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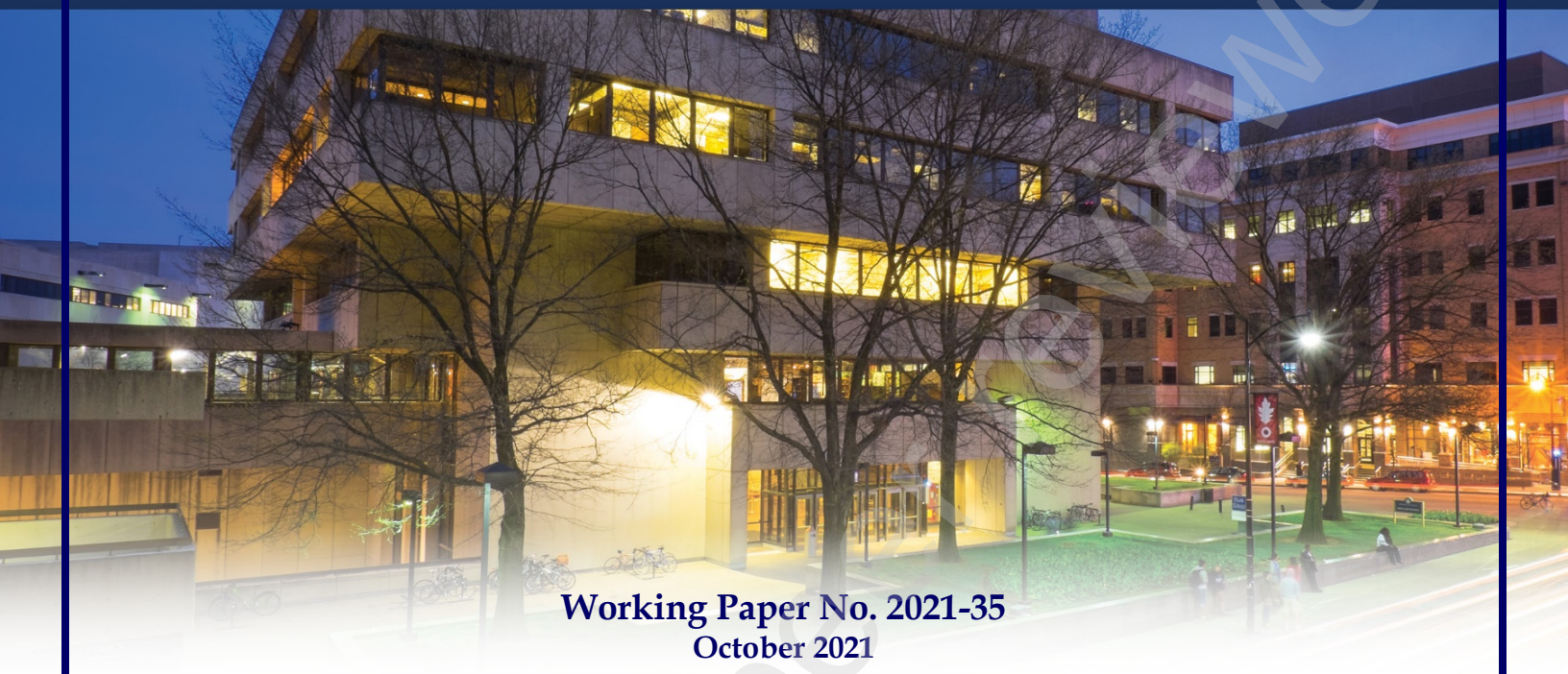

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Outsider Speech: The PLRA, AEDPA, and Adjudicative Expression

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> "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."
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> —*Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010)

I. Introduction

The Prison Litigation Reform Act ("PLRA")[1] and the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")[2] imposed sweeping new restrictions upon incarcerated persons' access to and use of the federal courts. The PLRA and AEDPA contain many troubling specific provisions; this Essay, however, will focus holistically upon the effects of these statutes in limiting incarcerated persons' access to the federal courts and cabining the claims that incarcerated persons may assert in federal courts. Taken as a whole, these statutes "were intended to, and did in fact, make it harder for prisoners to advance constitutional claims in federal court."[3]

Federal laws that make it more difficult (or conversely, easier) to assert certain claims in federal courts may not be inherently bad or irregular. From the basic rules of practice and procedure[4] to more targeted provisions regulating perceived excesses in litigation generally[5] or certain types of litigation

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[1] 42 U.S.C. § 1997e.

[2] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[3] Michael M. O'Hear, *Not So Sweet: Questions Raised by Sixteen Years of the PLRA and AEDPA*, 24 FED. SENT. R. 223, 223 (2012) [hereinafter O'Hear, *Sixteen Years of the PLRA and AEDPA*].

[4] *See, e.g.*, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure.

[5] *See, e.g.*, 28 U.S.C. § 1927 (authorizing the imposition of financial sanctions upon "[a]ny attorney or other person admitted to conduct cases in any court of the United States" who "multiplies the proceedings in any case unreasonably and vexatiously. . . .").

specifically,[6] legislation often regulates litigation and access to the courts.[7] Seldom, however, does legislation single out a specific class of people—incarcerated persons, in the case of the PLRA and AEDPA—and target them for restrictions upon their access to and use of the courts that are both wholesale and *sui generis* to the class.[8] Indeed, Human Rights Watch has noted that it is unaware "of any other country in which national legislation singles out prisoners for a unique set of barriers to vindicating their legal rights in court."[9]

While such indiscriminate class-based legislation is unusual, it is not unprecedented. Specifically, this Essay contends, similar restrictions were imposed upon enslaved persons as well as free blacks during the pre-Civil War legal regime.[10] To be clear: this

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[6] *See, e.g.*, the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (limiting securities fraud class action suits in various ways and aiming to reduce frivolous securities litigation).

[7] This is not to suggest that the examples of such regulations cited above are all normatively desirable or justifiable, of course. *See, e.g.*, Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004) [hereinafter Peters, *Adjudicative Speech*] (considering whether and how the various restrictions on advocates' courtroom speech, such as the Rules of Evidence and restrictions upon citations to unpublished judicial opinions, can be reconciled with free speech values); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 561 (2004) [hereinafter Lobel, *Courts as Forums for Protest*] (arguing, *inter alia*, that "[b]ecause of the importance of encouraging people to engage in discussion about current social issues, and because of the implications for freedom of speech, courts should not allow sanctions under Federal Rule of Civil Procedure 11 or other similar rules to stifle popular debate stirred by lawsuits that may be considered 'frivolous' because they argue against precedent or are viewed as losing cases").

[8] "Setting out to protect the federal courts against a presumed flood of [frivolous prisoner litigation], the PLRA established an array of barriers to constitutional litigation that apply to no litigants other than prisoners." Susan N. Herman, *Prison Reform Litigation Acts*, 24 FED. SENT. R. 263, 263 (2012) [hereinafter Herman, *Prison Reform*].

[9] Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States* (June 15, 2009), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states#_ftnref2 [hereinafter Human Rights Watch, *No Equal Justice*].

[10] Congress has also adopted wholesale and *sue generis* restrictions upon procedural rights and court access in the various "war on terror" statutes enacted in the wake of the September 11 attacks, such as the Detainee Treatment Act and the Military Commissions Act. As with incarcerated persons, the outcast status of persons accused of terrorist activity both motivated Congress to adopt and was used by Congress to justify dramatic departures from the ordinary procedural rights applicable to all other persons.

Essay does not contend that incarcerated persons are slaves. Nor does this Essay seek to analogize incarceration to enslavement or to argue that the conditions that incarcerated persons face are the same as those faced by enslaved persons.[11] Rather, this Essay examines the PLRA and AEDPA through the lens of the American slave system's limitations upon access to the courts by enslaved persons and free blacks in order to illuminate the ways in which the former replicates the latter for a similarly racialized[12] and socially alienated group deemed outcasts from civil society.

II. The PLRA and AEDPA: Background

Taken together, "PLRA and AEDPA both constitute multipronged attacks on the ability of prisoners to secure relief from federal courts for claimed violations of their constitutional rights."[13] As relevant to this Essay, these statutes constrain incarcerated

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[11] Many thoughtful scholars, observers, and formerly incarcerated persons have made such arguments. This Essay simply takes no position on these analogies and comparisons. Nor does this Essay address whether the treatment of enslaved persons may in some case amount to slave-like conditions, such as through the use of prison labor. *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019).

[12] As is well known, America's system of mass incarceration is highly racialized. *See, e.g.*, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ (June 14, 2016) (noting, *inter alia*, that as of 2016, African-Americans were incarcerated in state prisons at 5.1 times the rate of whites on average, and in five states, at ten times the rate of whites); *NAACP Criminal Justice Fact Sheet*, https://naacp.org/resources/criminal-justice-fact-sheet (stating that "56% of the US incarcerated population [is] represented by African Americans and Hispanics," although they comprise only 32% of the total U.S. population); Katie Mettler, *States Imprison Black People at Five Times the Rate of Whites—A Sign of a Narrowing Yet Still-Wide Gap*, WASH. POST, Dec. 4, 2019, https://www.washingtonpost.com/crime-law/2019/12/04/states-imprison-black-people-five-times-rate-whites-sign-narrowing-yet-still-wide-gap/ (noting that among the federal prison population, the black-to-white incarceration rate "fell from 8.4-to-1 to 7-to-1 between 2001 and 2017, and the ratio between white and Hispanic people decreased from 7.3-to-1 to 4.6-to-1," nonetheless remaining at very high levels of disparity).

[13] O'Hear, *Sixteen Years of the PLRA and AEDPA*, *supra* note 3, at 223.

persons'[14] access to the courts by, *inter alia*: requiring the payment of court filing fees even in cases brought by indigent persons;[15] imposing a new limitations period of one year for habeas corpus claims;[16] strictly limiting the filing of multiple habeas petitions;[17] imposing new statutory limitations upon federal court habeas review of state court decisions;[18] and capping attorney's fees in a manner likely to diminish the willingness of counsel to represent incarcerated persons and/or to affect the quality of representation by those attorneys who do so.[19] In addition to their instrumental effects in making litigation by incarcerated persons more difficult, thereby deterring such litigation (including litigation that may well be fully meritorious), scholars have argued that these statutes also have the effect—and perhaps the intent—of serving as an additional form of punishment by demeaning and degrading the individual's worth by subjecting them to a different set of rules conveying their lesser status as members of society. Under this view, the process is itself punishment, amounting to "a separate but unequal system of court access that applies only to prisoners."[20]

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[14] It is notable that the PLRA's restrictions apply "not only to persons who have been convicted of crime, but also to pretrial detainees who have not yet been tried and are presumed innocent." Human Rights Watch, *No Equal Justice*, *supra* note 9.

[15] O'Hear, *Sixteen Years of the PLRA and AEDPA*, *supra* note 3, at 224.

[16] *Id*.

[17] *Id*.

[18] *See* 28 U.S.C. § 2254(d)(2) (providing that federal habeas review shall not be granted unless the state court's judgment was contrary to U.S. Supreme Court decisions or is determined to have been an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

[19] Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 890 (2002) [hereinafter Tsai, *A Speech-Centered Theory of Court Access*] (arguing that, by restricting "the recovery of fees to no greater than 150 percent of the hourly rate established for payment of court-appointed counsel," and capping any attorney's fees at 150 percent of the judgment in those cases where monetary damages are obtained, the PLRA "discourages attorneys from taking on prisoners as clients, and creates disincentives to perform the work competently when representation is undertaken") (internal quotation marks and ellipsis omitted).

[20] David C. Fahti, *The Prison Litigation Reform Act: A Threat to Civil Rights*, 24 FED. SENT. R. 260, 260 (2012). *Cf.* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

The PLRA's and AEDPA's limits upon incarcerated persons use of the courts may well have led to meritorious claims of serious constitutional violations or personal injuries going unredressed.[21] But even assuming for the sake of argument that *all* of the claims disallowed, restricted, or otherwise burdened by these statutes would have been unsuccessful (a highly unlikely scenario), this Essay suggests that something has been lost nonetheless: namely, the ability of incarcerated persons to be treated with equal worth and dignity in seeking to utilize the courts to redress their perceived grievances and to communicate those grievances to the government and the public through the courts.[22] The next section of this Essay examines the literature regarding litigation as a form of expression.

III. Litigation as Expression

The American constitutional tradition values freedom of expression for several independent reasons, two of which are especially pertinent to adjudicative speech. The first relates to the democratic process. In Justice Brandeis's famous formulation:

> [The Framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly

[21] *See, e.g.*, Nancy King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 FED. SENT. R. 308 (2012) (analyzing a data set of 2,188 non-capital habeas cases in 2003 and 2004 and finding a 20% decrease in the rate at which habeas review was granted as compared to the pre-AEDPA rate). To be sure, the overall grant rate in raw numbers was very low both pre-AEDPA and post-AEDPA during the period studied (1 percent versus 0.8%); further, there may have been causes other than AEDPA that led to the decline. Whatever the effect of AEDPA on habeas grant rates, however, it seems clear that prisoner litigation overall has seen a sharp decline post-PLRA. *See, e.g.*, Maggie Filler & Daniel Greenfield, *A Wrong Without a Right? Overcoming the Prison Litigation Reform Act's Physical Injury Requirement in Solitary Confinement Cases*, 115 NW. U. L. REV. 257, 258 (2020) (stating that "in the years since the PLRA was enacted, prisoner lawsuits have slowed to a comparative trickle," citing, *inter alia*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1694 (2003) ("The [PLRA] has been highly successful in reducing litigation, triggering a forty-three percent decline over five years, notwithstanding the simultaneous twenty-three percent increase in the incarcerated population.")).

[22] To be clear, I am speaking here of claims that are colorable but would ultimately be found unsuccessful on the merits, not claims that are legally frivolous.

> discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[23]

Adjudicative speech can relate to the democratic process in several ways: among them, it can serve as a form of dissent against the government;[24] as a means to galvanize political change through "persistent and persuasive appeals to the public consciousness";[25] as a way to "focus the government's attention on the claims of the government when no other mechanism could";[26] and, in the case of collective litigation, allowing like-minded persons to amplify their voices through association, in a manner akin to a political party.[27] Indeed, the Supreme Court's pre-PLRA jurisprudence explicitly recognized that incarcerated persons' adjudicative speech can be an alternate form of participation in the political process, stating that "[b]ecause a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most fundamental political right, [preservative] of all rights."[28]

Freedom of expression is also valued as an aspect of the individual's dignity and autonomy. Protecting speech for its own sake, separate from any instrumental value that it may have, "sees

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[23] Whitney v. California, 274 U.S. 357, 375 (1927).

[24] Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantanamo*, 44 U.C. DAVIS L. REV. 1487, 1525 (2011) [hereinafter Sabbeth, *Lessons from Guantanamo*] ("courts [can] provide . . . an amplified platform for attracting public attention for expressions of dissent against government policies").

[25] *Id.*, quoting Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 A.B.A. FOUND. RES. J. 521, 550 (1977) (internal quotation marks omitted).

[26] Tsai, *A Speech-Centered Theory of Court Access*, *supra* note 19, at 853–54 (quoting Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2157 (1998) (internal quotation marks omitted).

[27] *See* NAACP v. Button, 371 U.S. 415 (1963). *Button* is discussed in greater detail below.

[28] McCarthy v. Madigan, 503 U.S. 140, 153 (1992). *McCarthy* was superseded by the PLRA.

expression as intrinsically important"[29] to all persons, and especially to persons belonging to subordinated groups whose voices tend to be undervalued. This view was noted in Justice Marshall's concurrence in *Procunier v. Martinez*.[30] *Procunier* involved a First Amendment challenge to a prison policy that incarcerated persons' incoming and outgoing mail would be screened by prison staff for prohibited content, such as letters in which a prisoner was deemed to "'unduly complain' or 'magnify grievances . . . ,'" or letters deemed to be "contraband writings 'expressing inflammatory political, racial, religious or other views or beliefs . . . .'"[31] In deeming the policy unconstitutional, the majority opinion focused on the First Amendment rights of non-incarcerated persons, reasoning that:

> [C]ensorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are *not* prisoners . . . . [T]he First Amendment liberties of *free citizens* are implicated in censorship of prisoner mail. We therefore turn for guidance, not to cases involving questions of "prisoners' rights," but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities.[32]

The majority opinion therefore strongly indicated that it might have viewed the issue differently were it framed in terms of the incarcerated person's rights. Justice Marshall, by contrast, writing for himself and Justice Brennan, called for a different understanding, one grounded in the dignity and autonomy of incarcerated person themselves. Justice Marshall noted that "[a]lthough the issue of the First Amendment rights of inmates is explicitly reserved by the Court, I would reach that issue and hold that prison authorities may not read inmate mail as a matter of course."[33]

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[29] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1183 (6th ed. 2020).
[30] 416 U.S. 396 (1974), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989).
[31] *Id.* at 399.
[32] *Id.* at 409 (emphasis added).
[33] *Id.* at 422 (Marshall, J., concurring).

Justice Marshall reasoned that:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity. When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment.[34]

Justice Douglas joined in the operative portion of Justice Marshall's opinion, making three Justices who would have invalidated the policy based upon the incarcerated person's First Amendment rights, grounded in the idea that the status of incarceration does not remove the constitutional protections applicable to all other persons.

If one accepts that the democratic self-governance and dignity rationales for protecting freedom of expression apply to incarcerated persons' expressive activities, the question then becomes whether the PLRA and AEDPA's limitations on litigation implicate free speech values. This Essay contends that they do. It is generally recognized that litigation can have a significant expressive component in addition to its instrumental value as a means of resolving private disputes and for the vindicating public rights.

The Supreme Court has long recognized that the First Amendment embraces a "right to advocate" which, as a necessary condition, includes a right to engage in "*effective* advocacy of both public and private points of view."[35] In the realm of litigation specifically, the Court has recognized that advocacy through

[34] *Id.* at 427–28 (internal citations omitted).
[35] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461, 460 (1958) (emphasis added).

litigation can serve as a means of expression protected by the First Amendment. In *NAACP v. Button*,[36] for example, the Court held that Virginia's broadened restrictions upon solicitation of clients for legal services as applied to the NAACP violated the First Amendment because it "infringe[d] the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."[37] Given the posture of the case—*i.e.*, restrictions upon lawyers' expressive activities as part of a collective entity like the NAACP—much of *Button*'s reasoning focuses upon freedom of association and litigation. The Court, however, also elaborated upon how litigation can have expressive value generally:

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy . . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment . . . . It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.[38]

The NAACP's litigation, the Court reasoned, "while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society."[39] Scholars have similarly recognized the

[36] 371 U.S. 415 (1963).
[37] *Id.* at 428.
[38] *Id.* at 431.
[39] *Id.*

expressive component of litigation as being of equal (or even higher) importance to its instrumental goals in certain contexts.[40]

Some scholarly examinations have focused upon limitations on litigation specifically through the lens of the First Amendment's Petition Clause,[41] while others have examined such restrictions more broadly via the Speech Clause or from the perspective of free speech values generally. By the same token, some scholars and courts have focused upon the expressive component of litigation in terms of the lawyer's own free speech interest[42] or the client's interest by proxy;[43] others directly upon the client's interest;[44] still others upon society's interest.[45] While the doctrinal basis is subject to debate, it is widely

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[40] *See, e.g.*, Sabbeth, *Lessons from Guantanamo*, *supra* note 24, at 1507 (arguing for a "a public law conception of litigation as an essential means of disseminating a message to government actors and to larger society" in certain kinds of cases); Lobel, *Courts as Forums for Protest*, *supra* note 7, at 477 (stating that "courts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda").

[41] *Compare* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665 (2000) [hereinafter Andrews, *Motive Restrictions*] with Tsai, *A Speech-Centered Theory of Court Access* (the latter arguing that "[t]heories of court access that are moored too tightly to the Petition Clause . . . are unsatisfactory in that they are not based upon a foundation that draws together other elements of the First Amendment. Under this admittedly constricted view of the right of access, only rules that explicitly bar individuals from lodging winning lawsuits or penalize individuals directly for doing so would raise First Amendment problems.").

[42] *See* Sabbeth, *Lessons from Guantanamo*, *supra* note 24, at 1507 (noting that "[t]he high water mark of protection for lawyers' speech in support of litigation with a political purpose was *In re* Primus, [which] identified First Amendment protection for a lawyer separate and apart from any right held by a client").

[43] *See, e.g.*, Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (holding that restrictions upon LSC-funded lawyers' ability to challenge federal welfare law violated the First Amendment and were not saved by the government speech doctrine because "an LSC-funded attorney speaks on the behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker.").

[44] *See, e.g.*, Tsai, *A Speech-Centered Theory of Court Access*, *supra* note 19, at 841–42 (arguing that "[t]reating the pursue of redress as [a form of anti-government] dissent marks its role as the gateway to the political-legal order by linking familiar, time-honored free speech concepts with a rich understanding of the civil rights plaintiff's role in constitutional discourse").

[45] *See, e.g.*, Andrews, *Motive Restrictions*, *supra* note 41, at 768 (stating that "[t]he First Amendment protects petitions for the further reason that they inform the government and thus create the potential for advancement of the law and cure of

accepted that litigation can have a substantial expressive component.

The PLRA's and AEDPA's limitations upon such expression in cases brought by incarcerated persons therefore raised issues under the First Amendment; they also raise issues under the Equal Protection Clause since those statutes create a classification between persons who are incarcerated and those who are not. This Essay, however, does not engage in a detailed First Amendment or equal protection doctrinal analysis. Rather, this Essay brings the insights of free speech and equal protection theory as well as the history of similar restrictions upon adjudicative expression during the slave regime to bear in analyzing the PLRA and AEDPA.

IV. History's Echoes: Enslaved Persons' Adjudicative Speech

The history of American slavery suggests that great concern is warranted whenever we see legal rules that categorically limit outcast groups' access to and use of the judicial system. Slavery was characterized by the "civil death" of those subject to it—and in many states, also of free blacks—whereby a single trait (*i.e.*, blackness) defined "one's status before the law for all time, with no possibility of redemption as a member of civil society."[46] As Orlando Patterson noted in his seminal book *Slavery and Social Death*,[47] among the key distinguishing features of American slavery as relevant here were procedural and substantive legal rules excluding enslaved person from invoking the judicial system, thereby leaving them at the mercy of their enslavers.[48] The American Slave Codes "permit[ed] and immuniz[ed] from prosecution or civil recourse the [slaveowners'] violence and coercion necessary to compel [forced

societal problems. These aims are achieved by the filing of a winning claim, no matter what the plaintiff thinks. Indeed, society might be deprived of important changes if the right to go to court were limited by the plaintiff's motive.").

[46] William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, 39 SEATTLE L. REV. 813, 826 (2016) [hereinafter Carter, *Class as Caste*].

[47] *See generally* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

[48] The generally accepted baseline in the slave states was that "the slave was outside the protection of the common law." Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209, 1209 (1993) [hereinafter Morris, *Slaves and the Rules of Evidence*].

labor]";[49] prohibited slaves (and often also free blacks) from forming binding judicially-enforceable contracts;[50] and barred slaves from testifying in court against white persons.[51] These provisions served to control enslaved persons by limiting their ability to assert claims of freedom or to demand other legal redress, but they also served the expressive purposes of inflicting terror and denoting enslaved persons' lesser status as outcasts from civil society.[52]

The Slave Codes also specifically targeted "blacks' freedom of speech and speech about black freedom":[53]

> Provisions of various states' slave codes expressly targeted freedom of speech. Mississippi's Slave Code, for example, authorized a sentence ranging from imprisonment at hard labor for up to twenty-one years to the death penalty upon conviction of

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[49] Carter, *Class as Caste*, *supra* note 46, at 817.

[50] William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 51 (2004) (quoting Senator Lyman Trumbull's statement during the congressional Reconstruction debates that "[w]hen slavery was abolished, slave codes in its support were abolished also. Those laws that prevented the colored man from going from home, that did not allow him to buy or to sell, *or to make contracts*; that did not allow him to own property; *that did not allow him to enforce rights*; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery.") (emphasis added).

[51] Morris, *Slaves and the Rules of Evidence*, *supra* note 48, at 1209 (noting that, under the Slave Codes, "slaves could not testify against whites") (but also noting that the evidentiary rules became more nuanced during later phases of the slave regime).

[52] Carter, *Class as Caste*, *supra* note 46, at 817–18 (arguing that the denial of "[a]s slavery became fully entrenched . . . , the panoply of laws and customs [under the Slave Codes] continued to serve their original instrumental purposes, [but] they also served the expressive purpose of dehumanizing slaves (and by extension, all blacks) as completely undeserving of either civil rights or moral empathy"). *Cf.* Brown v. Bd. of Education, 347 U.S. 483, 494 (1954) (stating that "[t]he impact of [school segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group") (internal quotation marks omitted); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996) ("There can be no doubt that law, like action in general, has an expressive function. . . . Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.").

[53] William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1084 (2021) [hereinafter Carter, *The Second Founding*].

> 'using language having a tendency to promote discontent among free colored people or insubordination among slaves.'[54]

Similar examples abound. North Carolina, for example, in 1830 adopted an act "suppressing expression with a tendency to cause slaves to rebel. [In] 1836, Virginia passed a comprehensive act aimed at antislavery agitation."[55] In Kansas, "[t]he proslavery government of the territory enacted a slave code[,] [which] made expressing antislavery opinions a crime . . . ."[56] Indeed, "with the exception of Kentucky, every Southern state eventually passed laws exercising loose to rigid control of speech, press, and discussion."[57]

In addition to suppressing traditional forms of verbal, written, and associative expression, the states' Slave Codes and the federal Fugitive Slave Acts specifically limited slaves' adjudicative expression in terms of access to or use of the courts. The slave states' rules of evidence in criminal cases either excluded the testimony of slaves entirely in cases involving whites or otherwise discounted or limited it.[58] In Mississippi, for example, although enslaved persons' testimony was inadmissible in cases against whites, the state's rules of evidence provided that "any negro or mulatto, bond or free, shall be a good witness in pleas of the state, for or against negroes or mulattoes, bond or free, or in civil pleas where free negroes or mulattoes shall alone be parties, and in no other cases whatever."[59] Similarly, in Pennsylvania during the colonial era, because of a special judicial system of "Negro courts" separate from the regular courts, "[o]ne can surmise that after 1700 blacks could not be witnesses against whites in the regular courts, since this right was

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[54] *Id*.
[55] Michael Kent Curtis, *Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1133 (1992) [hereinafter Curtis, *Free Speech, Slavery*].
[56] *Id*. at 1129.
[57] RUSSEL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830–1860, at 140 (Michigan State College Press 1949).
[58] Morris, *Slaves and the Rules of Evidence*, *supra* note 48, at 1209 (noting that "in the American South[,] [t]he wholesale exclusion [of slaves' testimony against whites] remained in force to the end of slavery").
[59] *Id*. at 1210.

not affirmatively given to free blacks until 1780 and to slaves until 1847."[60]

The federal Fugitive Slave Acts also operated to limit adjudicative expression by alleged slaves. In Frederick Douglas's speech commonly known as *What to the Slave is the Fourth of July?*,[61] Douglas described how the Fugitive Slave Act expressly silenced the adjudicative speech of the person claimed to be a slave while privileging the adjudicative speech of the putative slaveowner. Douglas noted that under the Act:

> The oath of any two villains is sufficient . . . to send the most pious and exemplary black man into the remorseless jaws of slavery! His own testimony is nothing. He can bring no witnesses for himself. The minister of American justice is bound by the law to hear but one side; and that side is the side of the oppressor.[62]

Douglas was speaking specifically of the Fugitive Slave Act of 1850, which expressly provided that "[i]n no trial or hearing under this act shall the testimony of [the] alleged fugitive [slave] be admitted in evidence,"[63] whereas any legally "satisfactory proof"[64] by the alleged slaveowner sufficed for the court to decide the claim summarily in his favor. Similar concerns pertained to the Fugitive Slave Act of 1793. Unlike the 1850 Act, the 1793 Act did not specifically bar the testimony of the person alleged to be a slave. However:

> [While] [t]he terms of the Act did not prohibit the judicial official from either conducting a hearing if the fugitive lodged a competing claim of freedom or [from] taking the testimony of the captured person on such a claim[,] [t]here was no explicit provision in

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[60] A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 282 (1978).
[61] Frederick Douglas, *The Meaning of July Fourth for the Negro* (1852), https://masshumanities.org/wp-content/uploads/2019/10/speech_complete.pdf.
[62] *Id.* at 11.
[63] Fugitive Slave Act of 1850 § 6, https://www.loc.gov/resource/rbpe.33700200/?st=text.
[64] *Id.*

> the Act [encouraging] the official to do either. Nor did the Act contain any other procedural protections for an alleged runaway who disputed the validity of the claim. Thus, the Act appeared to provide no more than a summary ministerial proceeding . . . .[65]
>
> If the claimant was able, by oral testimony or affidavit, to satisfy the judge or justice of the peace that the seized person was the claimant's slave, then the official [granted a] certificate authorizing the claimant to remove the person from the state. The certificate served as conclusive proof against any claim to freedom by the captured person.

The Fugitive Slave Acts' disallowance (in the 1850 Act) or disregard (in the 1793 Act) of testimony by persons arguing they were unlawfully detained as alleged slaves rings hauntingly close to AEDPA's restrictions upon the habeas claims of incarcerated persons seeking to establish their entitlement to freedom from incarceration. Both scenarios entail distortions of the adjudicative process by truncating exploration on the merits of the detainee's claims and utilizing substantive standards tilted heavily against the detainee.[66] There are, of course, many important differences between AEDPA and the Fugitive Slave Acts. Most importantly: under AEDPA, unlike under the Fugitive Slave Acts, an initial adjudication of the person's status through the regular criminal process with full procedural due process protections precedes the

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[65] Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 CORNELL L. REV. 1086, 1118–19 (1993).

[66] *See* 28 U.S.C. § 2254(d)(2), providing that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

determination of that status; and subsequent full review of the legality of the detention remains available outside of the truncated AEDPA framework, *i.e.*, via state courts or (in theory) via an original habeas action in the U.S. Supreme Court. This Section therefore does not contend that AEDPA is analogous to the Fugitive Slave Acts in terms of their details. This Essay does contend, however, that AEDPA and the PLRA create a framework that diminishes the ability of incarcerated persons' ability to fully have their claims heard due to their civil status, which historically has been a signal that the law operates differently both because of and in order to reinforce the group's alienated and despised status.[67] This same self-reinforcing cycle—othering, civil alienation, lesser substantive and procedural legal protections, which then contribute to the group's further othering and invisibility, which renders them yet more distant from civil society and therefore presumed to be entitled to lesser legal protections, etc.—operated with regard to enslaved persons and operates today with regard to incarcerated persons, a highly racialized population.[68]

V. A Doctrinal Detour: The PLRA and AEDPA Through a First Amendment Lens

This Essay has thus far examined PLRA and AEDPA's limitations on incarcerated persons' adjudicative speech as a matter of free speech and equal protection policy rather than doctrine. This Section sketches the contours of a First Amendment challenge to these limitations. It does so not to make the case that such a challenge would necessarily be successful, but rather to illustrate how such limitations would be assessed but for the fact that they involve incarcerated persons' rights—and by implication, to illustrate how little our legal system values incarcerated persons' rights.

Under traditional First Amendment doctrine, various provisions of the PLRA and AEDPA would amount to content,

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[67] *See, e.g.*, Morris, *Slaves and the Rules of Evidence*, *supra* note 48, at 1239 (arguing that during slavery, "[r]ules of evidence—rules fashioned to control juries and lawyers—were also constructed to assure the property interests of slave-owners, and the domination of whites over blacks").

[68] *See supra* note ___ and accompanying text (discussing the racial disparities in mass incarceration).

viewpoint, and speaker-based restrictions on expression. As such, if applied outside of the context of incarceration, they would be presumptively unconstitutional.

1. Content-based restrictions on expression

Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content"[69] unless the government's action satisfies strict scrutiny. A law is content based, and therefore presumptively unconstitutional, if it "applies to particular speech because of the topic discussed or the idea or message expressed."[70] Content based restrictions of expression strike at the heart of First Amendment values:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes [the] essential [First Amendment] right. [Content based laws] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.[71]

Content based laws are therefore highly suspect, regardless of whether the government professes neutral or even benign purposes. "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech . . . . The vice of content-based legislation is not that it is

[69] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). *See also* R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.") (internal citations omitted).

[70] *Reed*, 576 U.S. at 163. *Reed* held that a law will be deemed content based if it either: (1) is content based on its face; or (2) "cannot be justified without reference to the content of the regulated speech or [was] adopted by the government because of disagreement with the message the speech conveys." *Id.* at 163–64 (internal citations omitted).

[71] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994).

always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."[72]

By these definitions, several provisions of the PLRA and AEDPA would qualify as content-based restrictions on adjudicative expression and therefore be subject to strict scrutiny (if traditional First Amendment standards were applied). First, AEDPA's prohibition of the filing of "second or successive" habeas claims, subject to only a few very strict statutory exceptions,[73] is a content-based restriction. As noted above, a speech restriction is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed."[74] This provision of AEDPA is content based on its face because it "defin[es] regulated speech by particular subject matter," *i.e.*, whether it is a second or successive habeas claim, in contrast with a second or successive non-habeas claim. Under the same reasoning, the PLRA's physical injury requirement, which bars suits for emotional or mental harm (or, at least bars compensatory damages for such) while in custody absent a prior showing of physical injury,[75] also operates as a

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[72] *Reed*, 576 U.S. at 167.

[73] *See* 28 U.S.C. § 2244(b)(2):

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless:
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> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[74] *Reed*, 576 U.S. at 163.

[75] 42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or

content-based restriction on speech. Adjudicative speech containing the subject matter that Congress has specified (*i.e.*, a prior showing of physical injury) is permitted, whereas adjudicative speech that is the same in all relevant detail but for the absence of the prescribed content would be prohibited.[76]

Even assuming that these restrictions were not motivated by animus against incarcerated persons as a class—a dubious assumption, given (a) the historic American conflation of race, crime, fear, and the resulting subordination of people of color[77] and (b) the legislative history of the PLRA and AEDPA[78]—the Supreme Court's more recent First Amendment case would nonetheless classify them as content based. The Court has made clear that a neutral or benign underlying governmental purpose does not render a facially content-based law content neutral:

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emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . . ."

[76] This provision of the PLRA is not the run-of-the-mill scenario where Congress creates a cause of action and then specifies the elements of that cause of action necessary to state a claim. This provision does not create a cause of action; rather, it limits the ability to assert a cause of action arising from another source—whether state tort law, other federal statutory law, or federal constitutional law—based upon whether it contains content specified by the government. It would be as if Congress passed a statute prohibiting federal court jurisdiction over unreasonable searches and seizures unless the Fourth Amendment claim states that the allegedly illegal search or seizure was preceded or accomplished by physical harm.

[77] *See, e.g.*, Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2093 (1993) ("In colonial and early national America color became associated with inherently criminal behavior in almost every area of law. Following Virginia's lead, most of the British mainland colonies began to create a legal system that made race a prima facie indication of criminality."); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 109–10 (W.W. Norton & Co. 1977) (noting that the preamble to the South Carolina Slave Code specifically sought to justify the slave code as necessary to "tend[ing] to the safety and security of the [white] people of this Province and their estates").

[78] *See, e.g.*, Herman, *Prison Reform*, *supra* note 8, at 263 (stating that "[b]ecause the PLRA found its way into law as a rider to an appropriations bill, Congress did not hold full hearings to examine the truth about the causes, successes, and challenges of prison litigation. Instead, the legislative debate was fueled by anecdote, focusing on a few hand-picked cases mockingly described by four state Attorneys General in a *New York Times* letter to the editor.").

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. We have thus made clear that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive . . . . In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.[79]

Hence, whether these provisions were adopted by Congress to discourage frivolous litigation, streamline court dockets,[80] or accomplish other purposes is immaterial: their facially differential treatment of certain adjudicative expression based upon its subject matter would, under traditional First Amendment principles, be deemed a content-based restriction subject to strict scrutiny.

2. Viewpoint-based restrictions on expression

First Amendment jurisprudence has long considered viewpoint discrimination to be one of the most pernicious violations of freedom of expression. Indeed, viewpoint discrimination is at least *de facto* subject to a standard of judicial skepticism even higher than strict scrutiny.[81] The Supreme Court has characterized

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[79] *Reed*, 576 U.S. at 165–66.

[80] Discouraging truly frivolous litigation and even managing the flow of *prima facie* legitimate litigation to ensure that our court system and individual judges do not become overwhelmed are certain important and worthy goals. As to the former: frivolity can be screened for and dealt with in individual cases without placing wholesale limits on categories of litigation. As to the latter: "One sensible way to go about reducing the volume of prison litigation would be to reform the prisons, giving prisoners less to complain about . . . . The number of non-frivolous complaints could be reduced if the states were to ensure that prison conditions were minimally humane instead of waiting to be sued." Herman, *Prison Reform*, *supra* note 8, at 263.

[81] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) (reviewing cases and explaining that "the [Supreme] Court often differentiates between viewpoint-based restrictions and all other content-based restrictions . . . . It is not so much that the Court formally uses two different standards for subject matter and viewpoint regulation [but that in practice,] the Court almost always

governmental suppression of or favoritism toward speech because of its viewpoint as an especially "egregious form of content discrimination."[82] Viewpoint discrimination is considered particularly offensive to free speech values because "[t]he First Amendment is concerned not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate."[83] Speech restrictions that are based upon the speaker's point of view distort public debate because they reduce the amount of information available to the public regarding only one side of a given public debate and therefore interfere with "the thinking process of the community."[84]

Scholars have conceptualized constitutional litigation as a form of anti-government expression. "[T]he act of suing a branch of government or public official in court is an explicit, often multi-faceted, challenge to the authority of the defendant-government in the name of the public interest . . . . Whether a lawsuit demands monetary damages or equitable relief, every civil rights plaintiff seeks a formal, enforceable declaration that certain government enactments, policies, or practices exceed the government's lawful authority."[85] Courts too have recognized litigation as a form of dissent and protest.[86] Under this view, litigation by incarcerated persons challenging the legality or conditions of their detention amount to speech expressing an anti-government viewpoint because they argue in essence that the government lacks power over them at all (contrary to the government's position, as expressed by the act of incarceration, that their detention is lawful) or that the government's

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rigorously reviews and then [simply] invalidates regulations based on viewpoint [rather than applying strict scrutiny].").

[82] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). *See also* R.A.V. v. St. Paul, 505 U.S. at 392 (stating that "[the government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules").

[83] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 199 (1983).

[84] *Id.* (internal quotation marks omitted), *quoting* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

[85] Tsai, *A Speech-Centered Theory of Court Access*, *supra* note 19, at 871.

[86] *See, e.g.*, Sabbeth, *Lessons from Guantanamo*, *supra* note 24, at 1508 (characterizing the Supreme Court's decision in *In re* Primus, 436 U.S. 412 (1978) as "embrac[ing] the notion of litigation as a mode of political expression and, more specifically, as a particularly valuable means of voicing political dissent").

treatment of them is unlawful (contrary to the government's position, as evidenced by its act of allowing government officials to engage in the treatment). Under this view, then, the PLRA's and AEDPA's restrictions upon incarcerated persons' anti-government adjudicative expression seeking their freedom or raising claims about their conditions of confinement would be classified as viewpoint discrimination. These forms of adjudicative expression are subject to greater restrictions and less favorable treatment than other forms of adjudicative expression by incarcerated persons that are pro-government in their viewpoints: *e.g.*, written plea agreements, in-court guilty pleas and allocutions, confessions (whether written and submitted to the court or made orally in court), etc.

If traditional First Amendment doctrine were applied to the PLRA's and AEDPA's restrictions on incarcerated persons adjudicative speech, the venues for such speech (*i.e.*, courts) would likely be classified as limited public forums.[87] Although content discrimination in a limited public forum in the sense of constraining the forum to its originally intended purpose and/or audience is permissible,[88] viewpoint discrimination in such a forum is not. Even in a limited public forum, "[t]he State's power to restrict speech [is] not without limits. The restriction must not discriminate against speech on the basis of viewpoint and the restriction must be reasonable in light of the purpose served by the forum."[89]

3. Speaker-based restrictions on expression

By singling out a class of potential speakers (here, incarcerated persons) for restrictions upon their speech, the PLRA's and AEDPA's limitations on adjudicative expression would, if applied in any other context, also likely be classified as speaker-based restrictions under the Supreme Court's most recent First Amendment cases. Speaker-based laws, like content-based laws, are

[87] A limited public forum is a venue for expression that the government has created "for a limited purpose such as use by certain groups or for the discussion of certain subjects." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983).

[88] Good News Club v. Milford Central School, 533 U.S. 98, 106 (2001) (stating that "[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech").

[89] *Id.* at 106–07 (internal citations and quotation marks omitted).

subject to strict scrutiny because "[s]peaker-based laws run the risk that the State has left unburdened those speakers whose messages are in accord with [the State's] own views."[90] The Court has therefore made clear that its precedents are "deeply skeptical" of speaker-based restrictions on speech.[91] In *Citizens United v. FEC*,[92] for example, the Court reasoned that restrictions upon electioneering speech applicable only to certain speakers (*i.e.*, corporations and unions) violated the First Amendment. In addition to finding the restrictions to be impermissibly content based, the Court also found that the speaker-based nature of the restrictions independently rendered them unconstitutional.[93]

In *Sorrell v. IMS Health*,[94] the Supreme Court similarly found a speaker-based restriction on speech to be unconstitutional. *Sorrell* involved a state law prohibiting various persons and entities from selling, using, or disclosing pharmacy records containing information about doctors' prescribing practices. The law further provided that "[p]harmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents."[95] The Court found that "[t]he statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers."[96] The Court therefore applied heightened scrutiny

[90] National Institute of Family and Life Advocates ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2378 (2018) (internal quotation marks omitted). *See also* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 340 (2010) (holding that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content"); Sorrell v. IMS Health, Inc., 564 U.S. 552, 565 (2011) (holding that "strict scrutiny applies to regulations reflecting aversion to what disfavored speakers have to say") (internal quotation marks omitted).

[91] *Becerra*, 138 S. Ct. at 2378.

[92] 558 U.S. 310 (2010).

[93] *Citizens United*, 558 U.S. at 340 (stating that "*[q]uite apart from* the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers") (emphasis added).

[94] 564 U.S. 552 (2011).

[95] *Id.* at 559.

[96] *Id.* at 564.

to the restrictions and found that they failed to satisfy the heavy burden entailed.

Most recently, the Supreme Court in *NIFLA v. Becerra*,[97] also found a speaker-based restriction to be unconstitutional. *NIFLA* involved a California law mandating that pro-life pregnancy counseling centers provide certain notices to their clientele, including whether they were licensed by the state. The state's proffered justification was to avoid the risk of clients being misled regarding or confused about whether such facilities were licensed by the state. The Supreme Court found that this notice provision amounted to "a government-scripted, speaker-based disclosure requirement,"[98] because the provision by its terms only applied to those facilities that "primarily provide[d] 'pregnancy-related' services. Thus, a facility that advertises and provides pregnancy tests is covered by the [notice requirement], but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed." Hence, there being no relevant difference in the Court's view between the different classes of speakers, the provision burdening the speech of only one class of speakers raised the specter that the state chose to disadvantage those speakers because it disliked their message.

To be clear: there is much to criticize in *Citizens United*, *Sorrell*, and *NIFLA*. Given that those cases are currently settled law, however, this Essay contends that their principles and reasoning regarding speaker-based restrictions would apply—as a matter of policy if not strict doctrine—with at least equal force to incarcerated persons as a class as they do to corporations, unions, pharmaceutical companies, or anti-abortion counseling centers as a class. The underlying principle is the same: the government may not limit or disadvantage the expression of a class of speakers absent a truly compelling government interest that could be achieved in no other manner.

Even accepting that the PLRA's and AEDPA's restrictions upon incarcerated persons' adjudicative expression amount to speaker-based restrictions under the cases discussed above, the

[97] 138 S. Ct. 2361 (2018).
[98] *Id.* at 2377.

Supreme Court's reasoning in cases like *Jones v. North Carolina Prisoners' Labor Union*[99] could be used as evidence that such restrictions serve a government interest that is sufficiently weighty to outweigh the incarcerated person's speech interest. In *Jones*, the Court rejected First Amendment and equal protection challenges to a prison policy barring solicitation, meetings, and mailings to and from prisoners in connection with union organizing. The Court reasoned that the policy was valid because "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[100] Hence, the Court reasoned, "[i]n a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,"[101] and that deference should be extended to prison officials in making such determinations.

Even if one accepts the reasoning of *Jones* on its facts, it is inapplicable to the PLRA's and AEDPA's restrictions upon incarcerated persons' adjudicative speech. *Jones* clearly holds that an incarcerated person retains all of their First Amendment rights except those that are inconsistent with a person's status *as a prisoner* or legitimate *penological* interests.[102] As to the latter: unlike in *Jones*, where the person's status as a prisoner and penological interests were found to inherently entail constraints upon gatherings by incarcerated persons and monitoring their communications with persons outside of the prison system, no such objective pertains to the PLRA's and AEDPA's wholesale limitations upon incarcerated persons' adjudicative speech. While there is presumably some interest of the government in limiting incarcerated persons' ability to challenge the legality of their detention or conditions of confinement, a mere government interest in limiting challenges to its authority cannot by itself be a legitimate (let alone compelling)

[99] 433 U.S. 119 (1977).
[100] 433 U.S. 119, 125 (1977) (alteration in original).
[101] *Id.* (internal quotation marks omitted).
[102] *Jones* held that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." *Id.*

government interest for purposes of the First Amendment[103] (or the Due Process Clause, for that matter). And to the extent that *Jones*'s language regarding the permissibility of restricting First Amendment rights based upon the person's mere "status as a prisoner," it clearly runs afoul of the Court's cases holding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[104]

For the reasons explained above, if the provisions of the PLRA and AEDPA restricting, burdening, or disallowing incarcerated persons' adjudicative speech were to be analyzed under traditional First Amendment doctrine, it is likely they would be found to be unconstitutional as content, viewpoint, and/or speaker-based restrictions on expression. But, of course, courts have not so analyzed them, which returns to the main theme of this Essay: why does our legal system accept these restrictions upon incarcerated persons' fundamental freedoms when they would be rejected in nearly any other context?

VI. Conclusion

> "Prison walls serve not merely to restrain offenders but also to isolate them."[105]
>
> —*Procunier v. Martinez* (Justice Thurgood Marshall, concurring)

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[103] *See, e.g.*, Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 509 (1969) (stating that "[i]n order for [school officials] to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

[104] U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973). *See also* Romer v. Evans, 517 U.S. 620, 635 (1996) (citing *Moreno* and holding that a state constitutional amendment prohibiting localities from enacting laws prohibiting discrimination of the basis of sexual orientation was a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit").

[105] 416 U.S. 396 (1974) (Marshall, J., concurring), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

This Essay suggests that the most likely answer to the question at the end of the preceding section is an unspoken truth: our legal system accepts *sui generis* deprivations of incarcerated persons' fundamental rights because *we* do. The status of incarceration in our society operates to create a "large, racialized, near-permanent underclass unable to overcome its alienation from civil society."[106] The PLRA's and AEDPA's burdening and silencing of incarcerated persons' legal claims is but one of many depredations and denials of dignity that we are willing to tolerate being inflicted upon "them" but would never tolerate being inflicted upon us.

[106] Carter, *Class as Caste*, *supra* note 46, at 826.