

NOTES

FREE THEIR MINDS: LEGACIES OF ATTICA AND THE THREAT OF BOOKS TO THE CARCERAL STATE

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Book bans and censorship battles have garnered considerable attention in recent years, but one of the most critical battlegrounds is kept out of the public eye. Prison officials can ban any book that threatens the security or operations of their facility. This means that the knowledge access rights of incarcerated people are subject to the judgments of the people detaining them. This Note focuses on books about Black people in America and books about the history of and conditions in prisons, which are often banned for their potential to be divisive or incite unrest. The result is that Black people, who are already disproportionately victimized by the criminal punishment system, cannot read their own history and the history of the institution imprisoning them.

*This Note examines the legal backdrop enabling these book bans. As an example, it highlights the recent ban of Heather Ann Thompson’s *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy in the New York State prison system, including at the Attica Correctional Facility*. This Note argues that prison book bans are coeval with attacks on Black history in American schools, and labels both practices as attempts to stifle the democratic engagement of Black people and other marginalized groups. As a guiding thesis, it draws inspiration from the organizers of the Attica prison uprising to assert that this fight is best understood from the vantage point of those most impacted by prison book bans: incarcerated people who are denied the right to read.*

INTRODUCTION	2322
I. ENABLING CENSORSHIP	2327
A. Access to Books “Inside”	2327
1. Why Reading in Prison Matters.....	2327
2. Why and How Prisons Censor Books.....	2330
3. Procedural Barriers for Would-Be Plaintiffs	2334
B. The Prevailing Power of <i>Turner</i>	2336

* J.D. Candidate 2024, Columbia Law School. To Professor Kendall Thomas, thank you for your wisdom, for your guidance, and for always keeping me in alignment. To the staff of the *Columbia Law Review*, thank you for bridging the gap between my thoughts and the words on the page. To my family and friends, thank you for your unwavering support.

II. REVISITING ATTICA	2342
A. The Attica Prison Uprising	2343
B. <i>Thompson v. Annucci</i>	2347
1. <i>Blood in the Water</i> and Its Impact	2347
2. Challenging Censorship in New York	2348
3. The Case Against the State	2349
C. Censorship as a Racial Project	2351
1. Inside	2351
2. Outside	2354
III. RECOGNIZING RIGHTS	2358
A. A Return to Heightened Scrutiny	2358
1. Resurrecting the Lost <i>Turner</i> Factors	2358
2. Attacking Book Bans Before They Reach the Courts	2361
B. Lessons From the Battle for Inclusive Education	2367
CONCLUSION	2368

INTRODUCTION

On September 9, 1971, 1,281 incarcerated men took control of the Attica Correctional Facility in upstate New York.¹ The takeover of Attica initiated four days of protest and polemics about the politics of mass incarceration in the United States and the basic civil and human rights of people in prison.² On the fourth day, New York Governor Nelson Rockefeller ordered a retaking of the facility.³ Twenty-nine incarcerated men and nine civilian hostages were gunned down and killed during the ensuing siege.⁴ The Attica uprising and its aftermath sparked a nationwide conversation about what we have come to call “the carceral state.”⁵ Some saw the Attica rebellion as a vindication of the politics of “governing through crime,”⁶

1. Heather Ann Thompson, *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy* 64 (2016).

2. See Herman Badillo & Milton Haynes, *A Bill of No Rights: Attica and the American Prison System* 53–89 (1972) (describing the negotiations between the uprisers and state officials).

3. Thompson, *supra* note 1, at 155–56.

4. *Id.* at 187. A tenth civilian hostage was shot during the retaking and died the following month from his injuries. *Id.* at 249.

5. See *id.* at 558–62 (recounting the varied responses to the Attica uprising).

6. See, e.g., Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 3–5 (2007) (describing the concept of “governing through crime” as a lens to look at “the exercise of authority in America”).

others argued that it was an indictment of the prison system and the anti-Black violence that defines it.⁷

Forty-five years after the Attica uprising, historian Heather Ann Thompson published *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*.⁸ The book is considered to provide the most comprehensive history of the events leading up to, during, and after the uprising.⁹ In March 2022, Thompson filed suit against New York State officials, challenging the blanket censorship of *Blood in the Water* in the New York prison system.¹⁰ This struggle was foreshadowed by the original Attica uprisers: Abolishing censorship at the prison was one of their core demands.¹¹ Settlement proceedings between Thompson and the institutional defendants began in October 2022.¹²

The Attica uprisers' critique extended beyond their facility. They argued that their circumstances were not unique but archetypal: "Attica Prison is one of the most classic institutions of authoritative inhumanity upon men."¹³ Prison conditions were a focus, but the men of Attica also were intentional in describing the prison system as "the authoritative fangs of a coward in power."¹⁴ The mention of fangs implies the existence of a body. Critical to the uprisers' argument was the idea that prisons are one component of a larger structure, a framing similar to that of scholars who choose to discuss the "carceral state" rather than the "penal state."¹⁵ The

7. The fight lives on through the Attica Brothers Foundation, which works to support the survivors of the retaking and keep the memory of Attica alive in the present-day struggle against America's racist and dehumanizing prison system. For more information on their work, see generally Attica Brothers Foundation, <https://www.atticabrothersfoundation.org/> [<https://perma.cc/J9S6-YPP6>] (last visited Sept. 9, 2023) ("Today there are only a handful of the Brothers left. Our goal is to support them in their retirement and support their causes in perpetuity.").

8. Thompson, *supra* note 1, at xiii.

9. See Mark Oppenheimer, 'Blood in the Water,' A Gripping Account of the Attica Prison Uprising, *N.Y. Times* (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/books/blood-in-the-water-a-gripping-account-of-the-attica-prison-uprising.html> (on file with the *Columbia Law Review*) (arguing that Thompson's in-depth depiction of the events surrounding the uprising distinguishes her book from other pieces of "Attica literature").

10. See Complaint, *Thompson v. Annucci*, No. 22-CV-02632 (ER) (SN) (S.D.N.Y. filed Mar. 31, 2022) [hereinafter Complaint, S.D.N.Y.].

11. See *infra* notes 165–168 and accompanying text.

12. See Settlement Conference Order, *Thompson v. Annucci*, No. 22-CV-02632 (ER) (SN) (S.D.N.Y. filed Aug. 23, 2022), ECF No. 20.

13. The Attica Liberation Faction Manifesto of Demands and Anti-Depression Platform (1971), 53 *Race & Class*, no. 2, 2011, at 28, 28–29 [hereinafter *The Attica Manifesto*].

14. *Id.* at 29.

15. Dan Berger, Finding and Defining the Carceral State, 47 *Revs. Am. Hist.* 279, 281 (2019) ("Identifying the object of inquiry as the 'carceral state' rather than, as some in criminology have done, 'the penal state' . . . suggests a broader phalanx of institutions than just the prison." (second quotation quoting Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 *Theoretical Criminology* 422, 423 (2017))).

“carceral state” encompasses the physical institutions imprisoning people in America as well as the ideologies that fuel investment in those institutions.¹⁶ It is a larger government apparatus that functions as a means of social ordering against targeted groups and profit maximization for others.¹⁷ In recounting the uprisers’ critique, *Blood in the Water* offered a narrative that would have allowed the people incarcerated in Attica today to understand their history and, through that history, the meaning of their experience. This Note stems from a desire to understand the censorship of Thompson’s book from the vantage point of the people deprived of the right to read it.¹⁸

The carceral state and the carceral system are also a racist state and a racist system. The abolition of slavery brought with it a surge in Black criminalization and incarceration.¹⁹ In Alabama, for instance, the prison population shifted from ninety-nine percent white to ninety percent Black after the Civil War.²⁰ By the 1870s, Black people made up ninety-five percent of the prison population in the South.²¹ In the absence of slavery, incarceration became the container for Black freedom and the vehicle for Black labor exploitation.²² In state prisons today, Black people are

16. See Gabrielle French, Allie Goodman & Chloe Carlson, What Is the Carceral State?, U-M Carceral State Project (May 2020), <https://storymaps.arcgis.com/stories/7ab5f5c3fbca46c38f0b2496bcaa5ab0> [<https://perma.cc/94JZ-42HS>] (quoting Ruby Tapia, Professor of Eng. & Women’s Stud., Univ. of Mich., Remarks at the “What Is the Carceral State?” Panel of the Carceral State Project Symposium (Oct. 3, 2018)).

17. See *id.* (“Consider the days of colonization. Black people were brought to be slaves, and this sparked the roots of connecting Blackness to captivity, a carceral condition. These are the roots of the racialized prison industrial complex that looms over Americans in present day.”); see also Aisha Khan, The Carceral State: An American Story, 51 *Ann. Rev. Anthropology* 49, 50 (2022) (defining the “carceral state” as “governmentality that relies on institutionalized punishment and surveillance (including mass incarceration), particularly of targeted populations”).

18. See generally Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 *Harv. C.R.-C.L. L. Rev.* 323, 398–99 (1987) (describing the importance of looking to the people most impacted by an oppressive structure to facilitate positive change).

19. Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, American History, Race, and Prison, Vera Inst. Just., <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> [<https://perma.cc/AU2P-T2V3>] (last visited May 11, 2023) (“The year 1865 should be as notable to criminologists as is the year 1970. While it marked the end of the Civil War and the passage of the 13th Amendment, it also triggered the nation’s first prison boom when the number of [B]lack Americans arrested and incarcerated surged.”).

20. Alabama Begins Leasing Incarcerated People for Profit, Equal Just. Initiative, <https://calendar.eji.org/racial-injustice/feb/4> [<https://perma.cc/XFU3-8EKS>] (last visited Aug. 23, 2023).

21. Delaney et al., *supra* note 19.

22. See *id.* (“State penal authorities deployed these imprisoned people to help rebuild the South—they rented out convicted people to private companies through a system of convict leasing and put incarcerated individuals to work on, for example, prison farms to produce agricultural products.”); see also Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons, Sent’g Project 11 (2021), <https://www.sentencingproject.org>.

incarcerated at almost five times the rate of white people.²³ While Black people make up thirteen percent of the population in America, they represent thirty-eight percent of the incarcerated population.²⁴ One in three Black men will be sentenced to time in prison, in contrast with one in seventeen white men.²⁵ These disparities make clear that incarceration is simply the latest iteration of racial persecution in America.²⁶

Books are central to an analysis of the American prison because of the nexus between race, literacy, and incarceration. Black people are disproportionately imprisoned in America, and rates of illiteracy are disproportionately high among incarcerated people.²⁷ Participation in education programs while incarcerated has been shown to reduce recidivism; fewer educated people are reincarcerated upon release.²⁸ The interests of proponents and opponents of incarceration would seem to converge on reduced recidivism rates, which would mean that fewer people commit crimes and are reincarcerated after release.²⁹ Nevertheless,

org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/ZAV5-MQ2U] (“Using proper controls for other possible contributing factors, [University of Illinois at Chicago researchers] found that being charged in a county with a substantial legacy of slavery was associated with increases in pre-trial detention, imprisonment, and length of sentence.” (citing Aaron Gottlieb & Kalen Flynn, *The Legacy of Slavery and Mass Incarceration: Evidence From Felony Case Outcomes*, 95 Soc. Serv. Rev. 3, 27 (2021))).

23. Nellis, *supra* note 22, at 5.

24. Mike Wessler, *Updated Charts Provide Insights on Racial Disparities, Correctional Control, Jail Suicides, and More, Prison Pol’y Initiative* (May 19, 2022), https://www.prisonpolicy.org/blog/2022/05/19/updated_charts/ [https://perma.cc/Y864-VPSN]; see also *Inmate Race, Fed. Bureau Prisons* (May 6, 2023), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/6H8M-QWWT].

25. Criminal Justice Fact Sheet, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [https://perma.cc/QC8A-GCAC] (last visited May 11, 2023).

26. See Nellis, *supra* note 22, at 12 (“America’s legacy of white supremacy over Black people has taken many forms over the country’s history from chattel slavery to housing policies that made it impossible for African Americans to buy homes. Mass incarceration can be viewed as the current iteration.”).

27. See Corey Michon, *Uncovering Mass Incarceration’s Literacy Disparity, Prison Pol’y Initiative* (Apr. 1, 2016), <https://www.prisonpolicy.org/blog/2016/04/01/literacy/> [https://perma.cc/YK6G-L39K].

28. See Hayne Yoon, *Back to School: A Common-Sense Strategy to Lower Recidivism, Vera Inst. Just.* (Sept. 19, 2019), <https://www.vera.org/news/back-to-school-a-common-sense-strategy-to-lower-recidivism> [https://perma.cc/H3F5-7FBX].

29. See, e.g., *Our Mission & History, Anti-Recidivism Coal.*, <https://antirecidivism.org/who-we-are/mission-and-history/> [https://perma.cc/YCK6-2DX2] (last visited May 11, 2023) (detailing measures taken by a nonprofit organization to reduce the reincarceration of previously incarcerated people across California); *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons, DOJ*, <https://www.justice.gov/archives/prison-reform> [https://perma.cc/TTH6-J9QS] (last updated Mar. 6, 2017) (showing how the Department of Justice hopes to reduce recidivism in order to prevent crimes). For an elaboration on interest convergence, see generally Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980).

battles over the censorship of reading and educational materials rage on in America's prisons.³⁰

So how does censorship serve, or disserve, the goal of reducing recidivism? Prison officials rely on safety and security concerns to justify banning certain books.³¹ More specifically, books discussing race or the experience of incarceration might be banned for inciting division or unrest among incarcerated people.³² On the other hand, people focused on reducing prison populations point to the positive benefits that reading offers to incarcerated people, one of which is lowering the rate of recidivism and reincarceration.³³ From this perspective—and factoring in the lack of empirical data showing that books cause disruptions in prisons—maintaining order through censorship makes little sense.³⁴ But at present, the evidence of reading's benefits, and the absence of evidence of harm, receive little (if any) weight in censorship decisions.³⁵ The fact that decisionmakers don't consider the real effects of censorship on incarcerated people raises the question whether reduced recidivism can be honestly touted as a goal of incarceration or if book bans are merely one cog in a purely punitive machine. The history of withholding education to oppress freed Black people in America lends credence to the latter understanding of prison censorship.³⁶

This Note uses Thompson's case to unpack the racialized censorship of reading materials in prisons. Its specific focus is texts about the subjugation of Black people in America, which necessarily discuss the history of prisons and imprisonment. Part I offers a critical assessment of the statutes, administrative regulations, and case law that have shaped the law and policy around prison censorship. Part II revisits the Attica uprising, Thompson's challenge to the present-day censorship of her book by the Attica Correctional Facility, and the politics of racially motivated book bans in prisons. It also connects Thompson's prison censorship story to the broader attacks on Critical Race Theory (CRT) and the teaching of Black history outside of the prison system. Part III offers a proposal that rebalances the constitutional interests implicated by the current prison censorship regime. It places racial literacy and the knowledge access rights

30. See Alex Woodward, *America's Book Bans Have Already Come for Prisons*, *Independent* (Apr. 25, 2023), <https://www.independent.co.uk/news/world/americas/prison-book-bans-florida-texas-b2324553.html> [<https://perma.cc/Y3AW-WMN4>] (describing the breadth of censorship in prisons and critiques of those policies).

31. See *infra* notes 57–58 and accompanying text.

32. See *infra* notes 88–89 and accompanying text.

33. See Yoon, *supra* note 28.

34. See *infra* note 231 and accompanying text.

35. See *infra* section I.B.

36. See Colette Coleman, *How Literacy Became a Powerful Weapon in the Fight to End Slavery*, *History* (June 17, 2020), <https://www.history.com/news/nat-turner-rebellion-literacy-slavery> [<https://perma.cc/945P-5BBZ>] (last updated July 11, 2023) (noting that “[a]nti-literacy laws were written in response to abolition in the north”).

of incarcerated people at the center of the legal analysis and argues that this issue can only be approached through the eyes of the victims of censorship, not those of its perpetrators.³⁷

I. ENABLING CENSORSHIP

The free exercise of First Amendment rights “serves not only the needs of the polity but also those of the human spirit.”³⁸ This is equally if not more true for people in prison.³⁹ Book bans in prisons threaten the First Amendment rights of incarcerated people, and the current legal landscape makes it nearly impossible for those rights to be vindicated in the courts. Section I.A discusses the means and ends of censorship in prisons. Section I.B summarizes the case law governing the constitutional rights of incarcerated people to access reading material.

A. Access to Books “Inside”

1. *Why Reading in Prison Matters.* — Reading in prison is important. Malcolm X said he “never had been so truly free” until he took up reading during his incarceration.⁴⁰ Reading is a simple and important means for people in prison to engage with the outside world.⁴¹ Reading in prison is mental healthcare.⁴² For some incarcerated people, reading encourages them to pursue higher education upon release.⁴³ Most importantly, the

37. For an elaboration on the victim perspective versus the perpetrator perspective, see generally Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1978).

38. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring), overruled by *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

39. See *id.* at 428 (“If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment.”).

40. Malcolm X with the assistance of Alex Haley, *The Autobiography of Malcolm X* 176 (Ballantine Books, Mass Market ed. 2015) (1965).

41. See PEN America, *Literature Locked Up: How Prison Book Restriction Policies Constitute the Nation’s Largest Book Ban 1* (2019), <https://pen.org/wp-content/uploads/2019/09/literature-locked-up-report-9.24.19.pdf> [<https://perma.cc/H7UM-8DMJ>] (“Meaningful access to literature is essential for incarcerated people, where the written word is a rare source of information, education, and recreation, and a window to the wider world.”).

42. Alex Skopic, *The American Prison System’s War on Reading*, *Protean* (Nov. 29, 2021), <https://proteanmag.com/2021/11/29/the-american-prison-systems-war-on-reading/> [<https://perma.cc/HA2J-Y8MC>] (“Other studies have revealed a wide range of mental health benefits, with books providing improved self-esteem, communication skills, and a sense of purpose in life.”).

43. Tariro Mzezewa, *Opinion, To Make Prisons “Safer,” Some Are Banning . . . Books*, *N.Y. Times* (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/opinion/books-prison-packages-new-york.html> (on file with the *Columbia Law Review*) (describing how reading while in prison inspired one man to get a bachelor’s degree, master’s degree, and law degree).

right to read encompasses basic ideas about human dignity.⁴⁴ These positive factors weigh in favor of encouraging incarcerated people to read.

Those championing the right to read in prison often highlight its correlation with lower recidivism rates.⁴⁵ Over forty percent of people released from state prison are re-arrested within one year of release.⁴⁶ One study found that participation in educational programs in prison reduces the likelihood of recidivism by twenty-eight percent.⁴⁷ Reducing recidivism is desirable for a few reasons: Less recidivism means less crime, less crime means fewer people in prisons, and fewer people in prisons means less money spent on incarceration.⁴⁸ In spite of the evidence that education

44. See PEN America, *supra* note 41, at 16 (quoting Jonathan Rapping, founder of Gideon's Promise, as emphasizing that intellectual engagement "is essential to human dignity" and demanding "a criminal justice system that does not refuse to allow people the ability to develop their mind"); see also Mzezewa, *supra* note 43 (quoting Elizabeth Alexander, a Columbia University professor, as equating the right of incarcerated people to read with "the right to be able to understand the condition of their life").

45. See, e.g., PEN America, *supra* note 41, at 18 ("A meta-analysis by the RAND Corporation in 2018, for example, found that incarcerated people who participated in education programs were 28% less likely to return to incarceration than those who did not." (citing Robert Bozick, Jennifer Steele, Lois Davis & Susan Turner, *Does Providing Inmates With Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States*, 14 *J. Experimental Criminology* 389 (2018))); Thurgood Marshall C.R. Ctr., *Banning the Caged Bird: Prison Censorship Across America* 8 (2021), <https://thurgoodmarshallcenter.howard.edu/sites/tmrc.howard.edu/files/2021-10/HU8108%20%28Prison%20Censorship%20Report%20Update%29v1-revised.pdf> [<https://perma.cc/UV5C-TK7H>] ("Reading books in prison helps reduce recidivism, in part, because it increases education among incarcerated persons and teaches them basic vocational and educational skills needed to succeed in our society."); Kelly Jensen, *Why and How Censorship Thrives in American Prisons*, *Book Riot* (Oct. 21, 2019), <https://bookriot.com/censorship-in-american-prisons/> [<https://perma.cc/RRR2-LEV9>] ("It's been proven that access to books reduces recidivism."); Mzezewa, *supra* note 43 ("One 2013 study found that people who participate in correctional education programs while incarcerated had . . . 43 percent lower odds [of] recidivating than those who did not." (citing Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders & Jeremy N.V. Miles, *Evaluating the Effectiveness of Correctional Education* (2013))); Skopic, *supra* note 42 ("[I]n one study, the University of Massachusetts found that incarcerated people who took part in reading programs were much better equipped to deal with the outside world on their release, showing only an 18.75% rate of recidivism compared to a control group's 45%." (citing G. Roger Jarjoura & Susan T. Krumholz, *Combining Bibliotherapy and Positive Role Modeling as an Alternative to Incarceration*, 28 *J. Offender Rehab.*, no. 1-2, 1998, at 127, 132-33)).

46. Leonardo Antenangeli & Matthew R. Durose, DOJ, Off. of Just. Programs, NCJ 256094, *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008-2018)*, at 4 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr24s0810yfup0818.pdf> [<https://perma.cc/MLF8-PWME>].

47. Robert Bozick, Jennifer Steele, Lois Davis & Susan Turner, *Does Providing Inmates With Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States*, 14 *J. Experimental Criminology* 389, 390 (2018).

48. See Yoon, *supra* note 28 (noting that reducing recidivism can save "states a combined \$365.8 million in decreased prison costs per year"). For a critique of reform strategies focused on recidivism, see Avlana K. Eisenberg, *The Prisoner and the Polity*, 95 *N.Y.U. L. Rev.* 1, 29-30 (2020).

and reading are effective tools to combat mass incarceration, very few incarcerated people participate in educational programs.⁴⁹

Literacy can also be a predictor of a person's likelihood of being incarcerated in the first place. Young men who drop out of high school are forty-seven times more likely to be incarcerated than their college graduate counterparts.⁵⁰ Barbara Fedders, Director of the Youth Justice Clinic at the University of North Carolina School of Law, observes this pipeline firsthand. She notes how children who struggle with reading are more likely to get left behind by the educational system and picked up by the juvenile justice system.⁵¹ Across the board, illiteracy rates are higher for people in prison than for those outside.⁵² One study found that Black and Hispanic people who aren't incarcerated tend to have lower literacy rates than white people outside *or* inside prisons.⁵³ These data are perhaps unsurprising given the history of education deprivation as a tool of Black oppression.⁵⁴ Maintaining these disparities in literacy rates perpetuates

49. See Michael Sainato, U.S. Prison System Plagued by High Illiteracy Rates, *Observer* (July 18, 2017), <https://observer.com/2017/07/prison-illiteracy-criminal-justice-reform/> [<https://perma.cc/KAQ7-6C4M>] (noting that in California in 2006, for example, “just six percent of [incarcerated people] [were] in academic classes, and five percent attend[ed] vocational classes”). Part of the reason for historic low participation was the 1994 Violent Crime Control and Law Enforcement Act, which banned incarcerated people from receiving Pell grants and made it more difficult for them to pursue an education while incarcerated. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828 (“Section 401(b)(8) of the Higher Education Act of 1965 (20 U.S.C. 1070a(b)(8)) is amended to read as follows: ‘(8) No basic grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution.’”); Wendy Sawyer, *Since You Asked: How Did the 1994 Crime Bill Affect Prison College Programs?*, Prison Pol’y Initiative (Aug. 22, 2019), <https://www.prisonpolicy.org/blog/2019/08/22/college-in-prison/> [<https://perma.cc/XK67-MURT>]. The federal government reinstated Pell Grants for incarcerated people as of July 1, 2023. See Jamiles Lartey, *Students Behind Bars Regain Access to College Financial Aid*, Marshall Project (July 8, 2023), <https://www.themarshallproject.org/2023/07/08/prison-education-college-financial-aid-pell-grant> [<https://perma.cc/X223-ABLT>]. The Department of Education estimates that 760,000 incarcerated people will be newly eligible for college financial aid, but access to education will depend on individual partnerships between prisons and higher education institutions. *Id.*

50. Andrew Sum, Ishwar Khatiwada & Joseph McLaughlin, *The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers*, *Ctr. for Lab. Mkt. Stud. at Ne. Univ.* (Oct. 2009), https://repository.library.northeastern.edu/downloads/neu:376324?datastream_id=content [<https://perma.cc/W3C6-9ECD>].

51. See Elizabeth Thompson, *Reading Through the Lines: The Correlation Between Literacy and Incarceration*, *N.C. Health News* (Mar. 21, 2022), <https://www.northcarolinahealthnews.org/2022/03/21/reading-through-the-lines-the-correlation-between-literacy-and-incarceration/> [<https://perma.cc/Z2Z5-J3AH>].

52. See Michon, *supra* note 27 (“People in prison are 13 to 24 percent more represented in the lowest levels of literacy than people in the free world.”).

53. *Id.*

54. See, e.g., Coleman, *supra* note 36 (“In 1833, an Alabama law asserted that ‘any person or persons who shall attempt to teach any free person of color, or slave, to spell, read,

disparities in incarceration rates, serving the larger carceral goal of racial ordering.⁵⁵ One way to correct these disparities would be to increase literacy rates for people in prisons. Access to books seems like a commonsense approach to combatting mass incarceration because reading serves crime prevention on the front end and recidivism prevention on the back end.⁵⁶

2. *Why and How Prisons Censor Books.* — Prisons have broad power to restrict the reading materials of the people they imprison, and they tend to use it liberally.⁵⁷ The Federal Bureau of Prisons uses a catchall provision to censor any material deemed “detrimental to the security, good order, or discipline of the institution or [that] might facilitate criminal activity.”⁵⁸ Specific reasons for restricting a book (if given) include: The book poses a serious security concern,⁵⁹ the book is too “dangerous,”⁶⁰ the book contains “racially motivated” content,⁶¹ or the book contains nudity or sexually explicit material.⁶² Any of these features could be deemed disruptive to the rehabilitative function of prisons, justifying censorship in

or write, shall upon conviction thereof of indictment be fined in a sum not less than two hundred and fifty dollars.”).

55. See Nellis, *supra* note 22, at 15 (arguing that factors such as “unstable family systems, exposure to family and/or community violence, elevated rates of unemployment, and higher school dropout rates . . . are more likely to exist in communities of color” and that these factors are the result of a history of intentional racial oppression).

56. See Thurgood Marshall C.R. Ctr., *supra* note 45, at 8.

57. See PEN America, *supra* note 41, at 3 (“[P]rison officials generally have broad latitude to ban books based on their content, including the prerogative to develop their own rationales for why a book should be blocked. . . . The results have been wide-ranging . . .”).

58. Censorship and Banned Book Lists in Correctional Facilities, Nat’l Inst. of Corr. (Feb. 9, 2022), <https://nicic.gov/censorship-and-banned-book-lists-correctional-facilities> [<https://perma.cc/DD8F-QMMQ>] (noting also that this guideline is “generally understood” to cover “content such as explanations on how to make explosives, martial arts training manuals and books containing maps of the prison and its surrounding area”).

59. Banning Books in Prisons, Equal Just. Initiative (Jan. 7, 2020), <https://eji.org/news/banning-books-in-prisons/> [<https://perma.cc/U7VD-HQMX>] (“Courts have provided prison officials discretion to censor reading material that is a serious threat to security.”); Lee Gaines, Who Should Decide What Books Are Allowed in Prisons?, NPR (Feb. 22, 2020), <https://www.npr.org/2020/02/22/806966584/who-should-decide-what-books-are-allowed-in-prison> [<https://perma.cc/Y5N7-KFDN>] (noting that decisionmakers evaluate books and other publications based on their “potential threat to the security of the operation of the prisons”).

60. Banning Books in Prisons, *supra* note 59 (noting an Alabama prison’s ban of an award-winning book about racial oppression because it was “too dangerous for prisons”).

61. Gaines, *supra* note 59.

62. See *id.* (noting that Pennsylvania officials ban materials that are sexually explicit or intended for “sexual gratification”). Connecticut prison officials recently pointed to sexually explicit materials as creating an overly “sexually charged” environment that was unsafe for female staff at the facilities. *Reynolds v. Quiros*, 25 F.4th 72, 79 (2d Cir. 2022). The prison in that case considered a ban on such materials only for people convicted of sexual offenses but found such a limitation impracticable given that those people were not housed separately from the rest of the incarcerated population. *Id.* at 80.

the interest of public policy.⁶³ Using this calculus, prison officials weigh preserving the function of the prison against incarcerated people's right to read.⁶⁴ As this Note will discuss, a closer analysis of censored material calls into question the safety and security motivations upholding book bans.⁶⁵ The issue is whether book bans, examined critically, really can be justified by appeals to "corrections goals,"⁶⁶ or if they serve more sinister ends. In any context, limiting access to information based on a cost-benefit analysis warrants closer attention.⁶⁷

Opacity and bureaucracy help First Amendment violations in prisons persist without effective opposition.⁶⁸ Lists of banned books are rarely made available to the public.⁶⁹ On its censorship page, the National Institute of Corrections simply provides that "[s]ome states do *supposedly* maintain lists of banned items," but that there "certainly" isn't one comprehensive database for the country.⁷⁰ Advocacy organizations can use

63. See PEN America, *supra* note 41, at 1 ("Books in American prisons can be banned on vague grounds, with authorities striking titles and authors believed to be detrimental to 'rehabilitation' or somehow supportive of criminal behavior.").

64. See *id.*

65. See Thurgood Marshall C.R. Ctr., *supra* note 45, at 13 ("Few would take issue with prison officials seeking to maintain order in their institutions, but the content of the banned publications make clear that safety and order are not advanced by their prohibition."); see also Mzezewa, *supra* note 43 (questioning the reasoning behind prison book bans in light of research showing that reading and education lead to lower recidivism rates).

66. Cf. *Turner v. Safley*, 482 U.S. 78, 93 (1987) (upholding a restriction on correspondence between people incarcerated at different prisons because it was "reasonably related to valid corrections goals").

67. See Andy Chan & Michelle Dillon, *Opinion, Prison Systems Insist on Banning Books by Black Authors. It's Time to End the Censorship.*, *Wash. Post* (Jan. 12, 2022), <https://www.washingtonpost.com/opinions/2022/01/12/end-prisons-ban-books-black-authors-censorship-malcom-x-toni-morrison/> (on file with the *Columbia Law Review*) ("Limitations to access to information by the government should be deeply concerning, especially when considered within the known biases of the prison system.").

68. See PEN America, *supra* note 41, at 1 ("There is very little public visibility into how these policies are considered, adopted, implemented and reviewed.").

69. See *id.* at 4 ("Only a minority of states have made their prison banned book lists available."); Thurgood Marshall C.R. Ctr., *supra* note 45, at 12 ("While 26 states maintain lists of banned books, few states publicize their banned book lists on their websites, leaving the public with little understanding of what policies are in place in prisons."); Jensen, *supra* note 45 ("The Human Rights Defense Center has tracked state-by-state policies. According to their records as of writing, only two states have their banned books lists available online: Pennsylvania and Washington state."); Michael Van Aken, *Prisons and Legal Perspectives on Book Challenges and Bans*, *Riverside Cnty. L. Libr.: Blog* (Apr. 15, 2022), <https://www.rclawlibrary.org/blog/2022/04/prisons-and-legal-perspectives-on-book-challenges-and-bans/> [<https://perma.cc/F7H8-NKVF>] ("However, many book challenges and bans in prisons remain somewhat of a 'hidden issue,' meaning the issue rarely sees the light of day unless some form of reporting exposes it.").

70. *Censorship and Banned Book Lists in Correctional Facilities*, *supra* note 58 (emphasis added). For an example of advocacy organizations' efforts to aggregate this information, see Keri Blakinger, *The Books Banned in Your State's Prisons*, *Marshall Project* (Feb. 23, 2023), <https://www.themarshallproject.org/2022/12/21/prison-banned-books-list-find-your-state> [<https://perma.cc/STY4-AM4K>].

Freedom of Information Act requests to compel officials to disclose their banned book lists.⁷¹ But such requests do not require officials to continuously update the public with revisions to banned book lists, meaning that these disclosures are merely “snapshots in a timeline of censorship.”⁷² Sometimes the only way to find out if a book has been censored is to mail it to a prison and see what happens.⁷³ Using trial and error to obtain banned book lists from various facilities is time consuming and expensive, and some states charge for this information.⁷⁴ Red tape makes banned book lists difficult to access, which makes them difficult to fight.⁷⁵

Restrictions also vary by jurisdiction and by facility. An incarcerated person could lose access to a book simply because they were transferred to another facility with a more restrictive policy.⁷⁶ An incarcerated person could lose access to a book within a single facility because officials changed the internal censorship policy from one day to the next.⁷⁷ Censorship decisions are generally decentralized and unorganized. A book could be kept from its intended incarcerated recipient based on the decision of the prison mailroom staff, a prison-wide policy, or statutory law.⁷⁸ This lack of stability and consistency within and across institutions means the current state of censorship in America’s carceral state is unknowable with any certainty.⁷⁹

71. See PEN America, *supra* note 41, at 4–5 (“And even those states [who make their banned book lists available] normally only disclose their lists as the result of Freedom of Information Act (FOIA) requests from journalists or advocacy groups—requests for which they are legally obligated to respond.”).

72. *Id.* at 5.

73. Mzezewa, *supra* note 43 (“What’s clear is that in most states such policies are unclear, with people finding out if a book is not allowed only after it has been mailed, leading to frustration, wasted time and money.”).

74. See, e.g., *Thurgood Marshall C.R. Ctr.*, *supra* note 45, at 12 (“Some states were only responsive to inquiries about banned books after the [Howard Human and Civil Rights Clinic] submitted public information requests. Even then, a number of states were still unresponsive.”); Jensen, *supra* note 45 (noting that the Human Rights Defense Fund was charged \$2,000 for Alaska’s banned book records and that some states charge for the mere request of a banned book list even if such a list doesn’t exist).

75. See Chan & Dillon, *supra* note 67 (“With little transparency, these seemingly arbitrary bans are difficult and expensive to fight.”).

76. See *Thurgood Marshall C.R. Ctr.*, *supra* note 45, at 5 (“[A]n incarcerated individual might have access to a specific book in one facility, but that same book might be off limits to that individual in the event that he or she is transferred to a different facility in that same state.”); Chan & Dillon, *supra* note 67 (“A book accepted in one prison may be censored in another.”).

77. See Chan & Dillon, *supra* note 67 (noting that within a prison “[a] book accepted one day may be banned the next”).

78. See PEN America, *supra* note 41, at 4 (“Prison systems function as a hierarchy, meaning officials at multiple levels can act as censors and block incarcerated people’s access to books.”).

79. See *id.* (“[W]ith so many overlapping and conflicting bans, it’s difficult to get a full accounting of just how many titles and authors are banned in U.S. prisons.”); Nazish

Book bans can be divided into two categories: content-neutral and content-based.⁸⁰ Content-neutral bans restrict books based on how they enter the correctional facility.⁸¹ In theory, contraband might be smuggled into the facility inside books.⁸² To combat this potential threat, institutions limit the kind of mail incarcerated people can receive and may designate certain “approved vendors” to be the sole providers of books to the facility.⁸³ Partnering with approved vendors also gives prison officials control over what kinds of books are offered to incarcerated people, meaning content-neutral policies can function similarly to their content-based counterparts.⁸⁴

Content-based bans serve a more overt censorship purpose: They target books based on what they are about.⁸⁵ If a book contains subject matter considered disruptive to the functionality of the correctional facility, then it may be banned.⁸⁶ This Note focuses on content-based bans

Dholakia, *The Cruel Practice of Banning Books Behind Bars*, Vera Inst. Just. (Apr. 4, 2022), <https://www.vera.org/news/the-cruel-practice-of-banning-books-behind-bars> [<https://perma.cc/4MPT-8FZV>] (“This lack of transparency means that U.S. prisons’ book-banning practices could be far more extensive than we know.”).

80. See *Thurgood Marshall C.R. Ctr.*, supra note 45, at 10 (“State prisons in the United States generally ban books in one of two ways: content-based and content-neutral banning. (Some prisons use a combination of these two methods to ban books.)”).

81. See PEN America, supra note 41, at 8 (noting that prison officials may censor “books-as-packages” regardless of their subject matter).

82. See *id.* at 10 (“Prison authorities commonly invoke security concerns as the rationale for these book restrictions, arguing that books can be used to smuggle contraband into the prison.”).

83. See *Thurgood Marshall C.R. Ctr.*, supra note 45, at 10 (“Recently, in [2021], [t]he Biden Administration has begun to end physical mail [altogether] for federal incarcerated individuals The shift to electronic mail has often been accompanied by efforts to limit access to physical books for supposed security concerns”); Skopic, supra note 42 (“Under [Iowa’s] new guidelines, incarcerated people can get books only from a handful of ‘approved vendors.’” (quoting Iowa Dep’t of Corr., OP-MTV-02, Incoming Publications 3 (Apr. 2021))).

84. See PEN America, supra note 41, at 9 (stating that a nonprofit found that New York’s proposed program offered seventy-seven books total, forty-five of which were coloring books or puzzle books (citing Letter from N.Y.C. Books Through Bars to Andrew M. Cuomo, Gov., N.Y., and Anthony J. Annucci, Acting Comm’r, N.Y. State Dep’t of Corr. & Cmty. Supervision (Jan. 3, 2018), <https://booksthroughbarsnyc.org/wp/wp-content/uploads/2018/01/Statement-against-4911A.pdf> [<https://perma.cc/UJ6A-EQPC>])); see also *id.* at 9–10 (“The ACLU, reviewing the offerings of the vendors, found that books absent from their catalogues included *To Kill a Mockingbird* by Harper Lee, *I Know Why the Caged Bird Sings* by Maya Angelou, the Harry Potter series, and the complete works of Langston Hughes and Martin Luther King, Jr.” (citing Press Release, ACLU of Md., ACLU Calls on Prison System to Reverse Rule Severely Limiting Access to Books in Violation of First Amendment (May 31, 2018), <https://www.aclu-md.org/en/press-releases/aclu-calls-prison-system-reverse-rule-severely-limiting-access-books-violation-first> [<https://perma.cc/56SA-BSP3>])).

85. See *id.* at 3 (listing subject matters for which a book might be banned).

86. See *Thurgood Marshall C.R. Ctr.*, supra note 45, at 4 (“Generally, content-based bans prohibit books that the prison deems a potential threat to the safety and security of the prison facility, but each state sets forth its own specific categories of prohibited materials.”).

that target books about race and carceral history.⁸⁷ Books about race might be banned for their alleged potential to incite racial animus and conflict among groups within prisons.⁸⁸ Books about the carceral state and its history might be banned for their alleged potential to incite disobedience against corrections staff.⁸⁹ These subjects are, of course, highly relevant to people who are incarcerated, and the effort to exclude books about them from prisons is an effort to keep this knowledge away from the people who stand to benefit from it the most.⁹⁰

3. *Procedural Barriers for Would-Be Plaintiffs.* — Challenging a book ban as an incarcerated person is an onerous task. Notice is an initial obstacle. When a book is sent to someone in prison and authorities decide to censor it, the sender's and recipient's awareness of that decision depends on the facility's notice policy (and whether staff comply with that policy).⁹¹ Just as lack of transparency makes it difficult to challenge

87. See *id.* (“This report also found a nationwide trend of prisons banning books relating to racial equality.”); Skopic, *supra* note 42 (“Like so many things in the carceral system, the pattern of restrictions is flagrantly racist. For instance, many prisons have blanket bans on ‘urban’ novels, a genre revolving around crime and intrigue in African-American communities. These are treated as contraband, and can’t be obtained through approved sources.”).

88. See, e.g., La. Dep’t of Pub. Safety & Corr., C-02-009, Rejection List (July 2019), https://www.prisonlegalnews.org/media/publications/Louisiana_-_disapproved_publications_7-2-19.pdf [<https://perma.cc/T8A3-LHU8>] (listing banned books, including *Black Skin, White Masks* by Frantz Fanon; *Message to the Blackman in America* by Elijah Muhammad; and *Black Gods: Orisa Studies in the New World* by Gary Edwards and John Mason, a book about the prevalence of certain African religions in America); Wash. State Dep’t of Corr., 400-RE003, Publication Review Log (Aug. 2023), <https://www.doc.wa.gov/docs/publications/reports/400-RE003.pdf> [<https://perma.cc/W8W4-QL7F>] (initially flagging books about antiracism and Black Power because they “could reasonably cause confrontation between groups/race[s]”).

89. See, e.g., Wash. State Dep’t of Corr., *supra* note 88 (initially flagging Mariame Kaba’s *We Do This ‘Til They Free Us* because it “[a]dvocates violence against others and/or the overthrow of authority”).

90. See Thurgood Marshall C.R. Ctr., *supra* note 45, at 4 (“[E]qually valuable [as reduced recidivism] is the ability of the incarcerated to learn about and challenge the systems to which they are subjected. . . . When prisons ban books of this kind, they are purposefully cutting off the tools the incarcerated need to realize their civil and human rights.”); Andrew Hart, Librarians Despise Censorship. How Can Prison Librarians Handle That? It’s Complicated., Wash. Post (Jan. 16, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/01/16/librarians-despise-censorship-how-can-prison-librarians-handle-that-its-complicated/> (on file with the *Columbia Law Review*) (“Restricting [incarcerated people] from reading about injustices in the U.S. prison system struck many as a shocking and ironic overreach.”).

91. See Dholakia, *supra* note 79 (noting that the nonprofit Books to Prisoners “receives a handful of [censorship notices] every week,” making it “impossible to say how many books never make it to their intended recipients because such notices aren’t standard”); see also Censorship and Banned Book Lists in Correctional Facilities, *supra* note 58 (citing a claim against a prison that banned the *Jailhouse Lawyer’s Handbook* without notifying the publisher as required).

overarching censorship policies, lack of notice makes it difficult to challenge individual instances of censorship as they occur.⁹²

If an incarcerated person becomes aware of a censorship decision and wants to challenge it, they must also contend with the requirements of the Prison Litigation Reform Act (PLRA).⁹³ The statute's exhaustion requirement is particularly problematic since an incarcerated person's failure to *first* exhaust administrative remedies offered by the prison is grounds for dismissal of any lawsuit they might file.⁹⁴ If a prison offers the option to appeal a ban, an incarcerated person must take it, even if that option just means that a censorship decision will be reviewed only by other corrections officers and more likely than not upheld.⁹⁵ Advocacy groups might choose to litigate on behalf of an author or publisher to vindicate the rights of an incarcerated person and avoid the cumbersome requirements of the PLRA.⁹⁶ But this strategy relies on the author or publisher being sufficiently invested in the rights of incarcerated people to join the fight.⁹⁷ In the unlikely case that an incarcerated person clears these procedural hurdles or that a third party decides to litigate an anti-censorship claim, they must overcome the damning precedent of three Supreme Court opinions.

92. Thompson cited lack of notice in her complaint against New York prison officials for censoring her book. Complaint, S.D.N.Y., *supra* note 10, at 9–10.

93. John Boston, *The Prison Litigation Reform Act*, in *Colum. Hum. Rts. L. Rev., A Jailhouse Lawyer's Manual* 386–87 (12th ed. 2020); see also ACLU, *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [<https://perma.cc/4H8Q-UGP7>] (last visited Aug. 23, 2023).

94. 42 U.S.C. § 1997e(a) (2018); ACLU, *supra* note 93, at 1 (“If you file a lawsuit in federal court before taking your complaints through every step of your prison’s grievance procedure, it will almost certainly be dismissed.”). For a broader discussion of the ways prisons erect administrative barriers, see generally PEN America, *supra* note 41, at 14 (“Prisons may . . . implement unreasonably short filing deadlines, extend timelines as a stalling tactic, create multiple layers of review, or craft procedural dead ends. These systems are difficult to navigate, and courts will seize on any error . . . as a reason to dismiss the claim, regardless of the underlying merits.”).

95. PEN America, *supra* note 41, at 6 (noting that since review committees usually comprise other corrections officers, “these committees are far more likely to uphold the censor’s decision than to reverse it”); Boston, *supra* note 93, at 363 (“You may believe that the complaint system in your prison is unfair or a complete waste of time, but you still must use and go through all of the steps and give the prison a chance to fix the problem first.”); see also *infra* text accompanying notes 220–222.

96. See PEN America, *supra* note 41, at 15 (noting that, since there is no exhaustion requirement for nonincarcerated people, “much of the litigation on book banning in U.S. prisons occurs not on behalf of incarcerated people, but on behalf of the book publishers and distributors”). For example, Dr. Thompson, not one of the incarcerated people to whom she tried to send her book, is the plaintiff in her suit against New York State prison officials. See Complaint, S.D.N.Y., *supra* note 10, at 1.

97. See PEN America, *supra* note 41, at 15 (“But this litigation is rare. Publishers have very little financial incentive to wage a protracted and expensive legal battle for the book access rights of an incarcerated person who ordered their book. Furthermore, publishers and authors often are seldom aware that their book has been censored.”).

B. *The Prevailing Power of Turner*

The prevailing standard of review for constitutional challenges to prison regulations was set by the Supreme Court in *Turner v. Safley*.⁹⁸ This 1987 decision came on the heels of a period of increased incarcerated activism and litigation targeting apparently unconstitutional internal prison policies.⁹⁹ Before this period, it was accepted that incarceration placed people “outside the bounds of constitutional protection,” and courts were very deferential to the “expertise” of prison officials when determining which rights could be compromised.¹⁰⁰ Prison uprisings spiked in the 1950s, putting pressure on courts to actually consider the merits of incarcerated plaintiffs’ claims (something they had declined to do up to this point).¹⁰¹ Once these activism efforts revealed the completely arbitrary justifications behind many prison policies, the stage was set for the Supreme Court to rule on the issue definitively:¹⁰² The question at bar was how to protect incarcerated people’s constitutional rights while giving prisons enough deference to conduct their business safely.¹⁰³

98. 482 U.S. 78, 89–91 (1987) (laying out the four-factor test confronting those challenging prison regulations); see also Kristen Schnell, Note, *Turner’s Insurmountable Burden: A Three-Circuit Survey of Prisoner Free Speech Claims*, 6 Colum. Hum. Rts. L. Rev. Online 123, 125 (2022), <https://hrlr.law.columbia.edu/files/2022/03/Schnell-HRLR-Online.pdf> [<https://perma.cc/VGV6-BXU2>] (“As a result of the Court’s landmark decision in *Turner v. Safley*, challenges to prison regulations alleged to violate the Constitution are subject to a standard of review that places a heavy evidentiary burden on the [incarcerated] plaintiff.”).

99. See Schnell, *supra* note 98, at 128–29 (describing waves of prison uprisings and litigation from the 1950s through the 1970s “challenging conditions of confinement and . . . treatment [of incarcerated people]”).

100. See *id.* at 127–28 (noting that for the first two centuries after the United States was founded, “[t]he only protections granted to [incarcerated people] could be found in state law, should a state choose to afford them”).

101. See Nicole B. Godfrey, *Suffragist Prisoners and the Importance of Protecting Prisoner Protests*, 53 Akron L. Rev. 279, 296 (2019) (describing how the Civil Rights Movement prompted federal courts to “recogniz[e] federal remedies for constitutional violations” by the state and “also began allowing [incarcerated people] to sue prison officials for unconstitutional prison conditions”); Schnell, *supra* note 98, at 128 (“The need for reform gradually drove the Warren Court to shift away from their ‘hands-off’ approach and rule on the merits of [incarcerated people’s] rights claims, directly addressing the unconstitutionality of prison conditions and treatment of [incarcerated people].”).

102. See Schnell, *supra* note 98, at 129 (“Early lawsuits during this second wave of litigation revealed that prison officials frequently could not justify or even explain their procedures, leading courts to call for reforms.”).

103. *Id.* (“Courts thus faced the difficult question of how to ‘discharge their duty to protect constitutional rights,’ while still affording appropriate deference to the judgment of newly ‘professionalized’ prison administrators as to what regulations were truly necessary to maintain safe prison environments.” (quoting *Procunier v. Martinez*, 416 U.S. 396, 404–06 (1974), overruled by *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989))).

The standard of review for such claims was first considered in *Procunier v. Martinez*, which addressed mail censorship specifically.¹⁰⁴ This 1974 case was a class-action suit brought by people incarcerated in California who challenged a content-based ban on mail communications.¹⁰⁵ The Court struck down the ban as unconstitutional, objecting to the “extraordinary latitude” that the policy granted prison officials.¹⁰⁶ The Court applied a heightened standard of scrutiny, requiring that restrictions on correspondence be “generally necessary” to protect the government interest of “internal order and discipline.”¹⁰⁷ But the Court focused its holding on the First Amendment rights of the outside communicator.¹⁰⁸ It expressly declined to refer to case law on “prisoners’ rights” and instead relied on precedent dealing more generally with restrictions on First Amendment liberties.¹⁰⁹ In the aftermath, courts appeared confused about the standard the Court had set, applying varying levels of scrutiny to prison policies in claims brought by incarcerated people.¹¹⁰

104. Peter Keenan, Constitutional Law: The Supreme Court’s Recent Battle Against Judicial Oversight of Prison Affairs, 1989 Ann. Surv. Am. L. 507, 508 (“The Supreme Court first considered the question of the proper standard of review for prison regulations in *Procunier v. Martinez*.”).

105. *Martinez*, 416 U.S. at 398, 415 (evaluating ban prohibiting “statements that ‘unduly complain’ or ‘magnify grievances,’ expression of ‘inflammatory political, racial, religious or other views,’ and matter deemed ‘defamatory’ or ‘otherwise inappropriate’” (quoting Cal. Dep’t of Corr., Rules and Regulations of the Director of Corrections, DR-1201, -1205 (1972))).

106. *Id.*

107. *Id.* at 412–14.

108. See *id.* at 408 (“Whatever the status of a prisoner’s claim to uncensored correspondence with an outsider, it is plain that the latter’s interest is grounded in the First Amendment’s guarantee of freedom of speech.”).

109. *Id.* at 409; see also Keenan, *supra* note 104, at 509 (“The Court’s holding, however, was explicitly grounded on . . . the constitutional rights of *non-inmates* who sought to communicate with others who happened to be incarcerated. The Court looked not to prisoners’ rights cases, but to cases involving the incidental restriction of the first amendment rights of citizens generally.” (footnote omitted)).

110. See, e.g., *Martinez*, 416 U.S. at 412–13 (applying heightened scrutiny to a restriction on communications between incarcerated people and the general public); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (“[I]n the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”). Many lower courts subsequently relied on the *Martinez* standard to ground their analysis. See Keenan, *supra* note 104, at 511 (“Despite this fairly coherent line of cases counseling deference and examination of regulations against a reasonableness standard, different standards of review emerged in the circuit courts of appeals. These alternate standards of review frequently incorporated the ‘least restrictive alternative’ analysis of *Martinez*.” (footnote omitted)); see also Godfrey, *supra* note 101, at 296–97 (“[F]or many years, the federal courts subjected certain First Amendment violations by prison officials . . . to a more exacting standard of review.”).

Over a decade later, the Supreme Court established a universal standard of review for prison regulations in *Turner*.¹¹¹ The plaintiffs were people incarcerated in Missouri.¹¹² They challenged two prison regulations: The first prohibited correspondence between people incarcerated at different facilities, and the second prohibited marriage between incarcerated people.¹¹³ The plaintiffs brought claims under the First and Fourteenth Amendments, challenging both the interfacility communication ban and the marriage ban.¹¹⁴ The district court applied the heightened scrutiny from *Martinez* and found the communication ban to be “unnecessarily sweeping”; in other words, it was broader than necessary to promote order and security.¹¹⁵ The district court struck down the policies as unconstitutional and the Eighth Circuit upheld that decision.¹¹⁶

Turner is most remembered for establishing a new test for evaluating rights infringements in prisons.¹¹⁷ The test the Court applied was “whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”¹¹⁸ The Court established a four-factor test to measure reasonable relatedness.¹¹⁹ Those factors were:

- 1) Whether there is a “valid, rational connection” between the prison regulation and the government interest said to justify the regulation;

111. Schnell, *supra* note 98, at 140–41 (“The *Turner* Court reviewed its past jurisprudence to synthesize what it believed to be a coherent standard for evaluating these and future claims.”).

112. Godfrey, *supra* note 101, at 297–98.

113. *Id.*

114. Schnell, *supra* note 98, at 140–41.

115. *Safley v. Turner*, 586 F. Supp. 589, 595–96 (W.D. Mo. 1984), *aff’d*, 777 F.2d 1307 (8th Cir. 1985), *aff’d in part, rev’d in part*, 482 U.S. 78 (1987).

116. Godfrey, *supra* note 101, at 298 (“The Eighth Circuit affirmed, concluding that correspondence between [incarcerated people] ‘is not presumptively dangerous nor inherently inconsistent with legitimate penological objectives’ and that the marriage rule as applied by Superintendent [William] Turner was unconstitutional on its face because it provided no alternative means of exercising the right to marry.” (quoting *Turner*, 777 F.2d at 1313)); Keenan, *supra* note 104, at 512 (“The circuit court approved the use of the strict scrutiny standard and found that neither regulation was the least restrictive means of achieving the asserted security interest.”).

117. See *Turner*, 482 U.S. at 81 (“The Court of Appeals for the Eighth Circuit, applying a strict scrutiny analysis, concluded that the regulations violate respondents’ constitutional rights. We hold that a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules.”); see also Godfrey, *supra* note 101, at 298 (“The Supreme Court affirmed in part and reversed in part and, in so doing, announced a new test through which federal courts should examine First Amendment claims brought by [incarcerated people].”).

118. *Turner*, 482 U.S. at 87 (first quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984); then citing *Bell v. Wolfish*, 441 U.S. 520, 551 (1979)).

119. See Schnell, *supra* note 98, at 140–42 (crediting the *Turner* decision for setting “a universal standard of review for constitutional challenges to prison regulations”).

- 2) Whether there are “alternative means” of exercising the right that is limited by the regulation;
- 3) What impact accommodation of the asserted constitutional right would have on prison administrators, [incarcerated people], and prison resources; and
- 4) Whether there are “ready alternatives” to the chosen regulation.¹²⁰

Turner was immediately cemented as a near-insurmountable barrier to the subsequent litigation of similar claims.¹²¹ The first factor, testing rational connection, is widely regarded as the core of the test, and most plaintiffs fail to clear that hurdle.¹²² Institutional defendants usually only need to offer some “plausible security concern” to defeat a constitutional challenge,¹²³ an outcome feared by the dissenters.¹²⁴ The Court cited deference to prison officials to justify judicial restraint, noting that “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources.”¹²⁵ The Court deemed the communication ban “logically connected” to prison security

120. *Id.* at 142 (footnotes omitted) (citing *Turner*, 482 U.S. at 89–92). But see Justin L. Sowa, Note, *Gods Behind Bars: Prison Gangs, Due Process, and the First Amendment*, 77 *Brook. L. Rev.* 1593, 1598 (2012) (“The first prong . . . seems to have considerably more weight than the other three.”).

121. See Sowa, *supra* note 120, at 1600–01 (“The application of *Turner*, therefore, is not nearly as protective of prisoners’ rights as its plain language would suggest. Because of the Supreme Court’s continued emphasis on deference to the decisions of prison authorities, much of the force of the decision has been neutered.”).

122. See *id.* at 1596 (“In practice, as long as the first prong—the rational relation test—is met, courts tend to find that the others are met as well.”); see also Godfrey, *supra* note 101, at 298 (“Often, this factor alone is dispositive in *Turner* cases—if the prison system can come forward with any legitimate government interest to justify the regulation, even if that interest is not the actual reason the prison system enacted the policy, the [incarcerated person] loses.”).

123. See, e.g., Schnell, *supra* note 98, at 143–44 (“The Court has, for example, upheld regulations that allowed wardens to selectively reject incoming publications purportedly for ‘order and security,’ with no evidence in the record that publications would cause disruptions, nor any evidence that an incoming publication had caused a disciplinary or security problem.”).

124. See Keenan, *supra* note 104, at 515–16 (“[T]he dissent warned that if the Court’s standard can be satisfied merely by a ‘logical connection’ between the regulation and the asserted penological concern, then the standard would effectively be meaningless because it would permit abuses of . . . constitutional rights whenever an imaginative warden could produce a plausible security concern.”). In his dissent, Justice John Paul Stevens criticized the decision, including the Court’s “erratic use of the record” in distinguishing marriage from correspondence. *Turner*, 482 U.S. at 116 (Stevens, J., dissenting).

125. *Turner*, 482 U.S. at 84–85 (majority opinion); see also Keenan, *supra* note 104, at 512–13 (“The Court refused to subject day-to-day decisions of prison officials to ‘an inflexible strict scrutiny analysis’ for fear of distorting the decision-making process, hampering the efforts of prison officials to anticipate problems, and unnecessarily involving courts in the details of prison administration.” (quoting *Turner*, 482 U.S. at 89)).

concerns and upheld it as constitutional.¹²⁶ The only prison regulation to have failed *Turner's* reasonableness test before the Supreme Court is the marriage ban in *Turner* itself.¹²⁷

The Court affirmed this low bar just a few years later with *Thornburgh v. Abbott*.¹²⁸ The *Thornburgh* plaintiffs challenged the constitutionality of restrictions on “outside” publications within the prison based on institutional security concerns.¹²⁹ They argued for application of the stricter *Martinez* standard, which would have required heightened scrutiny for such restrictions.¹³⁰ But the Supreme Court definitively held that *Turner* controlled and overruled *Martinez*.¹³¹ The Court focused on the rights of nonincarcerated correspondents,¹³² analogizing this focus to the *Martinez* approach and distinguishing it from *Turner*, which considered the rights of incarcerated people specifically.¹³³ But the Court clarified that the more relevant distinction was the direction that communications flowed in the cases: out of the prison (*Martinez*) versus into the prison (*Turner* and the case at bar, *Thornburgh*).¹³⁴ Communications flowing into

126. *Turner*, 482 U.S. at 91–93; see also Keenan, *supra* note 104, at 514 (noting that prison officials testified that communications between incarcerated people posed a threat to security because there was the potential to “coordinate escapes, assaults, and gang activity,” and that the Court upheld the restriction in part because incarcerated people were still allowed to communicate with nonincarcerated people).

127. Schnell, *supra* note 98, at 144; see also Keenan, *supra* note 104, at 511, 515 (describing how the Court in *Turner* found the Missouri Division of Corrections’s prohibition on marriage between incarcerated people to be an “exaggerated response” to the cited security concerns (internal quotation marks omitted) (quoting *Turner*, 482 U.S. at 97–98)). See generally Sowa, *supra* note 120, at 1599 (“Under the *Turner* test, the Supreme Court has upheld prison regulations that . . . prevented [incarcerated] Muslim[s] from attending a religiously commanded Friday evening prayer service, severely restricted visitation rights, imposed up to sixteen-day delays in access to legal materials, and [forcibly] subjected an [incarcerated person] to treatment with antipsychotic drugs” (footnotes omitted)).

128. 490 U.S. 401 (1989).

129. *Id.* at 403.

130. *Id.*; see also *Procurier v. Martinez*, 416 U.S. 396, 413 (1974) (“[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”), overruled by *Thornburgh*, 490 U.S. at 413–14.

131. *Thornburgh*, 490 U.S. at 414 (“[W]e recognize that it might have been possible to apply a reasonableness standard to all incoming materials without overruling *Martinez* We choose not to go that route, however, for we prefer the express flexibility of the *Turner* reasonableness standard.”).

132. See *id.* at 408 (“In this case, there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to [incarcerated people].”).

133. See *id.* at 408–09 (noting that the question is what standard of review to apply to prison regulations limiting outsiders’ communications to incarcerated people and comparing that focus to other cases, including *Turner*, which “involv[ed] ‘prisoners’ rights” (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987))).

134. See *id.* at 413 (“[T]he logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence. . . . Any attempt to

a prison could more logically be expected to interfere with penological interests than those flowing out of a prison.¹³⁵ The Court determined that this distinction, rather than the identities of the rightsholders, was most relevant to the issues of prison order and security.¹³⁶

Thornburgh united the constitutional rights of incarcerated and nonincarcerated people with respect to reading materials “inside” under the *Turner* umbrella. For communications going into a prison, the inquiry (derived from *Turner*) was (1) whether the government objective at issue was legitimate and neutral and (2) whether the regulation was rationally related to that objective.¹³⁷ This eliminated federal courts’ ability to apply a more exacting standard reminiscent of *Martinez*.

If *Turner* and *Thornburgh* left any room to question the rights of incarcerated people to access “outside” reading materials, the Court answered in *Beard v. Banks*.¹³⁸ This 2006 case challenged the “deprivation theory of rehabilitation” in a Pennsylvania prison, where reading materials were restricted based on security levels.¹³⁹ Incarcerated people in the more restrictive level had heightened restrictions on reading materials,¹⁴⁰ and good behavior could allow them to move to the less restrictive level and earn access to those materials.¹⁴¹ In *Turner* terms, the legitimate penological interest at stake was rehabilitation.¹⁴²

justify a similar categorical distinction between incoming correspondence from [incarcerated people] . . . and incoming correspondence from [nonincarcerated people] would likely prove futile, and we do not invite it.”).

135. *Id.* at 412 (“We deal here with incoming publications, material requested by an individual [incarcerated person] but targeted to a general audience. Once in the prison, material of this kind reasonably may be expected to circulate . . . with the concomitant potential for coordinated disruptive conduct.”).

136. See *id.* at 411 (stating that the regulation in *Martinez* was rejected because “the regulated activity centrally at issue in that case . . . did not, by its very nature, pose a serious threat to prison order and security”).

137. *Id.* at 414.

138. 548 U.S. 521, 525 (2006) (plurality opinion); see also Schnell, *supra* note 98, at 145 (“Most extraordinarily, in the last case in which the *Turner* test was applied to a free speech challenge by the Supreme Court, the Court held that ‘deprivation’ of [incarcerated people’s] access to reading materials and photographs is reasonably related to prisoner rehabilitation and security.”).

139. See Schnell, *supra* note 98, at 145 (quoting *Beard*, 548 U.S. at 546 (Stevens, J., dissenting)).

140. Michael Keegan, The Supreme Court’s “Prisoner Dilemma:” How *Johnson*, RLUIPA, and *Cutter* Re-Defined Inmate Constitutional Claims, 86 Neb. L. Rev. 279, 310 (2007) (“[Incarcerated people] in the more restrictive level 2 have no access to the commissary, may only have one visitor per month, and are not allowed phone calls except in emergencies.”).

141. See *id.* at 310–11 (“An [incarcerated person] at level 1 still may not have photographs, but may receive one newspaper and five magazines.”).

142. See Schnell, *supra* note 98, at 145 (“As Justice Stevens noted in his dissent in *Beard*, there is no ‘limiting principle’ to this ‘deprivation theory of rehabilitation.’ Any number of constitutional rights could therefore be limited in the name of rehabilitation.” (quoting *Beard*, 548 U.S. at 546 (Stevens, J., dissenting))).

The *Beard* Court reaffirmed the *Turner* standard, which the prison policy easily satisfied.¹⁴³ The Court found it necessary to review only one of three justifications offered for the prison policy and hinged its decision almost exclusively on the first factor of the *Turner* test.¹⁴⁴ The Court held that the other *Turner* factors did not add much to the analysis so long as the regulation was reasonably related to at least one penological interest.¹⁴⁵ The only evidence the *Beard* Court offered to show that it wasn't "impossible" to defeat a prison regulation in court was that the marriage regulation from *Turner* failed the test laid out in that case.¹⁴⁶ Would-be plaintiffs were left with a near-impossible standard, such that only one regulation was struck down in the span of two decades.¹⁴⁷

II. REVISITING ATTICA

The Attica prison uprising challenged the human and civil rights violations committed by New York State prison officials against incarcerated people.¹⁴⁸ The original uprisers specifically called for an end to the harsh censorship policies limiting their right to read.¹⁴⁹ The ban on *Blood in the Water* at the very prison whose history it recounts is a grim reminder that censorship is a weapon still wielded by the carceral state. Section II.A recounts the circumstances surrounding the Attica prison uprising. Section II.B gives an overview of the current legal struggle against the present-day censorship of Attica's history at that same facility. Section II.C situates censorship in prisons alongside censorship of history in other contexts.

143. See *Beard*, 548 U.S. at 530–33 (plurality opinion) (applying *Turner*'s four-factor test to the regulation at issue).

144. See Keegan, *supra* note 140, at 311–12 ("The plurality began with the first *Turner* factor, accepting the valid rational connection offered by the Secretary Though the plurality opinion briefly looked at the second, third, and fourth factors, it noted that those factors 'here add little, one way or another, to the first factor's basic logical rationale.'" (quoting *Beard*, 548 U.S. at 532)).

145. See *id.*

146. See *id.* at 535–36 (referring to *Turner* itself to counter the argument that "the deference owed prison authorities makes it impossible for [incarcerated people] or others attacking a prison policy like the present one ever to succeed or to survive summary judgment").

147. See *supra* note 127 and accompanying text; see also Schnell, *supra* note 98, at 145 ("As the most recent case of *Beard* demonstrates, [incarcerated people's] free speech challenges essentially stand or fall with the first prong of *Turner*, i.e., whether there is a valid, rational connection between a prison regulation and the purported government interest.").

148. See *The Attica Manifesto*, *supra* note 13, at 28–30.

149. *Id.* at 30.

A. *The Attica Prison Uprising*¹⁵⁰

The 1971 uprising was preceded by consistent efforts by the men incarcerated at Attica to negotiate with their imprisoners for better treatment. In the year prior to the uprising, the men forced to work in Attica's metal shop went on strike in protest of their wages, which capped out at twenty-nine cents per day and were withheld by prison officials until the men's release.¹⁵¹ The metal shops were dirty and hot, showers were limited, and men continued work throughout the hot summer months in up to eighty-nine degree weather.¹⁵² The strike forced negotiations, which resulted in a raise for metal shop workers.¹⁵³ But responsibility for the peaceful strike was attributed to the "[B]lack militant[s]" of Attica, who unsettled the superintendent and corrections officers.¹⁵⁴ Many of these organizers were subjected to increased surveillance following the strike.¹⁵⁵

Attica's corrections staff were not alone in their fear of Black political organizing. Outside of prisons, anyone affiliated with the Black Power Movement had become a "national security threat," and the government fought back against these domestic enemies by incarcerating them.¹⁵⁶ Across the country, prison officials feared the larger numbers of Black "radicals" they suddenly found behind their walls.¹⁵⁷ And their revolutionary energy was contagious. A manifesto that originated from the 1970 uprising at Folsom Penitentiary circulated throughout prisons nationwide.¹⁵⁸ At the Auburn Correctional Facility in New York, a demonstration led by incarcerated Black political activists ended with violent retaliation from corrections officers.¹⁵⁹ News of this violence spread

150. The full story of the Attica prison uprising is better told by Thompson in *Blood in the Water*. The events of September 9 to 13 of 1971, including the uprising, negotiations, and retaking, are recounted in parts II, III, and IV of the book. See generally Thompson, *supra* note 1.

151. *Id.* at 15, 17; see also Attica: The Official Report of the New York State Special Commission on Attica 38–39 (1972) [hereinafter Attica: The Official Report] (noting that metal shop positions were hated among the men incarcerated at Attica).

152. Attica: The Official Report, *supra* note 151, at 39.

153. Thompson, *supra* note 1, at 17.

154. *Id.*

155. *Id.*

156. See Jordan T. Camp, *Incarcerating the Crisis: Freedom Struggles and the Rise of the Neoliberal State* 41–42 (2016) (describing how counterinsurgency efforts targeting Black radicals "marked a critical moment in the development of the neoliberal carceral state").

157. Badillo & Haynes, *supra* note 2, at 161 ("In all prisons . . . a dangerous racial tinderbox terrified wardens and prison administrators. Alarmed about radicals, revolutionaries, and 'ultra-liberal groups out to cause revolution' . . . most officials [were] neither inclined nor equipped to handle this extremely sensitive problem." (quoting John Zelter, Warden, Green Haven Correctional Facility)).

158. Mary Bosworth, *Explaining U.S. Imprisonment* 107 (2010).

159. Thompson, *supra* note 1, at 23–24.

quickly, and some of the organizers were transferred to Attica.¹⁶⁰ Riots in New York City jails ended with violence from prison officials, and some of the men deemed particularly culpable were also transferred to Attica.¹⁶¹ Ironically, many of these transferees became the leaders of Attica's own uprising.¹⁶² Finally, George Jackson's writings critiquing U.S. prisons as capitalist and oppressive were popular readings for organizers across the country.¹⁶³ He was murdered by prison guards in August 1971, to the outrage of those whom he inspired.¹⁶⁴

Over the summer of 1971, the incarcerated men at Attica spent increased time forming critiques of their conditions of imprisonment.¹⁶⁵ Led by the Attica Liberation Faction, they collaborated on a document titled "The Attica Liberation Faction Manifesto of Demands," in which they spoke out on behalf of all of the men of Attica and other incarcerated people against the human and civil rights violations perpetrated in the "fascist concentration camps of modern America."¹⁶⁶ Their preamble targeted, among other grievances, the blanket censorship of reading materials at Attica.¹⁶⁷ The men framed their right to read as the "human right[] to the wisdom of awareness" and accused prison officials of condemning them to "isolation status" by restricting this right.¹⁶⁸ The Faction sent the manifesto to the Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS) for review in the summer of 1971.¹⁶⁹ Negotiations ensued over the course of the summer but ended on September 2 with an anticlimactic tape-

160. *Id.* at 23–24, 27–28.

161. *Id.* at 29.

162. *Id.* at 27–28, 32 (noting that the New York Department of Corrections and Community Supervision (DOCCS) Commissioner found it "disturbing" that one of the Attica Manifesto's signers had been an organizer in the New York City jail rebellion the previous year).

163. Camp, *supra* note 156, at 75–76 ("[George Jackson's] prison letters were widely circulated and debated among the radical social movements from California to New York and beyond, and provided a vision of class struggle as a strategy for the emergent multiracial [incarcerated people's] movement.").

164. *Id.* at 70, 76 (noting that George Jackson's murder was "the spark" for the Attica uprising).

165. *Id.* at 69 (describing how the leaders of the Attica uprising "forged alliances in a social science class, where they learned concepts critical for analyzing the social formation" and "developed an understanding of the centrality of prisons as mechanisms of racist social control under U.S. capitalism").

166. The Attica Manifesto, *supra* note 13, at 28.

167. See *id.* at 30, 32 (describing the systematic censorship of news media and other print resources as tantamount to a form of isolation).

168. *Id.* at 30.

169. See Thompson, *supra* note 1, at 31.

recorded message from the commissioner; prison officials took no reformatory measures in response to the Faction's demands.¹⁷⁰

The uprising itself emerged out of a chaotic frenzy the morning of September 9, 1971. A group of incarcerated men was leaving breakfast when one of the superintendents ordered them to return to their cells as a disciplinary measure.¹⁷¹ The men normally would have passed through a tunnel to the yard for recreation time, but the superintendent ordered that the tunnel gate be locked to redirect the group to their cells; at that point, the men realized they were trapped in the tunnel with a guard known to be violent.¹⁷² Panic broke out, and 1,281 incarcerated men successfully gained control of the facility.¹⁷³

Once the frenzy dissipated, the men got organized.¹⁷⁴ They gathered in one of the prison's yards along with thirty-eight civilian employee and corrections officer hostages.¹⁷⁵ Two-thirds of the men assembled in the yard were Black, one-quarter white, and one-tenth Puerto Rican.¹⁷⁶ Over the next four days, nonviolent but tense negotiations ensued between the incarcerated men of Attica and the state, conducted through a team of civilian observers called in as middlemen.¹⁷⁷ Though the demonstration garnered international attention, Governor Rockefeller did not visit Attica during the uprising and did not otherwise meaningfully acknowledge the demands of the uprisers.¹⁷⁸

The state regained control of the facility and the narrative surrounding the uprising on September 13, 1971, when armed national guardsmen ambushed the prison and opened fire.¹⁷⁹ They fatally shot twenty-nine incarcerated men and nine civilian hostages, but prison officials immediately reported to the media that the civilians had their throats slit by the rioters.¹⁸⁰ The same day, newspapers across the country reported on the alleged throat slashings as fact.¹⁸¹ Though autopsy reports would soon prove this to be a complete fabrication, the damage to the collective interpretation and memory of Attica had already been done.¹⁸²

170. See *id.* at 39–40 (“[I]t seemed clear [to the uprisers] that their foray into the democratic process and their patience as well as pledge of nonviolence had produced not a single improvement in their living conditions.”).

171. See *id.* at 51.

172. See *id.* at 51–52.

173. See *id.* at 52–59, 64.

174. See *id.* at 64.

175. See Badillo & Haynes, *supra* note 2, at 40.

176. Thompson, *supra* note 1, at 65–66.

177. See Badillo & Haynes, *supra* note 2, at 53–89 (summarizing the negotiations between the uprisers and state officials).

178. *Id.* at 85–89.

179. See *supra* notes 3–4 and accompanying text.

180. See Thompson, *supra* note 1, at 180, 187, 193–95.

181. See *id.* at 195–96.

182. See *id.* at 227–30, 236.

The story fed to the outside audience was one of state heroism finally restoring order not only to the immediate facility but to “our free society” as well.¹⁸³ It took nearly fifty years for a competitive counternarrative to emerge.¹⁸⁴

The Attica prison uprising coincided with the birth of the prisoners’ rights movement.¹⁸⁵ The uprising was only one of thirty-seven that took place in 1971, which was a mere foreshadowing of the forty-eight that followed in 1972.¹⁸⁶ There was a cycle of incarcerated people educating themselves on the politics of their imprisonment through the work of Black organizers *outside* and those outside organizers eventually being incarcerated themselves.¹⁸⁷ By arresting political activists, the state created direct links between incarcerated individuals and groups such as the Black Panther Party, Black Muslims, the American Civil Liberties Union, and the American Communist Party, and their political education was a direct threat to the system imprisoning them.¹⁸⁸ The Attica prison uprising personified this threat; the lies spread about “knife-wielding prisoners” created moral panic and an enduring narrative about law and order, with the “insurgent prisoner” at the center.¹⁸⁹ Governor Rockefeller leveraged this narrative to usher in two cornerstones of mass incarceration: “the super-maximum-security prison”¹⁹⁰ and mandatory-minimum drug laws¹⁹¹ to funnel even more people behind those prison walls. These laws were duplicated across the country, and in this way Attica ushered in the tough-on-crime era responsible for mass incarceration today.¹⁹² The Attica Manifesto properly identified a shift in American incarceration away from any harm-reduction end and toward an “era of punitive excess” that

183. See *id.* at 194.

184. See *infra* notes 194–197 and accompanying text.

185. See David Fathi, 50 Years of Fighting for the Rights of Incarcerated People, ACLU (Sept. 26, 2022), <https://www.aclu.org/news/human-rights/50-years-of-fighting-for-the-rights-of-incarcerated-people> [<https://perma.cc/4UCU-5YDE>] (“The Attica rebellion shone a much-needed light on the appalling conditions in U.S. prisons. The uprising, and its bloody suppression, sparked the beginning of the modern prisoners’ rights movement.”).

186. See Robert T. Chase, We Are Not Slaves: Rethinking the Rise of Carceral States Through the Lens of the Prisoners’ Rights Movement, 102 *J. Am. Hist.* 73, 74 (2015).

187. See Bosworth, *supra* note 158, at 107–08 (“[M]ass media became a means of politicization, educating [incarcerated people] about their rights and shared experiences [F]rom the 1960s onwards, an increasing number of [incarcerated people] arrived already politicized by their experiences with the Civil Rights Movement and by the increasingly radical Black Power Movement.”).

188. *Id.* at 88, 111 (describing state efforts to quash Black Muslim and freedom movements within prisons).

189. See Camp, *supra* note 156, at 71.

190. *Id.* at 73.

191. See Thompson, *supra* note 1, at 563.

192. See *id.* at 562–63 (“That Attica had . . . helped fuel an anti-civil-rights and anti-rehabilitative ethos in the United States was soon clear Any politician who wanted money for his or her district had learned that the way to get it was by expanding the local criminal justice apparatus and making it far more punitive.”).

created and maintained an even worse status quo for American imprisonment.¹⁹³

B. Thompson v. Annucci

1. *Blood in the Water and Its Impact*. — In 2016, Dr. Heather Ann Thompson published *Blood in the Water*, an almost 600-page account of the events at Attica.¹⁹⁴ It is regarded as the first comprehensive, “definitive” history of the uprising.¹⁹⁵ *Blood in the Water* is not the only book about the Attica uprising, but it is unique for also covering both the sociopolitical context that birthed the uprising and the resulting fallout.¹⁹⁶ Central to her narrative was Thompson’s condemnation of the state-sponsored cover-up that followed the uprising, and she is credited for bringing the extent of this cover-up to light.¹⁹⁷ The book concludes by pointing to Attica as a key catalyst of mass incarceration as we know it today.¹⁹⁸

Blood in the Water was met with critical acclaim. Reviewers agreed that the book was particularly timely given how many more people are incarcerated in America today than in 1971.¹⁹⁹ Thompson accepted the

193. See Jeremy Travis & Bruce Western, *The Era of Punitive Excess*, Brennan Ctr. for Just. (Apr. 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess> [https://perma.cc/584E-MAVP]; see also *The Attica Manifesto*, supra note 13, at 30 (arguing that the system claiming to rehabilitate them was in fact victimizing them).

194. See Thompson, supra note 1.

195. Lauren-Brooke Eisen, *Book Review: Blood in the Water*, Brennan Ctr. for Just. (Aug. 24, 2016), <https://www.brennancenter.org/our-work/research-reports/book-review-blood-water> [https://perma.cc/2AMG-GHS2]; see also Terry Hartle, ‘*Blood in the Water*’ Does a Magnificent Job of Rewriting the Attica Story, *Christian Sci. Monitor* (Sept. 26, 2016), <https://www.csmonitor.com/Books/Book-Reviews/2016/0926/Blood-in-the-Water-does-a-magnificent-job-of-rewriting-the-Attica-story> [https://perma.cc/6XD7-QXRF] (describing *Blood in the Water* as a “magnificently comprehensive study”).

196. See Eisen, supra note 195; see also Michael Avery, *Book Review: Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*, 74 *Nat’l Laws. Guild Rev.* 57, 57 (2017) (“I was simply not prepared for the shock of Thompson’s painstaking recreation of the brutal retaking of the prison by the state police, or for her detailed account of the decades long callous indifference of New York State officials to the consequences of their actions.”); Oppenheimer, supra note 9 (“Had it only painstakingly reconstructed the events of that week in 1971, Ms. Thompson’s book would have been a definitive addition to a growing shelf of Attica literature But the uprising and its suppression barely get us halfway through the story.”).

197. See Avery, supra note 196, at 60 (“When it comes to the culpable officials, she names names, and provides detailed evidence, from Governor Rockefeller to Attica Superintendent Vincent Mancusi . . . as well as the bevy of lawyers, bureaucrats, and elected officials who attempted to cover up the truth.”); Hartle, supra note 195 (noting that Attica would, but for the cover-up, be grouped with other trust-shattering incidents like the Vietnam War and Watergate).

198. See Thompson, supra note 1, at 563 (describing how Governor Rockefeller introduced mandatory minimums for drug possession in New York in 1972, ushering in the War on Drugs and mass incarceration).

199. See Orisanmi Burton, *Diluting Radical History: Blood in the Water and the Politics of Erasure*, *Abolition J.* (Jan. 26, 2017), <https://abolitionjournal.org/diluting-radical->

2017 Pulitzer Prize for her work, among other awards.²⁰⁰ Critics praised her depth of research and compared her to bestselling author of *The New Jim Crow*, Michelle Alexander, for her ability to make difficult history accessible to a general audience.²⁰¹ While her reliance on official records translated to credibility for certain readers, others critiqued this methodology as telling the story “through the eyes of the state.”²⁰² In any case, the fact that Thompson was able to use these records at all was a feat. The introduction of *Blood in the Water* describes how difficult it was for Thompson to access any of the official records surrounding the uprising.²⁰³ Thompson is clear that this cover-up by the state was deliberate.²⁰⁴ Prison and law enforcement officials had fought hard to prevent the disclosure of certain documents, and others were only released subject to heavy redaction.²⁰⁵ It was by happenstance that Thompson found out about “a bunch of Attica papers” that had been moved to the back room of a courthouse in upstate New York.²⁰⁶ A similar stroke of luck led her to piles of evidence recovered from Attica immediately after the uprising.²⁰⁷ Once she had compiled what she found, one of Thompson’s express goals was to get this information to people in prisons.²⁰⁸

2. *Challenging Censorship in New York.* — Censorship in state prisons in New York is governed by regulation. Section 712.2 of the New York Administrative Code governs literature for incarcerated people.²⁰⁹ The regulation specifically prohibits materials containing child porn or that provide instructions on how to manufacture weapons.²¹⁰ It more broadly

history-blood-in-the-water-and-the-politics-of-erasure/ [https://perma.cc/43DF-2F5N] (“[*Blood in the Water*] could not have arrived at a more auspicious moment. It enters the public discourse during a time of formidable political struggle.”); Oppenheimer, *supra* note 9 (“[I]n 1971 the State of New York had only 12,500 [incarcerated people], a number that grew, by 2000, to almost 74,000. None of them can vote. But they can still strike or riot . . .”).

200. See Complaint, S.D.N.Y., *supra* note 10, at 5–6 (listing Thompson’s awards for *Blood in the Water*).

201. See Ashley T. Rubin, Heather Ann Thompson, *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*, 21 *Punishment & Soc’y* 131, 131 (2019) (book review).

202. Compare Burton, *supra* note 199 (critiquing Thompson for her overinvestment in official records to tell the story of Attica and her undisclosed “loyalty to the state”), with Oppenheimer, *supra* note 9 (lauding *Blood in the Water* as nonpartisan based on its reliance on various official documents).

203. Thompson, *supra* note 1, at xiii.

204. See *id.* at xvi–xvii (“That old wounds were never allowed to heal . . . is, I believe, the responsibility of officials in the state of New York. It is these officials who have chosen repeatedly, since 1971, to protect the politicians and members of law enforcement who caused so much trauma.”).

205. *Id.* at xiii.

206. *Id.* at xiv–xv.

207. *Id.* at xv.

208. Complaint, S.D.N.Y., *supra* note 10, at 1–2, 6.

209. N.Y. Comp. Codes R. & Regs. tit. 7, § 712.2 (2022).

210. *Id.* § 712.2(b), (f).

prohibits materials that “incite violence based on race,” “present[] a clear and immediate risk of lawlessness, violence, anarchy, or rebellion against governmental authority,” or encourage disobedience against correctional staff.²¹¹ The New York State DOCCS publishes more specific media review guidelines in Directive 4572.²¹² The directive tracks the New York Administrative Code but goes into greater procedural detail.²¹³ A book sent to an incarcerated person may be flagged in the mailroom for potentially violating one of the above provisions.²¹⁴ Flagged books are sent to the Facility Media Review Committee, comprising members of the facility’s prison staff, for an initial decision.²¹⁵ If the committee is considering withholding delivery of a book, it must notify the incarcerated recipient.²¹⁶ If the committee finds that the book violates the directive, the intended recipient may appeal to the statewide Central Office Media Review Committee.²¹⁷ The directive mandates this review procedure but outlines no specific review criteria other than the list of prohibited content from section 712.2.²¹⁸ Notice of the final decision to ban a book must be sent to the intended recipient of the book and its sender.²¹⁹

The shortcomings of New York’s media review procedures are typical of other carceral institutions.²²⁰ Initial censorship decisions are based on the “good faith belief[s]” of corrections staff, and review of those decisions is conducted by other corrections staff.²²¹ The only outside, and potentially less biased, review of these decisions is conducted by federal courts who have pledged deference to corrections staff on the subject.²²² The right to read in prison is thus almost completely subject to the whims of the imprisoners, which arbiters of justice are unlikely to check.

3. *The Case Against the State.* — Official efforts to prevent incarcerated people both in and outside New York from reading *Blood in the Water*

211. Id. § 712.2(c)–(e).

212. N.Y. State Dep’t of Corr. & Cmty. Supervision, Media Review, Directive No. 4572 (2023), <https://doccs.ny.gov/system/files/documents/2023/10/4572.pdf> [<https://perma.cc/H7GX-Z6U8>] [hereinafter Directive No. 4572].

213. See id. at 1–5 (stipulating both the standards for evaluating literature sent to incarcerated people and procedures for identifying and withholding literature that violates these standards).

214. Id. at 5.

215. Complaint, S.D.N.Y., supra note 10, at 7.

216. Directive No. 4572, supra note 212, at 4.

217. Complaint, S.D.N.Y., supra note 10, at 7.

218. For a list of content prohibited in New York State prisons, see Directive No. 4572, supra note 212, at 1–2.

219. See id. at 5.

220. For information on the censorship procedures in each state’s prison system, see Thurgood Marshall C.R. Ctr., supra note 45, at 26–68.

221. Directive No. 4572, supra note 212, at 4.

222. See, e.g., *Reynolds v. Quiros*, 25 F.4th 72, 83 (2d Cir. 2022) (“In weighing these competing interests, both the Supreme Court and this Court have emphasized that deference should be accorded to decision-making in the corrections system . . .”).

exemplify the book's impact.²²³ Under Directive 4572, New York State prisons have banned *Blood in the Water* since its publication.²²⁴ The directive prohibits materials that “advocate, expressly or by clear implication, acts of disobedience” toward “law enforcement officers or prison personnel.”²²⁵ Thompson received notice that her book had been censored not from the review committees, as the directive mandates,²²⁶ but instead from the incarcerated person she tried to send it to.²²⁷ She filed her claim in the Southern District of New York under the First and Fourteenth Amendments, seeking declaratory and injunctive relief.²²⁸ The named defendants were officials with authority over censorship decisions in New York State prisons, including DOCCS Commissioner Anthony Annucci.²²⁹ Thompson was represented by attorneys from the Cardozo Civil Rights Clinic at the Benjamin N. Cardozo School of Law and by the New York Civil Liberties Union.²³⁰ Thompson argued against the censorship of her book and for the right to read in prisons more generally. Thompson's position was that there was no evidence, in New York prisons or elsewhere, that her book caused disruption or disobedience among incarcerated people.²³¹ Thompson also noted the allowance of similar books, like *Soledad Brother: The Prison Letters of George Jackson* and *The New Jim Crow*, to point out the incoherence of the DOCCS policy as applied to her book in particular.²³² She cited three instances in which prison officials prevented incarcerated people from receiving copies of her book.²³³ Thompson argued that preventing people from reading her book excluded them from a larger conversation and public moment, an argument that harks back to the demands of the original uprisers.²³⁴ Amid the litigation, the DOCCS lifted the ban on *Blood in the Water* subject to one condition: The pages showing a map of the facility would be removed

223. See, e.g., Banned Books Lists, Books to Prisoners, <https://www.bookstoprisoners.net/banned-book-lists/> [<https://perma.cc/V6AX-3WSB>] (last visited Jan. 15, 2023) (noting that *Blood in the Water* is banned in state prisons in New Hampshire and Ohio, based on publicized lists).

224. Complaint, S.D.N.Y., *supra* note 10, at 8 (noting that bans of *Blood in the Water* have been upheld by the Central Office Media Review Committee “on around a dozen occasions”).

225. Directive No. 4572, *supra* note 212, at 2.

226. See *supra* note 219 and accompanying text.

227. Complaint, S.D.N.Y., *supra* note 10, at 9.

228. *Id.* at 15–16.

229. *Id.* at 3.

230. *Thompson v. Annucci*, NYCLU (Mar. 31, 2022), <https://www.nyclu.org/en/cases/thompson-v-annucci> [<https://perma.cc/HJN7-YUXW>].

231. Complaint, S.D.N.Y., *supra* note 10, at 12–13 (“There is no evidence that *Blood in the Water*'s presence in correctional facilities—either in New York or in facilities across the country—has ever caused disruptions or safety concerns between officers and incarcerated persons.”).

232. *Id.* at 13–14.

233. *Id.* at 9–11.

234. *Id.* at 10; *supra* notes 167–168 and accompanying text.

from each copy.²³⁵ The parties reached a settlement agreement in June 2023, under which Thompson would supply each DOCCS library with two copies of her book and the defendants would pay \$75,000 in attorney’s fees.²³⁶

While litigation was ongoing in New York, an identical claim by Thompson was quashed in Illinois—almost. Thompson filed that complaint in 2018, advancing an almost identical claim to her New York suit.²³⁷ In October 2022, a judge in the Central District of Illinois decided on cross-motions for summary judgment in favor of the institutional defendants.²³⁸ Thompson’s First Amendment claim did not defeat the qualified immunity standard, which allows “reasonable but mistaken judgments” on the part of the prison officials.²³⁹ The court also deemed the dispute “academic, if not entirely moot,” given that Thompson did not assert an intention to send any incarcerated person a copy of *Blood in the Water* in the future.²⁴⁰ Thompson filed her appeal from that decision in the Seventh Circuit in November 2022.²⁴¹ In September 2023, the parties reached a settlement agreement under which the defendants would approve *Blood in the Water* to be distributed in Illinois prisons and pay Thompson \$8,500.²⁴² The barriers Thompson faced—despite having more resources and facing fewer hurdles than an incarcerated plaintiff—demonstrate the inherent difficulties of fighting prison book bans in the courts.

C. *Censorship as a Racial Project*

1. *Inside.*— Central to the critique launched by the Attica Liberation Faction was the racism of the system imprisoning them. Censorship was a focus, but the Faction made clear that not all incarcerated people were censored equally; prison officials used censorship to politically and racially persecute certain groups at the prison.²⁴³ Those labeled “Black militants”

235. New York Prisons Lift Ban on Book About Attica Uprising, N.Y. Post (Aug. 3, 2022), <https://nypost.com/2022/08/03/new-york-prisons-lift-ban-on-book-about-attica-uprising/> [<https://perma.cc/XU4V-GJ5H>].

236. Stipulation and Order of Settlement and Dismissal at 2, 4, Thompson v. Annucci, No. 1:22-CV-02632(ER) (SN) (S.D.N.Y. June 14, 2023), ECF No. 48.

237. Complaint at 1, Thompson v. Baldwin, No. 3:18-cv-03230-SEM-KLM (C.D. Ill. Oct. 11, 2022) [hereinafter Complaint, C.D. Ill.].

238. *Thompson v. Baldwin*, No. 3:18-cv-03230-SEM-KLM, 2022 WL 6734896, at *1.

239. *Id.* at *6–7.

240. *Id.* at *9. Thompson made this intention clear in her New York suit. Complaint, S.D.N.Y., *supra* note 10, at 2.

241. Notice of Case Opening, Thompson v. Baldwin, No. 22-3016 (7th Cir. filed Nov. 11, 2022).

242. Settlement Agreement and General Release, *Thompson v. Baldwin*, No. 22-3016 (7th Cir. filed Sept. 20, 2023) (on file with the *Columbia Law Review*).

243. See The Attica Manifesto, *supra* note 13, at 32 (“We demand an end to political persecution, racial persecution, and the denial of prisoners’ rights to subscribe to political papers, books or any other educational and current media chronicles”); see also

were more closely monitored, and censorship was fundamental to that monitoring.²⁴⁴ Today, prisons liberally apply bans to books by Black authors recounting and critiquing the treatment of Black people in America, especially those highlighting the racism of the carceral state.²⁴⁵ “Racial” books are monitored for fear that they will cause disruption and foster an unsafe environment in prisons.²⁴⁶ But given that books authored by KKK members and even Hitler are sometimes permitted, these broad content-based bans obscure a different goal: preventing incarcerated people from reading Black history and carceral history.²⁴⁷

Censorship cuts off rare sources of hope for incarcerated people. Political writings are an easy target,²⁴⁸ as evidenced by the repression that led to the Attica uprising. So are books about life after prison; Florida prison officials deemed Keri Blakinger’s book about getting out of prison and making changes in her life “dangerously inflammatory.”²⁴⁹ Even abstract representations of optimism might not be safe. A mural by artist Faith Ringgold is being moved from Rikers to the Brooklyn Museum.²⁵⁰ The mural was completed in 1972; meant to provide inspiration to women detained at the facility, it depicts women in various careers “living happily

Thompson, *supra* note 1, at 13 (noting that censorship policies at Attica disproportionately targeted reading materials requested by Black and Puerto Rican incarcerated people);

244. See *supra* notes 154–155 and accompanying text.

245. See PEN America, *supra* note 41, at 5–6 (“Perhaps most controversially, prison[] systems frequently place bans on literature that discusses civil rights, historical abuses within America’s prisons, or criticisms of the prison system itself, often on the grounds that such titles advocate disruption of the prison’s social order.”); Tracy Onyenacho, Prisons Are Banning Black History Books, and the Law Has Made It Possible, *Prism* (Feb. 28, 2020), <https://prismreports.org/2020/02/28/prisons-are-banning-black-history-books-and-the-law-has-made-it-possible/> [<https://perma.cc/X997-LEWC>] (listing authors like W.E.B. Du Bois, Frederick Douglass, and Toni Morrison as common targets of prison book bans).

246. See Onyenacho, *supra* note 245 (noting use of the term “racial stuff” to justify the blanket ban on hundreds of books in an Illinois prison); *supra* notes 88–89.

247. See Ed Lyon, Prisons Banning Black Culture and History Books, *Prison Legal News* (Sept. 1, 2020), <https://www.prisonlegalnews.org/news/2020/sep/1/prisons-banning-black-culture-and-history-books/> [<https://perma.cc/QB85-EELW>] (noting that books by Adolph Hitler and head Klansman David Duke are available in some prisons); Onyenacho, *supra* note 245 (noting that prisons “tend to target books that focus on the prison-industrial complex, civil rights, and mass incarceration’s impact on Black people”).

248. See, e.g., Seth Galinsky, Keep Up Pressure Against Florida Prison Censorship!, *The Militant* (Dec. 24, 2018), <https://themilitant.com/2018/12/19/keep-up-pressure-against-florida-prison-censorship/> [<https://perma.cc/U2WT-AYVJ>] (“After impounding seven issues in one 10-week stretch earlier this year, Florida prison officials have eased off on their censorship against the *Militant*. This isn’t because of any change in the socialist newsweekly’s political coverage of working-class politics and protests worldwide.”).

249. Keri Blakinger, Why Would Prisons Ban My Book? Absurdities Rule the System, *Marshall Project* (Dec. 21, 2022), <https://www.themarshallproject.org/2022/12/21/prison-banned-books-new-york-florida-censorship> [<https://perma.cc/48UF-7UNR>].

250. Taylor Dafoe, A Beloved Faith Ringgold Mural Will Move From Its Longtime Home at Rikers Island to the Brooklyn Museum After a Unanimous Vote, *Artnet* (Feb. 14, 2022), <https://news.artnet.com/art-world/faith-ringgold-mural-rikers-island-brooklyn-museum-2072844> [<https://perma.cc/48RJ-EVCN>].

on their own terms.”²⁵¹ The mural had to be restored at one point due to prison officials painting over it after deeming the art inappropriate for the men incarcerated at Rikers.²⁵² After years of neglect, the painting is being moved in anticipation of the facility’s planned closure in 2027, though the people at Rikers remain.²⁵³ In these ways, censorship deprives people in prison of narratives that could inspire them to think beyond the conditions of their confinement. Censorship, when used like this, conflicts with the “principle of return,” the idea that imprisonment is finite and incarcerated people are entitled to return to free society.²⁵⁴ Formal educational opportunities are integral to a successful return, but so are reading materials and media that show possibilities to incarcerated people other than reoffending upon release.²⁵⁵ Censorship can effect perpetual punishment and recidivism when used to obscure these possibilities.

Prison book bans also continue the historical war on Black literacy in America.²⁵⁶ The application of book bans to books about race and prisons is disturbing given the disproportionate imprisonment of Black people in America.²⁵⁷ Alexander’s *The New Jim Crow* has been a common target of prison book bans.²⁵⁸ There is perhaps nowhere that her book is more

251. See Diana Budds, What’s Going to Happen to All the Art on Rikers?, *Curbed* (Jan. 28, 2022), <https://www.curbed.com/2022/01/faith-ringgold-rikers-jail-murals-wpa-groundswell-public-art.html> (on file with the *Columbia Law Review*); see also For the Women’s House, 1971, Faith Ringgold, <https://www.faithringgold.com/portfolio/for-the-womens-house-1971/> [<https://perma.cc/8XWA-BE7W>] (last visited May 11, 2023).

252. Dafoe, *supra* note 250.

253. See Budds, *supra* note 251 (noting that Ringgold supports the removal and preservation of her mural, “especially given the way it was treated in the past [at Rikers],” but that moving it to a museum “will further diminish its message since it will no longer be viewed in the context of a jail”); Dafoe, *supra* note 250 (“It is a shame that the Public Design Commission did not interrogate the serious concerns around lending public artwork to a private museum, especially an artwork specifically intended to serve people in jail.” (internal quotation marks omitted) (quoting public art preservationist Todd Fine)); Zachary Small, Faith Ringgold Mural at Rikers Island to Move to Brooklyn Museum, *N.Y. Times* (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/arts/design/faith-ringgold-mural-rikers-brooklyn-museum.html> (on file with the *Columbia Law Review*) (“And I just keep wondering whether they are doing a disservice to the people who are still in Rikers.” (internal quotation marks omitted) (quoting art historian Michele H. Bogart)).

254. See Eisenberg, *supra* note 48, at 48 (“After completing his or her punishment, a person is entitled to return as a free citizen.”).

255. See *supra* notes 41–43.

256. See Mzezewa, *supra* note 43 (“[T]he strategy of keeping information and limiting access to knowledge from [B]lack Americans . . . has a sordid history.”).

257. See Thurgood Marshall C.R. Ctr., *supra* note 45, at 4 (“In a prison system that disproportionately incarcerates African Americans relative to their population in the country, it is especially vital that those behind bars have access to books that affirm their racial identity and provide tools for coping with and challenging racist systems of oppression.”).

258. See Jonah E. Bromwich, Why Are American Prisons So Afraid of This Book?, *N.Y. Times* (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/new-jim-crow-book-ban-prison.html> (on file with the *Columbia Law Review*) (noting that prison policies prevented

relevant than in the institutions it critiques, as it could offer Black incarcerated people the tools needed to understand and challenge their imprisonment. Indeed, Alexander has mused that prison officials are worried that “the truth might actually set the captives free.”²⁵⁹ After all, in the American system, where stakeholders can profit from filling prison beds, perverse incentives exist to keep people inside.²⁶⁰ Pre–Civil War literacy bans that upheld slavery parallel modern-day book bans that uphold mass incarceration.²⁶¹ Further parallels can—and should—be drawn to a similar struggle *outside*.

2. *Outside*. — The fight for inclusive education in schools provides a possible model for recognizing and elevating the issue of censorship in prisons. The NAACP Legal Defense Fund has dubbed the current trend of school censorship “anti-CRT mania.”²⁶² The heroes are young people who are willing to speak out in defense of their right to inclusive education.²⁶³ The villains are anti-truth laws and their proponents, who use anti-CRT rhetoric to vilify and ban Black history from schools.²⁶⁴ The battleground is the classroom, “traditionally . . . the site of some of this nation’s most egregious acts of state sponsored racism.”²⁶⁵ This framing is accessible and powerful. And the characters and motivations are not so different from their carceral counterparts.

In both contexts, those suppressing certain parts of history seek to stifle the voices of the people and communities that history portrays, effectively eliminating their voices from our democracy.²⁶⁶ Anti-CRT

incarcerated people in Florida, Michigan, New Jersey, and North Carolina from accessing *The New Jim Crow*).

259. Christopher Zoukis, *Censorship in Prisons and Jails: A War on the Written Word*, Prison Legal News (Dec. 4, 2018), <https://www.prisonlegalnews.org/news/2018/dec/4/censorship-prisons-and-jails-war-written-word/> [<https://perma.cc/975L-4VFP>] (internal quotation marks omitted) (quoting Michelle Alexander).

260. See *id.* (“After all, the multi-billion dollar prison industrial complex is a very profitable industry.”).

261. See *id.*; see also Mzezewa, *supra* note 43 (“Slaves weren’t allowed to read because reading would directly lead to rebellion” (internal quotation marks omitted) (quoting Heather Ann Thompson)).

262. See Ishena Robinson, *Anti-CRT Mania and Book Bans Are the Latest Tactics to Halt Racial Justice*, NAACP LDF, <https://www.naacpldf.org/critical-race-theory-banned-books/> [<https://perma.cc/LH6R-L2DU>] [hereinafter Robinson, *Anti-CRT*] (last visited Jan. 15, 2023).

263. See *id.* (describing student-led demonstrations opposing bans on ostensibly “divisive” books).

264. See *id.* (“[T]he fearmongering around what politically-motivated forces are claiming is CRT has starkly illustrated the ever-shifting weapons being levelled at our multiracial democracy.”).

265. *Id.*

266. See Ishena Robinson, *Why Truthful, Inclusive Education Benefits All Students—And How to Make it Happen*, NAACP LDF, <https://www.naacpldf.org/protect-truth-and-inclusivity-in-public-schools/> [<https://perma.cc/N3AS-EE6N>] [hereinafter Robinson, *Why Truthful*] (last visited Jan. 15, 2023).

activists target Black history in particular as being too political or inflammatory.²⁶⁷ They characterize discussions about race as “divisive” and therefore disruptive to the goals of the classroom.²⁶⁸ In the prison context, officials label books about race as divisive while labeling books about prisons as disruptive.²⁶⁹ The fear is the same: Accurate historical information about this country and its protected tradition of racism translates to powerful critiques of the status quo.²⁷⁰ As one teacher notes, “[W]e have to understand how [systems of oppression] formed and whose interests they serve today” in order to challenge them.²⁷¹

These issues should be addressed in tandem.²⁷² Comparing anti-CRT mania with prison book bans makes it clear that prison censorship does not occur in the vacuum of “legitimate penological interests.”²⁷³ Both censorship regimes reflect the fragility of white supremacy and its alliance with the carceral state, since “[l]egitimate power does not fear discussion and study.”²⁷⁴ Eliminating truthful accounts of American history in schools can be seen as an attempt at “mind control,” in the words of the *Beard* dissenters.²⁷⁵ And if the attack on racial history in schools is part of “a multi-pronged attack on the lived experiences, voices, and political participation of the many diverse communities that make up this country,”²⁷⁶ then the attack on racial and carceral history in prisons is one

267. See Robinson, *Anti-CRT*, supra note 262 (“The disturbing proliferation of book bans in the past few months makes clear that the ultimate goal of these ‘anti-CRT’ efforts is to censor, silence, and suppress Americans’ ability to be fully informed about their own country and the lived experiences of their fellow citizens.”).

268. See supra note 263.

269. See supra notes 88–89.

270. See Robinson, *Anti-CRT*, supra note 262 (“Yet the realization of a truly functioning multiracial democracy, one in which even the most historically marginalized voices have power, is exactly what the ongoing war on truth aims to disrupt.”).

271. Robinson, *Why Truthful*, supra note 266 (internal quotation marks omitted) (quoting Kate Schuster, Director of the Hard History Project).

272. Compare Prisoners’ Right to Read: An Interpretation of the Library Bill of Rights, Am. Libr. Ass’n (Jan. 29, 2019), <https://www.ala.org/advocacy/intfreedom/librarybill/interpretations/prisonersrightoread> [<https://perma.cc/NPH8-FFWM>] [hereinafter *Right to Read*] (directing the public’s attention to the knowledge access rights of incarcerated people and potential infringements on those rights and noting the “diverse cultural values of the confined communities” among incarcerated people), with Press Release, Am. Libr. Ass’n, *ALA Statement on Censorship of Information Addressing Racial Injustice, Black American History, and Diversity Education* (Aug. 18, 2021), <https://www.ala.org/news/press-releases/2021/08/ala-executive-board-releases-statement-reinforces-commitment-safeguarding> [<https://perma.cc/V8WS-XZLJ>] (opposing “efforts to censor any consideration or discussion of racism, slavery, Black American history, and related issues and concerns in our *schools, colleges, and universities*” (emphasis added)).

273. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

274. See Skopic, supra note 42.

275. See *Beard v. Banks*, 548 U.S. 521, 552 (2006) (Stevens, J., dissenting) (asserting that the prison’s censorship policies “[came] perilously close to a state-sponsored effort at mind control”).

276. Robinson, *Why Truthful*, supra note 266.

of the prongs. Finally, comparing these struggles makes the act of reading in prison more familiar. Incarcerated people, like schoolchildren, “have a right to know the truth, to know who they are, to know who they live with, and what their community is like.”²⁷⁷

Juxtaposing these issues also allows us to better understand how carceral logic can reach those outside, too. Similarities between the two systems can be attributed to the strategy of running schools like prisons, a phenomenon that contributes to the school-to-prison pipeline.²⁷⁸ When schools incorporate the technologies and methods of prisons, sometimes through surveillance and monitoring by actual police officers, they simulate the experience of incarceration.²⁷⁹ Sociologist Carla Shedd argues that we can view today’s public high schools as “the extension of our larger ‘disciplinary society.’”²⁸⁰ Schools took inspiration from drug law enforcement to implement zero-tolerance disciplinary policies, and students are now increasingly likely to be disciplined by the criminal system rather than the school system.²⁸¹ The disproportionate representation of Black people in prisons is replicated and *produced* by the disproportionate representation of Black students in public school arrests.²⁸² In this context, banning Black history in schools is one of many mechanisms of socialization that primes students, particularly Black boys, to be ready to interact with the more formal criminal punishment system.²⁸³ The omnipresent surveillance and the deprivation of truthful narratives about Black life deprives students of opportunities to think beyond punishment, a punitive measure quite similar to prison censorship regimes.

277. *Id.* (internal quotation marks omitted) (quoting Kate Schuster).

278. See School-to-Prison Pipeline, ACLU, <https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline> [<https://perma.cc/ENAS-SS9D>] (last visited May 11, 2023) (“Zero-tolerance’ policies criminalize minor infractions of school rules, while cops in schools lead to students being criminalized for behavior that should be handled inside the school. Students of color are especially vulnerable to push-out trends and the discriminatory application of discipline.”).

279. See Carla Shedd, *Unequal City: Race, Schools, and Perceptions of Injustice* 80–81 (2015) (“Metal detectors, surveillance cameras, and other mechanisms designed to monitor and control inhabitants are now standard equipment in American urban schools. Youth who must navigate these spaces are inevitably at high risk of police contact, which may lead to frustration, disengagement, and delinquency.”).

280. *Id.* at 81 (quoting John Devine, *Maximum Security: The Culture of Violence in Inner-City Schools* 97 (1996)).

281. *Id.* at 84–85.

282. See *id.* at 85 (“Over 8,000 [Chicago Public Schools] students, ages five to eighteen, were arrested in 2003. African American students, who make up just under half of the students enrolled in Chicago public schools, accounted for more than three-quarters of those arrests.” (footnote omitted)).

283. See *id.* at 114 (“The current structure and culture of urban public education is socializing young people to interact with agents of the law inside their schools, thereby conditioning them to be ready to interact with police outside the schoolhouse doors, not as students but as suspects.”).

Both censorship practices can be viewed as a form of “memory law,” or a government policy designed to guide public interpretation of the past and influence social behavior. Memory laws “work by asserting a mandatory view of historical events, by forbidding the discussion of historical facts or interpretations or by providing vague guidelines that lead to self-censorship.”²⁸⁴ The goal is to “cultivate a national feeling” that cannot exist when the negative parts of a society’s history are taught and known.²⁸⁵ Historian Timothy Snyder uses Russian intervention in Ukraine during the Soviet era as an example.²⁸⁶ Accurate historical accounts of World War II and critiques of Stalin were labeled as “revisionism,” and Russia established a presidential commission to legally attack any such “revisionist” history.²⁸⁷ The goal was to guide public memory, hence the label “memory laws,” and ensure that pro-Russia accounts dominated over more truthful and critical ones.²⁸⁸

For Snyder, CRT scholars are America’s “revisionists,” targeted by those in power to maintain the racialized status quo.²⁸⁹ Anti-CRT legislation claims to fight against feelings of discomfort in classrooms and, like memory law, promotes a positive “national feeling.”²⁹⁰ The suppression of the legacy of the Attica uprising is another example of how memory laws function in America. It started with the lies spread by the government and cosponsored by media outlets in the wake of the retaking.²⁹¹ The next iteration of these memory laws was the specific suppression of the archival documentation of the uprising, lasting decades until Thompson unearthed this history while writing *Blood in the Water*. Thompson argues that the cover-up is still active, since multiple bodies of evidence that she used for her book seem to have since vanished.²⁹² Efforts

284. Timothy Snyder, *The War on History Is a War on Democracy*, N.Y. Times Mag. (June 29, 2021), <https://www.nytimes.com/2021/06/29/magazine/memory-laws.html> (on file with the *Columbia Law Review*).

285. See *id.*

286. *Id.*

287. See *id.* (“To note that the Soviet Union had actually begun the war as a Nazi ally, by this logic, was to commit a crime; a Russian citizen who mentioned in a social media post that Nazi Germany and the Soviet Union both invaded Poland was prosecuted.”).

288. See *id.*

289. See *id.* (“By the same token, anyone looking at the United States from the outside immediately sees that our new memory laws protect the legacy of racism. We are only fooling ourselves.”); see also Tayyab Mahmud, Foreword: LatCrit@25: Mapping Critical Geographies and Alternative Possibilities, 20 *Seattle J. for Soc. Just.* 915, 921 (2022) (noting that CRT consists of “counter-stories” that “embody cultural difference that emerges as resistance to hegemonic modes of representation”).

290. Snyder, *supra* note 284; see also Danielle M. Conway, *The Assault on Critical Race Theory as Pretext for Populist Backlash on Higher Education*, 66 *St. Louis U. L.J.* 707, 716 (2022) (“State-sanctioned, punitive memory laws, such as those enacted or proposed to ban CRT, amount to self-serving attempts to apply self-exculpatory laws to protect states from criticism about systemic racial inequality.”).

291. See *supra* notes 180–183 and accompanying text.

292. See Thompson, *supra* note 1, at xiii–xvi.

to ban *Blood in the Water* in prisons are a last-ditch effort to repress the memory of a group the state can comfortably control: incarcerated people.

III. RECOGNIZING RIGHTS

Reports and surveys conducted by advocacy groups help to aggregate the otherwise poorly organized data on prison book bans.²⁹³ They might include a list of proposals to combat censorship, such as statewide policies, publicly available book lists, oversight committees, and more literacy training for prison officials.²⁹⁴ Such reforms assume the continued existence of book bans and seek to mitigate the harms they cause “[u]ntil the right to read is fully recognized” and book bans in prisons are abolished.²⁹⁵

This Note also advocates for full recognition of the right to read for incarcerated people and the abolition of book bans in prisons. To reduce harm in the meantime, it suggests using the *Turner* factors to more critically examine the motivations behind book bans; involving more impartial decisionmakers in censorship decisions; and assigning more weight to the interests of incarcerated people. Section III.A discusses how the *Turner* factors could be better used to protect the rights of incarcerated people. Section III.B summarizes the lessons to be taken from the conflict surrounding inclusive education in America.

A. *A Return to Heightened Scrutiny*

1. *Resurrecting the Lost Turner Factors.* — Returning to the core of the *Turner* test and reframing the interests at stake could provide more protections for the rights of incarcerated people. Although the *Turner* Court claimed to step back from the heightened scrutiny of *Martinez*, Michael Keegan argues that the *Turner* test is itself a form of heightened scrutiny.²⁹⁶ True rational basis review should only require a “legitimate” government (in this case penological) interest to be put forth.²⁹⁷ *Turner*’s first factor, testing the “valid rational connection” between the challenged regulation and the penological interest justifying it, essentially “mirrors” rational basis review.²⁹⁸ But the *Turner* test has other factors. When the Court emphasizes the importance of the first factor and downplays the significance of the other factors, it applies something analogous to rational basis review.²⁹⁹

293. See, e.g., Thurgood Marshall C.R. Ctr., *supra* note 45, at 26–68 (aggregating information about prison censorship policies in each state as well as in federal prisons).

294. See, e.g., *id.* at 22–23 (listing the recommendations to combat prison censorship).

295. *Id.* at 22.

296. Keegan, *supra* note 140, at 332.

297. *Id.*

298. *Id.* at 334 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

299. See *supra* notes 121–124 and accompanying text.

Courts should look more closely at whether book bans are reasonably related to maintaining safe and orderly prison conditions. The suppression of carceral history in prisons is meant to suppress feelings of dissatisfaction with prison conditions.³⁰⁰ Proponents of prison censorship would draw a direct line between dissatisfaction and violent unrest.³⁰¹ This viewpoint easily satisfies the Court's weakened *Turner* test: If racial and carceral history lead to dissatisfaction and dissatisfaction leads to violence, then censoring that content supports the "legitimate penological objective" of maintaining safe correctional facilities. In other words, safety and censorship could be seen as reasonably related. Sometimes, as with Thompson's New York case, evidence exists to sever this connection. Thompson essentially demanded more scrutiny when she pointed to the lack of evidence linking her book to disorder in *any* prison.³⁰² Courts must take the absence of corroborating evidence seriously. Otherwise, the safety and security narrative offered by prison officials will persist.

But the Court also raised the bar for prison regulations with *Turner's* fourth factor.³⁰³ Keegan argues that *Turner's* fourth factor, which focuses attention on alternatives to the proposed regulation, heightens scrutiny above rational basis review.³⁰⁴ The *Turner* Court included the fourth factor to prohibit "exaggerated response[s]" to the penological interests at stake, whereas practically *any* response would be permissible under regular rational basis review.³⁰⁵ This standard falls somewhere between strict scrutiny, which requires narrow tailoring, and rational basis, which requires no tailoring as long as the government interest is not "arbitrary or irrational."³⁰⁶ For Keegan, this means that the *Turner* test should not be

300. See Mzezewa, *supra* note 43 ("The more checked into internal prison world and isolated, the harder it is to challenge the conditions . . ." (internal quotation marks omitted) (quoting Elizabeth Hinton, Professor, Harvard Univ.)); see also PEN America, *supra* note 41, at 5–6 (describing various justifications for banning books about racism and mass incarceration as security threats).

301. See *supra* note 300; see also *Thompson v. Baldwin*, No. 18-cv-03230-SEM-KLM, 2022 WL 6734896, at *3 (C.D. Ill. Oct. 11, 2022) (quoting a prison official arguing that there is always the potential for a prison riot and that *Blood in the Water* could easily be used "as a potential guideline and process" to that end).

302. See Complaint, S.D.N.Y., *supra* note 10, at 12.

303. See Keegan, *supra* note 140, at 334 ("The language fleshing out the fourth *Turner* prong raises the standard beyond that of the traditional rational-basis test.").

304. *Id.*

305. See *id.* (internal quotation marks omitted) (quoting *Turner v. Safley*, 482 U.S. 78, 87 (1987)) ("Under the traditional rational-basis examination, where the government needs to show only a 'reasonably conceivable set of facts,' an 'exaggerated response' would be permissible. All that must be shown is that the means of achieving the government objective was not arbitrary or irrational.").

306. *Id.* (internal quotation marks omitted) (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 (1980)).

classified as “toothless review,” even if the Court’s subsequent application of the test has rendered it so.³⁰⁷

Courts should consider how prison administrations themselves contribute to disorder to weaken the causal relationship between books and unrest. For example, writings from and news of other prison protests certainly inspired the men at Attica to organize themselves, but they did so peacefully.³⁰⁸ The uprising was caused more immediately by the violent atmosphere created by corrections officers and the refusal of prison officials to acknowledge the demands of the organizers.³⁰⁹ The Attica Liberation Faction Manifesto specifically stated that no strike would accompany the demands and that they were “trying to do this in a democratic fashion.”³¹⁰ A “ready alternative” to the banning of so-called inflammatory materials would have been meaningful negotiation and the removal of violent corrections staff. Discussion of these additional catalysts and alternative responses weakens the connection between access to certain reading materials and disorder. A weaker connection weighs against reasonable relatedness and supports the idea that complete bans on books critiquing prisons might be the kind of exaggerated response that *Turner* prohibits.

Though far from ideal, the *Turner* test has the potential to protect the interests of incarcerated people. And the Supreme Court seems unwilling to revisit its chosen standard for prison regulations.³¹¹ It has denied petitions for writs of certiorari for such claims since *Beard* in 2006.³¹² Thus, the *Beard* standard, with its emphasis on the first factor, stands.³¹³ Thompson’s cases show that there are rightsholders other than incarcerated people dedicated to fighting this battle in the courts. The settlements reached secured the right to read as it pertains to *Blood in the Water* in state prisons in New York and Illinois; victories in spite of the

307. *Id.* at 334–35. To observe the Court’s defanging of the *Turner* test, see, e.g., *Beard v. Banks*, 548 U.S. 521, 532 (2006) (plurality opinion) (“In fact, the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor’s basic logical rationale.”).

308. See *supra* notes 165–169 and accompanying text.

309. See *supra* note 170 and accompanying text.

310. The Attica Manifesto, *supra* note 13, at 29–30.

311. See Schnell, *supra* note 98, at 145 (“The Supreme Court does not appear willing to revisit the standard of review question, having consistently reaffirmed *Turner* and denied certiorari to cases involving *Turner* since *Beard* in 2006.”). But see Clay Calvert & Cara Carnley Murrhee, Big Censorship in the Big House—A Quarter-Century After *Turner v. Safley*: Muting Movies, Music & Books Behind Bars, 7 *Nw. J.L. & Soc. Pol’y* 257, 293–94 (2012) (arguing that while heightened scrutiny could help incarcerated plaintiffs litigate these claims, the test is unlikely to be applied in the prison context given the fact that incarcerated people are not a suspect class).

312. Schnell, *supra* note 98, at 145–46.

313. See *Beard v. Banks*, 548 U.S. 521, 532–33 (2006) (plurality opinion) (noting that *Turner*’s other three factors “add little” to the reasonable relatedness analysis).

unfavorable forum for this kind of claim.³¹⁴ Advocacy efforts by well-resourced parties like Thompson are necessary if courts are ever to incorporate the suggestions made by this Note and other commentators. Yet Thompson's struggles with mootness and qualified immunity show how difficult this road will be.³¹⁵ With success in the courts remaining improbable, opponents of censorship should consider additional battlegrounds to continue this fight.

2. *Attacking Book Bans Before They Reach the Courts.* — If the courts are an inhospitable environment for First Amendment claims brought by incarcerated plaintiffs, incarcerated people and advocates should seek to defeat book bans before they must be litigated. Critics agree that censorship review procedures in prisons are deeply flawed.³¹⁶ This Note emphasizes the need for standardized and detailed review procedures across institutions. If the prison system *must* infringe upon an incarcerated person's First Amendment rights, the degree of that infringement should not change based simply on where that person happens to be imprisoned.³¹⁷ Criteria binding reviewers should balance the interests of incarcerated people against those of the institution; reviewers should be required to consider the value offered by a book rather than just the threat it poses.³¹⁸ The *Turner* factors are a decent starting point for formulating these criteria. As Keegan suggests, the fourth *Turner* factor can and should operate as a check on the first factor.³¹⁹ As discussed above, the first factor should be applied to scrutinize prison censorship decisions more heavily.³²⁰ And with a shift in perspective, the second and third factors can consider penological goals *and* the interest incarcerated people have in reading.

The perspective of incarcerated people is noticeably absent from the current balancing test. The test considers censorship from the perspective of prison administrators. Each act of censorship is analyzed based on how it serves a particular penological goal. This focus invites responses that

314. See Stipulation and Order of Settlement and Dismissal, *supra* note 236; Settlement Agreement and General Release, *supra* note 242.

315. See *Thompson v. Baldwin*, No. 3:18-cv-03230-SEM-KLM, 2022 WL 6734896, at *1, *9 (C.D. Ill. Oct. 11, 2022) (“Because the Defendants are entitled to qualified immunity on the Plaintiff’s constitutional claims and Plaintiff cannot establish a likelihood of success on the merits as to her equitable claims, the Court Denies Plaintiff’s Motion for Partial Summary Judgment and Grants Defendants’ Motion for Summary Judgment.”).

316. See, e.g., *PEN America*, *supra* note 41, at 6–7 (describing the typical rubber-stamp review procedures for prison book bans); *Thurgood Marshall C.R. Ctr.*, *supra* note 45, at 22–23 (recommending improvements to review procedures).

317. See *supra* notes 76–79 and accompanying text.

318. See *PEN America*, *supra* note 41, at 18 (“As a country, we deserve better than prison policies that view access to books only through the lens of potential risk, that formalize people’s biases and prejudices, and that treat incarcerated people as less deserving of literature than others.”).

319. See *supra* notes 303–307 and accompanying text.

320. See *supra* notes 300–310 and accompanying text.

reflect what Alan Freeman describes as the “perpetrator perspective,” which views racial discrimination “not as conditions, but as actions . . . inflicted on the victim by the perpetrator.”³²¹ Approaching a case of wrongful censorship from the perpetrator perspective would focus on “neutraliz[ing] the inappropriate conduct of the perpetrator.”³²² The proceedings surrounding Thompson’s cases are a good example of the perpetrator perspective in action: The settlements give incarcerated people access to *Blood in the Water*, stopping this discrete harmful act by prison officials.³²³ In contrast, the victim perspective describes racial discrimination in terms of the conditions it produces for its victims.³²⁴ A proper solution to a dispute over a book ban would look to the effects of censorship on the conditions of incarcerated people at Attica and would situate a particular book ban within larger patterns of censorship at the prison. Such a solution would be consistent with the victim’s perspective, which is everything that the perpetrator’s perspective is not: It is collectivist; it is part of the social fabric and has historical continuity; it sees racial discrimination via the restriction of knowledge access as a social phenomenon.³²⁵ Without the victim perspective, solutions to censorship will be piecemeal and fail to address the oppressive conditions that book bans create.

Review boards and committees need more impartial decisionmakers to properly apply the victim perspective and weigh the criteria outlined above. The issue is not just *how* books bans are reviewed—it is *who* does the reviewing. On one side of the prison censorship debate are the victims: people in prison who have a First Amendment right to access their history and the history of the institutions that imprison them. On the other side are the perpetrators: prison and government officials interested in maintaining order, for both incarcerated people and corrections staff. Also involved are those who exist outside of the system, such as family and community members, politicians, nonprofits, and grassroots organizations. Any of these parties may be heavily invested in censorship decisions and biased toward one side or the other, making them

321. Freeman, *supra* note 37, at 1053.

322. *Id.*

323. See Stipulation and Order of Settlement and Dismissal, *supra* note 236, at 1–2 (stating that Thompson “brought this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief requiring that Defendants allow individuals in DOCCS’s custody to keep and read *Blood in the Water*”).

324. See Freeman, *supra* note 37, at 1052–53; see also *supra* text accompanying note 168 (describing the “isolation status” that the men incarcerated at Attica experienced as a direct consequence of the censorship policies).

325. *Cf.* Freeman, *supra* note 37, at 1054 (“The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.”).

potentially polarizing additions to review boards. This Note suggests looking to another set of stakeholders for guidance: prison librarians.

Prison librarians are in a unique position to balance the interests at stake when considering a potential book ban. Due to the nature of their workplace, prison librarians have a duty to prioritize security.³²⁶ If they subscribe to the tenets of the American Library Association (ALA), they are also bound by a commitment to intellectual freedom.³²⁷ This positions them well to balance the harmful conditions created by censorship regimes against the interests of the correctional institution. The ALA has already done this specifically for incarcerated people in its interpretation of the “Library Bill of Rights.”³²⁸ The ALA advocates for *selection* in prisons rather than *copyright*. Censorship is restrictive, while selection is inclusive.³²⁹ It advocates for prison libraries to reflect the needs of the people incarcerated at that facility.³³⁰ Thompson argues that *Blood in the Water* is “essential reading” for incarcerated people.³³¹ This Note backs Thompson and other advocates who argue that there is a need for people in prison, especially Black people, to access their own history and the history of the institution imprisoning them.³³² Prison librarians can help meet this need.

The ALA’s interpretation of the Library Bill of Rights also addresses the lax application of rational basis review to First Amendment challenges in prisons. It states: “Only those items that present an actual compelling and imminent risk to safety and security should be restricted. Although these limits restrict the range of material available, the extent of limitation

326. See Andrew, *A Day in the Life of a Prison Librarian*, Pub. Librs. Online (Oct. 20, 2017), <https://publiclibrariesonline.org/2017/10/a-day-in-the-life-of-a-prison-librarian/> [<https://perma.cc/2C45-GPYB>] (“Security is first and a prison librarian has to put security above all.”).

327. Mission & Priorities, Am. Libr. Ass’n, <https://www.ala.org/aboutala/mission-priorities> [<https://perma.cc/LE3D-3G5G>] (last visited Aug. 22, 2023).

328. See Right to Read, *supra* note 272 (“The American Library Association asserts a compelling public interest in the preservation of intellectual freedom for individuals of any age held in jails, prisons, detention facilities, juvenile facilities, immigration facilities, prison work camps, and segregated units within any facility, whether public or private.”). For the full text of the Library Bill of Rights, see Am. Libr. Ass’n, *Library Bill of Rights* (1939), <https://www.hollislibrary.org/wp-content/uploads/2019/06/The-Library-Bill-of-Rights-1.pdf> [<https://perma.cc/5557-W9HY>] (last updated Jan. 29, 2019).

329. See Right to Read, *supra* note 272 (“Censorship is a process of exclusion by which authority rejects specific viewpoints. Unlike censorship, selection is a process of inclusion that involves the search for materials, regardless of format, that represent diversity and a broad spectrum of ideas.”); see also Hart, *supra* note 90 (“There is nothing more contentious for librarians than censorship. . . . [T]he American Library Association has enshrined the core principles of [the] right [to read] in the Library Bill of Rights and in its Professional Code of Ethics.”).

330. See Right to Read, *supra* note 272 (citing informational needs, recreational needs, and cultural needs).

331. Complaint, S.D.N.Y., *supra* note 10, at 5.

332. See *supra* note 44; see also *supra* text accompanying note 277.

should be minimized”³³³ While the ALA understands the potential need to restrict some reading materials, it also recognizes the need for real limits to these restrictions.³³⁴ In concert with critics of memory laws and censorship in other contexts, the ALA considers the “suppression of ideas” to be “fatal to a democratic society.”³³⁵ In sum, the Library Bill of Rights urges prison librarians to critically examine the reasons a book might be banned. Critical examination might reveal that the offered reasons are pretextual. This heightened scrutiny will be especially useful when applied to the first and fourth *Turner* factors: whether a ban is in the interest of security, and, if so, whether it is an exaggerated response to serve malign ends.

If reviewers use the *Turner* test, they should incorporate the victim perspective into their analysis of the second and third factors. Prison librarians are good candidates for this job because they understand the value of books generally and how important reading is to incarcerated people specifically.³³⁶ The second *Turner* factor looks to whether there are “alternative means of exercising the right” at issue.³³⁷ The Supreme Court requires the right at issue to “be viewed sensibly and expansively,” making alternative means easy to find.³³⁸ In the book ban context, the Court has deemed the availability of any other book a sufficient alternative means of exercising First Amendment rights.³³⁹ The ALA’s interpretation of the Library Bill of Rights identifies reading as an “essential right[.]”³⁴⁰ Prison librarians can help define this right more precisely as the right to access specific books or information rather than books in general. For a book like *Blood in the Water*, a prison librarian could determine whether other permitted reading materials provide a similar-enough learning experience to satisfy the second factor. The third factor looks at the “impact” of allowing the right to be exercised.³⁴¹ Prison librarians can help balance out prison officials’ proffered negative impacts with the benefits of reading for incarcerated people, ensuring that the *Turner* factors do not favor censorship by default.³⁴²

333. Right to Read, *supra* note 272.

334. See *id.*

335. *Id.*; see also text accompanying note 266.

336. See, e.g., Andrew, *supra* note 326 (“The services prison librarians provide may seem insignificant, but have far reaching and lasting effects.”); Hart, *supra* note 90 (“[Incarcerated people] considered it a privilege to visit the library, and none of them wanted to mess up their chance at coming on their housing unit’s library days.”).

337. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

338. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989).

339. See *id.* at 418–19 (holding that even though the specific publications at issue were banned, the fact that other publications were available for incarcerated people to read satisfied the second factor).

340. Right to Read, *supra* note 272.

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

342. Cf. *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion) (considering the negative impact of allowing the incarcerated people to access certain materials with little

The concept of including librarians on censorship review boards is not a new one.³⁴³ In New York, DOCCS Directive 4572 suggests that the Facility Media Review Committee for each facility include representatives from security staff *and* program services staff.³⁴⁴ Program services include mental health, education, recreation, and library services.³⁴⁵ In theory, this is a good starting point. If prisons don't have a fleet of librarians available to handle censorship, other staff focused on the education and wellbeing of incarcerated people can similarly provide a different perspective from security staff. But under current regulations for New York prisons, including prison librarians, this is only a suggestion, not a requirement.³⁴⁶ Even if program services staff are included, they can likely only provide symbolic representation unless they have a voting majority.³⁴⁷ The mere inclusion of prison librarians and other program services staff cannot be the necessary "substantial check on prison censorship."³⁴⁸

This Note proposes a requirement that censorship review boards, like Facility Media Review Committees in New York, consist *equally* of security staff and program services staff (or their equivalents at a given facility). If a prison has library staff, they should be required to serve on review boards. The mandatory inclusion of nonsecurity staff, particularly librarians, in equal measure to security staff will help balance the interests at stake in censorship decisions.

To improve accountability, review boards should be required to publish written majority (and dissenting) opinions applying the *Turner* factors. Even if prison librarians and other program services staff succeed in striking down an unjust book ban, there is no guarantee that their decision will stand. Some states have a multilevel review system, meaning that the initial decision disfavoring censorship could be overturned on appeal.³⁴⁹ New York is one such state.³⁵⁰ It is also, of course, possible that

treatment of the "important constitutional dimension" encompassing the right to read in prison). The Court spoke vaguely about this "important constitutional dimension" in terms of First Amendment rights but did not specify the benefits of reading for incarcerated people. See *id.*

343. See, e.g., PEN America, *supra* note 41, at 19–20 (advocating for review committees to include trained librarians); Jeanie Austin, Melissa Charenko, Michelle Dillon & Jodi Lincoln, Systemic Oppression and the Contested Ground of Information Access for Incarcerated People, 4 *Open Info. Sci.* 169, 170 (2020) ("[C]ombating censorship within prisons . . . should, ostensibly, fall within the professional purview of [library and information science].").

344. Directive No. 4572, *supra* note 212, at 4.

345. *Id.*

346. See *id.* (using the language "[i]t is suggested that" regarding the inclusion of program services staff on review boards).

347. See, e.g., PEN America, *supra* note 41, at 7 (describing the system in Washington State, where the review board consists of two prison officials and only one librarian).

348. *Id.*

349. See, e.g., *supra* text accompanying notes 216–217 (describing New York's two-level review system).

350. See *supra* text accompanying notes 216–217.

the rest of the review board outvotes opponents of censorship. In these circumstances, a book ban may still be litigated. While the Supreme Court insisted in *Beard* that it was not “inconceivable” that an incarcerated person might overcome the *Turner* bar with the right evidence, meeting this burden remains difficult.³⁵¹ Incarcerated plaintiffs could use a written opinion by opponents of censorship as evidence to counter prison officials’ safety and security narratives in court.

One concern with this solution is resources. Not all prisons have libraries, so there is not always a librarian to review censorship decisions.³⁵² Existing prison libraries are underfunded and often first on the chopping block when budgets are cut.³⁵³ Prison librarians already do many jobs at once and might be overburdened by having to review censorship decisions on top of their other work.³⁵⁴ Additional funding dedicated to prison libraries could solve some of these issues. Another solution would be for one centralized board of decisionmakers—half security staff and half program services staff like prison librarians—to review all of the decisions in the state. This would make it irrelevant (for the discrete issue of book bans) whether each prison had its own librarian to review censorship decisions. It would also help make censorship policies consistent within each state.

The inclusion of librarians and other nonsecurity staff as decisionmakers cannot guarantee that books are never banned for the wrong reasons. Notwithstanding the ALA’s rights-affirming stance, many librarians may lack the requisite knowledge and training to put these values into action.³⁵⁵ On a systemic level, public library services in the United States have historically upheld and catered to the pro-white status quo.³⁵⁶ On an individual level, prison librarians are not immune to implicit (or explicit) biases that may prompt them to ban books about race or the history of prisons without valid cause. And even the ideal librarian representative can only ever be that: a representative. This solution relies

351. *Beard v. Banks*, 548 U.S. 521, 527, 535–36 (2006) (plurality opinion) (noting that the plaintiff’s evidence, consisting of one deposition of a prison official and various prison manuals and policies, was insufficient to support his claim).

352. See, e.g., PEN America, *supra* note 41, at 11 (“However, the nation’s prison libraries are under-funded, under-resourced, under-staffed, and under-stocked. On their own, our prison libraries are insufficient to address the incarcerated population’s need for access to literature.”).

353. *Id.*

354. See, e.g., Andrew, *supra* note 326 (“As you can see, this is a very busy schedule, and is typical for most prison librarians. One person performs the jobs of several. This can create a lot of stress and frustration.”).

355. See Austin et al., *supra* note 343, at 178 (noting that librarians “generally lack the skills and background knowledge needed to provide meaningful information access to . . . the groups of people most likely to be surveilled, policed, and incarcerated”).

356. See *id.* at 179, 182 (“[Library and information services] has been rooted in whiteness, heterosexuality, and gender normativity to the disadvantage of its patrons and professional codes.”).

on some level of collaboration between incarcerated people and prison librarians.³⁵⁷ As difficult as this work may be under carceral conditions, it is necessary to ensure that prison librarians successfully advocate for the victims of censorship.³⁵⁸

This is an imperfect solution largely because it exists within the deeply flawed and racist prison system. Full recognition of the right to read for incarcerated people will require a multifaceted and sustained attack on censorship by stakeholders both within and outside of that system. The suggested amendments to review procedures are mitigation tactics for the meantime.

B. *Lessons From the Battle for Inclusive Education*

Anti-CRT efforts in schools offer some guidance for opponents of racially motivated censorship in prisons. First, public pressure is key in the ongoing fight for information access. A few quickly repealed bans prove that this tactic can be effective in the prison context.³⁵⁹ The challenge is getting more eyes on the issue when book bans persist in large part due to the secrecy around prison censorship policies.³⁶⁰ In the education context, advocates point to New Jersey's Amistad Commission, an organization ensuring that New Jersey public schools teach Black history, as an example of what is necessary to achieve inclusive education goals.³⁶¹ Likewise,

357. The years surrounding the Attica uprising provide some examples of collaboration between librarians and incarcerated people. See Jeanie Austin, Reform and Revolution: Juvenile Detention Center Libraries in the 1970s, 1 *Librs.: Culture Hist. & Soc'y* 240, 244 (2017) ("From reformists to revolutionaries, individual librarians practiced their ideological positions in the collections and programs they provided within the contexts of juvenile detention and the ways in which they documented these services."). Of note, *Inside-Outside* was a political publication with contributions from both incarcerated people and librarians. See *id.* at 255–59 ("The newsletter's revolutionary stance positions libraries as a potential site of ongoing . . . resistance [for incarcerated people].").

358. At the time of the uprising, for example, the men incarcerated at Attica were held alone in their cells for fourteen to sixteen hours a day and sometimes had to pass messages by hand to communicate with each another. See *Attica: The Official Report*, *supra* note 151, at 33–34. Also recall the prison officials' negative response to the political organizing at Attica before the uprising. See *supra* text accompanying notes 151–155.

359. See, e.g., Tess Borden, New Jersey Prisons Reverse Course on Banning 'The New Jim Crow' After ACLU of New Jersey Letter, *ACLU: News & Comment* (Jan. 10, 2018), <https://www.aclu.org/news/prisoners-rights/new-jersey-prisons-reverse-course-banning-new-jim-crow> [<https://perma.cc/CU6S-UGA3>] (explaining that a ban of *The New Jim Crow* in New Jersey state prisons was lifted only hours after the ACLU sent a letter condemning the ban); Vivian Wang, Cuomo Halts a Controversial Prison Package Policy, *N.Y. Times* (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/nyregion/prison-package-policy-suspended.html> (on file with the *Columbia Law Review*) (stating that public outcry forced Governor Cuomo to almost immediately repeal New York's pilot program for limited vendors).

360. See *supra* notes 68–75 and accompanying text.

361. See About Amistad, N.J. Gov't, <https://www.nj.gov/education/amistad/about/> [<https://perma.cc/W2PC-8W9M>] (last visited Jan. 15, 2023); Robinson, *Why Truthful*, *supra* note 266 ("Things have to be monitored—just because it's written down on paper, doesn't mean it's actually being translated into reality.").

oversight from outside the prison system will be necessary to ensure compliance with any newly implemented procedures or measures to combat censorship.

Second, incarcerated people must be centered in the fight against racist book bans. Advocates for inclusive education urge supporters to uplift the voices and efforts of schoolchildren, whom restrictive policies affect most.³⁶² This wisdom applies equally to incarcerated people fighting against censorship. Protecting incarcerated people's connection to the outside world ensures that they can be active in this fight and other political movements. Access to books helps this connection survive. As the Attica uprising exemplifies, incarcerated people have been doing this work long before it gained mainstream recognition and are in the best position to fashion solutions that protect their interests.³⁶³

CONCLUSION

The banning of *Blood in the Water* at the Attica Correctional Facility exemplifies the interests at stake in the fight against censorship and the inadequacies of the existing administrative and legal remedies. It also reifies the throughline of anti-Black censorship practices in American history and the present.³⁶⁴ In demanding the right to read freely, incarcerated people simply “seek the rights and privileges of all American people.”³⁶⁵

Censorship policies inside and outside of prisons reflect vulnerability in the powers that be. Anti-CRT mania has risen at a time of historic critical resistance to systemic racism in America.³⁶⁶ Prison censorship attempts to stifle organized resistance among incarcerated people and uses “the façade of rehabilitation” to attack literature that highlights and inspires these movements.³⁶⁷ Conservative backlash in both instances can signal that proponents of knowledge access are on the right track.³⁶⁸ If the status quo were entirely secure, there would be no need to suppress history to

362. See, e.g., Robinson, *Why Truthful*, supra note 266 (“The first and I think most important is supporting young people in their school district. . . . They’re often the first people to say, ‘Hey, these books actually don’t make us feel guilt or anguish.’”).

363. See supra note 18; see also supra text accompanying notes 167–168.

364. See supra notes 256–261.

365. *The Attica Manifesto*, supra note 13, at 30.

366. Robinson, *Anti-CRT*, supra note 262.

367. *The Attica Manifesto*, supra note 13, at 30; see also Skopic, supra note 42 (“Prisons in cities like St. Louis have seen mass uprisings—not ‘riots’ of random violence, as the press would have it, but concerted political actions with specific demands . . .”).

368. See Skopic, supra note 42 (“[I]n the Biden era, we can lack for obvious means of pursuing change. Sending free books to people in prison is one such means, and if the recent backlash against donations is anything to judge by, it’s a potent one.”).

maintain it.³⁶⁹ The exposure of these insidious goals calls for nationwide recognition of the right to read in prisons. Proper recognition of this right will center the voices of incarcerated people, who are best situated to articulate their experience of information access, or lack thereof. Once the right is recognized, infringements can be remedied.

But more important than honoring the spirit of our Constitution, protecting the right to read in prison affirms the humanity of our people—all of them.

369. See *id.* (“Historically, systems of censorship and control are at their strictest when the regime in power knows it has something to hide, and fears exposure—if its position were unassailable, there would be no need.”).

