment on the fact that no funds actually had been deducted from Mr. Burns's account.²⁷⁴ With nothing taken, no process was due.²⁷⁵ But Burns argued that he "was deprived [of] his right to security in the funds in his inmate account, one of the essential sticks in the property ownership bundle of rights."²⁷⁶ The Third Circuit accepted that argument.²⁷⁷ It reversed the summary judgment and sent the case back to the district court.²⁷⁸ The district court once again granted summary judgment to the defendants on most counts.²⁷⁹ However, it also granted partial summary judgment to the plaintiff, Burns, with respect to the favorable finding that is under discussion here.²⁸⁰

265. *Burns*, 544 F.3d at 283.

266. *Id.*

267. *Id.* at 282-83. Mr. Mobley received only one treatment with ointment and a tetanus shot. *Id.* at 282. *See also* Brief for Appellees, *supra* note 260, at 11.

268. *Burns*, 544 F.3d at 283.

269. Appellant's Brief, *supra* note 259, at 11-12.

270. *Id.* at 3.

271. *Id.*

272. *Id.* at 4.

273. *Id.*

274. The district court "held that Burns was not entitled to . . . due process protections because he failed to show a deprivation of a cognizable liberty or property interest." *Burns*, 544 F.3d at 281. *See Burns v. Pennsylvania Dep't of Corr.*, No. 05-3462, 2007 WL 442385, at *4 (E.D. Pa. Feb. 6, 2007) ("Because Plaintiff has suffered no deprivation of property, he fails as a matter of law to state a due process violation.").

275. *Id.*

276. Appellant's Brief, *supra* note 259, at 15.

277. *Burns*, 544 F.3d at 291.

278. *Id.*

279. *Burns*, 2009 WL 1475274, at *18.

280. *Id.*

The Court DECLARES that [the hearing officer's] failure to independently assess the reliability and credibility of the confidential informants whose testimony she relied upon in assessing Plaintiff's inmate account *violated the procedural due process rights Plaintiff was entitled to given his protected property interest in the security of his inmate account.*²⁸¹

The judgment was appealed once more to the Third Circuit, which confirmed the novelty of the new property right but granted more relief to Burns in that it expunged his prison disciplinary record.²⁸²

2. Empathy in *Burns*

Strikingly scarce in the initial remand was any mention of deference owed to prison administrators.²⁸³ The Third Circuit implicitly criticized the prison's disciplinary proceedings by pointing out that the court below "had 'serious concerns that Defendants' actions would not satisfy even those minimal due process requirements [guaranteed to persons in prison].'"²⁸⁴ Nevertheless, the district court initially did not reach the issue of defects in the disciplinary proceedings because it found that Burns "failed to show a deprivation of a cognizable liberty or property interest" by means of those defective proceedings.²⁸⁵ The latter point was the error identified by the Third Circuit.²⁸⁶ Finding that the "assessment" of Burns's account did indeed deprive him of a property

281. *Id.* (emphasis added).

282. *Burns v. Pa. Dep't of Corr.*, 642 F.3d 163, 171 (2011).

283. Neither the majority opinion nor the dissent made use of the concept. The term "deference" appeared in only one citation of a Supreme Court case, although that passage was cited twice by the dissent and twice by the majority in response. *Burns*, 544 F.3d at 290 n.8, 293, 294. See *Sandin v. Conner*, 515 U.S. 472, 482 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment [and avoid] involvement of federal courts in the day-to-day management of prisons."). However, when deciding the second appeal, the Third Circuit sounded a lone note of empathy when it remarked that "an inmate's prison account may be the only means of paying for long distance phone calls to family or others in his/her support network." *Burns*, 642 F.3d at 172 n.9.

284. *Burns*, 544 F.3d at 281 (internal citations omitted). The court also took a dim view of the defendants' attempt to render the appeal moot by belatedly promising not to deduct any funds. *Id.* at 283-85 ("[B]ecause of the belated nature of the assurance—which was offered more than three years after the original disciplinary hearing and only after oral argument was heard in this case—it is possible that Burns is entitled to a more than nominal award as compensation for the time that his inmate account operated under a cloud.").

285. *Id.* at 281.

286. *Id.* ("Because we believe that the Department of Corrections' assessment of Burns'[s] inmate account constituted the impairment of a cognizable property interest, we will reverse the District Court's . . . order granting summary judgment and remand the case for further proceedings.").

interest, the appeals court remanded for an examination of the sufficiency of the disciplinary proceedings that had imposed the “assessment.”²⁸⁷ On remand, the result favored Burns on that point.²⁸⁸

Also conspicuous by its absence from the *Burns* opinion is the sort of rhetorical demonization of prisoners that accompanied and supported substantive deference toward prison authorities in *Overton*, *Banks*, and *Singer*.²⁸⁹ On the contrary, the majority seemed imaginatively to find common ground with the prisoner’s experience by analogizing it to more familiar financial affairs.²⁹⁰ Thus, the court readily could conceptualize an injury that Burns experienced. The injury was that once his account was assessed for an as yet undetermined amount, he was “faced with either constantly spending down his account, or potentially losing a portion of his funds through the Department of Corrections’ discretionary execution of its assessment.”²⁹¹ The assessment itself, imposed at the time of the disciplinary hearing as a “cloud” over the account, immediately deprived Burns of a property interest in the future use of his funds, though not of the funds themselves.²⁹²

Notwithstanding the likelihood that the amount of the assessment would have been “negligible,”²⁹³ the court exerted itself to conduct a detailed theoretical analysis of property rights and economic

287. *Id.* at 291.

288. *Burns v. Pennsylvania Dep’t of Corr.*, No. 05-3462, 2009 WL 1475274, at *18 (E.D. Pa., May 26, 2009) (declaring that prison officials “violated [Burns’s] procedural due process rights”).

289. *See supra* Part II.B.

290. The analogy was suggested to the court by the Appellant’s Brief. *Burns*, 544 F.3d at 288 (“Burns contends that the assessment placed the Department of Corrections in a position *analogous* to that of a Judgment Creditor.”) (emphasis added). The Third Circuit again pointed to this illuminating analogy in its second *Burns* decision, 642 F.3d at 178, 179. In fact, the Appellant’s Brief, *supra* note 259, at 18, states that the assessment *literally* created a “judgment debt” and “the DOC became a judgment creditor.”

291. *Burns*, 544 F.3d at 290.

292. *Id.* at 290 n.8. The court summarized its holding:

[T]he Department of Corrections’ assessment of Burns’ institutional account . . . deprived him of a protected property interest where that assessment (1) placed the DOC in a position analogous to that of a Judgment Creditor; (2) clouded Burns’s account for a period of more than three years; and (3) reduced the economic value and utility of that account.

Id.

293. Brief for Appellees, *supra* note 260, at 32 n.26 (“[Defendants asserted that] the cost of a dollup of triple anti-biotic ointment and a dose of Tetanus vaccine—all that was expended to treat Mobley—was undoubtedly negligible.”). But as the Third Circuit explained in its second decision, “when [the hearing officer] assessed Burns’ account, she believed that the assessment could be much larger than \$10.00, possibly including the costly prospect of covering plastic surgery Mobley may have needed. . . . Thus, although we now know that Burns’ exposure was less than \$10, the exposure appeared far more substantial at the time of the hearing.” *Burns*, 642 F.3d at 172-73.

relationships. It drew upon the philosophical work of A.M. Honoré for the notion that a “right to security” is one of the “bundle of sticks” that comprise property rights.²⁹⁴ The court quotes Honoré to the effect that an owner “should be able to look forward to remaining owner indefinitely.”²⁹⁵ The court went on to cite two microeconomics textbooks in support of the proposition that “property subject to seizure—even if the probability and timing of such a seizure is unknown—possesses a lesser present day economic value than property not so encumbered.”²⁹⁶ Like a judgment of indebtedness, the assessment of Burns’s account diminished its value and utility for him.²⁹⁷ The court’s painstaking financial and philosophical analysis is remarkably sympathetic to Burns’s predicament.

The court’s ability to adopt the prisoner’s perspective goes far to explain the vastly different result in *Burns*, when compared with the deferential holdings of more typical cases like *Overton*, *Banks*, and *Singer*.²⁹⁸

D. *The Meaning and Implications of Burns*

The surprising result in *Burns* bears further analysis to assess its import for future litigation over prisoners’ rights. As a practical effect, henceforward any adjudication that so much as hints at confiscation of a prisoner’s funds will be ultimately reviewable by an Article III court.²⁹⁹ In addition to its practical impact on prison administrative law, *Burns*

294. *Burns*, 544 F.3d at 287. See A.M. Honoré, *Ownership*, OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest, ed. 1961). The court also looked to Lawrence Becker to define the right of security as “immunity from expropriation.” 544 F.3d at 288. See LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 19 (1977).

295. *Burns*, 544 F.3d at 288. See Honoré, *supra* note 294.

296. *Burns*, 544 F.3d at 289. “Mathematically, the expected value of an account that is currently worth V but is subject to seizure would therefore equal $P*(V) + (1-P)*(V - \text{the amount seized})$, where ‘P’ equals the probability that the seizure will not be effectuated.” *Id.*

297. The court concedes that the analogy of a judgment creditor is imperfect, but points out that the prison has even more power over Burns’s funds than a conventional creditor would have.

[T]he Department of Corrections—unlike a putative Judgment Creditor—controls the process through which the amount of medical expenses will be determined. As such, they possess the unilateral authority to reduce their assessment to a specific dollar amount. Similarly, the Department of Corrections need not rely on third party enforcement of their assessment interest. Instead, they physically control Burns’s institutional account and can deduct any assessed fees without resort to an intermediary.

Id. at 288-89.

298. See *supra* Part III.B.

299. This will be so at least in the Third Circuit, where *Burns* is authoritative precedent. See U.S. CONST. art. I, § 1, § 2, cl. 1.

illuminates the role of empathy in the four-pronged *Turner* test that courts apply to prisoners' constitutional claims.³⁰⁰ This section addresses in turn these theoretical and administrative concerns: the constitutional jurisprudence of empathy and the practical impact of *Burns*. However, preliminary remarks establish the continuing viability of the *Turner* test in light of recent assertions that *Turner* was eviscerated if not overruled by *Banks*.³⁰¹

1. The *Turner* Framework

For nearly twenty-five years, the touchstone for permissible infringement of constitutional rights in prison has been the fourfold test set forth in *Turner*.³⁰² A *Turner* analysis weighs four factors to evaluate the constitutionality of a prison regulation or practice: (1) whether the regulation is rationally related to a legitimate penological objective; (2) whether other means exist for the prisoner to exercise the infringed right; (3) whether allowing the prohibited behavior would have a negative impact throughout the prison; and (4) whether other means exist for the prison to accomplish its objective.³⁰³

Turner remains good law, even though several commentators hastily concluded that the *Banks* Court collapsed the four factors into simple deference toward prison administrators.³⁰⁴ This mistaken conclusion emerges from efforts to account for the inordinately deferential weight that *Banks* gave to the first factor, the prison's ability to articulate a legitimate penological purpose for the regulation challenged.³⁰⁵ However, a more satisfactory explanation of the hyper-deference in *Banks* is available on the basis of a jurisprudence of

300. For discussion of the *Turner* test, see *supra* Part II.A-B.

301. See *supra* Part II.B-C for discussion of *Beard v. Banks*, 548 U.S. 521 (2006).

302. See *Turner v. Safley*, 482 U.S. 78 (1987).

303. *Turner*, 482 U.S. at 89-91.

304. See Melissa Rivero, *Melting in the Hands of the Court: M&M's, Art, and a Prisoner's Right to Freedom of Expression*, 73 BROOK. L. REV. 811, 831 (2008) (“[U]nless the connection between the challenged regulation and the interest is invalid, the Court will not address the other [*Turner*] factors.”); Wimsatt, *supra* note 217, at 1231 (“[A] majority of the Court . . . implemented a test that eliminated three of the *Turner* factors.”) (citations omitted). See also Jeremy T. Sellars, *Judicial Deference to the Professional Judgment of Prison Officials—First Amendment Validity of Prison Regulations Barring Newspapers, Magazines, and Personal Photographs*, 74 TENN. L. REV. 711, 726 (2007) (“Even with the factors developed in *Turner*, the reasonableness standard used by the Court does not adequately protect basic rights assured to prisoners under the United States Constitution.”); Wu, *supra* note 190, at 984, 1006 (“[T]he Court analyzed each factor under *Turner*” but succumbed to “an absolute bias completely in favor of prison administration interests.”).

305. Of the four authors cited *supra* note 304, Rivero and Wimsatt believe that this was effectively the only factor considered, while Sellars and Wu conclude that it was given inordinate weight.

empathy.³⁰⁶ Moreover, federal appellate and district courts in 2010 continued to apply the four prongs of the *Turner* test when prisoners alleged violations of their constitutional rights.³⁰⁷ Although *Turner* is still good law, effective application of its criteria depends upon the empathy brought to the case by counsel and judges alike.

The implicit and often unsuspected place of empathy as a component of jurisprudence received scholarly attention in Professor Darrell Miller's analysis of "plausibility," the heightened pleading standard announced in *Ashcroft v. Iqbal*.³⁰⁸ Miller argued that because empathy cannot be eliminated from human choices, judges ought to recognize its role, bring it to consciousness, and "harness it."³⁰⁹

Empathy is "the cognitive capacity *or training* to imagine oneself in the position of another person."³¹⁰ It can mean "perspective taking: the conscious ability to infer the mental or emotional state of another person, without necessarily sharing the other's emotional state or desiring to help that other person."³¹¹ In the narrow context of a motion to dismiss a complaint for failure to state a claim, Miller remarks that

judges will likely make more accurate decisions based on more—rather than less—information, that they are more likely to understand the motives of a party if they share some common experience or characteristic with that party, that they can compensate for lack of

306. This jurisprudence will be discussed presently. The role of empathy in *Burns* can illuminate the lopsided reliance of *Banks* on the first *Turner* factor, despite the fact that the *Burns* Court did not reach a *Turner* analysis of whether the prisoner's property was taken improperly. It merely established that the prisoner had a property interest that *could be and was* infringed.

307. See, e.g., *Watkins v. Kasper*, 599 F.3d 791, 796-98 (7th Cir. 2010) (reversing jury verdict in favor of prisoner against whom disciplinary action was taken for complaining in a manner deemed inappropriate when analyzed by the *Turner* factors, hence not constitutionally protected); *Bull v. San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc) (relying on three of the four *Turner* factors to uphold the constitutionality of strip searches for arrestees while overruling 1980's-era precedents that had provided broader protections for prisoners); *Maze v. Tafolla*, 369 F.App'x 532, 534 (5th Cir. 2010) (unpublished) (using the *Turner* factors to justify denial of contact visits with two-year-old daughter for mother charged with murder and awaiting trial in county jail); *Johnson v. Cate*, No. C 10-01273, 2010 WL 2681710 (N.D. Calif. July 6, 2010) (dismissing prisoner's equal protection challenge to policy that denied him free textbooks after a *Turner* analysis of the claims).

308. Miller, *supra* note 182. See *supra* notes 183-85 and accompanying text. See also *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

309. Miller, *supra* note 182, at 1011. See also Bandes and Maroney, *supra* note 185.

310. Miller, *supra* note 182, at 1008 (emphasis added).

311. Miller, *supra* note 182, at 1009 (citing the research of Frederique de Vignemont & Tania Singer, *The Empathetic Brain: How, When and Why?*, Opinion, 10 TRENDS IN COGNITIVE SCI. 435, 435 (2006) and Stephanie D. Preston & Frans B. M. de Waal, *Empathy: Its Ultimate and Proximate Bases*, 25 BEHAV. & BRAIN SCI. 1, 4 tbl. 2 (2002)).

personal experience with an active empathetic process, and that they can develop a coordinate ability to suspend the empathetic process when it begins to trigger bias.³¹²

If judges need more information, then the parties need to supply it in the pleadings,³¹³ hence the heightened “plausibility pleading standard” announced in *Bell Atlantic v. Twombly*³¹⁴ and confirmed in *Iqbal*.³¹⁵

2. Empathy and the *Turner* Factors

Although Miller’s focus was on pleading standards in general, his analysis readily extends itself to the four prongs of the *Turner* test for unconstitutional infringement of prisoner’s rights. Implicit in the *Turner* factors are the imperatives of empathy enumerated by Professor Miller: to understand motives, to imaginatively take on the different perspectives of the parties, to augment one’s own personal experience with that of others, and to recognize and avoid bias.³¹⁶ These dimensions of empathy are constitutive ingredients in the *Turner* factors as stated in principle.³¹⁷

The first and fourth factors call upon judges to understand motives, specifically the “legitimate governmental interest” that is the “asserted goal” of the challenged regulation.³¹⁸ This understanding is the basis on which to assess the strength of the rational connection between the

312. Miller, *supra* note 182, at 1011. See also Fed. R. Civ. P. 12(b)(6) and 8(a)(2).

313. Catherine G. O’Grady points out that “appellate judges will use the parties’ briefs and oral arguments as tools to assist them in obtaining their own empathic understandings of the case.” Catherine Gage O’Grady, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L.J. 4, 15 (2001).

314. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

315. Miller, *supra* note 182, at 1001, with reference to *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). But see Miller, *supra* note 175, at 1011.

Where *Iqbal* goes wrong is in its articulation of a standard that seems to privilege experience, without demanding impartiality. *Iqbal* seems to invite judges to determine plausibility based upon their own experience, rather than forcing them to do the hard work to imagine themselves in the scenario presented within the four corners of the complaint.

Id.

316. See *supra* notes 308-15 and accompanying text.

317. In practice, conversely, a *Turner* analysis goes awry to the extent that it neglects to empathize with the parties on either side of the dispute. Dissenting in *Turner*, Justice Stevens pointed to the danger of lopsided empathy. *Turner v. Safley*, 482 U.S. 78, 100-01 (1987) (Stevens, J., dissenting in part and concurring in part). The standard adopted by the majority

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.

Id. Justices Brennan, Marshall, and Blackmun joined in the Stevens opinion. *Id.*

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

prison's objective and the regulation (factor one) in comparison with possible alternative means of achieving the same objective (factor four). Understanding of motivation also comes into play when a court explores why the infringed right is important to the prisoner (factor three).³¹⁹ For example, the *Overton* Court apparently failed to grasp the intensity of the mutual need of prisoners and their young relatives for visits, although it readily recognized the motivation for banning such visits as articulated by the prison administration.³²⁰

Imaginatively taking on the differing perspectives of the parties is an imperative that drives several of the *Turner* factors. The court must consider alternatives on both sides: whether the prison has other means to achieve its objective (factor four) and whether the prisoners have other means to exercise the infringed right (factor two). For example, the *Banks* Court found that most prisoners in a restrictive housing unit had no present or even future alternative means to exercise their constitutional right to receive news, because most did not improve their behavior in reaction to the ban on newspapers.³²¹ Nevertheless, the Court upheld the ban, apparently because the perspective of the prison administration was easier for the Court to adopt than that of the prisoners.³²²

To augment one's experience with that of others is an empathic imperative that is essential in principle to the application of *Turner* factor three. Yet the *Turner* majority took a one-sided approach, acknowledging the value of administrators' experience but not that of prisoners:

A third consideration is the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.³²³

The metaphor of the "ripple" discloses what the Court overlooked here. Prisoners themselves first experience the "ripple" because of the

319. See *supra* notes 192-206 and accompanying text.

320. *Id.*

321. See *supra* notes 76-87 and accompanying text.

322. *Id.*

323. *Turner*, 482 U.S. at 90.

infringement of the right that is at issue; hence, they are a source of information about what this infringement means. Yet the need for such information may scarcely register with a court. For example, the *Singer* court all but ignored the testimony of fifteen affiants about the role-playing game Dungeons and Dragons.³²⁴

To recognize and avoid bias is perhaps the most subtle and vital of the imperatives of empathy. To be sure, the *Turner* majority embraced the principle of deference to prison administrators along with the principle of protecting prisoners' constitutional rights.³²⁵ But deference is not equivalent to bias against the prisoner and in favor of the state. Deference does not mandate lopsided empathy with administrators while ignoring what empathy could disclose about the interests of prisoners. On the contrary, even-handed empathy is a means of guarding against bias.³²⁶ For example, the *Burns* court dared to address "an issue of first impression across the courts of appeals."³²⁷ The court engaged in a far-reaching dialogue with secondary philosophical sources and with its own dissenting member after it could find "no precedential authority addressing the right to security."³²⁸

The foregoing discussion of the constitutional jurisprudence of empathy, inspired by Professor Miller's analysis of empathy as a component of the plausibility pleading standard, has established that empathy is also operative in the application of the *Turner* test for permissible infringement of prisoner rights. Decisions that demonize prisoners are decisions that implement the imperatives of empathy equivocally and without a critical awareness of empathy's inescapable role in human deliberation.³²⁹ By contrast, the *Burns* court avoided the unconscious bias that results from taking the perspective of prison authorities but not the perspective of the prisoner. The familiar analogy

324. See *supra* notes 228-46 and accompanying text.

325. *Turner*, 482 U.S. at 84-85.

326. As Professor Miller argues, "humans can employ higher order cognitive functions to inhibit, modify or stimulate this empathetic process." Miller, *supra* note 182, at 1010. Miller calls for

minimizing the type of cognitive errors that judges and juries are prone to make . . . [by recognizing] that judges will likely make more accurate decisions based on more—rather than less—information, . . . that they can compensate for lack of personal experience with an active empathetic process, and that they can develop a coordinate ability to suspend the empathetic process when it begins to trigger bias.

Id. at 1011.

327. *Burns v. Pennsylvania Dep't of Corr.*, 544 F.3d 279, 286 (3d Cir. 2008).

328. *Id.* at 287. The court looked to the property theory of A.M. Honoré to support its holding in favor of the prisoner. See *supra* notes 294-95 and accompanying text.

329. See *supra* Part III.B, where demonization of the prisoner plaintiff is illustrated in *Overton*, *Banks*, and *Singer*.

of the law of debt made prisoner Burns's predicament accessible to the court's empathic understanding.³³⁰

3. The Impact of *Burns* on Administrative Law

Besides illuminating the jurisprudence of empathy, *Burns* has practical implications for administrative law. It narrows the range of penalties that the Pennsylvania Department of Corrections can impose in a prison disciplinary hearing.³³¹ By statute, "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights" is defined as an "adjudication."³³² "Any person aggrieved by an adjudication of a Commonwealth agency . . . [has] the right to appeal therefrom to the court vested with jurisdiction of such appeals."³³³ That court is the Commonwealth Court, which has "exclusive jurisdiction of appeals from final orders of government agencies" including "any . . . Commonwealth agency having Statewide jurisdiction."³³⁴ However, a line of cases in the 1980's and 1990's called into question whether the Department of Corrections had the legal status of an agency.³³⁵ In 1998, the Supreme Court of Pennsylvania determined that the Commonwealth Court had neither original nor appellate jurisdiction in cases arising from decisions of prison disciplinary tribunals, with the exception of those involving constitutional claims.³³⁶ Constitutional claims can arise with regard to the property interest that was newly declared by the Third Circuit in *Burns*.³³⁷

330. See *supra* notes 290-97 and accompanying text.

331. Misconduct hearings are governed by the *Inmate Discipline Procedures Manual*, DC-ADM 801, *supra* note 120, which became effective June 13, 2008. The manual was not updated in the wake of the *Burns* decision, issued September 19, 2008. As a Third Circuit ruling, *Burns* similarly affects administrative law in Delaware, New Jersey, and the Virgin Islands, as well as in Pennsylvania.

332. 2 PA. CONS. STAT. ANN. § 101 (West 2008).

333. 2 PA. CONS. STAT. ANN. § 702 (West 2008).

334. 42 PA. CONS. STAT. ANN. § 763 (a) (West 2004).

335. See *Robson v. Biester*, 420 A.2d 9, 12 (Pa. Commw. Ct. 1980) ("A decision by an intra-prison disciplinary tribunal is not a final adjudication by an administration agency within this Court's appellate jurisdiction."); *Ricketts v. Cent. Office Review Comm.*, 557 A.2d 1180, 1182 (Pa. Commw. Ct. 1989) ("We are unwilling to elevate the CORC panel to an administrative agency."); Cf. *Lawson v. Commonwealth*, 538 A.2d 69, 71 (Pa. Commw. Ct. 1988) ("[I]f an inmate can identify a personal or property interest which is not limited by Department regulations and which is affected by a final decision of the Department, the Department's decision in those circumstances may constitute an adjudication subject to our appellate review."); *Kisner v. Pa. Dep't of Corr.*, 683 A.2d 353, 356 (Pa. Commw. Ct. 1996) ("[W]e conclude that CORC performs state-wide policymaking functions, ergo, its decisions are subject to review in this Court's original jurisdiction.");

336. *Bronson v. Cent. Office Review Comm.*, 721 A.2d 357, 359 (Pa. 1998).

337. See *supra* notes 2-3 and accompanying text.

The exception for constitutional claims accommodates the due process principles that were affirmed by the Commonwealth Court in a 1996 landmark case in prison administrative law, *Holloway v. Lehman*.³³⁸ Under *Holloway*, Pennsylvania prison administrators cannot deprive prisoners of their funds without providing the statutory protections of due process: notice, a hearing with transcribed testimony and opportunity for cross-examination, and a written decision explaining its reasons.³³⁹ Such a hearing, now commonly called a *Holloway* hearing, occurs some time after the disciplinary hearing that initially determined responsibility for harm done to persons or property.³⁴⁰ Its outcome is appealable “to the courts,”³⁴¹ although no judicial review is available for the findings of the disciplinary hearing.³⁴²

Before *Burns*, the non-reviewable³⁴³ disciplinary hearing could impose financial liability upon a prisoner found responsible for harm to persons or property, as long as the funds were not actually taken from the prisoner’s account until after a subsequent *Holloway* hearing.³⁴⁴ That changed with *Burns*. The assessment itself now is considered to diminish a constitutionally protected property interest.³⁴⁵

This outcome leaves two options for the Pennsylvania Department of Corrections (DOC). Either the DOC must refrain from assessing damages at all until the *Holloway* hearing, when all the trappings of due process are in place; or else the DOC must upgrade the initial disciplinary hearing so as to provide the statutory protections of notice,

338. *Holloway v. Lehman*, 671 A.2d 1179 (Pa. Commw. Ct. 1996). See *supra* notes 155-63 and accompanying text.

339. *Holloway*, 671 A.2d at 1182. See 2 PA. CONS. STAT. ANN. §§ 504, 505, 507 (West 2008).

340. *The Inmate Discipline Procedures Manual*, DC-ADM 801, *supra* note 120, distinguishes between the misconduct hearing (Section 3) and the cost assessment hearing (Section 8 C).

341. *Id.* at § 8 G 6.

342. Under *Bronson*, the Commonwealth Court does not have jurisdiction over prison disciplinary hearings. See *supra* note 140 and accompanying text.

343. The finding of the disciplinary hearing, or “misconduct hearing,” is appealable within the Department of Corrections to the Program Review Committee, then to the Facility manager, and finally to the Office of Chief Counsel. DC-ADM 801, *supra* note 120, at § 5. Under *Bronson*, it is not appealable to the courts except on constitutional grounds. See *supra* note 144 and accompanying text.

344. Writing in dissent in *Burns*, Judge Hardiman pointed out that Mr. Burns was entitled to a *Holloway* hearing before the Department of Corrections could touch his account. “[T]he DOC cannot deprive Burns of funds in his prison account until it establishes the amount of financial loss or cost, if any. Because it is undisputed that the DOC never established (or even attempted to establish) this amount, I would hold that Burns has not suffered a deprivation of property.” *Burns v. Pennsylvania Dep’t of Corr.*, 544 F.3d 279, 295-96 (3d Cir. 2008) (Hardiman, J., dissenting).

345. *Burns v. Pennsylvania Dep’t of Corr.*, 544 F.3d 279, 281 (3d Cir. 2008).

transcribed testimony, cross examination, and written decision.³⁴⁶ In the latter option, the disciplinary hearing would become judicially reviewable inasmuch as the assessment itself must be considered an “adjudication.”³⁴⁷

It seems unlikely that the Pennsylvania DOC will choose between those options or even recognize that it faces them until forced to do so through litigation. The impact of *Burns* has not been immediate. The DOC has yet to update its Inmate Discipline Procedures Manual, which still provides for assessment of costs to occur at the initial disciplinary hearing.³⁴⁸ The Commonwealth Court itself apparently has given *Burns* only a cursory reading, for a recent decision distinguished it on questionable grounds.³⁴⁹

One federal court in Georgia was unimpressed with the decision, remarking that “the holding in *Burns* is not controlling in this circuit.”³⁵⁰ Nevertheless, the same federal district court looked more kindly on a poorly drafted habeas action that relied on *Burns*.³⁵¹ In *Edinborough v. Haynes*,³⁵² the district court pointed out that while a claim of improper deductions from the prisoner’s account was not grounds for a habeas action, the claim could instead be brought as a *Bivens* action alleging violation of constitutional rights.³⁵³ Although “*Burns* is inapplicable to Edinborough’s habeas petition”³⁵⁴ and the Third Circuit ruling is “non-

346. 2 PA. CONS. STAT. ANN. §§ 504, 505, 507 (West 2007).

347. 2 PA. CONS. STAT. ANN. § 101 (West 2007).

348. See DC-ADM 801, *supra* note 120, at §§ 8.A-B. The current version of the Manual is dated June 13, 2008, some three months before the *Burns* decision.

349. See *Jerry v. Dep’t of Corr.*, 990 A.2d 112, 117 (Pa. Commw. Ct. 2010), *appeal denied*, 12 A.3d 372 (Pa. 2011) (asserting incorrectly that *Burns* was decided on the basis of the procedural deficiencies in the disciplinary hearing, not on the basis of the substantive rights infringed by its outcome).

350. See *Robinson v. Haynes*, No. CV209-126, 2010 WL 3338814, at *1 (S.D. Ga. 2010).

351. *Edinborough v. Haynes*, CV210-025, 2010 WL 3291931 (S.D. Ga. June 14, 2010) is the report and recommendation of the magistrate judge. He noted, “Edinborough asserts that he is being improperly required to pay his fine at the rate of from \$695 to \$786 per month instead of \$25 per quarter as recommended by the sentencing judge.” *Id.* at *1. As recommended, the complaint was dismissed without prejudice by the court. *Edinborough v. Haynes*, No. CV210-025, 2010 WL 3291934 (S.D. Ga. Aug. 19, 2010).

352. *Id.*

353. *Id.* See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

354. *Edinborough*, 2010 WL 3291931, at *1.

binding” on a federal district court in Georgia,³⁵⁵ the court hinted that *Burns* might be persuasive if cited in a properly drafted complaint.³⁵⁶

IV. CONCLUSION

The “new property right”³⁵⁷ declared in *Burns* seems to have gone almost unnoticed. The Pennsylvania Department of Corrections did not revise its disciplinary manual to protect this right,³⁵⁸ and a state appellate court misperceived the significance of the *Burns* holding.³⁵⁹ Federal district courts, too, have resisted recognizing the “newness” of the right; they have referred prisoner-plaintiffs to existing remedies for claims involving infringement of property interests.³⁶⁰ What, then, is the significance of *Burns*?

The significance lies in *how*—not *that*—a prisoner achieved judicial recognition of his security interest in prison account funds. What made the difference was the pleading of the claim in terms that the court was able and willing to understand through empathy. *Burns* is not unusual in that empathy played a role. As scholars persuasively argue, empathy has an essential function in all adjudication, whether recognized or not.³⁶¹ The unusual feature of *Burns*, in comparison with most prisoner litigation, is that the pleading of the claim made the prisoner’s experience accessible to the court’s understanding³⁶² through the analogy of debtor

355. *Edinborough*, 2010 WL 3291934, at *1. The magistrate judge’s recommendation mistakenly referred to *Burns* as an Eighth Circuit opinion. *See Edinborough*, 2010 WL 3291931, at *1.

356. The hint is implicit in the dismissal without prejudice and the suggestion of the appropriateness of a *Bivens* action. *See supra* note 353. On the other hand, a federal district court in the Third Circuit held that post-deprivation remedies already were sufficient to protect the property interest that a prisoner claimed under *Burns*. *See Morales v. Beard*, No. 09-162, 2009 WL 2413425, *1-2 (W.D. Pa. 2009). “*Burns* did not address whether the post deprivation process provided via the DOC administrative grievance procedures or the state law tort suit for conversion were adequate post deprivation remedies. . . . [T]hese post deprivation remedies were adequate.” *Id.* at *1. The court relied on *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that remedies that are available after the deprivation of property occurs may afford sufficient due process). *But see supra* notes 48-54 and accompanying text for the argument that *Hudson* cannot apply where funds are taken under an established prison policy.

357. *Burns v. Pa. Dep’t of Corr.*, 544 F.3d 279, 291 (3d Cir. 2008) (Hardiman, J., dissenting).

358. *See supra* note 348 and accompanying text.

359. *See supra* note 349 and accompanying text.

360. *See supra* notes 351-56 and accompanying text.

361. *See supra* notes 176-82 and accompanying text.

362. Although empathy can entail shared emotion, it is primarily the principle of shared understanding of matters involving personal value. It is the capacity for intellectually grasping the experience that someone else has lived. *See supra* notes 168-69, 179-81 and accompanying text.

and judgment creditor.³⁶³ That analogy enabled the court to acquire the perspective of the prisoner-plaintiff, whose circumstances were otherwise foreign to judges' experience, and not only the perspective of defendants, whose social circumstances as prison administrators were similar to those of judges.

Thus, *Burns* sheds light on the often unrecognized function of empathy in adjudication. In particular, it highlights the complementary duties of bench and bar. Counsel would do well to include accessible details and analogies in the pleadings.³⁶⁴ Judges, for their part, reel out or rein in their imaginations to compensate for lopsided affinity of experience with one of the parties.³⁶⁵ A jurisprudence of empathy enhances the court's ability to do justice to prisoners and all parties.

363. See *supra* notes 290-97 and accompanying text.

364. See *supra* notes 312-13 and accompanying text.

365. See *supra* notes 182-85.