

WATCHER WATCHING THE WATCHMEN

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When people think about censorship, they typically picture people being denied the right to say what they want, or to read, watch, or listen to a particular periodical or program. In other words, leisure activities.

Not so.

The freedom of speech is the FIRST Amendment because it is absolutely necessary to challenge government misconduct. Without free expression we inform others about the things that the government is doing, let alone attempt to motivate large groups to engage in unified action to challenge that misconduct.

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Prisons exemplify the Orwellian nightmare that is an absence of free speech. In prisons, everything people say and do is monitored and recorded, including phone calls, electronic messages, mail, and virtually every conceivable mode of communication. And prisons have broad discretion to censor the communication they surveil, often under a shroud of legitimacy.

For example, the U.S. Supreme Court's 1989 ruling in *Thornburgh v. Abbott* allows prison officials to reject incoming mail when it contains a publication "determined detrimental to the security, good order, or discipline of the institution" or contents that might facilitate criminal activity.¹ While it makes sense to grant staff the power to prevent prisoners from obtaining written materials, including books, that encourage violence or teach people skills that could help them escape, such power is often abused, particularly when the courts grant "broad discretion" to officials.²

The Court's vague language gives prison staff the ability to justify even arbitrary censorship with little judicial review. Such deference and lack of accountability have led to huge ramifications, at least for prisoners in Michigan. Some prisons reject books so often, and with such disregard for First Amendment rights, that most prisoners don't even attempt to purchase books. Just look at the Michigan Department of Corrections' (MDOC) restricted book list and you will begin to understand what I'm talking about.

In April 2022, the restricted book list included more than 1,200 publications, including 1,000 books ranging from computer programming manuals, income tax guides, and books about carpentry, automotive, truck driving, residential electrical

¹ *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989) (approvingly quoting Federal Bureau of Prison regulations).

² *Id.* at 416.

and welding.³ An updated list was released in August 2023, which included new bans on books about how to raise your credit score, learn new types of writing styles, trade in the stock market, and pass a driver's license test, all important life skills that could help support individuals re-entering the community after incarceration.⁴ When the list of MDOC censored materials went public last year, it generated a lot of headlines,⁵ but no real action.

And the funny thing is, MANY of these topics are actually taught in classes facilitated by the MDOC itself (welding, residential wiring, and computer programming).⁶ Rationalizing the decision to ban books on topics they teach requires mental gymnastics, but MDOC tries. One employee told me that allowing us "to read such books in MDOC-facilitated classes allows prisoners to do so under [their] 'guidance,' ensuring that [we] do not do anything inappropriate with the material." Hmmm... I guess that is what notes are for. (Note: they also let the prisoners take the books back to their rooms).

And the MDOC's haphazard censorship doesn't stop with material that can teach prisoners practical skills, either. I know an inmate who said he had a James Patterson book rejected because the plot includes a detective being killed.⁷ While I do not encourage anyone to engage in violence, censoring the mere mention of such incidents would require prisons to ban TVs, radios, and most fictional books!

Another common practice is blanket denials of books based on their titles' similarity to another book on the banned list. For example, prisoners cannot buy the Dungeons & Dragons Role Playing Game Guides because they can be used to role play in inappropriate ways. However, the mail room at Parnall & MTU⁸ has denied fantasy novels and historical biographies that include "Dungeons and Dragons" in the title.

Moreover, STF⁹ regularly delays the delivery of books. From the time that the postal service delivers it to the facility, the mail room or the property room sits on it for two weeks to two months. Then, if it's denied because they suspect it's from a third-party vendor (as opposed to an approved one like Amazon), it can take two more months!

In addition to banning books, Michigan prisons try to prevent prisoners from accessing content written by other prisoners. Currently, the MDOC has concluded that prisoners cannot receive any books, articles, etc. that have been authored by other prisoners because "allowing a current prisoner or prisoners the ability to impact the atmosphere of a facility in this way threatens the good order of our

³ Mich. Dep't of Corr., *Restricted Publications* (Apr. 12, 2022), <https://perma.cc/LL9W-3UFX>.

⁴ Mich. Dep't of Corr., *Restricted Publications* (Aug. 1, 2023), <https://perma.cc/4DVE-MVEY>.

⁵ See, e.g., Claire Woodcock, *Michigan is Banning Inmates from Reading Totally Normal Books*, VICE (Jan. 17, 2023), <https://perma.cc/Q7KA-QM8C>; Matt Jaworowski, *Safety vs the First Amendment? Changes Coming for Michigan Prisons' Banned Book List*, WOODTV (Apr. 12, 2023), <https://perma.cc/M5AR-8FJG>.

⁶ See, e.g., *Vocational Village*, MICH. DEP'T OF CORR. (Apr. 22, 2022), <https://perma.cc/6FFX-MMV9> (describing vocational classes for computer programming, commercial driving, electrical and carpentry trades, and more).

⁷ *Restricted Publications*, *supra* note 4 (listing two James Patterson novels, "Along Came a Spider" and "Kiss the Girls," as banned).

⁸ Parnall and MTU are prisons in Michigan.

⁹ STF or "Central Michigan Correctional Facility" is a prison in Michigan.

facilities."¹⁰ In other words, they fear a prisoner's ability to influence others, even in good ways. Supreme Court case law requires that prisons justify such restrictions with reasons unrelated to the content of the publications, or 'content neutral'.¹¹ However, writers who are incarcerated often critique the administration, which indicates that the 'content neutral' reason for denial is probably a pretext.

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As a currently incarcerated prisoner, I have filed several grievances about the arbitrary nature of the MDOC's censorship activities. However, the grievances were rejected based on vague, irrational justifications. For instance, in January 2023, PEN America¹² sent me its 2022 Prison Writing Awards Anthology¹³, but my facility refused to give it to me because I am the author of an article in the book. Their reasoning was that giving me the book would grant me the power to "exert pressure to have the story distributed by or to other prisoners as a means of communication with or influence of other prisoners confined in MDOC facilities and impact the atmosphere and threaten the order of the facility." This justification has nothing to do with the article's content and essentially denies all prisoners the ability to obtain a copy of writings that they produce while incarcerated. Several people have filed multiple grievances regarding this issue, and at multiple facilities, but the MDOC has upheld their own decisions at all steps of the process.

Since internal grievance procedures are practically nonexistent in the MDOC (they don't even pretend to have a hearing in the case of E-messages)¹⁴, we have no assurance that mail is *not* being rejected for the author's views, identity, or beliefs.

The reasoning provided in response to my grievance—that my own writing would allow me undue influence over other prisoners—clearly violates U.S. Supreme Court precedent, which asks officials to make an individualized assessment that the mail is actually a threat.¹⁵ Blanket bans that fail to consider the specific risk of access to a certain publication are discouraged under *Thornburgh v. Abbott*.¹⁶

However, the only way to challenge decisions to deny access to mail or other publications involves filing a grievance, and, if that fails, filing a federal civil rights lawsuit for a constitutional violation by the government.¹⁷ For 99% of prisoners,

¹⁰ Language from a grievance letter received by the author.

¹¹ *Thornburg*, 490 U.S. at 416.

¹² PEN America is a nonprofit organization that works to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to access the views, ideas, and literatures of others.

¹³ See PEN AMERICA, *Variations on an Undisclosed Location*, <https://perma.cc/5D5L-CT5K> (PEN America's 2022 Prison Writing Awards Anthology).

¹⁴ See Mich. Dep't of Corr., *Policy Directive 05.03.119* (Aug. 1, 2023), <https://perma.cc/8TWN-FRP3> ("An e-mail that is determined to violate PD 05.03.118 shall be rejected. The intended prisoner recipient is not entitled to notice of the rejection or a hearing").

¹⁵ *Thornburg*, 490 U.S. at 416-17 ("[W]e are comforted by the individualized nature of the determinations required by the regulation...the regulations expressly reject certain shortcuts that would lead to needless exclusions.").

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 1997e(a) (requiring prisoners to fully exhaust the facility grievance procedure before filing a federal lawsuit).

this process is almost impossible to do on their own because of the complexity of the law, as well as the courts' reluctance to question the reasoning behind prison staff decisions. In my experience, most cases are thrown out during summary judgment for procedural reasons, even when prisoners have strong cases.

Even when a prisoner's claims are strong, they are unlikely to attain an attorney. According to the Prison Litigation Reform Act, attorneys representing prisoners can only attain 150% of what a prisoner wins in the lawsuit.¹⁸ Many prisoners filing federal lawsuits only win \$1 for "nominal damages," and attorneys representing such individuals would only be entitled to \$1.50 in attorneys' fees!¹⁹ Thus, attorneys almost never take on such cases, preventing prisoners from holding authorities accountable for violating their constitutional rights.²⁰ In other words, prisoners are the MOST vulnerable population in America. The government controls every aspect of their lives, can arbitrarily violate their rights, and still, these people have little to no legal recourse to vindicate their rights.

Many court rulings bear this out. When some prisons argue that publishing a book is akin to "running a business," which they consider a security threat, many courts accept the shaky logic that both running a legal business behind bars and mere book publication are security threats. At least one court has also ruled that, so long as a prison does not actually prevent a prisoner from publishing, they can prevent a prisoner from accessing the research necessary to publish something.²¹

Other courts have found practices like Michigan's to be illegal. In a Colorado District Court Case, *Jordan v. Pugh*, the court held that prison staff must allow prisoners to publish their work, even if they're compensated.²² Further, the U.S. District Court in the Northern District of Ohio has acknowledged that prisoner-published writings may contribute to a finding "of [an] extraordinary and compelling reason to release him."²³ Thus, some recognize the obvious: writing is a positive behavior. Therefore, we should be encouraging prisoners to practice it, rather than hindering them.

Such inconsistency among courts is only possible because the U.S. Supreme Court has refused to adjudicate a prisoner's right to publish works. Thus, "it's not clearly established federal law." In such situations, prisoners don't have enforceable rights, as they cannot sue prison officials, even when the average citizen would believe that staff violated their rights.²⁴

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¹⁸ See Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 261-62 (2019) ("Courts have found [42 U.S.C. § 1997(e)(d)(2)] to cap attorney's fees at 150% of the monetary award.").

¹⁹ See also Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POLICY INITIATIVE (Apr. 26, 2021), <https://perma.cc/KAN9-5GZP>.

²⁰ *Id.*

²¹ *Lindell v. Esser*, No. 13-cv-563-wmc, (W.D. Wis. Mar. 2, 2015).

²² 504 F. Supp. 2d 1109 (2007); see also Clay Calvert, *Bylines: Behind Bars: Fame, Frustration and First Amendment Freedom*, 28 Loy. L.A. Ent. L. Rev. 71 (2007).

²³ *United States v. Walker*, No. 1:11 CR 270, (N.D. Ohio Oct. 17, 2019).

²⁴ *Dwyer v. Hall*, No. 5:21-cv-12024, (E.D. Mich. Apr. 25, 2022).

With such a state of affairs, it should not surprise us that the government would create an oppressive “cancel culture” in prisons. Since civil lawsuits have proven completely ineffective at holding prison staff accountable, there are only a few other ways to challenge their power: either garner public sentiment through the media or appeal directly to the governor or legislature's sense of decency, logic, etc. Either is a difficult task for people in prison.

Prisoners have almost no power to help get government officials reelected or hold them accountable, which makes appealing directly to governors and legislators near futile. Prisoners can't volunteer, make campaign contributions, or vote in most states. Further, prisoners often come from socially and politically marginalized communities who have similarly little influence over elected officials. And when politicians do support prison reform, they often receive negative responses from the voting public, even when the reforms will reduce crime, improve victim satisfaction (e.g., restorative justice), etc.

Whether or not a prisoner recognizes these political realities (in my experience, most do), they will still find it difficult to advocate for themselves for practical reasons. For example, phone calls from prison are expensive, and prison jobs pay almost nothing (most kitchen workers here make 17.5 cents an hour). Even if someone can afford a call, people are not likely to pick up calls from a prison, and if they miss the call, they can't call the prison back. Letter writing campaigns are also difficult because people in prisons are disproportionately illiterate compared to people on the outside.²⁵

For many of the same reasons, prisoners don't really have access to the press. The media rarely responds to prisoner-written letters. Further, even if a reporter wanted to interview a specific prisoner, laws may be passed that hinder attempts between prisoners and journalists to converse and collaborate.²⁶ Prison officials have "Broad discretion to deny reporters access to prisons and reject requests to speak with specific inmates..."²⁷

Pursuing any of those ways of challenging censorship decisions – the grievance process, civil litigation, going to the press, or legislative advocacy – poses risks. Over the years, prisoners' attempts to use these machinations have been crushed through retaliation, something that has been well documented. For instance, John Boston points out that prison staff have confiscated prisoners' legal papers, fired them from jobs, falsely charged them with misconduct, placed them in solitary

²⁵ Corey Michon, *Uncovering Mass Incarceration's Literacy Disparity*, PRISON POLICY INITIATIVE (Apr. 1, 2016), <https://perma.cc/5YE2-KM4X>.

²⁶ *Jamal v. Kane*, 105 F. Supp. 3d 448, 43 MEDIA L. REP. (BNA) 1679 (M.D. Pa. 2015) (striking down a Pennsylvania law, the Revictimization Relief Act, due to its restrictions on the right to free expression and explaining “The First Amendment does not evanesce at the prison gate, and its enduring guarantee of freedom of speech subsumes the right to expressive conduct that some may find offensive.”).

²⁷ Frank D. Lomonte & Jessica Terkovich, *Orange is the New Blackout: The First Amendment and Media Access to Jails*, 204 MARQ. L. REV. 1093 (2021).

confinement, and even assaulted them in response to prisoners' attempts to resolve problems in nonviolent ways (e.g. grievances, lawsuits, talking to the press, etc.).²⁸

While the courts have occasionally condemned such actions through small money judgments, they have also legalized many forms of retaliation. For example, Policy Directive 03.03.105 allows the MDOC to charge prisoners with "inciting a riot" for engaging in or encouraging others to participate in work stoppages, nonviolent gatherings, etc. Misconduct that can result in solitary confinement, parole denial, and removal from programs necessary for parole, probably tacking several years onto their sentence. In one case, a prisoner was removed from a college program merely because Amani Sawari, a prison advocate, sent him an article encouraging prisoners to engage in a national strike.²⁹ Regardless of specifics, even reading about or attempting to communicate about such mass protests can destroy prisoners' futures as well as hurt their current circumstances.³⁰

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So, is there any doubt that censorship exists in America?

Why should we care that prisoners' First Amendment rights are being violated? In some ways, they're the watchers watching the watchman. The government controls every aspect of the prisoners' life; with a snap of their fingers, they can put a prisoner in a cold cell, take away his clothes, and hold him for days without due process, claiming that the prisoner is suicidal or a security threat. Prisons are dark boxes, shielded from public viewing or critique. If people in prisons can't publish their work and tell the world what goes on inside them, who will?³¹ If staff can arbitrarily violate a prisoner's rights without consequences, then what else are they getting away with? If a prisoner's ability to read, write, and associate with others is being stomped out, how can they expose the conditions they're living under?

²⁸ John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431-32 n. 7 (2001).

²⁹ See *Bradley v. Yokom*, 2024 U.S. Dist. LEXIS 95067 (W.D. Mich. May 29, 2024) at *3-4, 8-9.

³⁰ *Id.*

³¹ Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining A Light*, 95 DENV. L. REV. 457, 499 (2018).