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The Free Exercise of Copyright Behind Bars

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Abstract

People in prison produce vast amounts of creative and expressive work—from paintings and sculptures to essays, novels, music, and NFTs—but they are rarely described as artists and their work is often not described as "art." Prisoners also do not regularly take advantage of copyright law, the primary form of protection for creative works. They should.

Copyright provides a strong set of rights that combines strains of free expression values with elements of property rights. Copyright confers dignitary and expressive benefits and, for some creators, financial rewards. As such, copyright can be a tool to help prisoners improve their lives, both while they are incarcerated and after they are released. In the prison context, copyright should be thought of as akin to a civil right and a part of the movement to reform the U.S. carceral system, empowering those who create. Moreover, because copyright is a right in

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intangibles, there is no reason that prisoners cannot or should not advance and vindicate their copyright interests just as they would if they were not incarcerated. In other words, copyright behind bars should not operate any differently than copyright in the free world.

This Article first describes the enormous range of artistic work created by those who are imprisoned, as well as the prison system's regular attempts to deter and suppress such work. The Article then explains how copyright law protects virtually all of these works and why copyright is valuable to prisoners and should become part of the carceral reform project. Finally, the Article argues that there is no reason to limit the exercise of copyright by those who are incarcerated and no justification for impinging on prisoners' ability to create, disseminate, and profit from their expressive and artistic works.

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INTRODUCTION

Prisoners in the United States create vast amounts of artwork. They write essays, draw landscapes, compose music, make NFTs, and create sculptures. Women in a writing group in a Connecticut prison wrote a collection of short stories, and one of the writers even won an award for her work.[1] Damien Hodges recently showed his NFT artwork while he remains in prison.[2] Detainees at Guantánamo Bay created a set of art works that has led to a multi-city exhibition tour.[3] Curtis Dawkins, imprisoned in Michigan, is a writer who entered into a publishing contract that included a $150,000 advance for his collection of short stories.[4]

Most work created in prison does not receive this level of attention or financial remuneration, but art, theater, "hobby

1. *See* William Yardley, *Inmate Can Keep Money Earned from a PEN Literary Award*, N.Y. TIMES (Apr. 17, 2004), https://perma.cc/8JZE-RQZX ("Barbara Parsons Lane will be one of the stars of the PEN 2004 Literary Gala . . . . Ms. Lane, however, will not be able to attend the event. She is serving 10 years in a Connecticut state prison after pleading no contest to manslaughter for killing her abusive husband."). There is more to this story, as will be discussed below. *See infra* Part I.B.2.

2. *See* Clara-Sophia Daly, *The Journey to Create an NFT Gallery of Art Made by People in Prison*, SOUNDCLOUD (Apr. 2022), https://perma.cc/5PS2-RWUV.

3. *See Art from Guantánamo Bay*, ART FROM GUANTÁNAMO BAY, https://perma.cc/ZVF4-DQUN ("Detainees began to make art almost as soon as they arrive[d] at the United States military prison camp known as Guantanamo Bay."). There is more—much more—to this story. *See infra* Part I.B.1.

4. *See* Alexandra Alter, *A Prisoner Got a Book Deal. Now the State Wants Him to Pay for His Imprisonment*, N.Y. TIMES (Feb. 17, 2018), https://perma.cc/LCG6-CN6T ("Curtis Dawkins, a felon who is serving a life sentence in Michigan for murdering a man during a botched robbery, got some unexpected good news. . . . Scribner, one of the top literary publishing houses in the United States, wanted to publish his debut collection of short stories . . . ."). Again, there is more to this story. *See infra* Part III.A.

craft," and writing programs proliferate in jails and prisons and incarcerated people create huge amounts of artwork both in connection with, and independent of, these programs. Very little of this work is bought or sold, very little of it would be considered "good" art, and few prisoners are considered "artists." These artists and writers are sometimes celebrated for their work, they occasionally make money from their work, and sometimes they are punished for their work—especially when it casts a negative light on the prison system.[5] What they rarely do is exercise the rights that accompany copyright. They should.

All incarcerated people who paint, write, compose, and otherwise create, are copyright owners with copyright rights—the right to make copies of their works and distribute them, the right to display their works in public, the right to transfer ownership of those rights, and so on.[6] But prisoners and their advocates appear to be mostly unaware of these rights and the value they may have. While prisoners are regularly permitted and at times even encouraged to create, they rarely exercise the formal, legal rights that accompany the products of those artistic efforts. Understanding that prisoners who create are artists—and treating their works as the protected copyrighted works they are—provides a valuable tool for the carceral reform movement.

Copyright law protects all "original works of authorship" as soon as they are "fixed in a tangible medium of expression,"[7] which means that virtually all of the creative work done by people in prison is protected by copyright. Like other forms of property, the rights conferred by copyright are fully alienable—they can be licensed or assigned as the owner chooses.[8] But copyright is not just valuable because of its potential financial returns. It is a dignifying, humanizing recognition of the significance of creative work; copyright is capable of promoting and protecting free expression and First Amendment values; and it is a property right, protected against private and government incursion. And although copyright

5. In many of these instances, it seems that negative publicity for the prison system leads to repercussions for those who bring this information to light. *See infra* Part III.B.

6. *See* 17 U.S.C. § 106.

7. *Id.* § 102(a).

8. *See id.* § 106.

law—like much of the legal system—has been used as a tool for oppression and subordination, it also has the potential to empower incarcerated people who create and to improve their lives while they are in prison and once they are released.

While copyright is a form of property right, it differs from real property in ways that are significant for those who are imprisoned. Most significantly, it is a right in intangibles rather than physical items.[9] For example, I own the copyright in this Article, but the right is not about control over the reprint or a digital copy. Instead, copyright allows me to grant the Journal the right to make and distribute copies of the work.[10] In the event that I want to expand the Article into a book, I can grant a publisher the right to do that.[11] I can license or assign the right to publish excerpts of the Article and, although it is exceedingly unlikely, I could grant the right to Universal Studios to create a movie version of the work.[12] None of these transfers involves the physical or tangible object in which the copyright inheres, and that is important for those who are incarcerated. It means that there are few practical or substantive impediments to the exercise of copyright in prison—in some sense, the exercise of copyright does not occur in a place at all, and there is thus no reason to restrict it when that exercise is by an incarcerated person. Copyright can, for the most part, be exercised from behind bars just as easily as in the free world.

Although copyright can be considered akin to a civil right or liberty, it resides in a "sub-constitutional" space in the prison law context.[13] Exercise of copyright from behind bars is therefore not governed by constitutional prison law (or, perhaps more accurately, constitutional prison law does not concern itself with copyright).[14] The sub-constitutional space includes

9. *See id.* § 202 ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.").

10. *See id.* § 106(1), (3).

11. *See id.* § 106(2) (explaining that the "owner of copyright" has the right "to prepare derivative works based upon the copyrighted work . . . .").

12. A movie version of a book is also a derivative work. *See id.* § 101.

13. Avlana K. Eisenberg, *The Prisoner and the Polity*, 95 N.Y.U. L. REV. 1, 6 (2020).

14. *See id.* ("Careful attention is given to whether conditions of confinement run afoul of the Eighth Amendment's ban on cruel and unusual punishment. Comparatively neglected are normative aspects of incarceration

wide swaths of prison life—from art and education programs to vocational and hobby activities—and scholars and advocates have recently begun to focus their attention on these spaces.[15] This work is animated by the notion that people who are incarcerated are a part of society rather than apart from society.[16]

This broader lens allows a reimagining of the relationship between prisons and society and between those who are incarcerated and those who are not incarcerated.[17] For example, although the Constitution has been held to require only a bare minimum of health and safety standards in prison, there are compelling normative reasons to import "free-world" regulatory law to the world behind bars.[18] For similarly compelling reasons,

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that fall outside this slice of constitutional law and beyond the purview of the Supreme Court." (citation omitted)).

15. There is much written about prison law in general and, in particular, about the ways in which the constitution regulates, or fails to regulate, the prison system. For a broad overview (and critique) of "prison law," see Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 517 (2021) (including citations to much of the significant work in the field). Much of the work on prison law focuses on constitutional issues; indeed, Driver and Kaufman define "prison law" as "a subspecialty of constitutional law and a neglected part of the discipline called criminal procedure." *Id.* at 521 (citation omitted); *see also id.* at 520 n.31 (citing some of the foundational prison law scholarship) Many in the carceral reform movement have worked for years outside of the legal system, of course.

16. Following the lead of these scholars, I will use both "prisoners" and "incarcerated people" throughout the Article, recognizing that there are differing views about the appropriate language. *See, e.g.*, Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. FORUM 302, 302 n.2 (2022); *see also* Driver & Kauffman, *supra* note 15.

17. *See, e.g.*, Eisenberg, *supra* note 13, at 6–7

> [Prison higher education] brings to the forefront issues about the place of prisoners in society both while they are incarcerated and once they are released, and challenges readers to think beyond the paradigms of warehousing and second-class citizenship to imagine what it would be like if those in prison were understood primarily as fellow members of the polity who would be returning to civil society.

see also Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1388 (2022) ("[People who are in prison] are, as a matter of reality, if inconsistently as a matter of law, inextricably intertwined with the rest of society.").

18. *See* Littman, *supra* note 17, at 1393

> Free-world regulatory law can help to redress incarceration's extraction of resources from poor communities of color, promoting

although the Constitution does not require prison education programs, prisons can and should provide those programs to improve the lives of those who are incarcerated and to facilitate their re-entry to the free world.[19]

This line of thinking focuses on what we can and should do rather than what the Constitution requires. Just as we can and should offer robust prison education programs and require high standards of health and safety behind bars, we can and should allow and encourage the free exercise of copyright behind bars. Indeed, this is a relatively straightforward step, with few logistical impediments in its way and the real possibility of improving the lives of prisoners.

This Article proceeds as follows. Part I describes the vast amount and range of expression that takes place in America's prisons. Incarcerated people create an enormous body of artistic and expressive work even under punishing conditions and with regular suppression and confiscation of that work by prison officials. Part II details how copyright protects virtually all of the creative work made by prisoners and explains how copyright, in the prison context at least, is akin to a civil right or liberty and should be understood as such by incarcerated people and their advocates. Finally, Part III demonstrates what the free exercise of copyright by prisoners would entail and argues that prison officials have no justification for limiting the exercise of copyright. Indeed, copyright behind bars hardly need function any differently than copyright in the free world.

I. CREATION AND EXPRESSION BEHIND BARS

Incarcerated people in the United States create a vast amount of artistic and expressive work. From stories and novels written in conjunction with prison writing programs, to prison newspapers, to the visual and sculptural works created in prison "hobbywork" programs, the volume of work is massive. Although many prisons purport to encourage creative work by

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> redistribution while improving conditions. Applying the law that governs society writ large to prisoners and prisons can reframe our social and moral conceptions of these people and places . . . [and] can account for . . . the broad range of serious harms that incarceration causes . . . .

19. *See* Eisenberg, *supra* note 13, at 5–6.

incarcerated people, prison officials frequently make it very difficult to do this work. Moreover, when creative or expressive work by a prisoner gains notice or recognition from the outside world, prison officials tend to suppress or deter it, particularly when this work casts a negative light on the prison system.

A. *The Range of Artistic Endeavors by Incarcerated People*

The range and quantity of art produced by those incarcerated in state and federal prisons is astounding.[20] The sheer number of prison art programs indicates that this is a significant aspect of the life of incarcerated people.[21] In addition to drawings and paintings, which are relatively easy to find and to view in some cases, people in prison write short stories, novels, essays, poems, musical compositions, and even computer code.[22] They produce newspapers and magazines, and create drawings, paintings, NFTs, and sculptures.[23] There are also many theater and performance programs across the nation's prisons.[24] For a small percentage of incarcerated people, their

20. For some galleries of art produced by incarcerated persons, see *Gallery*, P.A.T.H., https://perma.cc/JK85-BSKW; *Art & Writing*, JUST. ARTS COAL., https://perma.cc/MV4H-6EHY; *The Linkage Community*, PCAP, https://perma.cc/G5BG-QGJQ.

21. *See, e.g.*, *Program Directory*, JUST. ARTS COAL., https://perma.cc/LDZ3-AXA2; *About the Program*, CAL. ARTS IN CORR., https://perma.cc/L3AZ-F8QL; *Creative Acts*, CREATIVE ACTS, https://perma.cc/55ES-QXZ9; *About*, UNIV. OF DENVER PRISON ARTS INITIATIVE, https://perma.cc/8DCM-AT4B.

22. *See, e.g.*, *About*, THE LAST MILE, https://perma.cc/6CWB-JNAK ("The Last Mile prepares incarcerated individuals for successful reentry through business and technology training."). This graphic story explains San Quentin's coding program from the perspective of those who participated in the program. *See* Mark Fiore, *Meet the Programmers of San Quentin*, KQED (Sept. 5, 2018), https://perma.cc/N9XJ-DPUG.

23. *See, e.g.*, Jason Kottke, *An Online Collection of American Prison Newspapers (1800–2020)*, KOTTKE.ORG (Nov. 22, 2021), https://perma.cc/F3MP-SF4M. One example, the San Quentin News, has been operating for many years, publishes online, and prints and distributes 30,000 papers per month. *See Home*, SAN QUENTIN NEWS, https://perma.cc/QM9V-SMYU.

24. *See, e.g.*, Sofia Barrell, *Prison Theatre Programs,* AM. THEATRE (Jan. 22, 2019), https://perma.cc/4WP8-EAV2; John Moore, *In a Prison, Live Theater Lights Up the Dark*, DENVER GAZETTE (July 30, 2022), https://perma.cc/JD4Y-4C63 (last updated Dec. 23, 2022) (describing a play written, produced, and performed by more than fifty "incarcerated residents" of a prison in Colorado with the support of the DU Prison Arts Initiative).

creative endeavors may be remunerative; for the vast majority, however, these projects serve other purposes. Artistic expression and creation can be humanizing, consoling, engaging, expressive, and engrossing, and many incarcerated people report these kinds of feelings about their art.[25] All of this is similarly true for people who are not incarcerated—this will become a theme in this Article.

A noteworthy, if atypical, example of creation behind bars is the work made by detainees at Guantánamo Bay Detention Camp. In late 2017, the John Jay College of Criminal Justice presented *Ode to the Sea*, an exhibit of artwork made by detainees at Guantánamo.[26] The work was created in connection with an art program at the detention facility and was transferred from there to New York City by the detainee's lawyers.[27] The exhibition has traveled since 2017 and was most recently on display at Catamount Arts.[28]

The work created by Guantánamo detainees provides perhaps the most dramatic example of both the humanizing and

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25. *See generally, e.g.*, Bryonn Bain, *Women Beyond Bars: A Post-Prison Interview with Jennifer Claypool and Wendy Staggs*, 25 UCLA WOMEN'S L.J. 87 (2018). One of the women interviewed by Bain, Jennifer Claypool, described how the Actors' Gang Project was significant for her "because it made me deal with my emotions, made me actually feel. It made me start to become more emotionally aware." *Id.* at 110. Wendy Staggs, another interviewee, told Bain, "It's absolutely imperative to discuss the arts in my life and the effect they had in my life. The arts became my number one vessel in where I discovered healing." *Id.* at 111. Staggs went on:

> [The arts] is what I'm advocating for. . . . I don't believe that everybody's environment allowed to them to be a child and their childhood could have been taken away by many different things: gangs, drugs, molestation. That's why art is there, that why music is there—it's for that inner, most sacred part of you to find a place of happiness and unity with everybody else.

Id. at 112; *see also* Erin L. Thompson et al., *Ode to the Sea: Art from Guantanamo*, POSTPRINT MAG., Oct. 2017, at 1, 24, https://perma.cc/8DB8-ZYYZ ("While some detainees use artwork in a more overtly healing way . . . others hope that their work simply humanizes them to viewers.").

26. For the program from the exhibit, see *Art from Guantánamo Bay*, *supra* note 3.

27. *See* Jacey Fortin, *Who Owns Art from Guantanamo Bay? Not Prisoners, U.S. Says*, N.Y. TIMES (Nov. 27, 2017), https://perma.cc/UB75-TG6F.

28. *Art from Guantanamo Bay*, CATAMOUNT ARTS, https://perma.cc/X9MS-79VS.

therapeutic value of artistic creation *and* of the efforts by the carceral system to suppress these works. The catalog from the exhibit is available online,[29] and examples of the work the exhibit contains are breathtaking: poems about the sea that the detainees cannot see; paintings of their world and their imaginings beyond the cell walls; and sculptures ingeniously made from the items available to them.[30] It is difficult to see this work and not be moved, and it is difficult to see this work and not feel that artistic creation has immense value.[31] The drawings are remarkable, conveying a visceral sense of the experiences of the detainees.[32] The work speaks to the conditions at Guantánamo and the lives of the detainees, and the exhibit received a substantial amount of attention and acclaim.[33]

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29. *See* Erin L. Thompson et al., *supra* note 25.

30. As one example, images of two sculptures created by Moath Al-Alwi using materials such as plastic razor covers are included in the program. *Id.* at 48–49.

31. More recently, drawings by Abu Zubaydah, a detainee at Guantanamo, were included with profound effect in a report on the United States' torture program. *See* Michael Ricciardelli, *Torture Speaks: Seton Hall Law Report Documents U.S. Torture Program as Described by Both the Torturers and the Victims*, SETON HALL UNIV. (Dec. 4, 2019), https://perma.cc/ME3M-ZQ8P; Mark P. Denebeaux et al., *How America Tortures* (Dec. 2, 2019) (unpublished manuscript) (available at https://perma.cc/A64H-XATM). This is one of the few instances I have seen in which prisoner copyright rights are explicitly acknowledged. Each drawing includes an indication that [name] holds the copyright in the work. *See* Ricciardelli, *supra*. The significance of copyright notice is explained in Part III.A.1.

32. *See* Mansoor Adayfi, *In Our Prison on the Sea*, N.Y. TIMES (Sept. 15, 2017), https://perma.cc/6F8W-EMHR. The Guantánamo Bay detention facility is on an island, near the water, but because the facilities were covered with tarps, detainees never saw the ocean except on one occasion when the tarps were removed in advance of a hurricane. Monsoor Adayfi, a detainee, describes this experience:

> The tarps remained down for a few days, and the detainees started making art about the sea. Some wrote poems about it. And everyone who could draw drew the sea. I could see different meanings in each drawing, color and shape. I could see the detainees put their dreams, feelings, hopes and lives in them. I could see some of these drawings were mixtures of hope and pain. That the sea means freedom no one can control or own, freedom for everyone.

33. *See, e.g.*, Rick Carr, *Current and Former Guantanamo Bay Detainees Create 'Ode to the Sea' Art Exhibit*, NPR (Nov. 20, 2017), https://perma.cc/H3QV-6VHR; Valerie Hopkins, *'I Can Get My Soul Out of*

Guantánamo is obviously an atypical prison setting, but it is not an outlier in the extent to which people behind bars engage in creative and expressive work. Prisons regularly tout the art and theater programs that they host or allow to proceed, and people on all sides of the prison system seem to recognize the therapeutic and rehabilitative value of such programs.[34] Prisoners report enjoying the programs and finding value in their artistic endeavors both while they are incarcerated and afterwards.[35] Prison observers and researchers have found that prisoners who participate in arts programs commit fewer infractions while in prison and that there are ongoing positive effects.[36]

Prison': The Art Made by Guantanamo Detainees, THE GUARDIAN (Oct. 2, 2017), https://perma.cc/NK7W-M8X8.

34. The substantial literature on the effectiveness of arts education and arts programming for incarcerated persons overwhelmingly shows positive benefits from participation in these programs. *See generally* Amanda Gardner et al., *Prison Arts Resource Project: An Annotated Bibliography* (May 2014) (unpublished manuscript) (on file at https://perma.cc/9FZV-ZZMV). *See, e.g.*, Casey Barlow et al., *Mitigating* Over-*Isolation: Art Therapy in Prison Programs During COVID-19*, 39 J. AM. ART THERAPY ASS'N 71 (2022); Danielle Maude Littman & Shannon M. Sliva, *Prison Arts Program Outcomes: A Scoping Review*, 71 J. CORR. EDUC. 54 (2020) (reviewing twenty-five studies of prison arts programs and concluding that they are associated with positive outcomes in terms of socio-emotions, self-efficacy, self-esteem, social connections and relationships, mental health and well-being, and educational and vocational skills).

35. *See supra* note 25; *see also* David Smith, *'A Way to Deal with Emotion': How Teaching Art Can Help Prisoners*, THE GUARDIAN (Nov. 5, 2021), https://perma.cc/Q76Y-PZKQ; Hilarie M. Sheets, *For the Incarcerated, Drawing Is a Lifeline*, N.Y. TIMES (Sept. 20, 2019), https://perma.cc/LH5A-W45D.

36. *See, e.g.*, Larry Brewster, *The Impact of Prison Arts Programs on Inmate Attitudes and Behavior: A Quantitative Evaluation*, 11 JUST. POL'Y J. 1, 2 (2014). Perhaps not surprisingly, this literature does not mention copyright issues; however, there is discussion of the value for current and former inmates of the ability to take advantage of the rights conferred by copyright law. *See id.* at 4

> An added benefit of many prison art programs is the opportunity for inmate-artists to reconnect with society through their art in the form of auctions that support local nonprofit organizations, or community beautification projects. Displaying or selling artwork, performing music, and theater, or having public readings of inmate prose and poetry, provides inmates the opportunity to engage in "productive exchanges with the community before and after release." (citations omitted)

The creative work being done in America's prisons has received some attention in recent years. Nicole Fleetwood, a critic, curator, and professor of Media, Culture, and Communication at New York University, recently published a book that focuses on "the visual and creative practices emerging in and as a result of imprisonment."[37] The art Fleetwood describes and, in some instances, reproduces is compelling. As she puts it, her goal is to "foreground the experiments, experiences, and conceptualization of incarcerated artists in order to present prison art as central to the contemporary art world and as a manifestation and critique of the carceral state."[38]

It should be noted that this is a cross-cultural phenomenon. Studies from prison systems around the world have found that there are positive outcomes at least correlated with prison arts programs. *See, e.g.*, Natalia Hanley & Elena Marchetti, *Dreaming Inside: An Evaluation of a Creative Writing Program for Aboriginal and Torres Strait Islander Men in Prison*, 53 J. CRIMINOLOGY 285, 302 (2020); Norma Daykin et al., *Music-making for Health and Wellbeing in Youth Justice Settings: Mediated Affordances and the Impact of Context and Social Relations*, 39 SOCIO. HEALTH & ILLNESS 941, 955 (2017); Hong-Zhong Qiu et al., *Effect of an Art Brut Therapy Program Called Go Beyond the Schizophrenia (GBTS) on Prison Inmates with Schizophrenia in Mainland China—A Randomized, Longitudinal, and Controlled Trial*, 24 CLINICAL PSYCH. & PSYCHOTHERAPY 1069 (2017). A Touch of Light is a not-for-profit organization whose slogan is "Creating Social Change Through Captive Art." They have a "showcase of projects and programs around the world using Art to create Second Chances in their communities." *See International Arts in Prison*, A TOUCH OF LIGHT, https://perma.cc/27YZ-FD5M.

37. NICOLE R. FLEETWOOD, MARKING TIME: ART IN THE AGE OF MASS INCARCERATION xxi (2020).

38. *Id.* at xxiii. Fleetwood includes references to a variety of exhibitions, galleries, and collections of prison art (*see id.* at 16–19), and she has assembled a database of artwork and exhibitions. There have been other similar projects. The Justice Arts Coalition is a "national network and resource for those creating art in and around the criminal legal system," and its list of anthologies is particularly notable for collecting work by and about prison artists. *Anthologies*, JUST. ARTS COAL., https://perma.cc/WB8W-8PC6. The University of Colorado at Denver's "Captured Words/Free Thoughts" project is dedicated to publishing the art and writing of incarcerated people and it "aspires to empower its contributors, to enlighten its readers, and to shift societal perception so that prisoners are viewed as talented, valuable members of society, not persons to be feared." *Writing and Art from America's Prisons*, UNIV. OF COLO. DENVER, https://perma.cc/G6SJ-S6EA. There are also numerous examples of art exhibits by currently and formerly incarcerated people. For example, an exhibit at the Aldrich Contemporary Art Museum in Connecticut brought "together work by 34 incarcerated artists created over the past 30 years." Melkorka Licea, *A New Exhibition of Work by Prisoners Defies*

Fleetwood describes a range of work and a variety of creative practices, and other examples abound (although they are not usually presented in such a comprehensive and curated way). A notable recent project involves a documentary film made about an incarcerated artist. While in prison, Jesse Krimes created artworks with a variety of found items including "bed sheets, hair gel, and newspaper."[39] Among other projects, he made a forty-foot mural that he saw completed—rather than in the pieces that he managed to smuggle out—only upon his release.[40]

Another remarkable story involves Valentino Dixon, a man incarcerated at Attica whose artistic work ultimately led to his exoneration.[41] As Dixon tells it, once he began drawing in prison, the warden asked him to draw the twelfth hole at the Augusta National Golf Club.[42] Although he "had never set foot on a golf course and knew nothing about the sport," he began drawing images of golf courses and "said that golf art became his escape from the harsh reality of prison."[43] His work gained him some degree of recognition, and that attention eventually led a group of attorneys and students to work on his case.[44] Dixon was exonerated in 2018.[45]

These stories are all outliers, of course—the ones that come to our attention. But there can be no doubt that there is a vast amount of creative and expressive work produced by

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the Stereotypes of Prison Art—See Highlights Here, ARTNET NEWS (Feb. 22, 2019), https://perma.cc/7AHK-HBAX. "Mirror/Echo/Tilt" was "a performance and pedagogical project created by artists Melanie Crean, Shaun Leonardo, and Sable Elyse Smith to examine the language and gestures used to describe experiences of arrest and incarceration." *Mirror/Echo/Tilt*, MELANIE CREAN, https://perma.cc/W7P2-QM8F.

39. *Art & Krimes by Krimes*, KRIMES FILM, https://perma.cc/3PU2-TM8M.

40. *Id.*

41. *See The Story of Valentino Dixon*, VALENTINO DIXON, https://perma.cc/U3PG-JQRR.

42. *Id.*

43. *Valentino's Story*, VALENTINO DIXON FOUND., https://perma.cc/YDR6-JNHP.

44. *See id.*

45. *The Story of Valentino Dixon*, *supra* note 41. For other coverage of Dixon's story, see Phil Fairbanks, *Wrongfully Imprisoned for 27 Years, Valentino Dixon Sues His Accusers*, BUFFALO NEWS (Dec. 27, 2019), https://perma.cc/4QYE-7GEP; Claudine Ewing, *Valentino Dixon Tells His Story in New Book*, WGRZ (Mar. 14, 2022), https://perma.cc/9BLS-5D89.

incarcerated people in the United States. Indeed, there is so much of it that it is difficult to avoid the conclusion that the drive to create such work is foundational, perhaps fundamental, to the human condition.

B. *Suppression and Punishment for Creation in Prison*

Notwithstanding the existence of the variety of prison arts programs, it is often very difficult for incarcerated people to get the time, materials, and appropriate space for artistic creation and expression.[46] At a very basic level, prisoners are frequently not in control of these basic aspects of the creative process. In *Marking Time*, Nicole Fleetwood explains the difficulty of her project:

> One of the challenges of writing this book has been that many currently and formerly incarcerated artists are not in possession of their art, nor do they have documentation of their work or know how and where their art has circulated. For various reasons that all have to do with the extreme inequalities and exploitation that incarcerated people suffer, art made in prison is sent to relatives, traded with fellow prisoners, sold or "gifted" to prison staff, donated to nonprofit organizations, and sometimes made for private clients. Unlike artists who work outside prison, who are able to document their creations, incarcerated artists often are unable to photograph or make copies of their work. There are people I interviewed who described their work and practices to me but had nothing to show.[47]

It perhaps seems obvious that by virtue of their imprisonment it is difficult for incarcerated people to create artistic works and to engage in expressive activity, but it must be noted.

Some prisons have gone so far as to ban the creation of art and to criminally punish those who do engage in making artwork. Louisiana defines "contraband" to include "[a]ny sketch, painting, drawing, or pictorial rendering produced in

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46. It is also much more difficult to create while incarcerated for many obvious reasons. *See* FLEETWOOD, *supra* note 37, at 11. This Article does not take the position that there is an affirmative right to create or to make art; I leave for another time the question of whether restrictions on artistic creation are a form of punishment or a deprivation of a right.

47. *Id.* at xxii.

whole or in part by a capital offender, unless authorized by the warden of the institution."[48] According to Fleetwood, the "law was implemented as a measure to prevent people on death row from acquiring fame or financially profiting off their imprisonment."[49] Another way of saying this is that the state seeks to prevent those on death row from exercising their rights in their creative and artistic works.

The work that does emerge is regularly destroyed or suppressed, and its creation is sometimes punished. Particularly when incarcerated people receive recognition for their work—and especially when their work shines a negative light on the prison system—prison officials attempt to suppress that work.[50] It is challenging to collect this data, but a few examples paint a compelling picture.

1. Guantánamo

The works of art exhibited in the "Ode to the Sea" show were created under perhaps the most difficult conditions of incarceration. But even at Guantánamo there is—or *was*—some encouragement of this work. The Department of Defense provided some supplies and allowed art classes; they also permitted lawyers to take the artwork out of the facility.[51] But after the exhibit in New York, that all changed.

The Department of Defense responded to the exhibit (and, perhaps more to the point, to the attention given to the show) by canceling the art program and changing its regulations to prohibit the transfer of any artwork out of Guantánamo.[52] Prisoners were reportedly told that they would not be able to take their artwork with them if they were released and that it

48. LA. STAT. ANN. § 14:402(D)(10) (2023).

49. FLEETWOOD, *supra* note 37, at 10.

50. This is not always true, of course. There are times when prisons support and encourage art programs and individual artistic endeavor. Recall Valentino Dixon's story, for example. *See supra* Part I.A.

51. *See* Hopkins, *supra* note 33; Fortin, *supra* note 27.

52. *See* Fortin, *supra* note 27 ("[T]he Department of Defense had suspended transfers of art from the prison . . . . Asked why the policy came up for review and whether it had anything to do with the exhibition at John Jay College, Major Sakrisson said that 'media reporting brought it to the attention of the Department of Defense.'").

would be incinerated.[53] The Pentagon insisted that "items produced by detainees at Guantánamo Bay *remain* the property of the U.S. Government."[54]

Not only did the Department of Defense assert—wrongly, at least with respect to copyright—that it retained ownership of the works of art, but it offered no reason for shutting down the art program, confiscating materials, or limiting the detainees' exercise of their copyright rights.[55] The detainees had transferred their artwork to their lawyers and it is difficult to understand how this presented any kind of issue for the detention facility or the Department of Defense.

The Department of Defense's actions appear to be simply punitive rather than related to a security or other penological concern. In fact, they would seem to be counter-productive to the rehabilitative goals that are (theoretically) part of the American carceral system.[56] While the detention facility at Guantánamo is likely not designed or intended to be rehabilitative, the exercise of copyright in this instance did not affect the detention facility in any way. Indeed, it took place entirely outside of the naval base and, to the extent that there were physical, tangible manifestations of the exercise of copyright, those occurred in New York.[57]

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53. *See* Brigit Katz, *Exhibit of Art by Guantanamo Prisoners Prompts Pentagon Review*, SMITHSONIAN MAG. (Dec. 1, 2017), https://perma.cc/V435-QEGJ.

54. Fortin, *supra* note 27 (emphasis added). As explained in Part III.B, copyright does not inhere in the physical object, so confiscation of individual pieces of artwork does not necessarily interfere with the exercise of copyright. But the assertion of ownership by the Department of Defense here is inconsistent with the Copyright Act in that the "author" of a work is considered the "owner" of that work. In addition, one of the rights of the copyright is the right to display or authorize others to display the work, and the Department of Defense's actions here obstructed the detainees' ability to authorize others to display the work outside the facility. *See* 17 U.S.C. § 106(3); *infra* Part II.A.2.

55. *See* M Neelika Jayawardane, *The Guantanamo Art That Makes Washington Nervous*, ALJAZEERA (Dec. 26, 2017), https://perma.cc/7FPV-KWMN (noting that a Pentagon spokesman "declared all Guantanamo detainee art 'property of the US government,' and expressed grave fears about the financial proceeds of the sales" and that "the DoD also threatened to remove what it considers 'excess' artworks and said it might destroy them").

56. *See* Eisenberg, *supra* note 13, at 32–35.

57. *See Art from Guantánamo Bay*, *supra* note 3. The fact that copyright is a right in an intangible, and that it can be exercised almost entirely in

The Department of Defense's response received a great deal of attention; ironically, it probably brought more attention to the artwork and the artists than they would otherwise have received.[58] The exhibit continues to travel; some of the works have sold (including to celebrities); and the artists have pressed the case for the return of their work.[59] A group of current and former detainees recently sent an open letter to the Biden administration asking for the return of their works of art and a change of policy.[60] In the letter, the artists ask for an end to the "Trump-era policy" of confiscating artwork and a return of the art program at the detention facility.[61]

> Art from Guantánamo became part of our lives and of who we are. It was born from the ordeal we lived through. Each painting holds moments of our lives, secrets, tears, pain, and hope. Our artworks are parts of ourselves. We are still not free while parts of us are still imprisoned at Guantánamo.[62]

In February 2023, the Defense Department lifted the ban on the release of detainee artwork, allowing those released to take a "practicable quantity of their art when they leave."[63] This is only a partial lifting of the ban, as it is not clear whether those who remain in detention can transfer their artwork out of the facility. Moreover, the government still asserts that artwork is "the property of the U.S. government."[64]

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intangible ways, is significant for those who are incarcerated. *See infra* Part II.B.

58. *See* Carol Rosenberg, *U.S. Military May Archive Guantánamo Prison Art Rather Than Burn It*, MIA. HERALD (Dec. 1, 2017), https://perma.cc/EY5C-CU8E.

59. *See* Molly Enking, *Guantánamo Detainees Ask Biden to Let Them Keep Their Art*, SMITHSONIAN MAG. (Oct. 18, 2022), https://perma.cc/TSA7-QFVH.

60. Letter from Eight Former Guantánamo Prisoners (Mansoor Adayfi et al.) to President Joseph R. Biden, Jr. (2022) (available at https://perma.cc/659C-WZFT).

61. *Id.*

62. *Id.* One detainee has said that he will not leave unless the government agrees to also release his artwork. *Id.*

63. Carol Rosenberg, *Pentagon Lifts Trump-Era Ban on Release of Guantánamo Prisoners' Art*, N.Y. TIMES (Feb. 7, 2023), https://perma.cc/62LV-ABH8.

64. *Id.*

The detention center at Guantánamo is *sui generis*, of course, and the Department of Defense's response was extreme. This episode is nonetheless emblematic of the carceral system's attempts to punish those who make the system look bad and it highlights one of the ways in which the system dehumanizes those who are incarcerated.

2. Connecticut Women's Prison Writing Group

The novelist Wally Lamb led a writing workshop for a number of years in a Connecticut women's prison.[65] It was so successful that an anthology of the works was published, the writers earned royalties, and one of them ultimately won an award and a $25,000 prize.[66] Although the writing group was sponsored by the prison, when the state's attorney general heard of the attention paid to the work and the money the women were receiving, he brought a lawsuit against them seeking to garnish the royalties under Connecticut's cost of incarceration statute.[67] It went even farther: the prison canceled the writing program and confiscated the hard drives containing the writers' work.[68] Although the lawsuit was ultimately settled and the writers were able to recover their work from back-up files, the episode reflects the level of pushback prisoners can expect to receive when they express themselves artistically in ways that threaten the carceral system.[69] The essays in the anthology "mused about

65. *See* Wally Lamb, *Life Sentences: Writing Behind Bars*, OPRAH.COM (Feb. 2008), https://perma.cc/V6VY-QWWC.

66. *See* Michael Rigby, *Connecticut Prison Writers Settle Lawsuit, Writing Program Reinstated*, PRISON LEGAL NEWS (Feb. 15, 2005), https://perma.cc/8TJH-WX5Z.

67. *See Prisoner Earns Prize for Writing; Blumenthal Says Law to Recover Costs Needs Fine-Tuning*, NEW HAVEN REG. (Apr. 11, 2004), https://perma.cc/8AVQ-MSW9. For an in-depth review of cost of incarceration statutes and the issues associated with them, see LAUREN-BROOKE EISEN, CHARGING INMATES PERPETUATES MASS INCARCERATION (2015), https://perma.cc/QZ48-CM3J.

68. *See* Rigby, *supra* note 66.

69. It is impossible to know the motives of the prison officials who take these kinds of actions, but the correlation between incarcerated peoples' speech or expression and the punitive actions that follow is telling. According to Prison Legal News, Wally Lamb "believe[d] that the Commissioner of Corrections pushed for prosecution against the women because the essays were critical of the prison." Gary Hunter, *Prison Writers Punished for Success in Connecticut and Texas*, PRISON LEGAL NEWS (Dec. 15, 2003),

the criminal justice system and contemplated the sexual abuse, violence, drugs, alcoholism, and poverty that are recurrent themes in the lives of many prisoners."[70]

In the case of Wally Lamb's group, the prison's response to the attention the writers (and their work) received seems particularly disproportionate to any conceivable safety or security concern. It is understandable only as a punitive measure. Not only did the prison seek to capture the $25,000 award granted to one of the writers, but it canceled the writing program and sought to destroy the electronic copies of the work. It was only through data recovery efforts that the writers were able to obtain copies of their written works. In this rare instance, the writers objected to the actions of the prison officials and ultimately the state backed down.[71] Rather than reflecting a legitimate countervailing interest on the part of the prison system, it seems more likely that the prison's response reflects an effort to shut down critical voices and commentary on the prison system and prison conditions, and, more broadly, an effort to degrade and dehumanize those incarcerated within the system.

These are unusual examples to be sure—most art created by prisoners goes unnoticed.[72] And although most attempts to

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https://perma.cc/K44R-HGFT. One of the authors agreed with that conclusion: "I think they're worried," Robin Cullen said, "cause the doors are open now to what's really going on inside the facility." *Id.* As a follow up to this story, the anthology's third volume has not yet been released. Two of the writers sued Wally Lamb, claiming payment disputes and bullying. *See* Daniela Altimari, *Once-Celebrated Prison Writing Program Led by Author Wally Lamb Is Now Under Investigation by the State*, HARTFORD COURANT (July 15, 2019), https://perma.cc/PZZ3-MUX4. According to Prison Legal News, an "investigation found no wrongdoing by Lamb, and the writing program was reinstated in September 2019." David M. Reutter, *Connecticut Prison Writing Program Leads to Lawsuits*, PRISON LEGAL NEWS (Oct. 7, 2019), https://perma.cc/3DQX-2TVM.

70. Rigby, *supra* note 66.

71. *See id.* ("Although this story ends happily, it's the exception and not the rule. The majority of prison writers remain oppressed as prison officials around the country search for ways to silence them.").

72. Alex Greenberger, *Incarcerated Artists Are Making Some of Today's Most Important Art. A Powerful New Book Explains Why*, ARTNEWS (July 8, 2020), https://perma.cc/3ARG-77UJ.

deter and suppress artistic creation receive no publicity, there is no doubt that it happens regularly.[73]

II. COPYRIGHT IS AKIN TO A CIVIL RIGHT

Understanding the extent of creation by those who are incarcerated, and the system's response, is vital because everything from paintings and poems to musical compositions, essays, and, more prosaically, every letter written by a prisoner, is covered by the 1976 Copyright Act[74] and protected by national and international law. The Act confers property-like rights on the creators and creators do not forfeit those rights merely because they are incarcerated.[75] The creators of those works own the copyright in those works, but that fact is rarely acknowledged and little understood.

For copyright scholars and lawyers, it is obvious that copyright protects the vast majority of creative and expressive works created by prisoners. It seems, however, that it is not so clear to incarcerated people or their advocates, who rarely take advantage of the copyright system or exercise the rights conferred by copyright. For this latter group, this Part describes the copyright regime as it applies to the huge range of works

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73. *See* FLEETWOOD, *supra* note 37, at 11. In one example somewhat orthogonal to the discussion here, JPay (the communications company controlling email and internet access for a huge number of prisons in the United States) included a provision in its "Terms of Service" document that operated to transfer rights in all content transmitted with the JPay service to JPay. Dave Maass, *The Hidden Cost of JPay's Prison Email Service*, PRISON LEGAL NEWS (May 11, 2015), https://perma.cc/4DJV-ARA3. Prison Legal News reported on this story in 2015 and updated the story to indicate that JPay had deleted the provision from its terms of service. *Id.* This issue came to the attention of prison advocates when the family member of an incarcerated person posted a video recorded by the incarcerated person and the prison disciplined him, justifying this action because he had—allegedly—violated JPay's IP rights and the Terms of Service. *See* Dave Maass, *JPay Will No Longer Claim Ownership Over Inmate-Family Correspondence*, ELEC. FRONTIER FOUND. (May 8, 2015), https://perma.cc/E379-WJK7 ("[A]fter Buford published a videogram that her brother recorded via JPay to Facebook, prison administrators cut off her access to the JPay system, sent Benson to solitary confinement, and stripped away some of his earned 'good time.'").

74. 17 U.S.C. §§ 101–1401.

75. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 405.4 (3d ed. 2021), https://perma.cc/EC5H-MPZ2 (PDF) ("An incarcerated person may claim copyright . . . .").

described in Part I and explains what rights are conferred and how they may be exercised.[76]

This Part also provides some context regarding the animating features of copyright law. United States copyright law provides a variety of property-like rights; advances or, in some ways, complements the freedom of expression; and serves the crucial expressive purpose of recognizing the humanity and dignity of those who create and innovate. Indeed, some consider copyright to be a human right.[77] Although copyright has been used as a tool of oppression, claiming and exercising copyright can also be part of the effort to counteract oppression and undo subordination. As such, copyright is akin to a civil right and belongs in the toolbox for incarcerated people and their advocates.

A. *Copyright Protects Art Made in Prison*

From a copyright perspective, the rights of prison artists are straightforward: all original works of authorship—which are defined very broadly by the Copyright Act—are protected as soon as they are "fixed in any tangible medium of expression."[78] In other words, as soon as paint is on paper, words are written down (on paper, electronically, or otherwise), or music is recorded, copyright protection arises. Incarcerated people, just like all other artists, own and control the rights that copyright confers.

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76. The PEN America Prison and Justice Writing program has recently published a book that provides practical information about writing and publishing behind bars, but it is one of the few such resources I have been able to find. *See generally* PEN AM., THE SENTENCES THAT CREATE US: CRAFTING A WRITER'S LIFE IN PRISON (Caits Meissner ed., 2022). The book "provides a road map for incarcerated people and their allies to have a thriving writing life behind bars—and shared beyond the walls" and includes a chapter titled *Copyright Protection in Brief* by Lateef Mtima and John R. Whitman. *PEN America Prison and Justice Writing Program*, PEN AM., https://perma.cc/GU2G-VQZ9; *see also* Lateef Mtima & John R. Whitman, *Copyright Protection in Brief*, *in* THE SENTENCES THAT CREATE US: CRAFTING A WRITER'S LIFE IN PRISON 180–84 (Caits Meissner ed., 2022).

77. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 27 (Dec. 10, 1948) ("Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.").

78. 17 U.S.C. § 102.

Copyright law has its foundation in the Constitution and in the notion that artistic creation and scientific discovery are critical to society, to the public, and to values of democratic participation.[79] Article I, section 8, clause 8 of the Constitution provides that Congress has the power "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[80] The prefatory language in this clause is unusual, and important.[81] While there is, of course, no unanimity in the understanding of the Intellectual Property Clause, there is widespread agreement that it indicates the public-serving purpose of intellectual property protection.[82] The Clause indicates that rights may be granted to "Authors and Inventors" *in order* to achieve this public good: the progress of "Science and useful Arts."[83] In other words, the provision is animated by the utilitarian goal of encouraging creativity and innovation by providing rights to those who create and

79. *See* U.S. CONST. art. I, § 8, cl. 8; *see also* Mark B. Brown, *Science and Democracy*, OXFORD BIBLIOGRAPHIES (July 24, 2013), https://perma.cc/J9AT-JV6B ("Democracies depend on science for effectively addressing public problems, and many argue that science provides a model of rational democratic deliberation."); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 289 (1996) [hereinafter Netanel, *Copyright and a Democratic Civil Society*]

> The idea that copyright is in some way bound up with democratic governance is not new. In adopting the Constitution's Copyright Clause and enacting the first federal copyright statute, the Framers were animated by the belief that copyright's support for the diffusion of knowledge is "essential to the preservation of a free Constitution." Modern copyright jurisprudence contains a similar theme. It posits that the public education and discourse that undergird a democratic polity require a robust market for original works of authorship. (citations omitted).

80. U.S. CONST. art. I, § 8, cl. 8.

81. The only similar clause appears in the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

82. *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750–51 (2012) ("The Supreme Court, Congress, and many legal scholars consider utilitarianism the dominant purpose of American copyright and patent law." (citations omitted)).

83. U.S. CONST. art. I, § 8, cl. 8.

innovate.[84] We as a society care about the output of artists and scientists, so we are willing to provide them with a suite of rights in the things that they produce.[85]

1. Copyright Authorship and Ownership

Pursuant to the Intellectual Property Clause, Congress most recently enacted the Copyright Act, which provides that copyright arises as soon as a work is "fixed in any tangible medium of expression."[86] This means that no action need be taken in order for copyright to attach. The fixation requirement is a hurdle, but note how low that hurdle is: the only works that fail to meet this criteria are those that are purely transitory or those that are extemporaneous and never recorded or noted—an off-the-cuff speech, for example.[87] Contrary to popular lore, there is no need to put the copyright symbol on one's artwork or

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84. *See* Fromer, *supra* note 82, at 1751

> According to utilitarian theory, copyright law provides the incentive of exclusive rights for a limited duration to authors to motivate them to create culturally valuable works. Without this incentive, the theory goes, authors might not invest the time, energy, and money necessary to create these works because they might be copied cheaply and easily by free riders, eliminating authors' ability to profit from their works. (citations omitted).

85. Thomas Jefferson described the patent monopoly as an "embarrassment" and suggested that it should be limited. In a letter to Isaac McPherson he wrote, "Considering the exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not." Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), https://perma.cc/SDA6-D633.

86. 17 U.S.C. § 102. The first Copyright Act was passed in 1790, and protected a much more limited set of works, with a more limited set of rights. *See Copyright Act of 1790*, U.S. COPYRIGHT OFF., https://perma.cc/TA64-GZWF.

87. *See* U.S. COPYRIGHT OFF., CIRCULAR 1: COPYRIGHT BASICS 2 (2021), https://perma.cc/LE23-2QEF (PDF) [hereinafter U.S. COPYRIGHT OFF., CIRCULAR 1] (explaining that "[c]opyright does not protect . . . [w]orks that are not fixed in a tangible form (such as a choreographic work that has not been notated or recorded or an improvisational speech that has not been written down)").

to mail a copy to oneself.[88] Copyright arises as soon as the work is created.[89]

The other threshold requirements are similarly generous: the work must be "original,"[90] but the originality hurdle is very low. As an example, the white pages listings in a phone book are not sufficiently original to merit copyright protection, but the "selection, coordination, and arrangement"[91] of the information in a yellow pages listing likely qualifies as "original" for copyright purposes.[92] In addition, although there is a non-exclusive listing in the statute of the types of works eligible for copyright protection,[93] any "original works of authorship" may be protected by the statute.[94] The first Copyright Act, passed in 1790, provided protection for maps and books, but the scope of copyright protection has expanded considerably since that time to include everything from musical works and sound recordings to computer code and architectural works. So long as a work is minimally original—i.e., not copied—and fixed in a "tangible medium of expression," copyright protection exists.[95]

Almost all "original" expressive works fall within the scope of the Copyright Act, and rights in those works attach as soon as the work is created. In other words, it is very, very easy to get

88. *See* Mtima & Whitman, *supra* note 76, at 181 ("Some people think that sending a copy of your manuscript to yourself through the mail and not opening the envelope, sometimes called the 'poor man's copyright,' is the way to get or register copyright, but this is completely false.").

89. U.S. COPYRIGHT OFF., CIRCULAR 1, *supra* note 87, at 1.

90. 17 U.S.C. § 102.

91. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

92. *See generally* Bellsouth Advert. & Publ'g Corp. v. Donnelly Info. Publ'g, Inc., 999 F.2d 1436 (11th Cir. 1993).

93. *See* 17 U.S.C. § 102.

94. *Id.* The number of listed categories has increased over time to include, for example, architectural works, but the statute aims to be technology-neutral, indicating the intentionally low threshold for protection in another way. The substantive portion of the statute begins with the following statement: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.* This statement is designed to capture a broad range of works regardless of the way in which they are created or presented, thus making clear the intended reach of the Act.

95. *Id.*

copyright protection, and it is indisputable that the artistic works created by prisoners are protected by the 1976 Copyright Act. As an intellectual property matter, this is straightforward. The stories written by the women in the Connecticut prison writing group obviously fall within copyright's protections.[96] The paintings created by Guantánamo detainees likewise are protected.[97]

The fact of a creator's imprisonment does not affect this analysis, and artists who are incarcerated are the "authors" of

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96. Short stories are "literary works." *See id.* § 102(a)(1).

97. Whether the paintings are copyrightable is a simple matter—they are "pictorial, graphic, or sculptural works" as defined in the Copyright Act. *Id.* § 102(5); *see id.* § 101. Whether detainees at Guantánamo Bay are deemed to be in the territorial range of the United States legal system has been a hotly contested issue. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 798 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 655 (2006). With respect to copyright protection, the application of U.S. law to Guantánamo detainees is somewhat complicated. While works published by non-citizens of the United States outside of one of the "treaty countries"—those that have signed on to the international intellectual property treaties—are not protected by U.S. copyright law, a variety of other works created or published outside of the United States or by non-citizens of the United States *are* covered by the Copyright Act. This includes works created but not published by any person, anywhere. *See* 17 U.S.C. § 104(a) ("The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author."). Thus, detainees at Guantánamo retain copyright rights at least to the extent that their works are not published; this likely includes the vast majority of artworks and writing created by the detainees. In addition, upon publication, some authors retain the rights in their works, including those authors who are "stateless persons," which is the case for a number of Guantanamo detainees.

> The works specified by sections 102 and 103, when published, are subject to protection under this title if . . . on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled.

Id. § 104(b). Note that Cuba is one of the treaty countries, as are Afghanistan, Algeria, Bahrain, Jordan, Morocco, Mauritania, Syria, and Yemen. *See International Issues*, U.S. COPYRIGHT OFF., https://perma.cc/QWT6-Y3C3. Ultimately, although copyrightability would have to be determined on a case-by-case basis, the majority of the works created at the Guantánamo Bay detention facility are almost certainly protected by the Copyright Act, and the authors of those works are the owners of those copyright rights. *See generally* Note, "*Mein Kampf" and the Protection of Literary Property of Stateless Persons*, 49 YALE L.J. 132 (1939).

their expressive, copyrightable works.[98] "Authorship" is defined in copyright law and it is significant because, as a default matter, the "author" of a copyrightable work is the owner of the rights in that work.[99] There are some circumstances in which this general rule does not apply: for example, an employee who creates a copyrightable work within the scope of her employment is not the "author" and therefore not the owner of the work. Instead, the employer is considered to be both the author and the owner of the work.[100] Similarly, in some cases, the "hiring party" in an independent contractor relationship is deemed to be the author and owner of the work, but there must be a written contract to that effect.[101] In short, prison writers and prison artists are almost certainly, in almost all cases, not just the "authors" but also the "owners" of the copyright in the works they create.[102]

2. The Rights of Copyright

Ownership of copyright confers an array of (mostly) intangible rights.[103] The rights are not absolute—few property

98. *See supra* note 75 and accompanying text.

99. 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

100. *See id.* § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title."); *see also id.* § 101 (The first subsection of the "work made for hire" definition states that a "work prepared by an employee within the scope of his or her employment" is a work made for hire).

101. The second subsection of the "work made for hire" definition provides that for certain categories of works—collective works, motion pictures, or translations, for example—the works are works made for hire if the parties sign a written agreement to that effect. Notably, this provision requires a specific written agreement between the parties that the work is a work made for hire. *See id.* § 101.

102. In a limited number of circumstances, an incarcerated person could create a copyrightable work in the course of their prison work assignments, and it is possible that the prison or the contractor could claim copyright authorship and ownership in that instance. There is one case in which the Federal Circuit rejected the incarcerated plaintiff's copyright infringement claim because it deemed the prison to be the "author" of the work under the work made for hire doctrine. *See* Walton v. United States, 551 F.3d 1367, 1368 (Fed. Cir. 2009). Given the kinds of prison work assignments that exist, however, this is likely a rare situation. That is, most prison labor does not entail the creation of copyrightable works.

103. *See* 17 U.S.C. § 202.

rights are—and, unlike real property rights, they are limited in time. Consistent with the Constitution's mandate that rights in "Writings and Discoveries" may be granted only for "limited Times,"[104] the current copyright term is measured by the "life of the author" plus seventy years.[105] Thus, copyright rights, though not perpetual, last a long time and may be passed down by will or transferred by assignment.[106]

The rights conferred by the Copyright Act are enumerated in § 106, but the exercise of copyright really begins with knowing that you possess those rights and the ability to "claim" them.[107] I use air quotes because, in the copyright context, there is no need to claim rights.[108] But many authors want to include their name or some other identifying information so that they get credit for the work. Any indication of authorship or the source of the work is sufficient—a copyright notice is useful but not necessary.[109] For many creators, this aspect of authorship is fundamental.

Section 106 of the Copyright Act lays out the rights conferred and provides that "the owner of copyright under this title has the exclusive rights to do and to authorize any of" the rights conferred, including the rights to reproduction, distribution, display, and performance described above.[110] Note that these are rights not in specific, physical objects, but in intangibles—the right to make a copy of a book is distinct from the right to a particular copy of that book.

The ability to authorize others to carry out the rights of a copyright owner—that is, the alienability of copyright—makes clear that copyright grants property-like ownership interests.[111] An author may write a novel and assign all of the copyright

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104. U.S. CONST. art. I, § 8, cl. 8.

105. 17 U.S.C. § 302(a).

106. *See id.* § 201(d)(1).

107. *See id.* § 106(1)–(6).

108. *See* Mtima & Whitman, *supra* note 76, at 180.

109. *See* 17 U.S.C. § 401(a) ("Whenever a work protected under this title is published . . . a notice of copyright as provided by this section *may* be placed on publicly distributed copies . . . ." (emphasis added)).

110. 17 U.S.C. § 106(1)–(6).

111. *See id.* § 201(d)(2) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.").

rights to a publisher, to another person, or to a trust. The author might, in the alternative, choose to maintain the copyright in her own name but license, for example, the motion picture rights. This is not controversial—it is, in fact, a bedrock aspect of property ownership.[112]

The rights that a copyright owner might choose to exercise, or to authorize others to exercise, include: the right to make copies (the "reproduction" right),[113] the right to distribute those copies;[114] the right to create derivative works; and, depending on the work, the right to perform or display the work.[115] While some artists actually do some or all of these things themselves, it is very common for artists to license or assign these rights to others.

To summarize: it is very easy to acquire copyright rights. They vest as soon as a work with a minimal level of originality is "fixed in any tangible medium of expression."[116] Copyright accrues even in the absence of registration, but registration of the work is necessary prior to bringing a claim for

112. *See* Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 870 (2013).

113. *See* 17 U.S.C. § 106(1). The owner of a copyright has, most fundamentally, the right to control copies of the work—*copy*right first arose after the invention of the printing press, which over time democratized the making of copies of written works. The first concern of authors at that time was the ability to make and then to sell copies of their essays and books, and fundamental to the right to control copies of a work is the right to control distribution of those copies. *See id.* § 106(3). Thus, the Copyright Act also grants to the copyright owner the right to "first sale" of copies of a work. Once a copy of a work is distributed, the copyright owner no longer controls that particular copy, but the recipient of the physical copy still may not violate any of the copyright owner's copyright rights. Thus, once one purchases a book, for example, it may be given away, sold, or even used as a booster seat if the purchaser of the book chooses. *See id.* § 109(a).

114. *See id.* § 106(3).

115. *See id.* § 106(4)–(5). Copyright owners also control the right to display and perform their works publicly where each of those is relevant—for example, to display works of visual art or to performance musical compositions. There are some additional protections for works of visual art in the Visual Artists Rights Act ("VARA"), including the rights of attribution and against destruction of some works. *Id.* § 106A. Related to these rights, and overlapping them, are the personal property rights in the tangible versions of artistic works. This is most relevant in the cases of visual or sculptural works, but it could also arise in other circumstances.

116. 17 U.S.C. § 102(a).

infringement.[117] The rights conferred by copyright are broad, though not unlimited, and can be transferred by license or assignment.[118] None of this requires a physical, tangible object, and copyright therefore exists and can be exercised entirely in an intangible way.[119] That is, it does not require the existence of a physical object or location. As such, prisoners may exercise the rights of copyright just as any other creator or artist would. An incarcerated person who writes an essay or a screenplay, or creates a painting, or composes a song, is the author and therefore the owner[120] of that creative work as soon as the work is "fixed in any tangible medium of expression."[121] The owner of a copyright can exercise all of the rights set forth in § 106 of the Copyright Act and infringement of those rights without authorization is a violation of the Copyright Act.[122]

For a copyright lawyer, none of the above is particularly complicated; however, those who are incarcerated rarely take advantage of this set of rights.[123] This description of copyright law and the rights it confers should be sufficient to convince prisoners (and their allies) that exercising copyright would be a significant and useful pursuit. If nothing else, the simple knowledge of one's rights and the recognition of their existence can be a dignifying and humanizing process.

B. *Copyright Is Akin to a Civil Right*

The significance of the rights conferred by copyright is magnified when understood in copyright's broader context. In addition to operating as a property right, protected against both private and government intrusion, copyright can serve a variety of other purposes. Creators seek to possess and to exercise ownership interests for a range of reasons. The rights conferred by the Copyright Act provide a powerful tool for self-expression, for social change, for engaging in the cultural and commercial worlds, and for financial remuneration. Copyright can operate

117. *See id.* § 411(a).
118. *See id.* § 201(b).
119. *See supra* note 103 and accompanying text.
120. *See* 17 U.S.C. § 201.
121. *Id.* § 102(a).
122. *See id.* § 501(a).
123. *See* FLEETWOOD, *supra* note 37, at 10.

as an "engine of free expression," promoting speech and First Amendment values.[124] In addition, many artists feel a powerful personal connection to their works which translates into views about ownership.[125] Copyright also plays an important role in culture, which is an obvious driver of social change. "[A]dequately funded and well-produced film, art, music, and literature play an inestimable role in promoting social and cultural understanding and tolerance."[126] Taken together, these various understandings of copyright law mean that copyright should be understood as akin to a civil right or civil liberty, particularly in the prison context.

1. Copyright as a Property Right

Copyright is a property right, albeit one somewhat different from real property rights and personal property rights. There is, of course, a robust scholarly debate about how best to understand and characterize the rights granted by copyright.[127]

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124. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

125. *See* Ann Herman, Note, *You Belong with Me: Recording Artists' Fight for Ownership of Their Masters*, 18 NW. J. TECH. & INTELL. PROP. 239, 243 (2021).

126. PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2019, 15 (2019) (noting, for example, that the "public's gradual embrace of R&B, jazz, and gospel—what was once referred to as 'race music'—played a critical role in building a more cohesive and inclusive nation" (citation omitted)).

127. *See, e.g.*, William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 484–95 (2003); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031–32 (2005)

> The absolute protection or full-value view draws significant intellectual support from the idea that intellectual property is simply a species of real property rather than a unique form of legal protection designed to deal with public goods problems. Protectionists rely on the economic theory of real property, with its focus on the creation of strong rights in order to prevent congestion and overuse and to internalize externalities. They rely on the law of real property, with its strong right of exclusion. And they rely on the rhetoric of real property, with its condemnation of "free riding" by those who imitate or compete with intellectual property owners. The result is a legal regime for intellectual property that increasingly looks like the law of real property, or more properly an idealized construct of that law, one in which courts seek out and

Whether intellectual property is "property," or whether that is even the right analogy, remains disputed in the academy.[128]

There is no doubt, however, that copyright law contains substantial property-like elements.[129] The Copyright Act confers ownership rights that are alienable and exchangeable for value.[130] Recall that the Copyright Act confers the right to license or assign rights in part or in whole.[131] This is the essence of a property right, at least as a practical matter. And to the extent that copyright *is* property or is analogous to property, incarcerated people should take note. Property rights are

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> punish virtually any use of an intellectual property right by another.

see also Alina Ng, *Copyright's Empire: Why the Law Matters*, 11 MARQ. INTELL. PROP. L. REV. 337, 344 n.33 (2007)

> In [their] article, [Landes and Posner] argue that economic justifications for recognizing property rights in public goods apply equally to intellectual property to prevent diminishing value in a work and encourage continued investments in marketing, developing, and renewing works. Property rights are necessary in intellectual property to prevent the inefficiencies that would occur from overuse of goods that are freely available and accessible to the public. (citations omitted).

128. *See* Shyamkrishna Balganesh, *Alienability and Copyright Law*, *in* CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW 161, 161 (Helena R. Howe & Jonathan Griffiths eds., 2013) ("Debates about whether and to what extent copyright is a form of property abound in the literature, and remain by and large inconclusive." (citation omitted)); Simon Stern, *Copyright as a Property Right? Authorial Perspectives in Eighteenth-Century England*, 9 U.C. IRVINE L. REV. 461, 462 (2019) ("[W]hat becomes equally evident, from a reading of those histories and of the contemporaneous sources related to literary commerce more generally, is that the conception of copyright as a form of property was neither the only, nor even the dominant, paradigm in circulation at the time."); *see also* Mark Rose, *Property and Propriety: A Response to "Copyright as a Property Right?"*, 9 U.C. IRVINE L. REV. 489, 489 (2019) ("[T]he notion of copyright as fundamentally an economic right, a right of property, remains dominant.").

129. *See* Balganesh, *supra* note 128, at 161 ("Structured as a set of 'exclusive rights' that are vested in an author, who the law treats as the 'owner' of those rights, copyright seems to be modelled on the idea and structure of property law." (citation omitted)).

130. *See* Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1247 (2008) ("Property rights give individuals control over assets or resources. To hold property is to have the right to say what happens to an asset: who gets to use it and on what terms.").

131. *See supra* notes 111–115 and accompanying text.

enshrined in the Constitution and protected vigorously in the American legal system.

To be sure, property rights have been wielded against the cause of civil rights. One of the (many) legacies of slavery has been the ongoing and multi-faceted discrimination experienced by Black Americans in all facets of our economic system, and scholars have written about the ways in which the deprivation of property rights has been used as a tool of subordination.[132] Aided and abetted by the deprivation and misuse of property rights, there remains a substantial "financial fault line between black and white."[133] As Professor Mehrsa Baradaran puts it, "The wealth gap is where historic injustice breeds present suffering."[134]

The linkage between civil rights and economic rights has long been understood; indeed, Martin Luther King, Jr. called his movement the "Poor People's Campaign."[135] And property rights, a central aspect of economic rights more broadly, can—and should—be used to advance the cause of civil rights and those who are oppressed and subordinated.[136] The ability to

132. *See generally, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (describing the many ways in which government policies contributed to housing segregation and the implications for Black Americans' economic prospects now and for the foreseeable future). Property rights and civil rights have often been seen as conflicting, particularly as opponents of civil rights advances have relied heavily on property rights arguments. Even more to the point, enslaved people were deemed and treated as property. *See, e.g.*, Robert R.B. Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135, 135–38 (1963) (noting five situations in "the current year"—1962—in which property rights were deployed against advances in civil rights).

133. MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 1 (2017).

134. *Id.*

135. *See Poor People's Campaign*, STAN. KING INST., https://perma.cc/6K4E-TYZA ("Through nonviolent direct action, King and SCLS hoped to focus the nation's attention on economic inequality and poverty."); *see also* BARADARAN, *supra* note 133, at 140 ("[Martin Luther King, Jr.] understood that blacks had been excluded from full economic participation, and he maintained that any strides toward civil rights had to be linked with antipoverty programs to be effective because 'the inseparable twin of racial justice was economic justice.'" (citation omitted)).

136. *See* Janet Thompson Jackson, *What Is Property? Property Is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN'S L. REV. 63, 63–65 (2010).

own and transfer property is fundamental to citizenship and full participation in society, and the possibility of using copyright as a tool for advancing rights should not be ceded.[137]

Put more bluntly, as articulated by Lateef Mtima and John R. Whitman, "If anyone is going to make money from your writing, it should start with you and understanding how copyright law is designed to protect your original work."[138] It is copyright's property-like aspects that allow this.

2. Copyright and Free Expression

The ability to express oneself is obviously a core constitutional and human right, and one that many have acknowledged is particularly significant for those who are incarcerated. The "freedom to write in U.S. prisons [is] a critical free expression issue of our time," according to the PEN America Foundation, and the freedom to create more broadly accompanies that notion.[139]

Copyright and the First Amendment fit together somewhat uneasily. There are ways in which copyright advances free speech values and other ways in which it impedes those values.[140] The courts and commentators have regularly pointed to copyright's speech promoting aspects, describing copyright as

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137. This pairing may make for strange bedfellows but it seems counterproductive not to take advantage of all available tools at one's disposal. While the law and the Constitution have indeed been used as tools of oppression, they also contain seeds of change. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 9–10 (2019) (noting, at the same time, "the *futility* of employing U.S. constitutional law to dismantle the prison industrial complex and other aspects of the carceral state" and "the *utility* in applying the abolitionist history and logic of the Reconstruction Amendments to today's political conditions in service of prison abolition" (emphasis in original)).

138. Mtima & Whitman, *supra* note 76, at 180.

139. *PEN America Prison and Justice Writing Program*, *supra* note 76; *see id.* ("For [over] five decades, PEN America's Prison and Justice Writing program has amplified the work of thousands of writers who are creating while incarcerated in the United States. By providing resources, mentorship, and audiences outside the walls, we help these writers to join and enrich the broader literary community.").

140. *See, e.g.*, Neil Weinstock Netanel, *Locating Copyright in the First Amendment Skein*, 54 STAN. L. REV. 1, 3 (2001) [hereinafter Netanel, *Locating Copyright*].

"the engine of free expression"[141] that contains "built-in First Amendment accommodations."[142] To the extent that copyright is based on the utilitarian notion that there will be insufficient production of creative and expressive works in the absence of some form of protection, copyright encourages expression and is thus speech-promoting. Even to the extent that copyright suppresses speech, the idea/expression dichotomy and the fair use doctrine are deemed to be "built-in First Amendment accommodations," allowing for defenses to copyright claims in a way that provides breathing room for speech within copyright doctrine itself.[143] Indeed, courts have generally held that copyright is exempt from First Amendment scrutiny because of these safeguards.[144]

That said, a successful copyright infringement lawsuit constitutes an obvious restriction on speech and as such can have a chilling effect. Concerns about potential liability will inhibit speech and expression by the downstream users of a copyrighted work. This tension has provoked a great deal of concern and commentary, especially as the scope of copyright has expanded over the years.[145]

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141. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression.").

142. Eldred v. Ashcroft, 537 U.S. 186, 190 (2003) ("[The First] Amendment and the Copyright Clause were adopted close in time. This proximity indicates the Framers' view that copyright's limited monopolies are compatible with free speech principles. In addition, copyright law contains built-in First Amendment accommodations." (citation omitted)).

143. *Id.* at 190–91.

144. *See, e.g.*, *id.* at 221 ("[W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary." (citations omitted)).

145. In his seminal article, Neil Netanel argued that the balance has shifted over time such that copyright is no longer speech-promoting (if it ever was). *See* Netanel, *Locating Copyright*, *supra* note 140, at 27

> [C]opyright's role in our system of free expression is sufficiently complex, and copyright's support for expressive diversity sufficiently checkered, to caution strongly against any talismanic invocation of copyright-as-the-engine-of-free-expression. Indeed, one can plausibly contend, developments in the production and dissemination of expression in recent decades have greatly attenuated copyright's support of First Amendment goals.

Other commentators have voiced similar concerns, contending that changes in business methods, the expanding scope of copyright, and technological

In any event, copyright confers legal protections—legal rights—in expressive works and is thus a useful adjunct to the First Amendment's free expression protections. Whether or not copyright is speech-promoting at a broader societal level, it serves that purpose for an individual copyright owner.

3. Copyright as a Moral Right

Although copyright in the United States is justified primarily on a utilitarian basis, it contains strains of what are often called "moral rights." Natural or moral rights theories are grounded in the notion that authors deserve rights "by virtue of having created their works."[146] Moral rights serve as the primary basis for copyright protection in France, for example,[147] and some commentators argue that moral rights should be incorporated to a greater extent into U.S. law.[148]

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developments have altered the balance such that copyright's "built-in accommodations" no longer sufficiently account for free speech interests. *See, e.g.*, David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1396–97 (2009)

> Thus the ratio between the amount of speech encouraged by copyright as compared to the amount burdened by copyright has shifted decisively towards greater speech restriction. So, whereas the traditional justification for not applying First Amendment law to copyright cases was that copyright gave us much more speech than it restricted, the much-greater current restrictions on speech from copyright should now serve to encourage the reevaluation of how well recent copyright law achieves First Amendment interests on its own.

see also Alfred C. Yen, *Rethinking Copyright's Relationship to the First Amendment*, 100 B.U. L. REV. 1215, 1220 (2020).

146. *See* Fromer, *supra* note 82, at 1753

> Moral-rights theories typically come in two flavors: labor-desert and personhood. Labor-desert theory sees intellectual property rights as a Lockean acknowledgment of the labor of creation, in granting copyright or patent protection to creators that have worked sufficiently hard. . . . Personhood theories also establish intellectual property protection as a moral right of sorts, but unlike labor-desert approaches, they see a creative work as a Hegelian extension of the author's personality. (citations omitted).

147. *See generally* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990).

148. *See generally, e.g.*, ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (2009).

Even without explicit moral rights protections in the United States, many creators have

> [a] feeling of psychological ownership in these works—even absent legal ownership—[that] according to psychological research, "helps people define themselves, express their self-identity to others, and maintain the continuity of the self across time." People feel a sense of psychological ownership when they "control[] [an object], com[e] to know the target intimately, and invest[] the self in the target."[149]

In addition, as Jeanne Fromer describes, "there is a widely held belief that authors are entitled to some control over their works, for having labored on them."[150] Regardless of whether U.S. copyright law is intended to promote or satisfy these different interests and motivations, it may nonetheless do so as a descriptive matter. All of this is to say that there is a wide array of reasons that artists—those who are incarcerated and those who are not—might want to own and to wield the copyright interest in their work.

Some might hesitate, however, and for good reason. Copyright law—and intellectual property law more broadly—has been deployed to the detriment of Black artists and creators,[151] and the history of the use and misuse of intellectual property rights should not be ignored. As K.J. Greene describes, "For many generations, black artists as a class were denied the fruits of intellectual property protection—credit, copyright royalties and fair compensation. Institutional discrimination teamed with intellectual property and contract law resulted in the widespread under-protection of

149. Fromer, *supra* note 82, at 1767 (citations omitted).

150. *Id.* at 1770 (citation omitted).

151. *See* K.J. Greene, "*Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1183 (2008)

> [T]he treatment of black artists, much like that of women, exposes the hidden context of subordination in the IP arena. The appropriation of the creative output of black creators for a long period of U.S. history parallels the pervasive subordination of blacks generally under the color of law. Racial discrimination has produced unequal access to capital, education, land and other entitlements under slavery and Jim Crow segregation. Copyright law exists within social structures that historically did not serve the interests of black cultural production.

black artistic creativity."[152] Greene highlights the irony of the music industry seeking vigorous protection for its intellectual property given this history, and there is no doubt that IP law is part of the legal system's broad role in creating and reinforcing racial subordination.[153] As Greene notes, "IP scholars are increasingly recognizing that the legal regimes of intellectual property are inextricably linked to systems of social and economic inequality."[154]

In a similar vein, Anjali Vats "contend[s] that intellectual property law is organized through a racial episteme that consistently protects the (intellectual) property interests of white people and devalues the (intellectual) property interests of people of color."[155] Acknowledging this, Vats argues that "[i]n the so-called information economy, intellectual property justice is racial justice."[156] While portions of Vats' book critique the intellectual property system, discussing, for example, "the ways that racial scripts about the incapacity of people of color to create have prevented racial equality in creatorship," she also argues that "resistance to such narratives is abundant and productive."[157] Vats presents three case studies of such instances, demonstrating the ways in which intellectual property rights can be harnessed as part of resistance to subordination and exploitation. One case study involves Prince, and Vats asserts that "in death, the wisdom and radicalness of Prince's (intellectual) property management strategies became clear, particularly with respect to Blackness, citizenship, personhood, and economic equity."[158] Prince resisted many aspects of the music and copyright system—including, for example, changing his name to an unpronounceable symbol and contesting Warner Bros.' ownership of the rights in his works for years.[159] But Prince also took advantage of the copyright

152. *Id.* at 1181.

153. *See id.* at 1182–83.

154. *Id.* at 1182 (citation omitted).

155. ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS 3 (2020).

156. *Id.* at 4.

157. *Id.* at 155.

158. *Id.* at 159.

159. *See id.* at 161 (describing these acts as "point[ing] to the power of symbolic resistance in critiquing American conceptions of intellectual property

system when he could, regaining control of his master recordings and vigorously fighting infringement of his intellectual property rights.[160]

This is just one example of the potential value in taking advantage of the protections of copyright. Notwithstanding the troubled history (and current practice) of much of copyright law, the possibility remains that copyright can be used for the benefit of those who are disenfranchised, including the incarcerated. Prisoners can and should view these rights as a useful part of carceral reform efforts and the civil rights project.

III. THE FREE EXERCISE OF COPYRIGHT FROM BEHIND BARS

As described in the previous Part, copyright is valuable for incarcerated and non-incarcerated people alike because of its alienability, a facet copyright shares with other forms of property rights.[161] It is valuable to prisoners in particular, though, because of the way in which it *differs* from real and personal property—its intangibility. Because many copyright rights are not exercised in any particular place, prison systems are not affected by the exercise of those rights and there is simply no good reason that "free-world" copyright law cannot apply behind bars.[162] As a practical and descriptive matter, prisoners can and do own copyrights with no effect on the prison system, and as a normative matter, there is no reason why they ought not be able to exercise and vindicate those rights freely.

In other words, the exercise of copyright from behind bars can—and should—broadly mirror the exercise of copyright in the free world. But, for the most part, prisoners appear to be unaware of copyright law and they rarely take advantage of its benefits. The previous Part of this Article demonstrated why prisoners should take advantage of copyright and its benefits.

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and ownership, particularly where race and its links to creatorship and labor are at issue").

160. *See id*. at 168.

161. *See generally* Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993); Netanel, *Copyright and a Democratic Civil Society*, *supra* note 79.

162. *See* Littman, *supra* note 17, at 1390 n.9 ("I have chosen [the] descriptor [free-world] because it is the one that many of my clients would use to describe outside people and institutions.").

This Part describes what the exercise of copyright by prisoners would look like (spoiler alert: not much different than what it looks like for every other artist). It then anticipates and addresses the arguments prison officials would likely use to restrict the exercise of copyright. Perhaps surprisingly, however, the free exercise of copyright by incarcerated people presents vanishingly few concerns for the prison system. Putting aside control of the tangible objects in which copyright inheres, copyright operates mainly outside of the prison walls and can be exercised almost entirely apart from the prison context.

A. *The Exercise of Copyright*

Curtis Dawkins' story provides a useful example. Dawkins wrote a collection of short stories, *The Graybar Hotel*, while he was in prison.[163] It was not his first work of fiction, and he was already an accomplished writer, but this book met with more success than his earlier work.[164] He entered into a publication agreement with Scribner and received an advance of $150,000.[165] Dawkins put the money into a fund for his children, but state authorities intervened, capturing the money under the state's cost of incarceration statute.[166] It is difficult to know for sure, but it is plausible that this was because the novel is based upon, and critically examines aspects of, prison life and the carceral system in America, as well as the size of Dawkins' advance.[167]

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163. Alter, *supra* note 4.

164. *See id.*

165. *See* Edward Helmore, *Michigan Prisoner Turned Celebrated Author May Face Incarceration Bill*, THE GUARDIAN (Feb. 19, 2018), https://perma.cc/2K3M-5LUA.

166. *See id.* ("[T]he Michigan department of treasury is seeking 90% of Dawkins' assets, including 'proceeds from publications, future payments, royalties' from the book. Michigan puts the cost of his incarceration at $72,000 . . . .").

167. Nearly every state has a cost of incarceration (or "pay-to-stay") statute in place. *See generally* Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57 (2013). Michigan's statute directs the Department of Corrections to ascertain the assets of prisoners and permits the attorney general to seek reimbursement for "cost of care" if there is "good cause" to believe that the prisoner has "sufficient assets." MICH. COMP. LAWS § 800.403 (2023). It is unclear how often and under what circumstances these kinds of statutes are

The ways that Dawkins exercised his rights under copyright law, and the ways that he did not do so, are instructive. Dawkins knew about his copyright: he included a copyright notice, registered his work with the Copyright Office, and licensed some of his rights to a publishing company.[168] This is substantially more than most incarcerated people do with their copyright rights and demonstrates that, as a practical matter, the exercise of copyright from behind bars is possible. Dawkins could have nonetheless done more with his copyright, and by doing so may have achieved a better outcome for himself and his family. As such, understanding copyright remains significant for those who are in prison.

This Subpart walks through the exercise of copyright: acknowledging and understanding your rights; "claiming" copyright (with notice and registration); "doing" or "authorizing" the rights of copyright, including reproduction, distribution, derivative works, display, and performance; and pursuing claims for infringement. Dawkins engaged in some, but not all, of these aspects of copyright, and his experience demonstrates both the reach and limitations of copyright as an aspect of the carceral reform movement.

1. Understanding and Claiming Rights

At the most basic level, understanding and acknowledging that one has rights is significant. A right that is akin to a civil right—that sounds in the tradition of civil liberties—is valuable of itself, conferring a dignitary benefit and providing expressive value. Copyright vests as soon as the work is "fixed in any

invoked. The Michigan statute, for example, appears to be discretionary, and the few studies that are available have concluded that these statutes cost more to administer than they bring in and that they negatively affect the most vulnerable, impeding the ability to reintegrate following release. *See, e.g.*, Jessica Lussenhop, *The U.S. Inmates Charged per Night in Jail*, BBC (Nov. 9, 2015), https://perma.cc/87K8-S6TY; ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), https://perma.cc/H2RW-TGJL (PDF); Sarah Rahal, *Washtenaw Wipes Prisoner Jail Debt from 2013–20, Ending 'Financial Burden of Incarceration'*, DETROIT NEWS (Feb. 7, 2021), https://perma.cc/LGT8-ZHSQ (explaining how one county in Michigan eliminated "incarceration debt" in part because the policy discourages families from "supporting their incarcerated loved ones and in some cases is a barrier to family involvement and reunification").

168. *See generally* CURTIS DAWKINS, THE GRAYBAR HOTEL (2017).

tangible medium of expression," so once the work has been created, no extra steps are necessary for rights to accrue.[169]

Awareness of the set of rights conferred by copyright is an important first step in the exercise of copyright, but many incarcerated artists are likely unaware that they have these rights.[170] It is obvious, but fundamental, that knowledge of one's rights is essential to the exercise of those rights.

Fortunately, once one is aware of copyright, claiming those rights is simple. In fact, claiming rights is not even necessary; an artist need not do anything at all in order for rights to accrue. There are nonetheless both legal and dignitary reasons to provide notice of authorship and ownership by putting the copyright symbol—©—and one's name on the work.

Attribution is significant for many artists; simply having one's name attached to their creation may be one of the most important aspects of the exercise of copyright for many people.[171]

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169. 17 U.S.C. § 102; *see supra* Part II.A.

170. Many non-incarcerated people are also unaware of the rights they possess or how to exercise them. There are many online guides, FAQs, and primers for artists and writers, though these may be difficult for people who are incarcerated to access. *See, e.g.*, Holland Gormley, *What I Wish They Taught Me About Copyright in Art School*, LIBR. OF CONG. BLOGS (Sept. 1, 2020), https://perma.cc/9PB4-N4JY; *Artist Rights 101*, ARTIST RTS. SOC'Y, https://perma.cc/X39S-HJKF. They may not provide accurate information or helpful advice, either. There appear to be a virtually unlimited number of these kinds of sites, and YouTube has an unending supply of videos—try googling "youtube copyright artists," and you will see a huge list. *See, e.g.*, U.S. Copyright Office, *Copyright for Visual Artists*, YOUTUBE (Mar. 25, 2022), https://perma.cc/WQ7L-9QX3.

171. You can find artists describing this in their own words in various ways. *See, e.g.*, Elizabeth Miller, *Artist Attribution—Why It's Important and How to Do It*, PARRIS HOUSE WOOL WORKS (Sept. 15, 2022), https://perma.cc/9WK4-T22X

> [W]hen the work is then presented . . . with zero mention of the design's origin, we feel diminished in some way. We may feel diminished just because, hey, it would be great to have the recognition; we put our souls into this work and many designs have deep meaning for us. We may feel diminished because we know that if people knew who designed the piece, they might come to us for that pattern, too. . . . Or, we may feel diminished because it seems as though our creative genesis of that work has literally been forgotten.

Misattribution is a less common issue. The case regarding an artist named Peter Doig provides an interesting, if unusual, example, and coincidentally involves a painting made in prison and purchased by a prison guard. *See* Laura

Any artist can include their name and the copyright symbol on their work, providing notice of the source of the work and the fact that the author claims the protections of copyright law. This action serves an expressive purpose, conferring a dignitary value.[172] For many artists, proper credit and attribution are crucial, and the copyright system provides a straightforward vehicle for this to occur.[173]

Including the copyright symbol on a work, along with the author's name, also confers some legal benefits.[174] Most significantly, an innocent infringement defense is foreclosed if proper copyright notice is included on the work.[175] Proper copyright notice consists of: (1) the copyright symbol or the word "copyright"; (2) the year of publication; and (3) the author's name.[176] There is some flexibility with respect to each of these requirements, but compliance is required in order to obtain the benefits of this provision.[177]

Returning to Curtis Dawkins' story, it becomes apparent that these first simple, but fundamental, aspects of the exercise

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Alford, *The Curious Case of the Peters Doig(e)*, MCGILL UNIV. (Oct. 21, 2016), https://perma.cc/MT25-SXFA (recounting how a misspelled signature on a painting created an issue of misattribution that went to court).

172. *See* Fromer, *supra* note 82, at 1790–91 ("Attribution can provide creators with increased pecuniary rewards during their careers, as well as boost their reputation and highlight their creations as extensions of the self. Attribution is considered to be highly desirable to artists and inventors."). Copyright law does not *require* attribution, but it does provide a straightforward vehicle for "claiming" rights and seeking to encourage proper credit and attribution. *See id.* at 1793.

173. Again, artists explain the reasons for this in their own words. *See, e.g.*, Sophie King, *Why It's Important to Credit Artists Online*, MEDIUM (July 3, 2019), https://perma.cc/3UW8-EHM8

> As soon as an artwork enters a public space without a clear owner, individuals and companies believe it's up for grabs for themselves. Like a thief that enters a park and sees a handbag left on a bench, even though they must know it has an owner, they take it anyway and in their eyes it belongs to them now, to use however they want.

In addition, "[e]mpirical work . . . shows that, in order to receive attribution for their work, creators are willing to reduce significantly the amount of money they are willing to accept to license their intellectual property rights." Fromer, *supra* note 82, at 1791 (citation omitted).

174. *See* U.S. COPYRIGHT OFF., CIRCULAR 1, *supra* note 87, at 4–6.

175. *See* 17 U.S.C. § 401(d)

176. *Id.* § 401(b).

177. *See id.*

of copyright are accessible to those who are incarcerated. Dawkins obviously was aware of his rights under copyright (at least some of them) and his name and a proper copyright notice are included on his book.[178]

But many prisoners do not even do this much and are likely unaware that they have copyright rights accompanying their artistic creations.[179] A review of the collections of work by incarcerated people cited in Part I reveals that the artists are usually credited—that is, there is proper attribution—but there is rarely a copyright symbol and the websites generally do not mention copyright or permissions.[180] The artists at Guantánamo were credited in the program for the Ode to the Sea exhibit, but there is no mention of copyright in the program and the © symbol does not appear.[181] Of course, it is difficult to know what the detainees understand regarding their copyrights.

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178. *See* DAWKINS, *supra* note 168 (displaying "Copyright © 2017 by Curtis Dawkins" on the publishing information page).

179. The Justice Arts Coalition ("JAC") has a consent form for use by artists submitting work to them, and the form does contain a few references to copyright law. *Artist Consent Form*, JUST. ARTS COAL., https://perma.cc/7QRL-TWMH. It states for example, that the artist submitting the work "understand[s]" and "affirm[s]" that the "creative work I am submitting is my own original creation. As such, I own the copyright to this work and no one else may use it for financial gain without my permission, regardless of whether or not I have registered my copyright with the U.S. Copyright Office." *Id.* This is a reasonable, if overly general, statement of the law, but it is difficult to know what an imprisoned artist might understand about their copyright rights based on this form. The JAC has a number of galleries of work on its website. *Curated Galleries*, JUST. ARTS COAL., https://perma.cc/V4C9-BXSU. All of the work is credited to the artists, and there is even a notice at the top of each gallery page that states, "We ask that you do not utilize any of the artwork you see here without requesting permission to do so. We strongly believe that artists should have full agency over their work, so we do not share it with other entities without their consent." *E.g.*, *Abstract Gallery*, JUST. ARTS. COAL., https://perma.cc/XT8M-ASCL. There are, however, no copyright notices attached to any of the works (so far as I can determine).

180. There are some efforts to inform those in prison of their rights under copyright. *See generally, e.g.*, Mtima & Whitman, *supra* note 76.

181. *See Art from Guantanamo Bay*, *supra* note 3. While the quality and power of the artists' expression was highlighted in the "Ode to the Sea" show, there was neither a mention of nor a reference to the formal legal rights in the work. *Id.* We can assume that the artists granted permission for the display of their work, but there is no indication of copyright ownership, transfer of rights, or permissions granted. *Id.* I can also find no record of copyright registrations or applications.

2. Registering Copyright

For many artists, the expressive and dignitary value of claiming copyright may be sufficient and they may have no need or desire to take any further advantage of the copyright system. For those who do, the knowledge that one has a right is foundational to the ability to exercise that right, which starts—sometimes, but not always—with copyright registration.

I use the word "sometimes" because, oddly, copyright registration is both more and less significant than one might imagine. Registration is not necessary in order for rights to accrue.[182] It is also not necessary for the exercise of *most* of the rights of copyright—copyright may be licensed or assigned without registration, and the rights provided in the Copyright Act may be exercised even if the work is not registered with the Copyright Office.[183] This is good news for prisoners, who may have difficulty accessing and using the registration system, as discussed in this Subpart.

Copyright registration is significant in one respect, however. In order to bring an infringement claim, the work must be registered with the Copyright Office.[184] That is, there can be no remedy for copyright infringement in the absence of registration.[185] For someone who is not incarcerated, copyright registration is relatively straightforward. Most artists do not need a lawyer to assist with the process, and access to the internet and the postal service is all that is necessary.[186] For incarcerated people, though, it is these logistical aspects of the registration process, along with the filing fee, that may present the most difficulty.[187]

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182. *See supra* Part II.A.

183. *See Copyright in General*, U.S. COPYRIGHT OFF., https://perma.cc/37Z2-9NAJ ("In general, registration is voluntary. Copyright exists from the moment the work is created.").

184. *See id.*

185. *See* 17 U.S.C. § 411(a).

186. *See* Mtima & Whitman, *supra* note 76, at 181–82.

187. *See id.* ("If you don't have access to the internet, and it is difficult to file by mail, you can ask a trusted person to file for you in your name."); *see also* Littman, *supra* note 17, at 1417–20 (discussing the issue of access to telecommunications services in prison).

Copyright registration occurs through the United States Copyright Office, and there is an online registration portal.[188] The website contains a great deal of information about copyright and the registration process, including a set of FAQs, online registration help, and a comprehensive set of circulars on a variety of aspects of copyright law.[189] The process is simple[190] (again, for those who are not behind bars): submit an application form, a copy of the work to be registered, and the fee.[191]

The application form is relatively straightforward for most registrations and may be completed through the Copyright Office's website, by mail, or in-person.[192] For an incarcerated person, the primary hurdle here is logistical: can they access the internet reliably? Much has been written about this and related problems for those who are in prison,[193] and I simply note here that this is a practical rather than a substantive problem. That is, there is no reason that prisoners should be prohibited from communicating with the Copyright Office.[194]

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188. *Register Your Work: Registration Portal*, U.S. COPYRIGHT OFF., https://perma.cc/6V42-LK9Z.

189. *See id.*

190. As compared to both patent and trademark applications, which tend to be much more complex, time consuming, and expensive—and often require the assistance of an expert—copyright registration can and often is managed by non-lawyers and non-experts.

191. 17 U.S.C. § 408 ("[T]he owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee . . . ."). *See generally* U.S. COPYRIGHT OFF., CIRCULAR 2: COPYRIGHT REGISTRATION (2022), https://perma.cc/LW9U-5UUM (PDF) [hereinafter U.S. COPYRIGHT OFF., CIRCULAR 2].

192. *See* Mtima & Whitman, *supra* note 76, at 181–82.

193. *See, e.g.*, Alia Nahra & Leily Arzy, *Protecting the Fundamental Right to Mail in Prison*, BRENNAN CTR. FOR JUST. (Aug. 21, 2020), https://perma.cc/8MM7-NPNF ("Remote communication—by phone call, email, or video conferencing—allows some incarcerated individuals to reach the outside world, but internet access in prison remains restricted. There are also high costs for these types of communication."); Mia Armstrong, *Prisons Are Increasingly Banning Physical Mail*, SLATE (Aug. 9, 2021), https://perma.cc/SWY7-4D2N.

194. *See Free Speech in Prison*, ACLU, https://perma.cc/PV2Y-GHWU ("The U.S. Supreme Court has ruled that the First Amendment entitles prisoners to receive and send mail, subject only to the institution's need to protect security.").

In addition to the application form, registrants must deposit a copy of the work.[195] For an incarcerated person, this may well be a significant stumbling block, and one of the few instances in which exercise of copyright requires interaction with the tangible work in which the copyright inheres.[196] In some cases, however, an electronic copy will suffice.[197] The Copyright Office website indicates that if you register your unpublished or electronic-version-only work online, you may attach an electronic copy of your work, but the Library of Congress may also require a hard-copy deposit of the work.[198] There are a variety of exceptions and exemptions to this aspect of the registration process, making it one of the more difficult hurdles to navigate (for the incarcerated and non-incarcerated alike).[199]

Finally, the filing fee is not particularly onerous for those who are not behind bars—$45 for the most basic application[200]—but for those who are imprisoned even that relatively modest expense may well present an insuperable barrier to accessing the copyright system.

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195. 17 U.S.C. § 408. The deposit required for registration is distinct from the "mandatory deposit" requirement for all published works. *Id.* § 407. The deposit requirement is technically separate from the registration process, but registration requires compliance with the deposit provision and automatically satisfies that provision. *See Mandatory Deposit*, U.S. COPYRIGHT OFF., https://perma.cc/3LXX-A666.

196. With regard to the deposit required for registration, in a number of instances an electronic submission will suffice. *See* U.S. COPYRIGHT OFF., CIRCULAR 2, *supra* note 191, at 2 ("After you submit the filing fee, you can either upload a digital copy of your work or send a physical copy or copies of your work by mail. However, if your work is published in a physical edition or format, you should submit it in the physical format even if a corresponding digital version exists.").

197. *See* Mtima & Whitman, *supra* note 76, at 181 ("The current system on the Copyright Office website lets you file electronically by submitting a digital copy of your work (text plus images, if any, such as for a greeting card, a verifiable under-the-table prison industry) with a fee.").

198. *Registering a Work*, U.S. COPYRIGHT OFF., https://perma.cc/N4RV-GANA.

199. *See generally* U.S. COPYRIGHT OFF., *Compendium Chapter 1500: Deposits*, *in* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2021), https://perma.cc/STD8-VNK6 (PDF).

200. *Fees*, U.S. COPYRIGHT OFF., https://perma.cc/H6RC-4UC5.

Turning to Curtis Dawkins' story again: Dawkins did register his copyright.[201] Or, more likely, the publisher completed the copyright registration on his behalf. This is common practice in the publishing industry,[202] and with respect to popular fiction and nonfiction, the author typically maintains copyright in their own name.[203] Dawkins' situation is admittedly unusual—most prisoners have not been offered publication agreements with sizeable advances (as is also true of most people who are not in prison). But his story does demonstrate that the registration process can be accessible to those who are incarcerated.

There are other examples of copyright registration by incarcerated artists.[204] So it is obviously possible, but it is far from typical. Without discounting the logistical hurdles for prisoners, note that copyright registration occurs *outside* the prison walls. Thus, again, the hurdles that exist are practical ones; there are no substantive reasons that incarcerated people should not be able to access the copyright registration system, and in some instances there are real benefits to doing so.

3. "Doing" and "Authorizing" Copyright

Section 106 of the Copyright Act provides that the copyright owner has the right "to do" and the right "to authorize" the various rights set forth in that section.[205] Those rights include the right to reproduce—or copy—the work; the right to distribute the work; the right to create derivative works; and the right to display or to perform the work.[206] I emphasize here that § 106 confers not just the right "to do" these things but also the

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201. Dawkins' book was registered on December 21, 2017, registration number TX0008533035. *The Graybar Hotel*, U.S. COPYRIGHT OFF., https://perma.cc/7DWA-4LCX.

202. *Cf.* U.S. COPYRIGHT OFF., CIRCULAR 1, *supra* note 87, at 5.

203. In some industries and fields—textbook publishing, for example—it is common for the publisher to hold the copyright. *See* WORLD INTELL. PROP. ORG., MANAGING INTELLECTUAL PROPERTY IN THE BOOK PUBLISHING INDUSTRY 15 (2008), https://perma.cc/S52P-F98M (PDF).

204. *See, e.g.*, *Guantanamo Diary, Restored Edition*, U.S. COPYRIGHT OFF., https://perma.cc/MTU4-G9Y4; *Couldn't Keep It to Myself: Testimonies from Our Imprisoned Sisters*, U.S. COPYRIGHT OFF., https://perma.cc/53JR-XUVL.

205. 17 U.S.C. § 106.

206. *Id.*

right of the copyright owner "to authorize" others to carry out the rights set forth in § 106.

Due to their incarceration, prisoners are unlikely to regularly be able to "do" some of the things described in § 106. They may not be in a position to make multiple copies of a novel inside the prison walls, nor will they often be permitted to perform their musical compositions or display their drawings. These are real limitations, to be sure. In other words, some of the steps that an artist might want to take with their work—displaying a sculpture inside the prison, for example—may be restricted in the prison environment.[207] And this means that prisoners cannot truly exercise all of the rights of copyright ownership all of the time.[208] They can, however, exercise many of the most important aspects of copyright from behind bars.[209]

The right "to authorize" others to carry out any of the § 106 rights is arguably the most significant for incarcerated people (and quite possibly for all people) and makes clear the property-like aspects of copyright.[210] The rights are alienable, in

207. *See supra* Part.I.B. It is worth considering the extent to which these kinds of things ought to be permitted. I do not flesh out the argument here regarding whether a prison's restrictions on these sorts of acts should be considered copyright infringement (a long shot, to be sure) or whether there are arguments to be made that prison limitations on copyright-protected activities are unjustified. That would invoke the specter of the complicated apparatus of prison law and procedures and is beyond the scope of this Article.

208. I leave for another time the question of whether these restrictions are reasonable or justifiable.

209. This is not to discount the significance of what occurs within the prison walls, and there are good arguments to be made that people should be able to exercise their copyright rights *inside* prison much more freely. In the vast majority of cases, the argument that "security" reasons preclude the exercise of copyright is flimsy. Under the current doctrine, however, those arguments are likely to prevail. *See* Littman, *supra* note 17, at 1439 n.254 ("Carceral policies can and regularly do survive judicial scrutiny despite a total absence of evidentiary support, some modicum of which is ostensibly required under *Turner v. Safley*, 482 U.S. 78 (1987).").

210. There are, of course, debates in the academic literature about the extent to which copyright is a property right, and what property-like aspects are the most relevant for copyright law. *See supra* Part II.B.1; *see also, e.g.*, Balganesh, *supra* note 128, at 162

> The uni-dimensional focus on exclusion and its contribution to copyright's basic legal architecture has had the effect of directing attention away from other equally important analytical overlaps

part or in whole. Just as with real property, copyright can be seen as a "bundle of sticks," and the owner can license or assign one, some, or all of the sticks.[211] In the free world, this is common, and crucial to the free exercise of copyright. Indeed, it is alienability that confers much of the value of copyright.[212] Few creators are well-positioned to personally exploit the rights in their work: most writers cannot figure out how to publish and distribute their manuscript,[213] much less create the movie version of their work. But with the right "to authorize" others to carry out the copyright, an author can license the right to publish and distribute the work to a publishing company; the right to create a screenplay—which is a derivative work—might then be licensed to a screenwriter; finally, the right to create the motion picture (another derivative work) could be assigned to the movie studio.[214] More simply, the copyright can simply be assigned in its entirety to another person or an entity.[215]

The exercise of these rights is nothing more than a matter of contract—licenses and assignments are all by agreement of the parties—and none of it need take place in the prison. Indeed, it does not really take place anywhere. The biggest hurdle for a prisoner is, again, likely to be access to the internet or other

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between copyright and property. Foremost among these is the idea of *alienability*. (emphasis in original).

See generally Robilant, *supra* note 112.

211. *See* Balganesh, *supra* note 128, at 162

> An essential attribute of ownership, alienability refers to the transmissibility or transferability of whatever forms the object of the property right in question (that is, of the *res*). The power of the owner, the property right-holder, to alienate the object and any rights over it is taken to be a critical component of the bundle of rights that ownership is thought to constitute.

212. *See supra* note 130 and accompanying text.

213. The rise of self-publishing ameliorates this problem to some extent, and there are no good reasons why an incarcerated person could not or should not be able to take advantage of the self-publishing platforms that exist. The point nonetheless remains that exploiting all of one's copyright rights is nearly impossible to do while incarcerated without "authorizing others" to assist with the process.

214. *See* 17 U.S.C. § 106(2) (providing that the copyright owner has the right to "prepare derivative works based upon the copyrighted work" and to authorize others to do the same); *id.* § 101 (defining derivative works).

215. *See id.* § 201(d)(1).

forms of communication with the free world.[216] Other than this hurdle, however, and without discounting the obstacles placed in the way for those who are incarcerated, the ability of a prisoner to engage in these transactions is no different, as a theoretical matter, than that of any other person. And as a practical matter, the intangibility of copyright makes it easier to transfer than real and personal property.

The alienability (the property-ness) of copyright is central to its value for incarcerated and non-incarcerated people alike. Copyright owners can engage in transfers, by license or assignment, even without registering the copyright, and that is the primary way that they are able to realize economic value from the copyright. As the example of the book that is turned into a movie demonstrates, it is often necessary to transfer portions of the copyright in order to gain the most value. This right "to authorize" others to exercise the rights of copyright is thus the one with the most potential for concrete benefits for incarcerated people. (And it is important to note that this right "to authorize" others to carry out the rights of copyright is similarly significant for those who are not incarcerated.)[217]

Again, Curtis Dawkins' example is instructive. Dawkins exercised some of the rights of copyright—certainly more than most incarcerated people do. He (or someone on his behalf) registered his work with the Copyright Office.[218] He (must have) entered into a publication agreement, which almost certainly entailed a license of the right to copy and distribute the book.[219] And he received an advance as part of the publication agreement.[220] He retained the copyright in his own name, which is typical in this situation.[221] He established a trust for his children, and he deposited the advance money there.[222]

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216. As with copyright registration, it is the logistical and practical hurdles that are the most difficult for incarcerated people to overcome in attempting to license or assign their copyrights. *See supra* notes 193–194 and accompanying text.

217. *See* Richard Stim & Brian Farkas, *Who Owns and Holds the Rights to a Copyright*, NOLO, https://perma.cc/B9WN-G2E2.

218. *See supra* note 201.

219. *See* Helmore, *supra* note 165.

220. *Id.*

221. *See supra* note 201.

222. *See* Helmore, *supra* note 165.

Up to this point, Dawkins' exercise of copyright is no different from that of any other writer; however, his experience then diverges from that of a typical, non-incarcerated author. It is possible that if he had exercised his copyright differently, things would have turned out better for him. In other words, knowing more about the copyright system may well have been of benefit to Dawkins and his family.

When the State of Michigan learned that Dawkins had a contract for the publication of his novel, it began collection proceedings against this advance and asked the publisher to discontinue payments to Dawkins.[223] These actions proceeded under the auspices of Michigan's State Correctional Facility Reimbursement Act,[224] which provides that if the Attorney General believes that the inmate has sufficient assets to cover at least ten percent of the cost of incarceration, an action may be commenced to collect that amount.[225] "Assets" are defined to include "property, tangible or intangible" and income earned from a variety of sources, including pension payments, "previously earned salaries or wages," and income from other sources.[226] Notably, excluded from this definition is "[m]oney saved by the prisoner from wages and bonuses paid the prisoner while he or she was confined to a state correctional facility."[227] An argument could be made that royalties earned on a book publishing contract constitute "[m]oney saved by the prisoner from wages and bonuses paid the prisoner" while incarcerated, but Michigan nonetheless asserted its entitlement to the proceeds.

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223. *See* Alter, *supra* note 4 ("After the lawsuit against him was filed, Mr. Dawkins's agent suspended all payments from the publisher, on the state's orders.").

224. *See* MICH. COMP. LAWS, §§ 800.401–800.406 (2023).

225. *Id.* § 800.403 (2023). Note that prison officials also used a cost of incarceration statute to go after the writers in Wally Lamb's group. These statutes are not invoked regularly and some argue that they are selectively enforced. *See, e.g.*, Gary Hunter, *Prison Writers Punished for Success in Connecticut and Texas*, PRISON LEGAL NEWS (Dec. 15, 2003), https://perma.cc/F9US-HLFH. There have also been efforts to eliminate "pay-to-stay" statutes in some states. *See, e.g.*, *Governor, Attorney General Sued over Prison Debt*, ACLU CONN. (Mar. 14, 2022), https://perma.cc/32MY-QDSR.

226. MICH. COMP. LAWS § 800.401(a) (2023).

227. *Id.* § 800.401(a)(ii) (2023).

Had Dawkins consulted a copyright lawyer—one who was also aware of Michigan's cost of incarceration statute—the lawyer might have advised that Dawkins assign his copyright to his children rather than retaining ownership and placing the proceeds in a trust. A copyright owner has the right to transfer some or all copyright rights by assignment, and as with all contracts, the consideration does not need to be more than a mere "peppercorn."[228] The assignment must be in writing to be valid, but there are no other formalities required.[229]

Of course, the State of Michigan might have attempted to apply the cost of incarceration statute to the copyright as an item of intangible property, although determining its value at the outset—i.e., before the publication agreement was signed—would be very difficult.[230] It seems likely that the State proceeded as it did because of the specific monetary figure of the advance. That is, if Dawkins had assigned his copyright at an early stage, it is much less likely that the cost of incarceration statute would have been invoked.

Dawkins' story reveals two important points. First, as a practical matter, incarcerated people can exercise their rights under copyright law. Second, understanding copyright law in more depth—even though Dawkins accessed the copyright system to a much greater extent than other prisoners—might have led to a better result for Dawkins and his family. It is an example of why those who are incarcerated, along with their advocates, should know about copyright and consider it part of the carceral reform and civil rights agenda.

4. Suing for Copyright Infringement

Copyright infringement lawsuits make headlines,[231] and the ability to vindicate one's rights and receive a remedy for infringement of those rights is of obvious importance. But most

228. *See* 17 U.S.C. § 201(d).

229. *See id.*

230. *See* Ted Hagelin, *A New Method to Value Intellectual Property*, 30 AIPLA Q.J. 353, 356–57 (2002).

231. *See, e.g.*, Larisha Paul, *Netflix Dismiss Copyright Infringement Lawsuit Against Unofficial 'Bridgerton' Musical*, ROLLING STONE (Sept. 24, 2022), https://perma.cc/X3WC-LCND; Riddhi Setty, *Miles Davis Photographer's Suit Against Tattoo Artist Von D to Test Copyright 'Fair Use'*, BLOOMBERG (June 17, 2022), https://perma.cc/MK9T-LWKU.

copyright owners, even those who exercise the other rights of copyright, never file lawsuits or even threaten to do so.[232] The exercise of copyright mainly involves transactions—licenses or assignments of copyright—although of course the possibility of enforcing those rights, even if remote, provides a crucial backstop as a deterrent to infringement.

There are very few examples of prisoners suing for copyright infringement, but it is possible as a general matter for them to access the federal courts[233] and bring claims for copyright infringement.[234] In some circumstances, incarcerated people might wish to bring infringement claims against the prison, but these lawsuits will be sharply constricted because of the hurdles presented by state and federal immunity doctrines[235] and the constitutional prison-law doctrines with their related caselaw and regulations.[236]

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232. *Compare* U.S. COPYRIGHT OFF., ANNUAL REPORT FY 2021, 34 (2022), https://perma.cc/6ZGP-MLHC (PDF) (showing 414,285 copyright registrations in 2016), *with Fewer Copyright Infringement Lawsuits Filed*, TRAC REPS. (Sept. 29, 2017), https://perma.cc/BT7M-K63D (showing 3,956 copyright infringement lawsuits filed in 2016).

233. *See* 28 U.S.C. § 1338(a) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.").

234. *But see* Walton v. United States, 551 F.3d 1367, 1369–71 (Fed. Cir. 2009) (holding that the statute governing copyright infringement suits against the federal government did not authorize plaintiff's suit because the work was prepared in the course of his prison employment).

235. Although the Copyright Act allows for an abrogation of state immunity from suit for copyright infringement, 17 U.S.C. § 511(a) provides that:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner.

The Supreme Court recently held that an attempt at abrogating immunity was ineffective. *See* Allen v. Cooper, 140 S. Ct. 994, 1003 (2020) (holding that Congress did not effectively abrogate state sovereign immunity in enacting the Copyright Remedy Clarification Act of 1990). The federal government has waived its immunity to a limited extent—claims must be brought in the Court of Federal Claims and the remedies are limited. *See* 28 U.S.C. § 1498(b).

236. *See infra* Part III.B.

Prisoners may sue for infringement that occurs outside the prison walls, however, and as with the other rights of copyright, there are no substantive reasons why this should not occur. There are a few practical hurdles, but they are not insuperable.

As discussed above, copyright registration must occur before an infringement suit may be brought.[237] Ideally, one would register the copyright shortly after creation or publication of the work, but that is not required. If infringement is detected, the copyright owner may register the work at that point, and then sue for infringement.[238] The potential remedies are limited in that situation, but the possibility of suit remains.[239]

Other than the registration requirement, copyright infringement suits do not differ from other kinds of litigation. There would, of course, be the logistical difficulties of handling a case from behind bars, but prisoners should have access to the legal system (for many important reasons). In a reasonably strong copyright infringement case, an incarcerated plaintiff may even have a decent possibility of finding a lawyer. The Copyright Act provides for statutory damages of up to $150,000 per infringement,[240] so there may be attorneys willing to take cases on a contingency fee basis.

There are few examples of incarcerated people bringing copyright infringement cases, but that does not mean that it is impossible. As with the other rights of copyright, the right to pursue infringers can, practically-speaking, be exercised from behind bars.

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237. *See supra* Part III.A.2.

238. *See* 17 U.S.C. § 501.

239. *See id.* § 412

> [N]o award of statutory damages or of attorney's fees . . . shall be made for—(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

240. *Id.* § 504(c).

B. *No Justification for Limiting the Exercise of Copyright Behind Bars*

If prisoners begin to exercise the rights of copyright ownership more regularly, prison officials will probably respond negatively, perhaps even punitively. We know this because they have already done so.[241] The Guantánamo art program was canceled; the writing program in Connecticut was canceled and computers were confiscated; in Curtis Dawkins' case, it is possible that the cost of incarceration statute was invoked only because of the attention he received from the publication of his book and the extent to which it was a commentary on the prison system.

Victor Martin's story provides another telling example. Martin did not begin writing until he was imprisoned, but he became a prolific author in prison, writing a number of books in the "urban fiction" or "street literature" genre.[242] Although there were times when prison officials tolerated or even supported his work,[243] there was also backlash and punishment.[244] One of Martin's manuscripts—the only copy—was confiscated, and he was put in solitary confinement for a year.[245] Martin's story ultimately contains some seeds of hope, as we will see, but it is a clear demonstration that prison officials can and do punish

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241. *See supra* Part I.B.

242. *See* Kamala Kelkar, *Born Behind Bars, This Literary Genre Has 'Grown Up' to Resonate with Young Adults*, PBS (Aug. 6, 2017), https://perma.cc/7CHG-J323.

243. *See* David M. Reutter, *Settlement Allows North Carolina Prisoners to Receive Compensation for Writings,* PRISON LEGAL NEWS (Oct. 15, 2010), https://perma.cc/6S9T-M5N5 ("Prior to November 30, 2006, Martin had written and published four novels through three publishing companies without adverse action from prison officials, who not only were aware of these activities, but who praised him for 'doing something positive.'").

244. *See id.*

> [A]n Internal Affairs officer at Central Prison . . . was not enthused with Martin's writings, which contain "the language of the streets, with plenty of slang and four-letter words." [The official], along with several other guards, searched Martin's cell and seized materials related to his urban fiction writing and his publication efforts. From that time on, Martin was regularly written disciplinary infractions and placed in segregation for his writing activities violating prison rules against conducting a business."

245. Kelkar, *supra* note 242.

those who engage in creative practices and seek to exercise their copyright rights in connection with their artistic endeavors.

Such efforts to restrict the exercise of copyright, and punishment for doing so, are simply not justified. Because of the intangible nature of copyright and the fact that the rights granted by copyright can be exercised mainly in intangible ways (and often primarily outside of the prison walls), no plausible grounds exist for limiting the exercise of copyright by prisoners or for punishment based on engaging in creative and expressive work.

Prison officials may well raise concerns about security—the most common argument made for limiting the rights of those who are incarcerated.[246] And surely they will contend that the panoply of hurdles presented by the body of constitutional "prison law" ought to limit or eliminate the exercise of copyright.[247] But, in addition to the emptiness of the security arguments, constitutional prison law—a complex thicket of prison rules and regulations—simply does not apply to the exercise of copyright by those who are incarcerated. This is, in part, because much of the exercise of copyright takes place outside the prison walls.[248] And to the extent that it does take

246. *See, e.g.*, Littman, *supra* note 17, at 1439 n.254 ("The prison officials' justifications for the policy—that short beards were a security threat and could allow prisoners to hide contraband—were unsupported by any evidence, and the latter suggestion at least was ridiculous.").

247. "Prison" law focuses on the conditions of confinement in both state and federal facilities, with the Eighth Amendment and the Prison Litigation Reform Act, along with the Religious Land Use and Institutionalized Persons Act, constituting the structure for analyzing claims by incarcerated people. *See* Eisenberg, *supra* note 13, at 6 n.6. Though the Amendment and the statutes are framed in terms of "rights," they operate more like a (low) ceiling on the ability of incarcerated people to advocate for themselves or to seek to improve their conditions. *See* Littman, *supra* note 17, at 1389–90 ("Eighth Amendment doctrine affords prison and jail officials tremendous deference, and the process of litigating these claims is littered with procedural obstacles purpose-built to stymy and cabin challenges to conditions of confinement." (citation omitted)). They present a series of hurdles and hoops that are extremely difficult to navigate. *Id.* Much has been written, by many scholars more knowledgeable than I am, about the problems, contradictions, and devastating consequences of this body of law. I cannot summarize it (much less do it justice) here. For an overview, however, see, for example, Eisenberg, *supra* note 13, at 6 n.6 and sources cited therein.

248. *See supra* Part III.A.

place inside the prison, it exists in a "sub-constitutional" space.[249]

Scholars and advocates have recently begun exploring aspects of sub-constitutional prison law as part of carceral reform and abolition efforts. Avlana Eisenberg, in discussing prison education programs, notes that what we think of as "prison law" does not operate in that context. As she explains: "Careful attention is given to whether conditions of confinement run afoul of the Eighth Amendment's ban on cruel and unusual punishment. Comparatively neglected are normative aspects of incarceration that fall outside this slice of constitutional law and beyond the purview of the Supreme Court."[250] In a similar vein, Aaron Littman argues that the vast body of regulatory law should apply behind bars, essentially as a supplement to constitutional prison law.[251]

Although this "sub-constitutional law space" has been "comparatively neglected,"[252] the fact that much of the lived experience of those who are incarcerated is beyond the reach of constitutional prison law opens up potential for change and opportunities for reform. The ability to bypass that body of law permits us to consider what we *should* do rather than what we *must* do. Both Eisenberg and Littman take this normative approach.

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249. Eisenberg, *supra* note 13, at 6. Prison officials could, consistent with the Constitution, prohibit the exercise of copyright in prison. This Article contends that they *should* not. This is along the same lines as the arguments put forth by Aaron Littman. *See* Littman, *supra* note 17, at 1391 ("Nevertheless, were it to be robustly applied to prisons and jails, free-world regulatory law would hold promise as a tool for ameliorating conditions. Substantively, procedurally, and normatively, it can avoid many of the shortcomings of the constitutional prison law that has long been asked to fill deregulatory voids." (citation omitted)); Eisenberg, *supra* note 13, at 10–11

> The basis for the normative argument is not that the lack of enrichment programs would constitute cruel and unusual punishment, as it has been defined by the Supreme Court. Rather, the Article's claim is that the state is failing in a political obligation it owes all members of the polity by allowing punishment to prevent the possibility of reintegration. In short, the state should provide to term-limited prisoners at least a plausible hope of basic reintegration, and the state should avoid further debilitation that might be termed "punishment-plus." (citations omitted).

250. Eisenberg, *supra* note 13, at 6 (citation omitted).

251. *See* Littman, *supra* note 17, at 1390.

252. Eisenberg, *supra* note 13, at 6.

Littman proposes that "free-world" regulatory law can and should be brought behind bars to provide a substantial source of protection for those in prison.[253] As he describes, prison law "offers exceedingly little protection" to prisoners.[254] Instead of suggesting reform of that body of law, Littman asserts that "'free-world' regulatory systems in arenas as diverse as public health, public utilities, public finance, and public records should also be understood as part of the corpus of prison law because they can and do shape incarceration in profound ways."[255] In essence, Littman proposes sidestepping constitutional prison law to import welfare-enhancing regulatory law into the prison system.[256] Littman acknowledges the difficulty of this project,[257] but it is also quite simple in some ways. We—localities, cities, licensing boards, etc.—could simply decide that various free-world regulatory requirements apply behind bars just as they apply elsewhere. One way of understanding Littman's argument is as an acknowledgment that those who are incarcerated are a part of society, not apart from society, and should be treated accordingly.[258]

Eisenberg's argument is animated by the same understanding. Based on the critical fact that nearly all prisoners will "return to civil society," Eisenberg argues that we must "critically examine the 'practices of incarceration'—including the prison environment and programs, whether vocational, educational, religious, artistic, or recreational—that either promote or detract from a prisoner's reentry into society" because "[t]hese practices of incarceration

253. *See* Littman, *supra* note 17, at 1391.

254. *Id.* at 1389.

255. *Id.* at 1390 (citations omitted).

256. *See id.* at 1391 ("For visionaries, understanding prisons and jails as the proper subjects of free-world regulation allows us to reconceptualize incarcerated people as members of the public—with the attendant entitlements—and to divert power from carceral institutions to the regulatory infrastructure of communal health and safety." (citation omitted)).

257. *See id.* at 1392–93 ("While the both the Prison Litigation Reform Act (PLRA) and judicial doctrines of deference make it extraordinarily difficult to obtain relief that will durably prevent future violations, regulation is well designed to take the long view . . . .").

258. *See id.* at 1472 ("[R]egulatory reform can also clarify and even reorient our moral frame—as to incarcerated people and our obligations to them—in ways that align with an abolitionist vision.").

are vitally important both for former prisoners and their future neighbors and communities."[259] This is in service of the idea that we must carefully consider

> the place of prisoners in society both while they are incarcerated and once they are released, and . . . think beyond the paradigms of warehousing and second-class citizenship to imagine what it would be like if those in prison were understood primarily as fellow members of the polity who would be returning to civil society.[260]

Taking up this imperative to understand prisoners as part of civil society and to treat them accordingly, permitting and even encouraging the free exercise of copyright behind bars is a straightforward proposition. Like prison education programs, the exercise of copyright behind bars similarly operates at a sub-constitutional level. That is, prison officials *could*, consistent with the Constitution, place limits on the practice. But they *should* not do so. For the variety of reasons discussed in Part I, creative practices are a fundamental part of existence for many people, incarcerated or not. And for many of those who are incarcerated, engaging in those creative practices confers a range of positive benefits.[261] The exercise of copyright in the works that emerge is the logical extension of these creative practices and there is no reason why the rights that flow from copyright should not be available to those who are incarcerated.

Most of the exercise of copyright does not even take place behind bars at all. To that extent, it is both "sub-constitutional"

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259. Eisenberg, *supra* note 13, at 5 (citation omitted).

260. *Id.* at 7. Littman expresses some disagreement with Eisenberg regarding the extent to which those in prison should be considered part of society even while they are in prison. *See* Littman, *supra* note 17, at 1474

> [Eisenberg] advances a communitarian "principle of return," "insist[ing] on conceptualizing punishment as a precursor to . . . return to civil society," and arguing that we ought not "ignore what happens within the prison environment" vis-à-vis that eventual rejoining. This move explicitly concedes, however, that for the duration of incarceration, people are outside of civil society, citizens-in-waiting, on hiatus. (citation omitted)

This difference is a distinction between the two, reflecting Littman's abolition approach as compared to Eisenberg's reform approach.

261. *See supra* Part I.A.

and outside the scope of any sort of prison law.[262] The exercise of copyright occurs intangibly, or, if it is in a particular location, it is most often outside the prison walls. This is a crucially important fact. Any asserted security concerns are barely plausible, and the usual arguments for the application of prison law are simply irrelevant. Put another way, there is no reason for copyright to be any different for those who are behind bars than for those who are not.

The exercise of copyright by those who are imprisoned is not just possible as a practical matter—it should be encouraged as a normative matter. People who are incarcerated describe the value and benefits of art programs and of engaging in creative and expressive work while in prison.[263] The understanding and recognition of the rights that accompany this work are significant in itself, humanizing, and dignifying. And for some number of people—those who are incarcerated and those who are not—there is value, financial and otherwise, in the exercise of copyright. As described in Part II.B, the typical exercise of copyright involves the licensing or assignment of rights in a creative or expressive work. Permitting or encouraging those who are incarcerated to exercise these rights imposes no burden on the prison system but has the potential to improve the lives of those who are incarcerated, both while they are imprisoned and afterward.

I said above that we know prisons will punish or deter the exercise of copyright by those who are incarcerated because they have done so.[264] On a more optimistic note, we also know that prisons *can* allow, and even encourage, creative practices and the exercise of copyright because they have done so.[265] Just as we have seen that, as a practical matter, prisoners can exercise their copyright rights, we also see that prison officials can, and at times do, permit the free exercise of copyright from behind bars.

Returning to Victor Martin, his story illustrates the kinds of punishment incarcerated artists can expect to receive,[266] but

262. One could call it sub-constitutional non-prison law, but another way of saying that is just to call it "copyright law."

263. *See supra* Part I.B.

264. *See supra* Part I.B.

265. *See supra* Part I.B.

266. *See supra* notes 244–245 and accompanying text.

it also provides an example of the possibilities for change and for more positive outcomes. After Martin's manuscript was confiscated, the ACLU took up Martin's case and ultimately reached a settlement with the state that allowed Martin to continue his work and required the prison system to adopt new policies permitting, and to some extent assisting with, the creation and publication of written works.[267] Martin's infractions were overturned and, as part of the settlement, "North Carolina also agreed to protect written expression in its prisons—including drawings, lyrics, poetry and books."[268] Martin described the result in this way: "I just wanted to make it so everybody could be able to write without getting punished. . . . I didn't cross any lines. I didn't do no stupid stuff. I found out that it's true that the pen is mightier than the sword."[269] Martin makes the point that there are good reasons to allow for creative practices in prison—PBS reported that "Martin said writing has become his mental escape, saving him from joining a gang or getting into more trouble in the countdown to his release on September 14, 2018, four days before his mom's birthday."[270]

Exercising copyright is in some ways just an extension of those creative practices, reinforcing their significance and, for a few people, providing a means of support and financial remuneration. The terms of Martin's settlement with North Carolina make clear that prisons can, as a practical matter, allow both the creative practices and the exercise of copyright. According to the ACLU, the settlement not only protects the creative practices, but goes further by providing that the policy must "allow inmates to prepare a manuscript for publication, for outside typing, for copyrighting or for private use, so long as the inmate does not receive direct compensation for publication of the manuscript."[271] Note that this aspect of the agreement refers explicitly to copyright and mentions some aspects of the exercise

267. *See* Kelkar, *supra* note 242.

268. *Id.*

269. *Id.*

270. *Id.*

271. Press Release, ACLU, ACLU-NC Legal Foundation Announces Successful Settlement of Lawsuit Against North Carolina Prison Officials for Violating Free Speech Rights of Published Author/Prisoner (Mar. 8, 2010), https://perma.cc/WT6D-66KW.

of copyright—publication—which involves both the reproduction and distribution rights. It does not permit the full exercise of copyright because it proscribes direct compensation. It does, however, provide that prisoners "may still receive compensation for published manuscripts, so long as the inmate authorizes a family member to handle all issues and correspondence related to the business aspect of publishing for compensation."[272] It is unclear what this means, exactly, but it indicates that in some ways the author—the creator of the work—can authorize others to capitalize on some copyright rights. This resolution does not allow for the full and free exercise of copyright, but it comes close and provides a real-world example of what is within reach.

Victor Martin's story demonstrates, quite clearly, that the exercise of copyright from behind bars is not just possible, but that prisons can accommodate that exercise.[273] They should.

CONCLUSION

People who are incarcerated paint, write, draw, and sculpt, and they often do so under punitive conditions. They also sometimes exercise the rights that go along with these creative practices, so we know that they can do so as a practical matter. This Article has sought to convince them that they *should* do so, and more regularly than they do now. Because copyright is a right in an intangible and because it can be exercised in many ways outside the prison walls, prison officials can allow, or even encourage, this to happen. We know that they can do this, because they have done it. This Article contends that they *should* do it—not because it is required by the Constitution, but because it will improve the lives and well-being of those who are incarcerated.

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272. *Id.*

273. To be clear, Martin's lawsuit was based on the First Amendment and Martin's lawyers deployed constitutional prison law to achieve this result. *See id.* Note, however, that the terms of the settlement involve the exercise of copyright. *See* Settlement Agreement, Martin v. Keller, No. 5:09-ct-03021 (E.D.N.C. Mar. 8, 2010).