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ARTICLES

LOCKED UP, SHUT UP: WHY SPEECH IN PRISON MATTERS

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INTRODUCTION

On January 18, 2017, Michael D. Williams, an Alabama prisoner, received notice from Holman Correctional Facility that his mail had been rejected.[1] The prison was blocking his receipt of the *San Francisco Bay View*, a 40-year-old national black newspaper covering political and cultural issues in the Bay Area and beyond.[2] The newspaper publishes articles and op-eds on topics such as the childcare crisis,[3] the need for multi-unit smoke-free housing policies,[4] net neutrality and free speech,[5] and police response to crimes involving black victims.[6] Writings by prisoners are often featured in the publication as well.[7]

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[1] Michael D. Williams, *Alabama's Holman Prison Bans the Bay View for Being 'Racially Motivated,' Subscriber Declares Hunger Strike*, S.F. BAY VIEW (Mar. 26, 2017), http://sfbayview.com/2017/03/Alabamas-Holman-Prison-bans-the-Bay-View-for-being-racially-motivated-subscriber-declares-hunger-strike/; *see also* Christopher Harress, *Holman Prison Bans 'Racially Motivated' Newspaper*, AL.COM (Mar. 27, 2017), https://www.al.com/news/index.ssf/2017/03/holman_prison_bans_racially_mo.html.

[2] S.F. BAY VIEW, http://sfbayview.com (last visited June 22, 2018).

[3] Mary Ignatius, *Parents Bring the Child Care Crisis to Sacramento at the 21st Annual Stand for Children Day*, S.F. BAY VIEW (May 9, 2017), http://sfbayview.com/2017/05/Parents-bring-the-child-care-crisis-to-Sacramento-at-the-21st-annual-Stand-for-Children-Day/.

[4] Marlene Christine Hurd, *Why Oakland Needs a Multi-Unit Smoke Free Housing Policy*, S.F. BAY VIEW (Apr. 29, 2017), http://sfbayview.com/2017/04/Why-Oakland-needs-a-multi-unit-smoke-free-housing-policy/.

[5] Linda Kennedy, *Net Neutrality: Protecting Your Right to Free Speech in the 21st Century*, S.F. BAY VIEW (May 2, 2017), http://sfbayview.com/2017/05/Net-neutrality-Protecting-your-right-to-free-speech-in-the-21st-century/.

[6] Slauson Girl, *Did Police and EMT Response Contribute to Humboldt State Student's Death?*, S.F. BAY VIEW (Apr. 27, 2017), http://sfbayview.com/2017/04/Did-police-and-EMT-response-contribute-to-Humboldt-State-students-death/.

[7] *See, e.g.*, Anthony Robinson, *Why Isn't 'Prison Reform' Seeking an Effective Demand for Change?*, S.F. BAY VIEW (Mar. 26, 2017), http://sfbayview.com/2017/

Why was Mr. Williams barred from receiving the *San Francisco Bay View*? On the rejection notification, prison officials stated that the newspaper was banned because it was "racially motivated."[8] Nothing more. Holman Correctional Facility was not the only prison to prohibit prisoners from receiving the newspaper.[9] Texas and Pennsylvania banned the newspaper in prisons statewide, and the editor of the newspaper received letters from prisoners in Louisiana, Indiana, California, and Illinois claiming that they had been denied the publication as well.[10]

Censorship of this nature is pervasive in American prisons and jails.[11] To our surprise, however, the academic literature has yet to provide a full account of why speech in prison matters from a First Amendment standpoint. Previous scholarship has argued that American courts offer little protection to the expressive freedoms of incarcerated men and women because judges defer

03/Why-isnt-prison-reform-seeking-an-effective-demand-for-change/ (opinion piece written about prison reform by a prisoner in California).

[8] Williams, *supra* note 1.

[9] *See* Kamala Kelkar, *From Media Cutoffs to Lockdown, Tracing the Fallout from the U.S. Prison Strike*, PBS NEWSHOUR (Dec. 18, 2016), https://www.pbs.org/newshour/nation/prison-strike-lockdown-fallout.

[10] *Id.*

[11] *See* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 988–1005 (2016). Though restrictions on incoming speech are only one aspect in which prisoners' speech is limited, *see infra* Section I.B, book bans illustrate the stark arbitrariness of speech regulations in prisons. Prisoners in Texas can obtain copies of *Mein Kampf*, but Michelle Alexander's monograph, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, was prohibited in North Carolina and New Jersey until earlier this year because it was "likely to provoke confrontation between racial groups." Jonah Engel Bromwich, *Why Are American Prisons So Afraid of This Book?*, N.Y. TIMES (Jan. 18, 2018) [hereinafter Bromwich, *Why Are American Prisons So Afraid of This Book?*], https://www.nytimes.com/2018/01/18/us/new-jim-crow-book-ban-prison.html; *see also* Matthew Haag, *Texas Prisons Ban 10,000 Books. No 'Charlie Brown Christmas' for Inmates.*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/us/banned-books-texas-prisons.html. North Carolina and New Jersey have since lifted the ban on the book after receiving complaints from the American Civil Liberties Union. Jonah Engel Bromwich, *North Carolina Prisons Drop Ban on 'New Jim Crow'*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/us/new-jim-crow-north-carolina.html. *The New Jim Crow* is still prohibited in Florida, where the ban was apparently instituted because the prison system's literature review determined that the book was filled with "racial overtures." Bromwich, *Why Are American Prisons So Afraid of This Book?*, *supra*.

obsequiously to the censorship decisions of prison officials.[12] This article addresses an antecedent question: Why does speech in prison matter in the first place, if at all?

Prison speech is important under the free expression rationales that figure most prominently in Supreme Court case law—the marketplace of ideas, democracy legitimation, the checking value of free speech, and self-fulfillment. The marketplace of ideas does not function properly when the government impedes prisoners from participating in public discourse, especially with regard to criminal justice and mass incarceration matters. Under the democracy legitimation theory, unrestrained prison censorship excludes prisoners' voices from the discussion of political and public issues that is central to facilitating democratic decision-making. As for the checking value of free speech, discourse cannot restrain the power of prison officials if those very officials have the authority to keep complaints about their conduct and prison conditions from ever leaving the prison's walls. And prison censorship surely compromises self-fulfillment; as Justice Thurgood Marshall wrote: "When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions . . . ."[13] For purposes of this article, we remain agnostic as to which of the prominent free expression theories provides the best justification for valuing prisoner speech. Prison speech matters under each of them.

The rise of mass incarceration in the United States heightens the importance of protecting free speech in prison. The unprecedented scale of incarceration in America—where some 2.2 million people reside in prisons and jails—leaves more people

[12] Erwin Chemerinsky, for example, discusses how the Supreme Court has treated prisons when it comes to protection of individual rights, showing that judicial oversight is most needed over such institutions. *See* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441–42 (1999). Sharon Dolovich explores the Court's unprincipled stance of deference in prisoners' rights jurisprudence. Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245 (2012). Scott Moss argues for the application of intermediate scrutiny in the context of prisons. Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1678–79 (2007). Many others have commented on and critiqued *Turner*'s reasonableness standard. For a list of prior literature, *see* Shapiro, *supra* note 11, at 976 n.20.

[13] Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

than ever before at the mercy of speech restrictions.[14] Because poor people and people of color face disproportionate rates of incarceration, prison censorship affects these groups with the greatest force, reducing their power to participate in the public forum.[15] As the issue of mass incarceration has assumed greater prominence in social discourse—with everyone from Hillary Clinton to Newt Gingrich calling for sentencing reform—prison censorship has the perverse ability to exclude the voices of incarcerated men and women from debates about incarceration itself.[16]

Prison speech may be divided into four categories: (1) pure incoming speech, such as a letter sent by a non-prisoner to a prisoner; (2) pure outgoing speech, such as a letter sent by a prisoner to a non-prisoner; (3) mixed incoming/outgoing speech, such as a real-time conversation between a prisoner and a non-prisoner during a visit or telephone call; and (4) pure internal speech, such as a conversation between two prisoners. At first blush, it might seem that theories of free speech focused on public discourse—such as the marketplace of ideas and democracy legitimation—should be concerned only with pure outgoing speech and mixed incoming/outgoing speech. After all, pure incoming speech is directed into the prison and pure internal speech occurs within the prison; neither enters the public discourse. Nevertheless, the breadth of ideas and information that prisoners can receive—from those outside prison walls and from other prisoners—ultimately affects their ability to produce outwardly-directed speech.[17] Therefore, greater protection for pure outgoing speech and mixed incoming/outgoing speech would only partly solve the problems created by excessive judicial deference to prison censorship. To

[14] THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 2 (2018), http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

[15] *See infra* Section III.A.

[16] Michelle Mark, *Where Hillary Clinton Stands on Criminal Justice*, BUS. INSIDER (Oct. 8, 2016), http://www.businessinsider.com/where-hillary-clinton-stands-on-criminal-justice-2016-10; Newt Gingrich & Van Jones, *Prison System Is Failing America*, CNN (May 22, 2014), http://www.cnn.com/2014/05/21/opinion/gingrich-jones-Prison-system-fails-America/index.html.

[17] *See infra* Section I.C.

enable prisoners to function as full participants in public discourse, the law must protect not only their ability to disseminate speech, but also their ability to receive it.

Our ultimate conclusion—that prison speech matters—suggests that the current legal standard that governs prisoners' First Amendment claims, the legitimate penological interest test established by the Supreme Court in *Turner v. Safley*, is inadequate. The *Turner* standard requires a high level of judicial deference to prison officials' censorship decisions, leaving prisoners' speech with less protection than it merits.

This Article proceeds in three Parts. Part I describes the deferential *Turner* standard that governs First Amendment claims brought by prisoners. Virtually every word uttered or written *to* a prisoner and virtually every word uttered or written *by* a prisoner receives extremely limited legal protection. Largely as a result of this legal regime, senseless censorship is all too common in American prisons. Jailers and prison officials seem to have received the message that they can ban speech with impunity.

Part II argues that the combination of *Turner* deference and mass incarceration divests prisoners of expressive power, thereby distorting public discourse. Not only do people in American prisons and jails comprise a significant portion of the population—some 2.2 million men and women—but the people locked up are poorer, blacker, and browner than the population at large. The combination of mass incarceration and prison censorship skews public debate in favor of wealthier, whiter, non-incarcerated participants. The same combination prevents some of the most relevant speakers from engaging in public discourse on prison-related topics such as solitary confinement and mass incarceration: prisoners themselves.

Part III demonstrates that under the leading theories of free expression, prison speech matters. It matters from the standpoint of the marketplace of ideas, democracy legitimation, the checking value of free speech, and self-fulfillment. Under all of these theories, prison speech is of consequence and deserves more protection than it now receives.

I. THE RULE OF DEFERENCE

When it comes to judicial review of prison censorship, deference to prison officials is the order of the day. The Supreme Court established a deferential standard for prison speech restrictions in *Turner v. Safley*, and several lower court decisions take such deference to great extremes.[18] The *Turner* standard applies to virtually all categories of speech that a prisoner creates, transmits, and receives. This includes: all speech from outsiders, such as incoming letters and publications; all real-time communication with outsiders, such as a visits and phone calls; and all communication between two prisoners or between a prisoner and a corrections official.[19] The one category potentially exempted from deference under *Turner* is "pure outgoing speech," meaning one-way communications directed from a prisoner to an outsider.

A. Deference Under Turner

The dominant legal standard for evaluating prisoner speech is the legitimate penological interest test established by the Supreme Court in *Turner*,[20] described as "the most important and widely used legal standard for evaluating prisoners' rights claims."[21] Courts have cited the test in decisions more than 8,000 times.[22] *Turner*'s legitimate penological interest test posits that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is *reasonably related* to legitimate penological interests."[23] Four inquiries inform this analysis: (1) whether there is a " 'valid, rational connection' between the prison regulation and the legitimate governmental interest"; (2) "whether there are alternative means" for prisoners to exercise constitutional rights; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and

[18] Turner v. Safley, 482 U.S. 78, 89–91 (1987); *see infra* note 36 and accompanying text.

[19] *See infra* Section I.B.

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

[21] Christopher E. Smith, *Justice Sandra Day O'Connor and Corrections Law*, 32 HAMLINE L. REV. 477, 493 (2009).

[22] Shapiro, *supra* note 11, at 975.

[23] *Turner*, 482 U.S. at 89 (emphasis added).

(4) the presence or "absence of ready alternatives."[24] The first of these prongs—the existence of a valid rational connection—is the crux of the standard and is often dispositive.[25]

Turner and its progeny require courts to accord great deference to the judgment of prison officials in assessing whether there is a rational connection between a speech restriction and a valid penological interest.[26] The standard reflects the view that "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations."[27] For example, prison officials in *Turner* prohibited correspondence between prisoners at different facilities because the officials believed that such correspondence "facilitate[d] the development of informal organizations that threaten the core functions of prison administration, maintaining safety and internal security."[28] The Court held that "the choice made by corrections officials—which is, after all, a judgment 'peculiarly within [their] province and professional expertise'—should not be lightly set aside by the courts."[29] In *Thornburgh v. Abbott*, the Supreme Court elaborated on the reasons for judicial deference to prison censorship:

> [W]e have been sensitive to the delicate balance that prison administrators must strike between the order and security of the internal prison environment and the legitimate demands of those on the "outside" who seek to enter that environment, in person or through the written word . . . . Acknowledging the expertise of these officials and that the judiciary is "ill equipped" to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.[30]

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[24] *Id.* at 89–90.

[25] Shapiro, *supra* note 11, at 982 & n.54.

[26] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407–08 (1989); *Turner*, 482 U.S. at 89.

[27] *Turner*, 482 U.S. at 89 (alterations in original) (citing Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 128 (1977)).

[28] *Id.* at 92.

[29] *Id.* at 92–93 (alteration in original) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

[30] *Thornburgh*, 490 U.S. at 407–08.

Indeed, *Turner* itself marked the only time that the Supreme Court invalidated a prison restriction that it analyzed under the *Turner* standard—a ban on inmate marriage.[31] The Supreme Court, applying *Turner*, has consistently upheld prison regulations restricting a range of expressive activities, including accessing publications, meeting with visitors, and engaging in religious worship.[32]

Lower courts have taken *Turner* deference to even greater extremes, giving prison speech restrictions far more deference than required under *Turner*.[33] Prisoners who challenge speech restrictions confront "the often vast deference accorded to prison officials and the steep, uphill battle that inmates must surmount when fighting for their First Amendment rights to access magazines, movies, music, and other popular forms of media materials."[34] Examples of senseless restrictions upheld by federal courts of appeals include a prohibition on all newspapers and magazines, a rejection of a book about the treatment of women in prison, and a refusal to deliver the *Physician's Desk Reference*.[35]

Prison officials appear to have received the message that they enjoy "practical immunity" from First Amendment lawsuits by prisoners due to a combination of *Turner* deference, other legal obstacles that stand in the way of successful prisoner actions (such as administrative exhaustion under the Prison Litigation Reform Act), and non-legal impediments (such as limited education, poverty, and the difficulty of obtaining counsel).[36] The prison censors carry on with impunity.[37] As one of us has argued previously and at greater length, "anything goes" seems to be the attitude of prison officials, who have been liberated from serious judicial oversight.[38] Prison officials have

[31] *Turner*, 482 U.S. at 97–99.

[32] Beard v. Banks, 548 U.S. 521, 530 (2006); Overton v. Bazzetta, 539 U.S. 126, 131 (2003); *Thornburgh*, 490 U.S. at 408–13; O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–50 (1987).

[33] Shapiro, *supra* note 11, at 1026.

[34] Clay Calvert & Kara 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, 269 (2012).

[35] Shapiro, *supra* note 11, at 988–94.

[36] *See id.* at 1012–19.

[37] *Id.* at 995–1005.

[38] *See id.* at 1027.

done "everything from prohibiting President Obama's book as a national security threat; to using hobby knives to excise Bible passages from letters; to forbidding all nonreligious publications; to banning Ulysses, John Updike, Maimonides, case law, and cat pictures."[39]

B. Speech Subject to Turner *Deference*

To understand the breadth of communication governed by *Turner*'s deferential standard, it is helpful to divide prisoners' speech into four major categories based on where the speech originates and where it is directed. We refer to these categories as pure incoming speech, pure outgoing speech, mixed incoming/outgoing speech, and internal speech. The chart on the next page summarizes this taxonomy, and the text that follows describes the law that applies to each category.

[39] *Id.*

Category	Description	Examples	Standard
Pure incoming speech	Speech from an outsider to a prisoner	A letter or publication sent from a non-prisoner to a prisoner	*Turner* legitimate penological interest test
Pure outgoing speech	Speech to a prisoner from an outsider	A letter sent by a prisoner to an outsider	Varies by circuit
Mixed incoming /outgoing speech	An exchange between a prisoner and an outsider, in which speech flows in both directions and therefore cannot be categorized as pure incoming speech or pure outgoing speech	A real-time conversation between a prisoner and a non-prisoner during a visit or telephone call	*Turner* legitimate penological interest test
Pure internal speech	Speech by a prisoner that does not leave the prison	A discussion between two prisoners, or a discussion between a prisoner and a correctional officer	*Turner* legitimate penological interest test

1. Pure Incoming Speech: *Turner* Deference

Under the Supreme Court's decision in *Thornburgh v. Abbott*, the *Turner* standard clearly applies to pure incoming speech, such as publications sent to prisoners.[40]

2. Pure Outgoing Speech: Standard Varies by Circuit

While the issue is not free from debate, the best reading of Supreme Court case law is that a more searching standard of judicial review applies to prisoners' pure outgoing speech under *Procunier v. Martinez*,[41] a decision that predates *Turner*. In *Martinez*, which concerned a challenge to prison rules that censored outgoing prisoner mail, the Court applied the following test: (1) "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression"; and (2) "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[42] This standard, which requires both an important or substantial interest and tailoring between a speech restriction and the governmental interest, demands greater scrutiny than the *Turner* standard, which requires only a legitimate interest and a rational connection. In *Thornburgh*, however, the Supreme Court declined to apply the *Martinez* standard to incoming publications, noting the greater "implications of incoming materials" for "prison security."[43]

In our view, *Thornburgh*'s focus on the distinction between incoming and outgoing speech shows that the Court intended to limit the *Martinez* standard to outgoing speech, not to reject the *Martinez* standard for all speech by prisoners.[44] But the circuits are split on this question. For example, the Fifth Circuit has held that *Thornburgh* overrules *Martinez* completely and that

[40] Thornburgh v. Abbott, 490 U.S. 401, 407–08 (1989).

[41] Procunier v. Martinez, 416 U.S. 396 (1974).

[42] *Id.* at 413 (emphasis omitted).

[43] *Thornburgh*, 490 U.S. at 413.

[44] JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 188 nn.67–68 (4th ed. 2010); David M. Shapiro, *The Cutting Edge of Prison Litigation*, 1 UCLA CRIM. JUST. L. REV. 95, 97–98 (2017).

the deferential *Turner* standard applies to all prisoner speech.[45] Other circuits hold that the more searching *Martinez* standard continues to apply to pure outgoing speech.[46]

3. Mixed Incoming/Outgoing Speech: *Turner* Deference

Mixed incoming/outgoing speech consists of two-way communications between a prisoner and an outsider that occur in real-time. The primary examples are phone calls and in-person visits. In these exchanges, the prisoner is directing communications out of the prison, and the outsider is directing communications into the prison. The deferential *Turner* standard governs mixed incoming/outgoing speech. Thus, in *Overton v. Bazetta*, the Supreme Court applied the *Turner* standard to restrictions on visits, which involve speech exchanged between prisoners and outsiders.[47] Lower courts have similarly applied *Turner* when deciding whether restrictions on the number of people prisoners are allowed to call violate the First Amendment.[48]

4. Pure Internal Speech: *Turner* Deference

While the Supreme Court has not considered a case involving purely internal speech, the rationale for *Turner* deference—the maintenance of internal prison order[49]—certainly applies to speech that occurs entirely within a prison. Indeed,

[45] *See, e.g.*, Prison Legal News v. Livingston, 683 F.3d 201, 214–15 (5th Cir. 2012); Samford v. Dretke, 562 F.3d 674, 678–79 (5th Cir. 2009).

[46] *See, e.g.*, Koutnik v. Brown, 456 F.3d 777, 781 (7th Cir. 2006); Nasir v. Morgan, 350 F.3d 366, 369 (3d Cir. 2003); Treff v. Galetka, 74 F.3d 191, 194 (10th Cir. 1996); Bell-Bey v. Williams, 87 F.3d 832, 838 (6th Cir. 1996); Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995); Stow v. Grimaldi, 993 F.2d 1002, 1003–04 (1st Cir. 1993).

[47] Overton v. Bazzetta, 539 U.S. 126, 133–36 (2003).

[48] Pope v. Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996) ("Consideration of the *Turner* factors demonstrates that the ten-person telephone calling list imposed at Donaldson bears a reasonable relation to legitimate penological objectives."); Benzel v. Grammer, 869 F.2d 1105, 1106, 1109 (8th Cir. 1989) (holding that "[b]ased on the wide deference given prison officials under recent Supreme Court decisions . . . internal security and rehabilitation concerns" justified a three-person telephone calling list).

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

the Supreme Court has extended the *Turner* standard to Free Exercise cases in which prisoners challenge restrictions of religious freedom that occur entirely within prison walls.[50]

* * *

In sum, if one envisions speech in prison as a territorial map, the *Martinez* standard occupies a small island surrounded by a sea of *Turner* deference. *Turner* applies to internal speech, incoming speech, and mixed incoming/outgoing speech. These categories of speech encompass everything that a prisoner says to another prisoner or a prison staff member, every word that enters a prison by mail, and every word exchanged by a prisoner and a non-prisoner in a visit, phone call, or interview. The more exacting *Martinez* standard is limited to pure outgoing speech, such as letters sent by prisoners, and even that exception to *Turner* deference varies by circuit.[51]

C. Degradation of Pure Outgoing Speech

Even in the circuits that apply the more exacting *Martinez* standard to pure outgoing speech, the very limited protection that *Turner* affords to internal speech, incoming speech, and mixed incoming-outgoing speech threatens pure outgoing speech indirectly. The receipt of speech is critical to the production of speech. Generally, in addition to the constitutional right of a sender to have her communication delivered to the recipient, a recipient has a constitutional right to receive a sender's communication.[52] Without the ability to receive, people have fewer ideas, sources, and information at their disposal when creating their own speech. As the Supreme Court has held, "access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful

[50] O'Lone v. Estate of Shabazz, 482 U.S. 342, 352–53 (1987) (upholding restrictions on attending a weekly Muslim congregational service).

[51] *See* Samford v. Dretke, 562 F.3d 674, 678–79 (5th Cir. 2009); Smith v. Delo, 995 F.2d 827, 830 (8th Cir. 1993); Shapiro, *supra* note 44, at 97–98.

[52] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("[T]he Constitution protects the right to receive information and ideas."); *see also* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth, is fundamental to our free society." (citation omitted)); Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 175 (2003) ("Although the First Amendment to the Constitution guarantees the right to free speech, if you can't get access to the speech, the value of the guarantee diminishes.").

manner."[53] Indeed, "without freedom to acquire information, the right to publish would be impermissibly compromised."[54] As Jack Balkin has written, "[f]reedom of speech is part of an interactive cycle of social exchange, social participation, and self-formation. We speak and we listen, we send out and we take in. . . . [A]nd we make something new out of what existed before."[55] The corollary of prohibiting incoming information is the creation of speech that is less informed and less meaningful.

In short, restrictions on input affect output.[56] The fact that the more searching *Martinez* standard applies to pure outgoing speech in some circuits does not protect such speech, even in those circuits, from the effects of *Turner* deference. *Turner* deference envelops, directly and indirectly, nearly all prisoner speech. It applies to every word that enters a prison, every word within a prison, and, in some circuits, every word that leaves a prison.[57] And even where *Turner* does not apply directly to pure outgoing speech, it threatens the production of speech by curtailing the consumption of speech.

II. MASS INCARCERATION AS MARKETPLACE DISTORTION

Turner deference encompasses not only a large swath of speech, but also a large segment of the population. With the United States locking up 2.2 million people—more people than any other nation on earth—incarcerated men and women make up a substantial portion of the body politic.[58] The *Turner* standard allows the government to censor this portion of the population much more severely than it can censor the population at large.

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[53] Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1982). The Supreme Court's precedents have focused on the First Amendment's role "in affording the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 866 (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

[54] Branzburg v. Hayes, 408 U.S. 665, 728 (1972).

[55] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 32 (2004).

[56] Thomas Emerson argued that the freedom of expression includes "the right of the individual *to access . . . knowledge*; to shape his own views; to communicate his needs, preference and judgments; in short, to participate in formulating the aims and achievements of his society and his state." Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880 (1963) (emphasis added).

[57] Shapiro, *supra* note 11, at 988–95.

[58] THE SENTENCING PROJECT, *supra* note 14.

Prison censorship harms the marketplace of ideas in at least two ways. Not only does it result in a general diminution of speech and viewpoint variety in the public sphere, it also skews the overall composition of public discourse by allowing prisoners—a group disproportionately composed of people of color—to be subjected to sweeping speech restrictions. The prison population is not racially representative of the population as a whole, and because race often correlates with views on various matters of public concern, silencing prisoners threatens to distort public discourse by muffling particular viewpoints.[59]

In the United States, African Americans are incarcerated at five times the rate of whites.[60] The rate for Latinos is 1.4 times the rate of whites.[61] Men make up the vast majority of the prison population,[62] and young men of color are much more likely to be incarcerated than young white men.[63] Poverty and lower rates of educational attainment, factors that disproportionately affect people of color—and that often are intertwined—also increase the chances of being incarcerated.[64]

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[59] *See infra* Section III.B.

[60] ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/; *see* JENNIFER TURNER & JAMIL DAKWAR, ACLU, RACIAL DISPARITIES IN SENTENCING 1 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

[61] NELLIS, *supra* note 60.

[62] DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 14 (2016), https://www.bjs.gov/content/pub/pdf/cpus15.pdf.

[63] Peter Wagner, *Incarceration Is Not an Equal Opportunity Punishment*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/articles/notequal.html (last updated Aug. 28, 2012).

[64] *See, e.g.*, Sean F. Reardon et al., *Patterns and Trends in Racial/Ethnic and Socioeconomic Academic Achievement Gaps*, *in* HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 491 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 183 (2004); Bernadette Rauby & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html. This is not to mention the devastating effects that imprisonment has on individuals and communities of color more generally. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004); PAUL SAMUELS & DEBBIE MUKAMAL, LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE

In aggregate terms, people of color who are incarcerated have different views on many matters of public concern than people who are white and free, especially when it comes to criminal justice. Curtailing prisoners' ability to participate in public discourse—the combined result of locking up millions of people and failing to safeguard their expressive freedom—translates into viewpoint distortion. The threat of distortion looms especially large in the present because mass incarceration and criminal justice reform have become focal points of public debate.[65] According to the Sentencing Project, "[w]hite Americans are more punitive than people of color."[66] Thus, "while the majority of whites supported the death penalty for someone convicted of murder in 2013, half of Hispanics and a majority of blacks opposed this punishment."[67] Similar differences of opinion exist over sentencing practices, the principal driver of mass incarceration: "Compared to blacks, whites are also more likely to support 'three strikes and you're out' laws, to describe the courts as not harsh enough, and to endorse trying youth as adults."[68]

Americans also split along racial lines in their attitudes toward policing. In 2016, the Pew Research Center reported that:

> Only about a third of blacks but roughly three-quarters of whites say police in their communities do an excellent or good job in using the appropriate force on suspects, treating all racial and ethnic minorities equally and holding officers accountable when misconduct occurs. Roughly half of all blacks say local police do an excellent or good job combating crime—a view held by about eight-in-ten whites.[69]

WITH CRIMINAL RECORDS 9 (2004), http://lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

[65] *See infra* note 75 and accompanying text.

[66] THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 3 (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf.

[67] *Id.* (emphasis omitted).

[68] *Id.*

[69] RICH MORIN & RENEE STEPLER, PEW RESEARCH CTR., THE RACIAL CONFIDENCE GAP IN POLICE PERFORMANCE 2 (2016), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/09/ST_2016.09.29_Police-Final.pdf.

When asked whether their local police departments use "the right amount of force for each situation," 75% of whites, 62% of Hispanics, and 33% of blacks respond that the police are doing an excellent or good job.[70] Similarly, Gallup polling data aggregated from 2014 to 2016 shows that 58% of whites but only 29% of blacks report having "a great deal or quite a lot of confidence in police."[71] The same polls indicated that 76% of African Americans but only 45% of whites believe that the criminal justice system is biased against African Americans.[72]

Opinion polling, however, does not capture the full cost of excluding prisoners from public discourse. The loss lies not only in the potential distortion of how many people can be heard arguing for or against a given policy or proposition, but also in the silencing of important perspectives that only prisoners may have. Consider the words of Robert King, who spent twenty-nine years in solitary confinement in Alabama, and Sarah Shourd, who endured a period of solitary confinement in Iran. King writes:

> Some days I would pace up and down and from left to right for hours, counting to myself. I learned to know every inch of the cell. Maybe I looked crazy walking back and forth like some trapped animal, but I had no choice—I needed to feel in control of my space.
>
> At times I felt an anguish that is hard to put into words. To live 24/7 in a box, year after year, without the possibility of parole, probation or the suspension of sentence is a terrible thing to endure.[73]

Shourd writes:

> After two months with next to no human contact, my mind began to slip. Some days, I heard phantom footsteps coming down the hall. I spent large portions of my days crouched down on all fours by a small slit in the door, listening. In the periphery of my vision, I began to see flashing lights, only to

[70] *Id.* at 5.

[71] Frank Newport, *Public Opinion Context: Americans, Race, and Police*, GALLUP (July 8, 2016), http://www.gallup.com/opinion/polling-matters/193586/public-opinion-context-americans-race-police.aspx?g_source=Blog&g_medium=sidebottom&g_campaign=tiles.

[72] *Id.*

[73] Robert King, *I Spent 29 Years in Solitary Confinement*, THE GUARDIAN (Aug. 27, 2010), https://www.theguardian.com/lifeandstyle/2010/aug/28/29-years-solitary-confinement-robert-king.

> jerk my head around to find that nothing was there. More than once, I beat at the walls until my knuckles bled and cried myself into a state of exhaustion. At one point, I heard someone screaming, and it wasn't until I felt the hands of one of the friendlier guards on my face, trying to revive me, that I realized the screams were my own.[74]

Firsthand accounts like King's and Shourd's enrich public discussion of solitary confinement, but we will never know what other voices have been silenced by the effects of *Turner* deference. Prison censorship distorts and diminishes public discourse by excluding many of the people most affected by the criminal justice system from public discussion of the very issues that affect them. This marketplace distortion likely affects public debates on mass incarceration, solitary confinement, private prisons, prison conditions, and life without parole sentences—all topics that have been matters of heightened public concern in recent years.[75]

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[74] Sarah Shourd, *Tortured by Solitude*, N.Y. TIMES (Nov. 5, 2011), http://www.nytimes.com/2011/11/06/opinion/sunday/in-an-iranian-prison-tortured-by-solitude.html.

[75] *See, e.g.*, Tina Rosenberg, *Even in Texas, Mass Imprisonment Is Going out of Style*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/opinion/even-in-texas-mass-imprisonment-is-going-out-of-style.html?mcubz=3; Margaret Winter, *Is This the Beginning of the End for Solitary Confinement in the United States?*, ACLU (Sept. 23, 2015), https://www.aclu.org/blog/prisoners-rights/solitary-confinement/beginning-end-solitary-confinement-united-states?redirect=blog/speak-freely/beginning-end-solitary-confinement-united-states; Clint Smith, *Why the U.S. Is Right to Move Away from Private Prisons*, NEW YORKER (Aug. 24, 2016), http://www.newyorker.com/news/news-desk/why-the-u-s-is-right-to-move-away-from-private-prisons; Daniel Denvir, *Private Prisons Are Not the Problem: Why Mass Incarceration Is the Real Issue*, SALON (Aug. 24, 2016), http://www.salon.com/2016/08/24/private-prisons-are-not-the-problem-why-mass-incarceration-is-the-real-issue/; Jolie McCullough, *Heat Is Part of Life at Texas Prisons, but Federal Judge Orders One To Cool It*, TEX. TRIBUNE (July 20, 2017), https://www.texastribune.org/2017/07/20/texas-prison-heat-air-conditioning-lawsuit/; Rebecca Shaeffer, *A British Court Rules That Sending Defendants to the U.S. Prison System Is a Human Rights Violation*, WASH. POST (Feb. 7, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/02/07/a-british-court-rules-that-sending-defendants-to-the-u-s-prison-system-is-a-human-rights-violation/?utm_term=.6ac26050f60f; Joe Fassler & Claire Brown, *Prison Food is Making U.S. Inmates Disproportionately Sick*, THE ATLANTIC (Dec. 27, 2017), https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179/; Sarah Barr, *Youth Advocates Using Documentary To Sway Public Opinion on JLWOP*, JUV. JUST. INFO. EXCHANGE (July 28, 2015), http://jjie.org/2015/07/28/youth-advocates-using-documentary-to-sway-public-opinion-on-jlwop/; Madison Pauly, *How Louisiana Tried and Failed to Stop Life Prison Sentences for Teens*, MOTHER JONES (June 8, 2016),

III. PRISON SPEECH MATTERS

We show in this section that prisoners' speech matters under the free expression theories that have had the greatest influence on Supreme Court decisions in First Amendment cases—the marketplace of ideas, democratic legitimation, the checking value of free speech, and self-fulfillment.

A. The Marketplace of Ideas

The marketplace of ideas theory dates back to John Milton's *Areopagitica*, written in 1644.[76] John Stuart Mill presented a similar argument much later in *On Liberty*.[77] The theory suggests that unfettered debate leads to the revelation of truth. According to this theory, censorship impedes the discovery of truth by suppressing free discussion. The marketplace of ideas theory entered Supreme Court jurisprudence in 1919,[78] when Justice Holmes famously dissented in *Abrams v. United States*:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.[79]

The marketplace of ideas theory has been adopted in several subsequent Supreme Court decisions and continues to influence both case law and scholarship.[80]

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http://www.motherjones.com/politics/2016/06/louisiana-still-throwing-kids-in-jail-for-life/.

[76] *See generally* JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND (1644), *reprinted in* AREOPAGITICA AND OTHER PROSE WORKS (Jim Miller ed., Dover Pubs., Inc. 2016).

[77] JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* THE SIX GREAT HUMANISTIC ESSAYS OF JOHN STUART MILL 145 (3d prtg. 1970) ("He is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it.").

[78] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[79] *Id.*

[80] *See* Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 n.2 (1984) (compiling a list of First Amendment cases in which the marketplace of ideas was present); Paul H. Brietzke,

Turner deference allows prison censorship that curtails prisoners' participation in the marketplace of ideas. If the purpose of the marketplace of ideas is to seek truth, then the voices of prisoners are among the most important views to consider when discussing prison-related issues. Just as one would want to hear what farmers have to say about agriculture, or teachers about education, one would want to know what prisoners have to say about the operation of prisons. For the marketplace of ideas to function properly, prisoners must have access to it.[81]

Consider here the racial and economic disparities in the prison population, highlighted earlier.[82] The upshot of these disparities, when combined with restrictive prison censorship, is that in the aggregate, people who are richer, whiter, and not incarcerated, will enjoy greater access to the marketplace of ideas than others. Disparate access will result in a distorted mixture of viewpoints in public discourse because demographic factors correlate with viewpoints on at least some matters of public concern, especially ones involving criminal justice.

B. The Checking Value of Free Speech

Like the marketplace of ideas theory, the "checking value" theory of free expression holds that the First Amendment protects the open exchange of ideas, but this theory does not conceive of free expression as a means to discover truth.[83] In *The Checking Value in First Amendment Theory*, Vincent Blasi argued that a central function of the First Amendment is to protect the press when it exposes governmental abuses of power.[84] Blasi advocates for the free flow of information, not

How and Why the Marketplace of Ideas Fails, 31 VAL. U. L. REV. 951, 952 n.6 (1997) (adding to Ingber's original list); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 825 n.7 (2008).

[81] *See infra* note 88.

[82] *See supra* notes 60–61, 63 and accompanying text.

[83] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977).

[84] *Id.* (noting that in the years prior to publishing, "the First Amendment has had at least as much impact on American life by facilitating a process by which countervailing forces check the misuse of official power as by protecting the dignity of the individual, maintaining a diverse society in the face of conformist pressures, promoting the quest for scientific and philosophic truth, or fostering a regime of 'self-government' in which large numbers of ordinary citizens take an active part in political affairs").

because he believes it will actually lead to truth—he concedes this point—but instead because "any governmental intervention in the market is likely to exacerbate rather than ameliorate the preexisting distortions."[85] Distortion is problematic because it dilutes the accountability of those in positions of authority.

One of the most important functions of prisoners' speech is to expose prison abuses, a matter of public concern.[86] But speech critical of prison officials also faces a heightened risk of censorship, for it is often officers and their colleagues—those who hold censoring power—who are being criticized. In *Martinez*, for example, the regulations at issue prohibited prisoners from "magnify[ing] grievances," and the Supreme Court observed that this provision "fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship."[87] "Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism."[88] In other words, correctional officers' biases led them to stifle criticism.[89] Justice Marshall amplified this point in his concurrence, warning that "the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration."[90]

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[85] *Id.* at 550; *see also* Elizabeth Blanks Hindman, *First Amendment Theories and Press Responsibility: The Work of Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker*, 69 JOURNALISM Q. 48, 56 (1992).

[86] *See generally* Victoria Law, *Tens of Thousands of California Prisoners Launch Mass Hunger Strike*, THE NATION (July 10, 2013), https://www.thenation.com/article/tens-thousands-california-prisoners-launch-mass-hunger-strike/; German Lopez, *We're in the Midst of the Biggest Prison Strike in U.S. History*, VOX (Oct. 19, 2016), https://www.vox.com/identities/2016/10/19/13306178/prison-strike-protests-attica; Noelle Crombie, *Women Inmates File Second Suit Against State Prison Doctor*, THE OREGONIAN (Apr. 24, 2017), www.oregonlive.com/pacific-northwest-news/index.ssf/2017/04/second_lawsuit_filed_against_c.html.

[87] Procunier v. Martinez, 416 U.S. 396, 415 (1974).

[88] *Id.*

[89] *Id.* ("[A]t one institution under the Department's jurisdiction, the checklist used by the mailroom staff authorized rejection of letters 'criticizing policy, rules or officials,' and the mailroom sergeant stated in a deposition that he would reject as 'defamatory' letters 'belitting staff or our judicial system or anything connected with Department of Corrections.' Correspondence was also censored for 'disrespectful comments,' 'derogatory remarks,' and the like.").

[90] *Id.* at 427 (Marshall, J., concurring).

Abuses by prison officials increase the importance of prisoners' speech as a check on government power.[91] Erwin Chemerinsky has observed that in authoritarian institutions such as prisons, "there is a great need for judicial protection of rights . . . because of the great likelihood of serious rights violations. Indeed, the greater the authority some have over others, and the fewer the checks or limits on behavior, the greater the chance for abuse."[92] Without prisoners' speech, public information about prisons would come primarily from prison officials themselves.[93] Speech in prisons is especially fragile because limited checks on officials' behavior increase the risk of retaliation.[94] In this way, *Turner* deference diminishes the checking value of free speech by granting prison officials free reign to censor speech about prison abuses.[95]

C. Democracy Legitimation

The democracy legitimation theory asserts that free political discourse is necessary to democratic decision-making and the proper functioning of democratic government. It follows that

[91] *See, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887–89 (2009) (noting the troubling prevalence of overcrowding, violence, rape and sexual assault, and inadequate health care in correctional facilities); MARGARET NOONAN ET AL., U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013—STATISTICAL TABLES 1 (2015), https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf (noting the increase of prisoner deaths); *Words from Prison: Sexual Abuse in Prison*, ACLU, https://www.aclu.org/other/words-prison-sexual-abuse-prison (last visited June 22, 2018); Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 80–81 (1973) (demonstrating how power abuses are inherent in authoritarian institutions such as prisons).

[92] Chemerinsky, *supra* note 12, at 458.

[93] DAVID M. SHAPIRO, ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 40–41 (2011), https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf ("For-profit prison companies go to great lengths, and apparently spend significant funds, to put forth a positive public image. Certain private prison companies offer the public well-manicured websites with extensive press releases and video footage touting their accomplishments . . . . Private prison companies also funnel money . . . into communications departments . . . . Meanwhile, private prison websites rarely report negative information: no one would know from [the Corrections Corporation of America]'s website that one of its employees sexually abused multiple female immigration detainees, or that one of its facilities is allegedly so violent that it has been dubbed the 'gladiator school.' ").

[94] *See* Chemerinsky, *supra* note 12, at 458.

[95] *See supra* Section I.A.

speech related to the governing function is entitled to the strongest First Amendment protection. The democracy legitimation theory therefore prizes political speech, or at least speech that may impact political or public issues.

The theory appears in James Madison's Report on the Virginia Resolutions, where he wrote that if either the legislative or executive branch failed to "discharge its trust," the President and the legislators "should be brought into contempt or disrepute, and incur the hatred of the people," who should vote them out of office.[96] This process requires free speech because a given official may or may not deserve the public's contempt—it is a question that "can only be determined by a free examination thereof, and a free communication among the people thereon."[97]

Justice Brandeis argued a similar point in his 1927 concurrence in *Whitney v. California*, where he described free speech as a means to "political truth":

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[98]

The Supreme Court has since recognized Justice Brandeis' concurrence as the "classic formulation" of the democracy legitimation theory.[99]

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[96] JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), *reprinted in* 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS, OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 574 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1866), http://press-pubs.uchicago.edu/founders/documents/v1ch8s42.html.

[97] *Id.*

[98] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[99] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (quoting *Whitney,* 274 U.S. at 375–76) ("[Those who won independence for the United States] recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds

Alexander Meiklejohn similarly argued that the First Amendment protects democratic governance.[100] The people are the governors, and they exercise their governing function in the voting booth.[101] Properly exercising that function demands a free flow of information and opinion. Speech regarding political or public issues is therefore entitled to the highest protection. Meiklejohn's approach to the First Amendment is structural—the Amendment is designed to protect "the freedom of those activities of thought and communication by which we 'govern.' "[102]

The democracy legitimation account has appeared in scholarship[103] as well as Supreme Court cases post-*Whitney*. For example, in *Stromberg v. California*, the Court held that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[104] Likewise, in *Garrison v. Louisiana*, Justice Brennan wrote that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[105]

Turner deference compromises the democratic legitimization function of free speech by allowing prodigious censorship of political discourse. *Turner* deference makes no distinction

repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

[100] *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 252 (1961) [hereinafter Meiklejohn, *The First Amendment is an Absolute*]; ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 115–18 (1960).

[101] *See* Meiklejohn, *The First Amendment is an Absolute, supra* note 100, at 255.

[102] *Id.*

[103] *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 603 (1990); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986) ("We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.").

[104] Stromberg v. California, 283 U.S. 359, 369 (1931).

[105] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964). For a discussion of the self-fulfillment theory, *see infra* Section III.D.

between political speech and any other type of speech—it applies equally to suppression of books about creating home-made shanks and books about the history of socialism.[106] Judicial deference thus enables prison officials to exclude prisoners from political discourse vital to democratic government. *Turner* deference is further at odds with the democratic legitimation theory because the criminal justice system is undoubtedly a matter of public concern. As Justice Stewart wrote in *Pell v. Procunier*, "the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance."[107] *Turner* deference, however, severely undercuts the ability of non-prisoners, and prisoners themselves, to receive information about prisons and the penal system.

D. Self-Fulfillment

The theories described above are "structural" in that they view free speech not as an end in itself but as a condition necessary for a society to achieve other goals—truth, official accountability, democratic governance. In contrast, the self-fulfillment theory views the First Amendment as a personal right, one that protects individual expression for the sake of individual expression.

Thomas Emerson, the scholar most closely associated with the individual self-fulfillment theory of First Amendment, concluded that expression was the realization of an individual's own character and potentialities.[108] He reasoned that:

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[106] Amatel v. Reno, 156 F.3d 192, 210 (D.C. Cir. 1998) (Wald, J., dissenting) ("[L]awmakers who believe that books on Russian history may lead to disrespect for the United States may ban those books for prisoners; lawmakers who hold pro-life views may prevent prisoners from reading publications describing *Roe v. Wade*; and lawmakers who hold an antiquated view of the role women should play in society may ban the distribution in prisons of publications with feminist themes. Each of these actions could logically be taken in the name of rehabilitation, broadly defined, and each, without doubt, would contribute to a continual evisceration of the First Amendment rights of prisoners.").

[107] Pell v. Procunier, 417 U.S. 817, 830 n.7 (1974). Justice Stewart cited a speech by Chief Justice Burger to support the idea that if society "want[s] prisoners to change, public attitudes toward prisoners and ex-prisoners must change. . . . A visit to most prisons will make you a zealot for prison reform." *Id.* (quoting Warren Burger, *For Whom the Bell Tolls*, reprinted at 25 Record of N.Y.C.B.A. (Supp.) 14, 20–21 (1970)).

[108] Emerson, *supra* note 56, at 879–81 ("The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the

> every man—in the development of his own personality—has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.[109]

Under this theory, as long as an act of expression serves the integral function of allowing humans to find "meaning and . . . place in the world," then it should be free of censorship.[110]

Like Emerson, C. Edwin Baker argued that the First Amendment protects the act of speech for the sake of individual development, not the content of speech itself.[111] Under this theory, "the Constitution should protect all expressive conduct, whether or not intended to communicate propositions or attitudes to others, that involves individual self-expression or attempts at creation, unless the conduct operates coercively, physically obstructs others' activities, or otherwise interferes with others' legitimate decisionmaking authority."[112]

The self-fulfillment rationale, like other positive theories of free expression, has been invoked in judicial opinions. Justice Marshall, a proponent of the theory, concurred in *Procunier v.*

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proper end of man is the realization of his character and potentialities as a human being.").

[109] *Id*. at 879.

[110] *Id.* at 879–80; *see also* David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) ("The idea here is that people are not to be constrained to communicate or not to communicate, to believe or not to believe, to associate or not to associate. The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person's full and untrammelled exercise of capacities central to human rationality. . . . Freedom of expression permits and encourages the exercise of these capacities: it supports a mature individual's sovereign autonomy in deciding how to communicate with others; it disfavors restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established. In so doing, it nurtures and sustains the self-respect of the mature person.").

[111] *See* C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 342–43 (1982); *see also* Hindman, *supra* note 85, at 59 (noting how Baker's theory differs from theories such as Blasi's checking value, which views the First Amendment as protecting speech because of its content).

[112] Baker, *supra* note 111, at 333.

Martinez, which dealt with the censorship of prisoners' outgoing correspondence. Citing Emerson's *Towards a General Theory of the First Amendment*, Justice Marshall wrote:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.[113]

More recently, the rationale of the self-fulfillment theory appeared in the case *Ashcroft v. Free Speech Coalition*,[114] where Justice Kennedy wrote: "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[115]

Turner deference compromises the self-fulfillment value of free expression. It grants the government vast power to censor prisoners' speech, and correctional officials have used this power to censor literary, scientific, and religious speech in prison.[116] Removing access to these sources of knowledge and inspiration dilutes a prisoner's right to self-fulfillment by hindering the ability to draw on external sources when forming his or her own beliefs. While self-fulfillment is not dependent on unlimited access to outside information—after all, many prisoners engage in self-expression through various artistic, academic, and literary avenues despite the *Turner* standard[117]—the degree to which prisoners are able to fully engage in self-fulfillment is lessened by incoming and internal speech restrictions permitted under *Turner*.

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[113] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (citing Emerson, *supra* note 56, at 879–80).

[114] Ashcroft v. Free Speech Coal., 535 U.S. 234, 248 (2002).

[115] *Id.* at 253.

[116] *See* Shapiro, *supra* note 11, at 995–1005.

[117] *See* Amy Rutledge, *Program Helps Female Inmates with Stress, Self Expression*, WGN-TV (Mar. 9, 2017), http://wgntv.com/2017/03/09/program-helps-female-inmates-with-stress-self-expression/; PRISON WRITERS, http://prisonwriters.com (last visited June 22, 2018); THE PRISON ARTS COALITION, https://theprisonartscoalition.com (last visited June 22, 2018); J. PRISONERS ON PRISONS, http://www.jpp.org (last visited June 22, 2018).

CONCLUSION

Turner deference depends on the assumption that judicial meddling in prison affairs will compromise prison order and security.[118] One of us has argued previously that this concern is overblown—and the best evidence is the fact that heightened statutory protections for prisoners' religious exercise have not unleashed violence and disorder, which makes it doubtful that increased protections of prisoners' non-religious expression would have widespread negative effects.[119] When it comes to restrictions on expressive activities, the benefits of deference to prison authorities appear to be overstated.

Not only are the benefits of deference to prison censorship limited, but, as this Article has shown, the costs of deference are quite severe. Speech by prisoners is vital to the American system of free expression, yet the current legal regime fails to accord such speech the protection it deserves. The extreme deference accorded prison officials by *Turner* and its progeny enables censorship that compromises the core functions of the First Amendment. *Turner* deference does not merely impact individual prisoners; it threatens the legitimacy of our system of free expression by encouraging unwarranted and insurmountable obstacles to speech for a large segment of the American population.

[118] Turner v. Safley, 482 U.S. 78, 84–85 (1987).

[119] Shapiro, *supra* note 11, at 1021–23 (noting that the Religious Land Use and Institutionalized Persons Act and the Religious Freedom Restoration Act command courts to apply strict scrutiny to substantial burdens on prisoners' religious rights).