Racial Origins of Doctrines Limiting Prisoner Protest Speech

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ABSTRACT

This article examines the racial origins of two foundational cases governing prisoner protest speech to better understand their impact in light of the Black Lives Matter movement. Two Supreme Court cases provide the primary architecture for the regulation of prisoner or detainee speech. The first, *Adderley v. Florida*, is (mis)interpreted for the proposition that jails (and by analogy, prisons) are non-public spaces. Under First Amendment doctrine, non-public spaces are subject to heightened regulation and suppression of speech is authorized. The second, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, amplifies the effect of *Adderley* and prohibits prisoner solicitation for union membership. Together, these two cases effectively provide broad discretion to prison administrators to punish prisoners and detainees for their protest speech. Neither *Adderley* nor *Jones* acknowledge the racial origins of the cases. Holdings in both cases relied on race-neutral rationales and analysis and yet, the underlying concerns in each case appear tied to racial concerns and fears. Thus this Article is a continuation of a broader critical race praxis that reminds us that seemingly objective and neutral doctrines themselves may incorporate particular ideas and notions about race. Today's protesters face a demonstrably different doctrinal landscape, should they protest within the prison or jail walls. While the content of speech by a "Black Lives Matter" activist may not change, the constitutional protection afforded to that speech will be radically different depending on where she speaks.

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I. INTRODUCTION

Two inmate welders refused a direct order to build the lethal injection gurney to replace the electrocution chair at a state maximum security prison.[1] They were placed in administrative segregation – solitary confinement in a single cell for 23 hours a day – for their protest.[2] The next day, the other 37 welders, including one whose brother had been executed in the outgoing electric chair, similarly refused and were similarly punished.[3] Hundreds of inmates assigned to farm the 18,000 acre prison engaged in a work stoppage to protest both the order and the punishment of their fellow inmates. Ultimately, the warden rescinded the order but not before issuing hundreds of disciplinary reports to the inmates (which can affect everything from inmate classification to privileges to parole) and placing many in isolation.[4] None of these inmates could claim their protest was protected by the First Amendment of the U.S. Constitution and thereby challenge their punishments.

While the U.S. Constitution does not stop at the prison wall, certain constitutional rights are limited once exercised within carceral facilities.[5] Some

[1] WILBERT RIDEAU, IN THE PLACE OF JUSTICE 224 (2010).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *E.g., Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (standing for the proposition that the retention of constitutional rights in prison is not without limitations and applies equally to pretrial detainees and convicted prisoners); *Overton v. Bazzetta*, 539 U.S.126 (2003) (holding that limits on visiting rights of inmates does not violate the First Amendment right to free association).

constitutional rights, such as the right to be free from discrimination under the Equal Protection Clause of the Fifth and Fourteenth Amendment,[6] apply with equal force whether or not an individual is incarcerated.[7] At the other end of the spectrum, the right to bear arms under the Second Amendment is non-existent for the incarcerated.[8] In between these two extremes, the exercise of constitutional rights of the incarcerated differs from the non-incarcerated, depending on the right claimed and the security concerns of the detention facility.

The First Amendment rights to freedom of speech, expression, and association are especially limited in the carceral context. "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penal objectives of the correctional system."[9] Courts have applied this rule to limit and/or regulate: the content of incoming mail for prisoners, visitation, prisoner-to-prisoner contact, and media access, among other things. [10]

In this Article, I focus on a very specific type of First Amendment speech: prisoner[11] protest speech. I use the term "protest speech" to describe non-violent conduct and direct action methods typically employed by the civil

[6] Although the Fifth Amendment does not contain the actual text of the Equal Protection Clause, the Supreme Court has interpreted the Fifth Amendment's guarantee of due process by federal authorities to incorporate the guarantees of the Equal Protection Clause of the Fourteenth Amendment, which applies to states. *See Bolling v Sharpe*, 347 U.S. 497 (1954).
[7] *See Johnson v. Cal*, 543 U.S. 499 (2005).
[8] 18 U.S.C.A. § 1791 (West, Westlaw through P.L.114-200). And indeed may be limited for those re-entering society after incarceration, depending on the crime and state and federal law. *E.g.*18 U.S.C.A § 922(g)(1) ((g) (West, Westlaw through P.L. 114-200) (It shall be unlawful for any person--(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.); N.C. Gen. Stat. Ann. § 14-415.1 (West 2016). *See, e.g., D.C. v. Heller*, 554 U.S. 570, 626 (2008) (acknowledging the validity of limits on firearm ownership by felons while upholding the individual right to bear arms).
[9] *Pell v. Procunier,* 417 U.S. 817, 822 (1974).
[10] *See e.g.,* Ronald Kuby & William Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind The Walls*, 26 CREIGHTON L. REV. 1005 (1993)(surveying cases of diminished First Amendment rights for prisoners).
[11] This article uses the terms detainee and prisoner interchangeably to refer to those involuntarily incarcerated. Detainee usually refers to those who are incarcerated but not yet convicted. For detainees, their conditions of confinement claims are governed by the due process clauses of the Fifth and Fourteenth Amendments. Prisoners are those who have been criminally convicted and accordingly, their conditions claims would be brought under the Eighth Amendment's ban on cruel and unusual punishment. Though they are distinct terms, for purposes of this First Amendment analysis, the constitutional rules limiting speech are the same.

rights movement.[12] These include organizing, sit-ins, work slowdowns or stoppages, hunger strikes, petitioning, etc. "Protest speech" can involve elements of speech, expression, and association depending on how the protest is conducted.

As the example of inmate welders in Angola demonstrates, a prisoner protesting inhumane conditions in the facility where he is incarcerated can be punished by prison authorities. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[13] Lower courts have almost uniformly held that protestative acts – such as drafting, circulating, or signing petitions or work stoppages – are not protected speech.[14] Punishments vary but can run the gamut from solitary confinement to loss of visiting privileges. And prisoners continue to risk punishment, in part, because in a few cases, protest actually led to changes.[15]

Two Supreme Court cases provide the primary architecture for the regulation of prisoner or detainee speech. The first, *Adderley v. Florida*[16], is (mis)interpreted for the proposition that jails (and by analogy, prisons) are non-public spaces. Under First Amendment doctrine, non-public spaces are subject to heightened regulation and suppression of speech is authorized. The second, *Jones v. North Carolina Prisoners' Labor Union, Inc.*[17], amplifies the effect of *Adderly* and prohibits prisoner solicitation for union membership. Together, these two cases effectively provide broad discretion to prison administrators to punish prisoners and detainees for their protest speech.

It is generally accepted that our country's fascination with incarceration disproportionally impacts minority communities.[18] Approximately 2.3 million

[12] Thus the term "protest speech" includes "symbolic speech" (i.e. speech that is "communicative in character" such as display of certain symbols or flags), "speech-plus conduct" (i.e. acts that consist of both expression and conduct such as sit-ins and picketing), as well as the more typical direct speech (i.e. letter writing, actual utterances). *See* D. Sneed & Harry W. Stonecipher, *Prisoner Fasting as Symbolic Speech: The Ultimate Speech-Action Test*, 32 HOW. L.J. 549 (1989).
[13] *Turner v. Safley*, 482 U.S. 78, 84 (1987).
[14] *See* discussion *infra*. *But see* Nicholas v. Miller, 109 F. Supp. 2d 152, 156 (S.D.N.Y. 2000) (acknowledging that a few courts have recognized "political association" claims for impact litigation, but distinguishing protest from litigation.)
[15] *See* Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State* 8 LABOR, NO. 3, 2011, at 15, 29 (discussing how inmate protests "helped pave the way" for improved work environments and limited governance input).
[16] *Adderly v. Fla.*, 385 U.S. 39 (1966).
[17] 433 U.S. 119 (1977).
[18] Nat'l Research Council of Nat'l Academies, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 56 (Jeremy Travis and Bruce Western, eds., 2014) [hereinafter GROWTH OF INCARCERATION]

people are incarcerated at any given time by federal, state, and local governments.[19] Over the last 40 years, the rate of incarceration in the United States has increased by approximately 500%.[20] African-Americans and Latinos comprise 56% of the incarcerated, but only represent 30% of the total U.S. population.[21] Beginning in the 1970s, the United States' incarceration rate increased sharply, "but much more in absolute terms for African-Americans than for whites."[22] This stems, in part, from the criminalization of urban spaces following the gains of the civil rights era.[23] The racial disparities in incarceration prompted Loïc Wacquant to argue that the term "mass incarceration" shrouds the "hyper-incarceration" of primarily poor African-American men from urban areas.[24] This fascination with incarceration has created a "carceral state," that exists "to exclude and control those people officially labeled as criminals."[25]

But what is missing in part from this conversation about incarceration is that in certain cases, the doctrinal rules that govern prisoner behavior themselves emerge out of specific racial contexts. Neither *Adderley* nor *Jones* acknowledge the racial origins of the cases and yet, I argue it is critical to understand the racial context in order to fully understand the impact of these two opinions. Holdings in both cases relied on race-neutral rationales and analysis and yet, the underlying concerns in each case appear tied to racial concerns and fears. Thus this Article is a continuation of a broader critical race praxis that reminds us that seemingly objective and neutral doctrines themselves may incorporate particular ideas and notions about race.[26]

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[19] Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie: 2016*, Prison Policy Initiative, http://www.prisonpolicy.org/reports/pie2016.html (last visited August 13, 2016). The 2.3 million includes immigration detention, juvenile facilities, involuntary civil commitments and military detention, in addition to jail and prison populations. If we only look at state and federal jail and prison criminal detentions, the U.S. incarcerated approximately 1.5 million people in 2014. *See* E. Ann Carson, U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2014*, 1 (Sept 2015) http://www.bjs.gov/content/pub/pdf/p14.pdf

[20] Nicole D. Porter, *Unfinished of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J. OF L. & POL'Y 1, 3 (2016).

[21] *Id*. at 6.

[22] GROWTH OF INCARCERATION, *supra* note 18 at 58.

[23] Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, J. AMER. HIS. 703, 706 (December 2010).

[24] Loïc Wacquant, *Class, Race, & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74.

[25] Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 261 (2011).

[26] *See e.g.,* Charles R. Lawrence, III, *The Word and the River: Pedagogy As Scholarship As Struggle*, 65 S. CAL. L. REV. 2231, 2262 (1992) (describing critical race methodology in personal terms and reflecting on the non-neutrality of the law and scholars).

Part I of this Article explores the current risks for inmates who protest within the prison or jail walls. Part II explores *Adderley* with a particular focus on unearthing the racial dimensions of the case. Part III examines *Jones* to fully understand the impact of *Adderley* and the implications for the civil rights movement. Part IV places these two cases within the larger racial context of the African-American civil rights movement. This critical race perspective is essential to understanding judicial reluctance to protect protests within carceral facilities and the doctrine facing today's "Black Lives Matter" activists.

II. PRISONERS' UNPROTECTED PROTESTS

Despite the lack of legal protection, inmates engage in protests to draw attention to prison conditions and laws that eliminate or reduce the possibility of early release. In 2014 and again in 2016, inmates in Alabama claim to have staged massive work stoppages as a form of protest. The Alabama Department of Corrections acknowledged that there had been a disturbance at the prison starting on January 1, 2014.[27] A spokesman for the prison said that inmates at St. Claire and Holman Correctional facilities had refused to work in the kitchen and the laundry, stating that they would like to be paid for their work.[28] (The Thirteenth Amendment provides for an exception to the general prohibition on forced labor for those convicted of a crime.)[29] An inmate who spoke with reporters stated that "all the prisoners" at both of the prisons were participating.[30] The Holman Correctional facility has a capacity for 1,002 inmates and the St. Clair Correctional facility has a capacity of 1,514.[31] The Alabama Department of Corrections offered a different account, reporting that only a handful of inmates refused to report to work.[32] The inmate's grievances included overcrowding, dissatisfaction with the mental health treatment

[27] Brandon Moseley, *Alabama Prisoner's Strike Continues*, ALABAMA POLITICAL REPORTER (Jan. 7, 2014), http://www.alreporter.com/alabama-prisoners-strike-continues/.
[28] *Id*.
[29] *See* Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEAT. U. L. REV. 846 (2012) (arguing that the "convict exception" in the Thirteenth Amendment should be interpreted as an exception to "involuntary servitude" but not to the prohibition on slavery).
[30] *Id*.
[31] Alabama Department of Corrections, *Holman Correctional Facility* http://www.doc.state.al.us/facility.aspx?loc=33 (last visited Aug. 6, 2016 1:30PM); Alabama Department of Corrections, *St. Clair Correctional Facility* http://www.doc.state.al.us/facility.aspx?loc=21 (last visited Aug. 6, 2016 1:30PM).
[32] Josh Eidelson, *Exclusive: Inmates to strike in Alabama, declare prison is "running a slave empire"*, SALON (April 18, 2014 12:30PM), http://www.salon.com/2014/04/18/exclusive_prison_inmates_to_strike_in_alabama_declare_they're_running_a_slave_empire/.

available at the prison, the inadequacy of prison food, dissatisfaction with inmate's wages, and lack of educational opportunities.[33] Similarly, in May 2016, inmates at two additional facilities in Alabama refused to perform their work assignments.[34] Inmates at the facilities said they were protesting the conditions of their confinement, good time calculations and parole.[35] The work stoppage included more than 300 inmates at one facility alone.[36] Both facilities were put on lockdown because of the strikes.[37] The prisoners emailed a list of demands to the media that included the following: abolishing sentences of life without parole for first time offenders; repealing the Habitual Felony Offender Act;[38] implementing education, rehabilitation and reentry programs; expanding the Alabaman Innocence Inquiry Commission; and, ending prison slavery..[39]

In April 2016, inmates went on simultaneous strikes at seven Texas State prisons. The prisoners refused to leave their cells and report for their work assignments.[40] The Texas Department of Corrections responded by imposing lockdown restrictions in all seven facilities.[41] The demands, communicated by the Incarcerated Workers Organizing Committee (IWOC), an inmate advocacy group with contacts inside of Texas state prisons, included humane living conditions, a repeal of the $100 medical co-pay, a right to an attorney for habeas corpus proceedings, and creation of an oversight committee for the operation of Texas jails and prisons.[42]

Sometimes the protest takes the form of a hunger strike. In March 2016, approximately 1,000 of the 1,300 inmates at the Kinross correctional facility in

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[33] *Id*.
[34] Connor Sheets, *Inmates at multiple Alabama prisons go on strike in protest against system, conditions*, ALABAMA.COM (May 02, 2016 at 3:35 PM), http://www.al.com/news/index.ssf/2016/05/inmates_at_multiple_alabama_pr.html.
[35] *Id*.
[36] Raven Rakia, *Hundreds of Inmates Across Alabama Have Gone on Strike to Protest 'Prison Slavery'*, VICE NEWS (May 13, 2016 2:45 pm), https://news.vice.com/article/hundreds-of-inmates-across-alabama-have-gone-on-strike-to-protest-prison-slavery.
[37] *Id*.
[38] The Habitual Felony Offender Act is Alabama's version of a "three-strikes" law and has led to life sentences for some repeat offenders convicted of drug charges and other low-level, non-violent offenses. Rakkia, *supra.*
[39] *Id*.
[40] Chase Hoffberger, *Texas Inmates Strike for Better Conditions: Inmates at seven state prisons have refused to leave their cells*, AUSTIN CHRONICLE (April 6, 2016, 12:28PM), http://www.austinchronicle.com/daily/news/2016-04-06/texas-inmates-strike-for-better-conditions/.
[41] *Id*.
[42] Kriston Capps, *Texas Prisoners Strike for Unionization*, CITY LAB (April 8, 2016), http://www.austinchronicle.com/daily/news/2016-04-06/texas-inmates-strike-for-better-conditions/.

the upper peninsula of Michigan engaged in a silent protest over food conditions at the facility.[43] The next day a similar number refused to eat the meals provided by the prison.[44] The next day only about 40 prisoners came to breakfast, compared to the usual 500.[45] That same day 60 inmates came to lunch and only 30 for dinner. Over 1,200 inmates normally go to each of those meals.[46] Inmates also engaged in silent protests at the Michigan facility, by leaving the yard 20 minutes early protest of the food conditions.[47]

There is certainly evidence that would support the inmates' concerns about inhumane treatment. Prisoners have been denied adequate and life-saving medical care;[48] may live in unsanitary conditions including a lack of running water;[49] may endure repeated assaults by both guards and other inmates; and can be forced in some cases to become a slave to the state.[50] Case law is replete with modern-day examples of unconstitutional prison conditions including lack of running water, unsanitary facilities, repeated excessive force, extreme heat or cold, sexual assault, and failure to provide necessary (and sometimes life-saving) medical treatment.[51]

In addition, over the last few decades, many states have taken a more punitive approach to sentencing. Across the United States, governments have adopted laws that have contributed to increased sentence lengths for the incarcerated, ranging from mandatory minimum sentences to three strikes/habitual offender laws to removing the possibility of parole from life sentences.[52] Many of these particularly punitive laws apply to crimes for which minorities are disproportionately arrested.[53] Thus, not only may inmates experience inhumane treatment, but they are also subject to that inhumane treatment for longer lengths of time.

A. Ineffective Legal Methods of Protest

[43] Paul Egan, *Prisoners protest food under new contractor Trinity*, DETROIT FREE PRESS (March 22, 2016 8:08PM) http://www.freep.com/story/news/local/michigan/2016/03/22/prisoners-protest-food-under-new-contractor-trinity/82120158/.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Brown v. Plata*, 131 S.Ct. 1910, 1925 (2010).
[49] *Id*.
[50] Armstrong, *supra* note 29.
[51] *See e.g., Brown*, *supra* note 50 at 1910-1930.
[52] GROWTH OF INCARCERATION, *supra* note 18, at 89.
[53] *Id.* at 91.

Inmates have few legal methods to challenge these types of prison conditions. Prisoners may describe the conditions in written outgoing mail to family, friends, politicians and the media for example.[54] While protection for outgoing mail is certainly one of the strongest constitutional protections for inmates, it is also distinctly inefficient as a means of protest particularly in the age of mass incarceration. Many prisoners are serving longer sentences, with a higher percentage serving life sentences[55] and often in locations remote from their families and communities.[56] As a result, family and social ties are strained and even broken and thus unavailable as potential prisoner advocates.[57] Moreover, the poor and minorities are disproportionately represented in prison[58] and even where such social ties remain, they are likely ineffective in penetrating traditional centers of power from which the poor and minorities are historically excluded.[59] As such, mailing protests outside the prison walls – while a protected First Amendment right – is in practice often meaningless as a form of protest.

Prisoners have also engaged in hunger strikes, in effect hurting only themselves in their refusal to eat. Nevertheless, most courts have held that wardens are free to force feed inmates when medically necessary.[60] Wardens have argued that hunger strikes disrupt security and order in prisons, though with little supportive evidence.[61] Instead, wardens speculate that the death of a hunger striker will incite prison unrest and that the medical needs of the hunger striker drains resources from other necessary prison tasks. Though wardens have failed to proffer actual examples and data to support their conclusions, some courts have nevertheless adopted these arguments in allowing prisoners to be force-fed.

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[54] *E.g., Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *Turner v. Safley*, 482 U.S. 78 (1987); *Pell v. Procunier*, 417 U.S. 817, 824 (1974).
[55] GROWTH OF INCARCERATION, *supra* note 18, at 52-54.
[56] Bernadette Rabuy and Daniel Kopf, *Separation by Bars and Miles: Visitation in state prisons* (Oct. 20, 2015), Prison Policy Initiative, http://www.prisonpolicy.org/reports/prisonvisits.html; *but see* GROWTH OF INCARCERATION, *supra* note 18, at 40 (noting that 1/3 of the incarcerated population are housed in jails, which may be closer to home).
[57] *See* GROWTH OF INCARCERATION, *supra* note 18, at 262.
[58] *Id*. at 202-203.
[59] *See* Atiba R. Ellis, *Race, Class, and Structural Discrimination: On Vulnerability Within the Political Process*, 28 J. CIV. RTS. & ECON. DEV 33, 34 (2015).
[60] *See e.g.*, Mara Silver, *Testing Curzan: Prisoners and the Constitutional Question of Self-Starvation*, Note, 58 STAN. L. REV. 631, 649 (2005).
[61] Steven C. Bennett, *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. REV. 1157, 1210-1217 (1983) (summarizing cases where prison officials have argued that hunger strikes present an institutional threat).

Prisoners may also file a civil suit, but under the Anti-Terrorism and Effective Death Penalty Act, prisoners must first exhaust the prison's internal administrative grievance process.[62] Filing written individual grievances with the prison administration is generally considered protected speech for prisoners under the First Amendment.[63] Others have exhaustively detailed the myriad of problems with the prisoner grievance requirements,[64] including problems in accessing prison rules and regulations, the lack of a clear procedure for filing grievances, the failure of prisoner authorities to meaningfully review the grievances, etc. In addition, transfer between institutions and even release can complicate the grievance filing process. For purposes of this paper, the filing of a civil suit poses two difficulties as an avenue of effective prisoner protest. First, the reasons for the protest are often, but not always, an immediate need but the grievance and civil suit process is long. So in my opening example of inmates refusing to build the lethal-injection gurney, the crisis was immediate and the process was ill-equipped to address the inmates' protests. The second difficulty is tied to the first. Where lower courts have failed to recognize a First Amendment right to non-violent protest for prisoners, prison authorities are less cautious in their suppression and punishment of that speech.

As a result of these legal but ineffective methods of protest, prisoners have engaged in a variety of unprotected activities to challenge their conditions, which I call "protest speech." "Protest speech" for purposes of this paper include a range of traditional community organizing and civil rights tools, all of which are non-violent acts. Examples include sit-ins, work stoppages and slow downs, petitions, and hunger strikes. None of these actions are designed to encourage violence, lead to escape, or otherwise threaten the safety of prisoners or staff. Yet each of these acts is accompanied by a demand.

B. Punishment for Protest

When prisoners engage in protest speech, however, they may be disciplined by prison authorities for disruption to the order and security of

[62] 42 U.S.C. §1997 (1996).
[63] Smith v. Mosley, 532 F.3d 1270, 1276 (11th Cir. 2008).
[64] *See* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 139-40 (2008); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act* (PLRA), 29 CARDOZO L. REV. 291(2007); Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519 (2015).

prisons and in some states, may be convicted of additional offenses based on their acts of protest.

Several states have specific criminal offenses that capture acts of protest in correctional institutions.[65] Some of these statutes define the terms "riot" and "strike" so broadly that non-violent acts of protest become criminal acts.[66] It is unclear to what extent inmates are actually prosecuted under these statutes for non-violent conduct for a variety of reasons. Unless a conviction is appealed, trial court convictions are less commonly available in legal databases. Moreover, even if an inmate is charged, an inmate may plead guilty to a lesser offense to obtain a more favorable sentence. But even if inmates are not currently being prosecuted for non-violent protest under these statutes, the statutes very existence may serve as a caution to engaging in protest within the prison walls.

In Connecticut, for example, a prisoner engaged in non-violent protest may be criminally convicted of "rioting at [a] correctional institution" under Conn. Gen.Stat. § 53a–179b(a) (2011). Sub-section a of the statute provides

> A person is guilty of rioting at a correctional institution when he incites, instigates, organizes, connives at, causes, aids, abets, assists or takes part in any disorder, disturbance, *strike*, riot or other *organized disobedience* to the rules and regulations of such institution.[67]

[65] *E.g.*, Fla. Stat. Ann. § 944.45 (West 2016) (Designating mutiny, riot, or strike in a correctional facility as a second degree felony); Conn. Gen. Stat. Ann. § 53a-179c (West 2016) (Designating inciting to riot at a correctional institution as a class C felony); Wash. Rev. Code Ann. § 9.94.010 (West 2016) (Defining the gathering of two or more inmates for the purpose of disturbing the "good order" of the institution either through the use or threat of violence or force as engaging in a riot); Colo. Rev. State. Ann. § 18-8-211 (2016) (designating violent conduct in combination with two or more others a felony); Ga. Code Ann §16-10-56 (West 2016) (designing act of violence or other tumultuous act a felony); Mich. Comp. Laws Ann §752.542a (West 2016) (designating violent conduct within a facility with three or more people a crime); N.Y. Penal Law § 240.06 (McKinney 2016) (designating riot in the first degree as a class E felony); Ohio Rev. Code Ann. §2917.02 (West 2016) (designating aggravated riot as a felony), and §2917.03 (designating riot as a misdemeanor); R.I. Gen. Laws Ann. § 11-38-5 (West 2016) (designating riot within a correctional facility a crime); S.C. Code Ann § 24-13-430 (2010) (designating rioting in a facility as a felony); *see also* W.Va. Code Ann. §62-8-1 (West 2005) (creates felony crime for resisting lawful authority of guard or officer).

[66] *But see e.g.*,18 U.S.C.A. § 1792 (Current through P.L. 114-219) (defining riot for purposes of federal criminal offense of riot or mutiny in penal institutions as encompassing "violent" actions); Mich. Comp. Laws Ann. § 752.542a (West 2016) (requiring both violence and threat or harm to safety of others).

[67] Conn. Gen.Stat. § 53a–179b(a) (2011) (emphasis added).

As Justice Scalia observed in *Johnson v. U.S.*, "Who is to say which the ordinary "disorder" most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a "passive and nonviolent [act] such as disregarding an order to move." [68] In striking the residual clause of the Armed Career Criminal Act that covered "violent felonies" as void for vagueness, the Supreme Court also acknowledged that an inmate could be prosecuted for non-violent conduct under the Connecticut rioting statute.

In Florida, a prisoner may be convicted of the felony of "mutiny, riot, strike" if she "instigates, contrives, willfully attempts to cause, assists, or conspires to cause any mutiny, riot, or strike in defiance of official orders, in any state correctional institution"[69] In addition, Florida law provides for a misdemeanor for any person who "interferes with or in any way interrupts the work of any prisoner under the custody of the department or who in any way interferes with the discipline or good conduct of any prisoner."[70] Thus, a prisoner who organizes a hunger strike or sit-in may be exposed to additional criminal penalties for their non-violent protest.

Beyond the criminal statutes governing riots and disturbances in prison, at least one state also criminalizes a particular form of protest, when that protest occurs in prison. In Louisiana, an inmate convicted of "self-mutilation by a prisoner" could be sentenced to up to two additional years consecutive to the sentence being served.[71] One defendant was sentenced to an additional four years in prison after being charged with "attempting to hang himself with a sheet, sticking his finger in a light socket, cutting his wrist and arm with a blunt

[68] 135 S. Ct. 2551, 2560 (2015) (held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution's guarantee of due process). The Court expressly overruled the Second Circuit's rationale upholding the residual clause when the Second Circuit held that though the statute had the potential to apply to non-violent conduct, reported cases of prosecutions under this statute involved either use of a weapon or resulted in injury to a guard, an inmate, or both. *U.S. v. Johnson*, 616 F.3d 85 (2nd Cir. 2010) (holding that conviction under this statute may be considered a violent felony for purposes of the Armed Career Criminal Act);

[69] Fla. Stat. Ann. § 944.39 (West 2016).

[70] Fla. Stat. Ann. § 944.45 (West 2016).

[71] A. Self-mutilation by a prisoner is the intentional infliction of injuries to himself by a prisoner incarcerated in any state penitentiary or any local penal or correctional institution or while in the lawful custody of a peace officer, or the procuring or permitting of another person to inflict injury on such prisoner by means of shooting, stabbing, cutting, applying chemicals or other substances to the body, drinking or eating poisonous or toxic substances, or in any manner, when such results in permanent or temporary injury.
B. Whoever commits the crime of self-mutilation by a prisoner shall be imprisoned at hard labor for a term not exceeding two years. Any sentence imposed under this Section shall run consecutively to any other sentence being served by the offender at the time of the offense. La. Rev.Stat. Ann. 14:404 (2016).

metal instrument on three occasions, and sticking a radio antenna in his side" although the motivation for these acts is unclear.[72]

Prisons may also have internal rules that prohibit non-violent protest and suffer disciplinary action as a result. For example, New York's Department of Corrections Standards of Inmate Behavior Rule 104.12 provides that "inmates shall not lead, organize, participate or urge other inmates to participate in sit-ins, lock-ins, or other actions which may be detrimental to the order of the facility."[73] As a result of violating these internal rules, prisoners may lose canteen privileges, earned good time credits, certain work assignments, and even be subject to administrative segregation or placement in secure housing units. For example, the punishment for circulating a petition in a Texas federal prison included forfeiture of 30 days of statutory good time, placement in disciplinary segregation for 15 days and recommendation for a disciplinary transfer.[74] In Georgia, an inmate may be disciplined for "[f]ailure to perform or complete any work, training, or other assignment, as ordered, directed or instructed, either verbally or in writing by a staff member, whether that protest is individual or part of a group.[75] In Illinois, the punishment for engaging in a hunger strike can include loss or restriction of privileges, revocation of good time, or segregation for up to a year.[76] Even if a prisoner were to prevail in an underlying lawsuit regarding inhumane conditions, the disciplinary punishment for protesting would remain untouched. The court-ordered remedy would address the conditions, but not the punishment, unless the prisoner could prove that the punishment constituted retaliation by prison officials for the original protest. However, most retaliation claims for protest speech fail, because an essential element of establishing a retaliation claim is that the prisoner was engaging in protected speech.[77]

Other prisoners have been slightly more successful in filing procedural due process claims challenging the punishment for their protest speech. In those cases, which mainly consist of punishments for drafting, circulating, or signing petitions, courts have held that prisons failed to provide notice that such activity

[72] *State v. Bay*, 503 So. 2d 745, 746 (La. Ct. App.), writ denied, 506 So. 2d 1223 (La. 1987)
[73] N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2(B)(5)(iii)(West 2016).
[74] *Adams v. Gunnell*, 729 F.2d 362, 365 (1984).
[75] Georgia Department of Corrections, Inmate Handbook, 125-3-2-.04(c)2 and 16.
[76] Ill Admin. Code 504 App. A - Offense numbers and Definitions (Feb. 28, 2014).
[77] *See e,g*., *Freeman v. Texas Dept. of Criminal Justice*, 369 F.3d 854, 863 (5th Cir. 2004) (holding Freeman's protest of the chaplain's practices was not protected and therefore his challenge to his punishment and subsequent transfer to a high-security unit did not qualify as retaliation). Some prisoners have gotten around this requirement by claiming that the punishment was in response to a written grievance (which is protected speech), rather than the act of protest.

is prohibited. Accordingly, the punishment is unconstitutional, not because the protest act itself is protected, but because the prison failed to provide notice that the act was prohibited. But where protest speech concerns disobeying a direct order, as in our lethal injection example at the beginning of this Article, or speech that is expressly prohibited, such as a sit-in or work strike, the Due Process claim will fail.

Though conditions of confinement may present real harms, inmates have few viable methods to contest these conditions, other than individual grievances presented to prison administrators. If prisoners engage in protest speech in carceral facilities, they risk a range of sanctions ranging from an additional criminal conviction to disciplinary segregation to the loss of certain privileges. These sanctions are made possible through limiting the protection of the First Amendment for speech, expression, and association when that activity occurs within the prison walls.

III. ADDERLEY V. FLORIDA

Race, the civil rights movement, and race relations all play a critical role in understanding the lack of protection for prisoner protest. The Supreme Court's 1966 opinion in *Adderley v. Florida* held that jails are a non-public fora and therefore protests on jail grounds were not protected under the First Amendment.[78] Modern applications of *Adderley* ignore the distinction between First Amendment acts outside of the jail or prison walls versus those within the prison walls.[79] That distinction, however, is critically important since those within the prison walls are prohibited from leaving and therefore can not alter the time or place of their activities.[80]

A. Adderley and Race

In 1966, the Supreme Court in a 5-4 decision, affirmed the convictions of 32 individuals convicted of criminal trespass for their protest outside of a jail in Florida. The majority opinion, by Justice Black,[81] focuses on how the protesters

[78] *Adderley v. Fla.*, 385 U.S. 39 (1966).
[79] *See Bell v. Wolfish*, 441 U.S. 520, 552 (1979) (upholding prison policy of forbidding hard-back books except by authorized manner, citing *Adderley*, as a reasonable time, place or manner restriction).
[80] *See e.g.*, *Id.* at 573 n.14 (Marshall J., dissenting).
[81] Justice Black's position on civil rights issues is full of contradictions. He authored the Court's *Korematsu* opinion, judicially affirming the power of the U.S. government to detain Japanese-Americans during World War II, *Korematsu v. U.S.*, 323 U.S. 214 (1944), but also voted to deny

disobeyed a direct order to leave the grounds of the jail and therefore were properly convicted of criminal trespass.[82] Around 250 people gathered at Florida A&M campus on Monday morning at 9AM and together, marched peacefully on the sidewalks to the local jail to protest the segregated public facilities, including the jail, and police brutality.[83] None of the protesters carried weapons or engaged in violence.[84] Along the way, crowds jeered and spat on the protesters.[85] The county jail building was adjacent to a grassy area, which did not have a surrounding fence or "no trespassing" signs.[86] Once arriving at the jail, the protesters obeyed orders to move further away from the jail to the public sidewalks and grassy area.[87] At no point did the demonstrators attempt to enter the jail or make threats to do so.[88] The trespass at issue in this case is the alleged partial blocking of a non-public driveway leading to the jail facility.

The Supreme Court's majority opinion in *Adderley* obscures and eliminates critical facts, thereby masking the racial implications of the case. According to the Court,

> Petitioners, Harriett Louise Adderley and 31 other persons, were convicted by a jury in a joint trial in the County Judge's Court of Leon County, Florida, on a charge of 'trespass with a malicious and mischievous intent' upon the premises of the county jail contrary to

enforcement of racially restrictive covenants at issue in *Shelley v. Kramer*, 334 U.S. 1 (1948). Justice Black, at one point in his life, was a member of the Ku Klux Klan and as a senator representing Alabama, consistently voted against enacting Anti-Lynching federal statute. *See*, Debbie Eliot, *Author Interviews, A Life of Justice: 'Hugo Black of Alabama'*, NATIONAL PUBLIC RADIO (Sept. 11, 2005) http://www.npr.org/templates/story/story.php?storyId=4828849 (Interview with biographer Steve Suitts about his biography of Justice Black); United Press International, *Justice Black Dies at 85; Served on Court 34 Years*, (Sept. 25, 1971) *available at* http://www.nytimes.com/learning/general/onthisday/bday/0227.html (Obituary detailing Justice Black's life including his opposition to federal anti-lynching legislation).

[82] *Adderley*, 385 U.S. at 41, 44-46.

[83] Brief for Petitioners at 6-7, *Adderley v. Fla.* 385 U.S. 39 (1966) (No. 19).

[84] *Id*. at 7.; *accord* Reply Brief for the State at 7, *Adderley v. Fla..,* 385 U.S. 39 (1966) (No. 19).

[85] Michael Abrams, *Harriett Adderley went to bat 50 years ago in civil rights protest that resulted in landmark case*, TALLAHASSEE NEWS (Sept. 25, 2013). http://www.thetallahasseenews.com/index.php/site/article/harriett_adderley_went_to_bat_50_years_ago_in_civil_rights_protest_that_res.

[86] Oral Argument at 12:37, *Adderley v. Fla.*, 385 U.S. 39 (1966) (No. 19), *available at* https://www.oyez.org/cases/1966/19

[87] *Id*. at 13:28.

[88] *Adderley*, 385 U.S. at 51 (Douglas, J., dissenting)(noting "[t]here was no violence; no threat of violence; no attempted jail break; no storming of a prison; no plan or plot to do anything but protest. The evidence is uncontradicted that the petitioners' conduct did not upset the jailhouse routine; things went on as they normally would. None of the group entered the jail.").

> s 821.18 of the Florida statutes set out below. Petitioners, apparently all students of the Florida A. & M. University in Tallahassee, had gone from the school to the jail about a mile away, along with many other students, to 'demonstrate' at the jail their protests of arrests of other protesting students the day before, and perhaps to protest more generally against state and local policies and practices of racial segregation, including segregation of the jail. The county sheriff, legal custodian of the jail and jail grounds, tried to persuade the students to leave the jail grounds. When this did not work, he notified them that they must leave, that if they did not leave he would arrest them for trespassing, and that if they resisted he would charge them with that as well. Some of the students left but others, including petitioners, remained and they were arrested.[89]

Justice Black's opinion in *Adderley*, for example, specifically did not refer to the race of the arrestees.[90] The protests took place in September of 1963.[91] Local government officials, likely Caucasian, faced a group of 200-250 "Negroes"[92] singing and dancing with no intent to disperse. The previous day, the local sheriff had arrested several individuals for attempting to integrate, i.e. enter, a Whites-only theater.[93] During this period, everyday people engaged in massive unrest and civil disobedience to end state-approved discrimination against African-Americans.

In its summary of the facts of the case, the Court at best downplays the validity of the protesters' underlying concerns. A less charitable interpretation is that the Court implies that the protesters had a more sinister motive than simply protesting racial segregation. The Court's use of quotation marks around the word "demonstrate" and insertion of the word "perhaps," before acknowledging that racial segregation may be an issue, functions to undercut moral claims by the petitioners that their protest was valid. In fact, later in the *Adderley* opinion, Justice Black is particularly dismissive of the First Amendment rights claimed by the protesters. The First Amendment does not mean, according to Justice Black, "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and

[89] *Id.* at 40 (footnote omitted).
[90] This stands in stark contrast to a recent prior case, *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963). The majority opinion by Justice Stewart specifically notes the arrests of 187 "high school and college students of the Negro race" for breach of the peace while protesting segregation at the State House. The Court ultimately overturned the convictions.
[91] Petitioners' Brief at 4, *Adderley v. Fla.*, 385 U.S. 39 (1966) (No. 506), 1966 WL 100632.
[92] *Id*.
[93] *Adderley*, 385 U.S. at 51 (Douglas, J., dissenting).

wherever they please."[94] "Propagandize" is a particularly loaded word in the context of the Cold War, the Red Scare, and efforts to link civil rights leaders to communism.[95]

The trial record in the case establishes additional facts critical to understanding the racial implications. First, the Court fails to note that Florida A&M University is an HBCU (Historically Black College or University).[96] HBCUs are defined as higher education institutions established before 1964 primarily for the education of African-Americans.[97] HBCUs developed in response to the segregation of educational institutions under the aegis of "separate but equal" institutions. During the 1950s and 60s, Florida A&M students were integral to the civil rights movement in Florida.

The protests at issue in *Adderly* were also part of a broader civil rights movement in Florida to claim equal rights for African-Americans. In 1956, African-Americans boycotted public transportation for seven months after two Florida A&M students were arrested for sitting next to a Caucasian woman on a bus. Movement organizers were arrested and convicted of "operating an illegal transportation system" for arranging alternative transportation for protesters.[98] In 1960, the civil rights movement in Florida focused on other public accommodations, such as restaurants and theaters. In February 1960, students at Florida A&M and Florida State University were arrested and convicted of "disturbing the peace" for refusing to leave the "Whites-only" lunch counter at Woolworths.[99] In March 1960, police reportedly used tear gas to disrupt a march of approximately 250 students protesting the arrests of fellow students during various lunch counter sit-ins.[100] Civil rights organizers led pickets and

[94] *Adderley*, 385 U.S. at 48. *See also Greer v. Spock*, 424 U.S. 828, 837 (1976) (upholding military base regulation that prohibited distribution of literature or political demonstrations on base)(citing this proposition in *Adderley*).
[95] DONALD TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS' LABOR UNION 14-15 (2012). *See also* Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. OF AMERICAN HISTORY 4, 40 (2005), *available at* http://mejo.unc.edu/sites/default/files/images/documents/redstates/longcivilrights.pdf..
[96] *See* Transcript of Record at 5, *Adderley v. Florida*, 385 U.S. 39 (1966) (No. 506); Florida Agricultural and Mechanical University, *About Florida Agricultural and Mechanical University*, FAMU.EDU http://www.famu.edu/index.cfm?AboutFAMU&History (last visited Aug. 12, 2016).
[97] Elementary and Secondary Education Act of 1965 (ESEA), Act of Apr. 11, 1965, Pub. L. No. 89-10, 79 Stat. 27, 29 (codified at 20 U.S.C. §§ 6301-7941 (2002)).
[98] Florida Memory Project, State Library and Archives, www.floridamemory.org (last visited Aug. 16, 2016).
[99] *Id*.
[100] *Id.*

sit-ins in segregated downtown Tallahassee businesses, such as "Neisner's, McCrory's, F.W. Woolworth's, Walgreen's, and Sears."[101]

The *Adderley* protests on September 16, 1963 were actually the last of three days of civil rights protests from September 14-16.[102] Just a day before the *Adderley* protests, four African-Americans girls died in the now infamous Birmingham church bombing.[103] Over 350 individuals were arrested over the three days of Florida civil rights demonstrations.[104]

The omitted racial and civil rights context is critical, in part, because of the actual charge that the protesters were convicted of. The Florida statute requires "trespass with *malicious or mischevious intent*."[105] By negating the racial context in which the protests occurred, the Court also eliminates the actual intent of the protesters at the jail, i.e. to protest segregation of public facilities and police brutality. If the actual protest of the demonstrators is eliminated, then what other purpose is possible for their assembly at the jail facility other than "malicious or mischevious" intent?

In *Adderley*, the Court is quick to distinguish how the civil rights demonstration at the jail is different from a recently upheld civil rights demonstration at the South Carolina State Capitol House. In both protests, participants "sang hymns and danced."[106] But Justice Black argues that the critical difference is the place in which the two demonstrations were conducted, implying that the *Adderley* protesters should have selected a venue with greater First Amendment protection, such as a state-house. In addition, Justice Black focuses on the right of the persons protesting to be in that particular forum. The *Adderley* protesters had no legal right to be present on jail grounds, since the jails primary purpose was security, whereas the other protesters had a right, as citizens, to be present in the State Capitol House.

The omission of race by the Court is even more compelling because race and the purpose of the protests was a central aspect of the demonstrators' legal argument. The role of race in the arrests was clearly presented to the U.S. Supreme Court. For example, in their petition for certiorari, the demonstrators frame the question presented as

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[101] *Id.*
[102] Michael Abrams, *Harriett Adderley went to bat 50 years ago in civil rights protest that resulted in landmark case*, TALLAHASSEE NEWS (Sept. 25, 2013).
[103] United Press International, *Six Dead After Church Bombing*, WASH POST (Sept. 16, 1966), http://www.washingtonpost.com/wp-srv/national/longterm/churches/archives1.htm
[104] Abrahams, *supra* note 106.
[105] Fla. Stat. § 821.18-19 (Repealed by Laws 1974, c. 74-383, § 66) (emphasis added).
[106] 385 U.S. at 41.

> [d]oes the arrest and conviction of a group of Negro for violating a state statute prohibiting 'trespass . . . with a malicious and mischevious intent,' when based solely on said Negroes peaceful congregation in front of the county jailhouse for the purpose of protesting the segregated facilities within the jail as well as the previous arrest of anti-segregation demonstrators deny said Negroes rights of free speech, assembly, petition, due process, and equal protection.[107]

In addition, during oral argument, counsel for the arrestees reminded the Court that the 32 arrestees were all African-American and were singing freedom songs.[108] Instead, the Court dismisses race from the case by finding that there was no evidence that the Sheriff exercised his power to arrest because he disagreed with the substance of the protesters' grievances.[109] Under this logic, race is not implicated in *Adderley* because the demonstrators were arrested for their presence at the jail and not the substance of their protests. Thus *Adderley*, a case of criminal arrest for engaging in civil rights protest, becomes transformed into a race-neutral case cited for two broad propositions: 1) the government is akin to private property owners when the government restricts speech to preserve purpose of government property;[110] 2) time, place, and manner restrictions on First Amendment rights are legitimate when necessary for significant government interests.[111]

Adderley also stands in stark contrast to the increasingly liberal interpretation of the First Amendment at the time. Randall Kennedy, in his analysis of the relationship between law, litigation and impact of the civil rights campaign, with particular attention to Martin Luther King Jr., notes a "blossoming of libertarian themes in First Amendment jurisprudence."[112] In a series of cases, the Court affirmed the First Amendment rights of civil rights demonstrators to engage in sit-ins and protest marches with specific reference to the race of the arrestees.[113]

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[107] Brief for Petitioners at 3, *Adderley v. Fla.* 385 U.S. 39 (1966) (No. 19).
[108] Oral Argument, *supra* note 90, at 2:56.
[109] *Adderley*, 385 U.S. at 47.
[110] *See e.g., Greer v. Spock*, 424 U.S. 828, 836, 96 S. Ct. 1211, 1216-17, 47 L. Ed. 2d 505 (1976); *U. S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981).
[111] *See e.g.*, *Wood v. Moss*, 134 S. Ct. 2056, 2060, (2014); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000).
[112] Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1001 (1989).
[113] *See e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963); *Brown v. State of La.*, 383 U.S. 131 (1966); *Cox v. La.*, 379

To be clear, the point of unearthing the racial context of Adderely is not to argue that the opinion was wrongly decided or that the opinion was "racist" and therefore invalid. *Adderley* affirmed and sanctioned the use of criminal penalties against primarily African-American protesters engaging in non-violent protest speech at a site of heightened government authority, yet erased the role of race in its majority opinion. And perhaps the Court is justified in its distinction that the outside of a jail is fundamentally different than the outside of a state capitol building. But race is still relevant.

The erasure of race from the *Adderley* opinion could be interpreted in a variety of ways. While it is clear that race is not addressed in *Adderley*, it is not clear why Justice Black omitted any mention of it. Was race omitted because it was deemed irrelevant and if yes, why? Or alternatively, was race omitted because it was deemed threatening within the context of generalized unrest during the civil rights movement? Did the omission of race have any relation to a continuing insistence[114] that the U.S. criminal justice system operates as an objective arbiter and punisher of crime? By re-situating *Adderley* within its racial context, these and additional questions become visible. More fundamentally, *Adderley* is a foundational case restricting the protest rights of the incarcerated and as such, should be seen as a product of a distinct racial moment within our jurisprudence.[115] .

B. Adderley's Impact

Since *Adderley* was decided, the Court has further developed its First Amendment doctrine to take account of the place or space in which the speech is conducted. As discussed more fully below, courts have since interpreted *Adderley* to provide that jails are non-public spaces and accordingly, the lowest level of First Amendment protection applies to speech within those spaces. Thus speech by detainees, by virtue of their incarceration, receives the lowest level of constitutional protection.

U.S. 536 (1965); *Louisiana ex rel. Gremillion v. Nat'l Ass'n for the Advancement of Colored People*, 366 U.S. 293 (1961); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

[114] James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, (2012) (Arguing that modern views of mass incarceration through the lens of Michelle Alexander's "The New Jim Crow" ignore the narrative of many Americans in which the provides proper punishment for crimes. The author also argues that the dichotomous racial structure of this viewpoint does not acknowledge class, other races and criminality as a part of the larger conversation about criminal justice).

[115] *See* discussion *supra* II.B. (*Adderley's* Impact)

The First Amendment does not provide a complete blanket of protection for private speech. Rather, speech is subject to government regulation. In part, the degree to which the government may restrict the performance of speech depends on the forum in which a particular message is being conveyed.[116] As Justice Marshall explained in *Grayned v. City of Rockford*, the authority of the government to regulate speech depends in part on where the speech occurs and to what extent the speech is "incompatible with the normal activity of a particular place at a particular time."[117] Thus the government could arguably restrict speech in the reading room of a public library but not restrict the same speech when it occurs in a park.[118] In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[119] the Supreme Court summarized the three types of fora in analyzing the extent to which the government may restrict forms of speech.

The first are *traditional public fora,* pertaining to open areas such as streets, sidewalks, and parks. These areas enjoy the widest level of private speech protection because they "have imminently been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[120] Further, "use of streets places has, from ancient times, been a part of the privileges immunities, rights, and liberties of citizens."[121] Public fora

[116] *See Grayned v. City of Rockford*, 408 U.S. 104 , 155-116 (1972) (citing *Adderley* in discussing time, place, and manner restrictions for peaceful protests outside of a school in violation of the city's anti-noise ordinance). "Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people—students, their family members, and friends—gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: 'Black cheerleaders to cheer too'; 'Black history with black teachers'; 'Equal rights, Negro counselors.' Others, without placards, made the 'power to the people' sign with their upraised and clenched fists". *Id.* at 105. The protesters in this case were outside of a school on the public sidewalk.

[117] *Id.*, at 116 (holding anti-picketing ordinance unconstitutional but upholding anti-noise ordinance regarding protests on school grounds.)

[118] *Id.*

[119] 460 U.S. 37 (1983).

[120] *Hague v. CIO*, 307 U.S. 496 (1939) (nullifying a mayor's ordinance which banned political meetings and the distribution of CIO literature on public grounds.)

[121] *Id*. at 515.

historically have been "venues for the exchange of ideas,"[122] where a "speaker can be confident that he is not simply preaching to the choir."[123]

The second type of fora are *designated (or limited) public fora.* Designated public foras "consist of public property which the State has opened for use by the public as a place for expressive activity."[124] The crucial difference between traditional public fora and limited public fora is that the latter is specifically created by the government for certain groups to engage in expressive acts. School board meetings[125], college and university facilities[126], and municipal auditoriums[127] are examples of limited public fora.

Last are the *nonpublic fora*. Since these areas are not traditionally used for the expression of speech (such as parks and streets) nor are they created or opened for the expression of acts (such as municipal auditoriums and university facilities), nonpublic fora are accorded the least amount of First Amendment protection. This is because these areas have distinct governmental purposes, other than public speech or expressive acts. Commonly cited examples include jails,[128] public airport terminals,[129] military bases[130], and public schools. Courts have routinely held that jails and prisons are non-public fora.[131]

The government has the greatest ability to restrict speech in nonpublic foras. As noted by the Supreme Court, "the State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."[132] In nonpublic foras, the government may impose time, place or manner restrictions on speech and it "may reserve the forum for its intended purposes, communicative or otherwise, as long as the

[122] *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (holding Massachusetts law creating buffer zones around health clinics performing abortions was not narrowly tailored and therefore violated protesters' First Amendment rights).
[123] *Id.*
[124] *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45 (1983).
[125] *See City of Madison Joint School Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167 (1976).
[126] *See Widmar v. Vincent*, 454 U.S. 263 (1981).
[127] *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).
[128] *See Adderly v. Florida*, 385 U.S. 39 (1966). This categorization is discussed in more depth infra.
[129] *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).
[130] *See Greer v. Spock*, 424 U.S. 828 (1976).
[131] *See Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 803-804 (1985) (citing *Adderley* for the proposition that jails are not public fora and *Jones* for the same proposition in regards to prisons). *But see Pell v. Procunier*, 417 U.S. 817, 827-29 (1974) (holding that limits on face-to-face interviews between the press and inmates was not an unreasonable restriction in light of alternative means of expression).
[132] *Adderley*, 385 U.S. at 48.

regulation on speech is reasonable and not an effort suppress expression merely because public officials oppose the speakers view."[133] The language "as long as the regulation on speech is reasonable" implies that courts will examine the constitutionality of the government's restriction on an individual's ability to engage in expressive acts in a nonpublic forum, under a rational basis standard. Accordingly, in such non-public fora, the government is free to restrict and even eliminate speech or otherwise expressive acts, so long as the restriction is not motivated by the content of the speech.

The analysis in *Adderley* was sufficiently broad to allow subsequent courts to conclude that jail and prison facilities themselves are non-public fora. The protests in *Adderley* were not in the jail facility, but rather, at most, the "curtilage of the jailhouse."[134] However, the Court emphasized the ability of the government to control the use of *its own property* for its own lawful nondiscriminatory purpose,"[135] in this case the facility itself as well as the adjacent curtilage. The Court's emphasis essentially extends the inquiry from the specific space where the protests occurred to a broader inquiry about the property as a whole.[136] In so doing, the Court ascribes the purpose of the facility itself to the property as a whole. Although *Adderley* did not specifically hold that the jail was a non-public forum, subsequent cases have interpreted it as such under the broad rationale announced in *Adderley*.[137]

In a series of cases that have nothing to do with prisons, courts, in dicta, have characterized jails and prisons are non-public fora.[138] For example, the Fifth Circuit, in a case about speech on public housing grounds, indicates that jails are non-public fora, citing *Adderley* as support for that proposition.[139] In outlining the relevant doctrinal framework, the Eleventh Circuit notes prisons are non-public fora in a case concerning a university's First Amendment

[133] *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. at 129.
[134] *Addlerey*, 385 U.S. at 47.
[135] *Adderley*, 385 U.S. at 48. (emphasis added).
[136] *But see Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 804, 105 S. Ct. 3439, 3450, 87 L. Ed. 2d 567 (1985)(citing *Adderley* to support proposition that the "jailhouse grounds" are not public fora.)
[137] In fact, some scholars credit *Adderley* with providing the foundation for development of the "non-public forum" doctrine. *See* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 116 (1986); Martin B. Margulies, *The Davis Case and the First Amendment*, 11 ST. JOHN'S J. Legal Comment. 39, 49 (1995).
[138] In *Jones*, discussed infra, the Court did conclude, "a prison is most emphatically not a 'public forum'" *Jones*, 433 U.S. at 136. But that is different than concluding that prison is a non-public forum. *Jones* only establishes that prisons and jails are not public, but it does not specifically foreclose the possibility that a prison could be a limited or quasi-public forum.
[139] *de la O v. Hous. Auth. of City of El Paso, Tex.,* 417 F.3d 495, 503 (5th Cir. 2005).

violations against members of the school's Gay Lesbian Bisexual Alliance student group.[140] Thus, *Adderley* underlies court decisions holding that jails and prisons are non-public fora more generally.

Courts in a few cases have also cited to *Adderley* when addressing speech claims *within* carceral facilities. In *Pell v. Procunier*, the regulation at issue prohibited "face-to-face interviews between press representatives and individual inmates whom they specifically name and request to interview."[141] Plaintiff inmates[142] claimed the regulation infringed on their First Amendment right to freedom of speech by denying media access to incarcerated individuals. The U.S. Supreme Court upheld the regulation as applied to the inmate plaintiffs primarily on two grounds: 1) there were available alternatives for individual contact, such as via mail or personal visits with family and friends; and 2) that the government may constitutionally regulate speech as to the time, place, and manner to further significant government interests. The Court cited *Adderley*, among other cases, for the second proposition. Because the prison's interests are maintaining security and order, combined with deference to the judgments of prison administrators, the Court concluded that the regulation did not "abridge any First Amendment freedoms retained by prison inmates."[143] Lower courts have followed suit. For example, in *Paka v. Manson*,[144] the district court upheld a prison prohibition on unions, citing to Pell v. Procunier and Adderley, because the prohibition was an appropriate "time, place, and manner" restriction. One lower court applied the *Adderley* rationale to speech by correctional employees within the prison facility. In *Israel v. Abate*,[145] the district court judge cited *Adderley* as an appropriate time, place, and manner restriction in upholding restrictions on the distribution of union materials among correctional employees within the detention facility. Hence, despite its uncertain origins, it is generally taken for granted that jails and prisons after Adderley are non-public fora.

Designating the interior of jails and prisons as non-public fora, however, is fundamentally at odds with one of the underlying rationales for the First Amendment's place-based approach, i.e. the differing constitutional rules depending on the place in which the speech occurs.[146] A place-based approach

[140] *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1548 (11th Cir. 1997)
[141] 417 U.S. 817, 819 (1974).
[142] Separately, the Court also addressed the claims of plaintiff journalists contesting the regulation. *Procunier*, 417 U.S. at 829-835.
[143] *Id*. at 828.
[144] 387 F. Supp. 111 (D. Conn. 1974).
[145] 949 F. Supp. 1035, 1043 n.6 (S.D.N.Y. 1996).
[146] *See e.g.*, *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding regulation banning distribution of material except from fixed and limited locations); *Int'l Soc.*

is justified, in part, because speakers have a choice in where to express their views. Jails and prisons, by definition, require the involuntary confinement and isolation of individuals, thus incarcerated individuals lack a choice in where to express themselves. [147] As Justice Marshall has noted in dissent in another prisoners' rights case, it defies logic to apply "time, place, and manner" analysis to detainees, who have little to no choice in the time or place of their speech by virtue of their incarceration.[148]

The extension of *Adderley* to speech within the facility ignores the distinction between the incarcerated and the non-incarcerated. *Adderley* may intuitively be correct that jails and prisons are not a public forum for non-incarcerated individuals. Carceral facilities may properly limit public access to the interior of a facility, for example, to prevent the introduction of contraband that would threaten the order or security of the facility.[149] But for the incarcerated, the facility is the only forum they may legally access during their incarceration.

When we re-introduce the racial context of the *Adderley* case, the paradox of the case is more readily apparent. What initially began as a case concerning the rights of African-American protesters to protest segregation outside of a jail has morphed into a broad proposition that limits the First Amendment rights of the incarcerated, who are disproportionately racial minorities.

IV. JONES V. NORTH CAROLINA PRISONERS' LABOR UNION, INC.

Race is also a hidden factor in *Jones v. North Carolina Prisoners' Labor Union, Inc.*[150] In 1977, the overruled the a three-judge panel district court and upheld the curtailment of the rights of prisoners to organize a prisoners' union

for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (applying forum analysis to uphold restriction of solicitation and distribution of materials in airports).

[147] *Procunier*, 417 U.S. at 826.

[148] *Bell v. Wolfish*, 441 U.S. 520, 573 (1979)(Marshall, J. dissenting) ("In each of the cases cited by the Court for this proposition, the private individuals had the ability to alter the time, place, or manner of exercising their First Amendment rights.") (Holding that the prohibition against the receipt of hardback books unless mailed from the publisher or a book club was not an unreasonable restriction on prisoners First Amendment rights).

[149] *See Saxbe v. Washington Post Co.,* 417 U.S. 843, 849 (1974) (acknowledging "the truism that prisons are institutions where public access is generally limited.") (internal citations and quotation marks omitted).

[150] 433 U.S. 119 (1977).

within North Carolina. The union, a direct outgrowth of the Black Power Movement, sought to improve prison conditions and "to serve as a vehicle for the presentation and resolution of inmate grievances."[151] In so doing, the Court applied *Adderley* to conclude that jails and prisons are not public fora[152] and further narrowed the availability of non-violent protest speech within carceral facilities.

A. Jones and Race

The North Carolina Department of Corrections prohibited soliciting other inmates to join the Prisoners' Union, barred Union meetings, and restricted bulk mailings related to the union. Justice Rehnquist, writing for the majority, overturned the trial court, which had held that the state's union related regulations had infringed on the First Amendment rights of the prisoners. Notably, the state did not directly challenge the formation of, or individual membership in, a prisoners' union.[153] Instead, the state regulations focused on the ability of the union to operate. The regulation was adopted in March 1975, after the incorporation of the North Carolina Prisoners' Labor Union (NCPLU) in 1974. The newly introduced North Carolina regulations prohibited solicitation of new members, whether in person or by correspondence.[154] The regulations also forbid union meetings and negotiations between union representatives and correctional officials.[155] The new regulations stood in stark contrast to the regulations governing other inmate associations, such as Alcoholics Anonymous and the Junior Council, which were allowed to both solicit new members and meet within the detention facilities.[156]

The North Carolina Prisoners' Labor Union, Inc. (NCPLU) was incorporated in 1974 and by the time of trial, claimed approximately 2,000 members scattered across various detention facilities within the state.[157] The trial court concluded that "[t]o permit an inmate to join a union and forbid his inviting others to join borders on the irrational."[158] And although trial court found – based on conflicting expert testimony – that there was no consensus on

[151] *Id*. at 122.
[152] *Id*. at 134-36.
[153] *N. Carolina Prisoners' Labor Union, Inc. v. Jones*, 409 F. Supp. 937, 941 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977).
[154] *Id*. at 941.
[155] *Id*. at 942.
[156] *Id*. at 942.
[157] *Jones*, 433 U.S. at 122.
[158] *N. Carolina*, 409 F. Supp. at 943.

the ultimate benefit (or danger) of a union in general,[159] the trial court also found that there was "not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions."[160]

In Jones, the Supreme Court overruled the trial court and upheld the state regulations prohibiting certain union activities. According to the majority opinion, was not really about speech. The Court noted that "First Amendment speech rights are barely implicated in this case."[161] This was the case in part, because *Jones* relied heavily on *Pell v. Procunier*, which had relied in part on *Adderley*.[162] Under *Procunier*, prisoners only retain those First Amendment rights that are "not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[163] Accordingly, the Court held that a regulation prohibiting media access to specific inmates did not constitutionally infringe on inmates' First Amendment speech rights.

Instead the Court focused on the First Amendment freedom of association rights of the inmates. Moreover, *Procunier* also identified and discussed four legitimate penological objectives, namely deterrence, namely deterrence, isolation, rehabilitation, and security.[164] In *Procunier*, the Court noted that "[c]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."[165] *Jones* approvingly adopted this rationale in upholding the North Carolina regulation prohibiting solicitation of union membership. Thus, in *Jones*, we see an extension of *Adderley* and *Procunier* beyond individual speech, but also to association among inmates.

The Supreme Court's 7-2 majority opinion by then-Justice Rehnquist in *Jones* also scolded the trial court for failing to give appropriate deference to the views of the prison administrators about the potential dangers of the NCPLU.[166] Deference was due because of the unique circumstances of administering a detention facility and because courts are not equipped with the specific expertise required to make these administrative decisions.[167] North Carolina prison officials testified that a prisoners' union *could* be misused, leading to work stoppages and riots.[168] Although expert opinion was divided, the Supreme Court

[159] *Id*. at 943.
[160] *Id*. at 944.
[161] *Jones*, 433 U.S. at 130.
[162] *See* discussion *supra* III.B.
[163] *Pell v. Procunier*, 417 U.S. 817, 822 (1974).
[164] *Id*. at 823.
[165] *Id*.
[166] *Jones*, 433 U.S. at 125-126.
[167] *Id*.
[168] *Id*. at 127 (emphasis added).

held that the trial court should have deferred to the views of the corrections officials, unless there was evidence that such views were unreasonable.[169]

Deference, however, is particularly susceptible to the influence of race.[170] When courts accept correctional views at face-value, courts are also accepting the various factors that informed the correctional views in the first place. For example, the Supreme Court would not have required North Carolina officials to explain *why* there was a potential for misuse by inmates or *why* riots were a possibility in light of the lack of violence and disruption in the first few years of the Union's existence. In a stark departure from the trial court's actual findings, the Supreme Court fully adopted the views of the correctional officials and even characterized the challenged regulations as preventing an "imminent threat of institutional disruption or violence."[171] One possibility for these views is the racial context in which the NCPLU emerged.

Understanding the racial context of the *Jones* case isn't to deny that the 1970's weren't a turbulent time in American prisons and jails. They were. In March 1970, 1500 prisoners at Rikers prison in New York refused to eat or perform work assignments for three days to protest a decrease in commutation time for good behavior.[172] In November 1970, some reports indicated 2100 inmates planned to strike in Folsom prison in California, which held 2400 total.[173] While the Warden claimed the strike was limited to 500 prisoners, he did pre-emptively order a general lock down for all cells. Prison industries and kitchen operations were completely shut down in the non-violent protest, which ultimately lasted nineteen days.[174] Perhaps one of the most infamous prison rebellions, the four-day stand off in Attica, occurred in 1971.[175] But the racial context may be helpful in understanding why protest in particular became an issue in the 1970's.[176]

Prisoners have attempted to protest inhumane living conditions for decades, well before the 1970s. For example, in the early 1950s, 31 prisoners at

[169] *Id*. at 127-128.
[170] See Andrea Armstrong, *Race, Prison Discipline, and the Law*, 5 U. OF CA. IRVINE L. REV. 101 (2015) (noting the potential influence of race in prison disciplinary decisions in the context of deference to the judgments of prison officials).
[171] *Jones*, 433 U.S. at 136.
[172] TIBBS, *supra* note 99, at 96.
[173] *Id*. at 107-112. The strike at Folsom has been described as the longest prison strike, and the beginning of the prison union movement.
[174] TIBBS, *supra* note 99, at 107-112; John Pallas and Robert Barber, *From Riot to Revolution*, *in* THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA 241, 252-253 (Erik Olin Wright ed., 1973).
[175] ARTHUR LIMAN, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA, (1972),
[176] This isn't to say that race is the only factor, but that race may be *a* factor.

Angola cut their Achilles tendons to protest their conditions of confinement.[177] More than 50 "largely spontaneous" prison riots occurred in the early 1950s to protest living conditions.[178] The leaders of these riots were usually white, although people of all races were participants.[179] But with the increasing incarceration of civil rights and Black Power leaders, as well as the increased political consciousness of the incarcerated during the 1970s, these protests began to assume a racial overtone.

Jones, according to Donald Tibb's exhaustive study of the background to the case, was directly related to the rise of the Black Power Movement[180] and the incarceration of those leaders in jails and prisons nationwide.[181] In 1970, the Huey Newton, then Minister of Defense for the Black Panther Party, specifically addressed prisoners in an article entitled "Prison, where is thy victory?" [182] In that article, Newton argued that though the prison may hold the body, a prison can never contain an idea and urges prisoners to understand that prisons support an illegitimate state order.[183] In a similar vein, civil rights activists began advancing the idea of "notion of blackness as uninterrupted captivity."[184]

Many of the Black Power movement leaders were incarcerated during this time, providing a vehicle for transmitting the ideas to prison populations.[185]

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[177] *Heel Tendons Cut in Gaol Protest*, AGE, Feb. 28, 1951, at 4, *available at* https://news.google.com/newspapers?nid=1300&dat=19510228&id=nrVVAAAAIBAJ&sjid=vr0DAAAAIBAJ&pg=2935,6603888&hl=en; Ralph Hallow, *The prison that dared to pray: Angola used faith, family to stem violence*, WASH. POST (July 15, 2014), http://www.washingtontimes.com/news/2014/jul/15/the-prison-that-dared-to-pray-angola-used-faith-fa/.

[178] PALLAS &BARBER, *supra* note 178, at 238-39.

[179] *Id*. at 240-41.

[180] A not insignificant aspect of the Black Power Movement was the Nation of Islam and its influence in prisons and jails across the country. A full discussion of the Nation of Islam and the role of Black Muslim identity is beyond the scope of this article, which is limited to identifying the racial context of the *Jones* case. But that should not be interpreted to deny the intersectionality of race and religion and that potential influence on the outcome of *Jones*. For more on the role of the Nation of Islam and their role in prison organizing, *see* TIBBS, *supra* note 99, at 15-19.

[181] TIBBS, *supra* note 99.

[182] *Id*. at 97.

[183] Huey Newton, *Prison – Where is thy victory?, in* THE GENIUS OF HUEY NEWTON 18, 18-22 (Huey P. Newton ed., 1970) *available at*, http://www.freedomarchives.org/Documents/Finder/Black%20Liberation%20Disk/Black%20Power!/SugahData/Books/Newton.S.pdf

[184] DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 25 (2014).

[185] James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80* 2 CRIME AND JUSTICE 429, 436-437 (1980) *available at*, http://www.jstor.org.ezproxy.loyno.edu/stable/1147419.

Prominent Black Power movement organizers, such as Angela Davis and Eldgridge Cleaver, were arrested and incarcerated.[186] An inmate rights lawyer noted a similar dynamic in 1971 when he claimed "[the guys coming off the street, the guys who have been in the Black Panthers, in heavy actions outside, will not all of a sudden junk what they've learned and thought about what to organize around." [187] Organization and protest within prisons began to incorporate the protesters' strategies outside of prison. Prof. Thompson, in her study of labor movements and prison activism, argues that these prison unions deliberately "connected the problem of their labor exploitation to that of their racial subjugation."[188] This shift towards more visible political consciousness of the incarcerated was then expanded through formal and informal means by the incarcerated themselves.

The prison unionization effort began in California, according to Donald Tibbs. Members of the Black Panther Party began organizing "secret political education" classes for inmates in San Quentin.[189] George Jackson, an incarcerated and self-taught Black radical, was appointed an official field marshall for the Black Panther Party by Huey Newton while both were incarcerated at San Quentin.[190] Jackson had published *Soledad Brother*, which was being smuggled in and read in facilities across California.[191] San Quentin was the site for one of the largest prison strikes at the time, in which 1000 prisoners participated.[192] The prisoners demands were written by inmate Warren Wells, a member of the Black Panther Party. [193] Three months later, perhaps inspired by San Quentin, inmates at Folsom prison also went on strike, led by Huey Newton among others.[194] Their demands included equal treatment and the right to form a prisoners' union.[195] The demand for the union was emblematic of the Black Panther strategy at the time, which one scholar as characterized as "join[ing] two dominant defense traditions in American history,

[186] TIBBS, *supra* not 99, at 102; *see also* Jacobs *supra* note 189, at 436-437.
[187] Steven W. Roberts, *Prisons Feel a Mood of Protest: Mood of Protest, Often Highly Political and Radical, Emerges in Nation's Prisons*, N.Y.TIMES, Sept. 19, 1971 at 1.
[188] Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State* 8 LABOR, NO. 3, 2011, at 15, 25.
[189] TIBBS, *supra* note 99 at 88.
[190] *Id.* at 94.
[191] *Id.* at 94.
[192] *Id.* at 106.
[193] *Id.* at 106.
[194] *Id.* at 107.
[195] *Id.* at 112.

labor and anti-lynching."[196] According to Donald Tibbs, Black radicals during this time used "their ability to push their message about the exploitation of prison inmates beyond race."[197] Within months, California activists, including formerly incarcerated, formed the first prisoners' union, the "United Prisoner Union."[198] In 1971, that union split based on a disagreement about tactics, into the United Prisoner Union and the Prisoners' Union.[199] The resulting prisoner union movement ultimately reflected the strategies and growth of the Black Power movement.

In 1971, Outlaw, a nationwide prisoners rights newspaper for a California-based Prisoners' Union, printed instructions on how to organize a prison union, including authorization slips designating Prisoners' Union as the collective bargaining agent.[200] Within months, 12,000 inmates nationwide applying for membership.[201] The Outlaw continued to support prisoner unionization efforts across the U.S. by highlighting organizing efforts in various institutions.[202] By the time that the NCPLU was formed, prisoners had organized unions in facilities across at least ten states.[203]

The NCPLU at issue in *Jones* is a direct result of the California prisoners unions. The North Carolina inmates wrote to the Prisoners' Union in California to request a meeting with their union representatives.[204] Connor Nixon, one of the California Prisoners' Union organizers, visited North Carolina Central Prison and met with inmate Wayne Brooks. Together, they agreed to organize the first iteration of the North Carolina Prisoner Labor Union.[205] The NCPLU deliberately did not portray itself as a race-based movement. In its brief to the Supreme Court, the NCPLU portrayed its leadership as "multi-racial" noting the Board of Directors is composed of seven white persons, six black persons and

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[196] Dan Berger, *We Are the Revolutionaries": Visibility, Protest, and Racial Formation in 1970s Prison Radicalism* 47 (2010) Publicly accessible Penn Dissertations, Paper 250 (citing Rebecca Hill) at: http://repository.upenn.edu/cgi/viewcontent.cgi?article=1321&context=edissertations
[197] TIBBS, *supra* note 99 at 116.
[198] *Id*. at 112.
[199] *Id.* at 122-123.
[200] *Id.* at 120-24.
[201] *Id*. at 124.
[202] *See e.g*., TIBBS, *supra* note 99, at 125 (discussion May-June 1973 edition of the Outlaw, article discussed Prisoners' Union as a national drive to organize prisoner inmates).
[203] Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State* 8 LABOR, NO. 3, 2011, at 15, 24. The states include California, Delaware, Maine, Massachusetts, Michigan, Minnesota, Ohio, Pennsylvania, Rhode Island, and Wisconsin, in addition to Washington D.C.
[204] TIBBS, *supra* note 99, at 126.
[205] *Id*. at 126. Nixon subsequently absconded with the union fees and cards, but Brooks shortly organized the second iteration of the NCPLU. *Id*. at 136.

one American Indian.[206] This statement tracks efforts in California to shape public perception of the United Prisoners Union as "less radical" and racially-inclusive than the ideologies of some of their Black Panther and Brown Beret members.[207] It also reflects the broader focus on class exploitation as a "convict class."[208]

During this time period, organizing unions and protests within prisons were perceived as race-based, even when the unions emphasized a "class" approach to prison reform.[209] Many of the unions during this time period were founded and led by African-Americans,[210] but the reform focus was squarely on class. A New York Times article from 1971 describes the prisoner movement as "radical," "political" and often connected to the "Black Panthers."[211] This perception of race is so strong that one New York Times reporter concluded, "[o]ne basic fact about the prison movement is that it is led largely by blacks and other minority groups."[212]

Absent the racial context, *Jones* could be read as simply a fear of concerted group activity by the incarcerated. Since security was paramount, North Carolina officials did not have to wait "until the eve of a riot" to act.[213] Rather, the Court opined, the very existence of a union – although not prohibited or contested by North Carolina regulations – could surely bring trouble. The trouble, according to the Court, lies in the union's role in facilitating group action. But the Court feared not just any group action, but the action by this group in particular. The Court was not concerned with the activities of other groups, namely the JayCees or Alcoholics Anonymous, for example. And the Court uses race-neutral language to describe the potential danger of a union. "Solicitation of membership itself involves a good deal more than the simple expression of individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited

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[206] Brief for Appellee at 7, *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (No. 75-1874), 1976 WL 181714 (U.S.).
[207] Everett Holles, *Convicts Seek to Form a National Union*, N.Y. TIMES, Sept. 26, 1971, at 74.
[208] TIBBS, *supra* note 99 at 117.
[209] *See* Dan Berger, "We Are the Revolutionaries": Visibility, Protest, and Racial Formation in 1970s Prison Radicalism 243-248 (Dec. 22, 2012) (unpublished Ph.D dissertation, University of Pennsylvania)(on file with Publicly Accessible Penn Dissertations, http://repository.upenn.edu/edissertations/250) (Provides a broader discussion about the tensions between the Black nationalist-based prison organizing and the class-labor based prison organizing)..
[210] Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State* 8 LABOR, NO. 3, 2011, at 15, 25.
[211] Roberts, *supra* note 191.
[212] *Id*.
[213] *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 133 (1977),

activity."[214] A union that focuses on "presentation of grievances to, and encouragement of adversary relations with, institution officials"[215] would present a danger distinct from a group focused on coping with substance abuse, for example. Certain comments during oral argument, however, indicate underlying concerns about race.

During oral argument, however, Justice Stewart attempted to compare the Union to other externally-affiliated racially-based groups. Stewart asked counsel for the Union whether a prison could constitutionally prohibit external organizations such as the "Ku Klux Klan (KKK) or the Palestinian Liberation Organization (PLO)" from organizing chapters within a prison facility.[216] Without any basis in the briefs submitted, Justice Stewart sua sponte raised the issue of the Ku Klux Klan and whether prison officials could prohibit the KKK from operating within the prison by determining in advance that the organization would lead to "racial difficulties and racial violence."[217] He also implicitly questioned whether the stated bylaws and constitution of the NCPLU reflected its real aims, again in comparison to the KKK as well as other "dictatorships."[218]

In so doing, Stewart made two troubling inferences about the NCPLU. First, his question highlights concerns about potential relationships between internal organizations and connections to other organizations. Justice Stewart specifically questioned NCPLU counsel about whether NCPLU was connected to a union also operating in California.[219] Perhaps he feared that the actions by the internal organization would be influenced or directed by an external organization with different organizational objectives? Or perhaps he was concerned that the linkage to an external organization could facilitate activities by internal chapters at multiple facilities? More broadly, his concern seems to undermine the idea that the NCPLU could represent authentic issues within the facility and instead act as a mouthpiece for external objectives.

Second, Justice Stewart's choice of comparable organizations may reflect an inference that the NCPLU was similarly linked to race. The KKK advocates for the supremacy of the Caucasian race and culture.[220] Certainly during the 1960s and 1970s, the KKK was renowned for its use of private

[214] *Id.* at 131-32.
[215] *Id.* at 133.
[216] Oral argument at 53:24, *Jones*, 433 U.S. 119 (1977) (No. 75-1874), *available at* https://www.oyez.org/cases/1976/75-1874.
[217] *Id.* at 50:44.
[218] *Id*. at 51:37-48.
[219] *Id*. at 53:13.
[220] Southern Poverty Law Center, *Ku Klux Klan*, SOUTHERN POVERTY LAW CENTER https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan (last visited Aug. 12, 2016).

violence and threats to achieve racial objectives.[221] The KKK held public lynchings of African-Americans, bombed homes and buildings of African-Americans or their sympathizers, and issued threats of violence to organizations and individuals advocating for equal rights for African-Americans.[222] Similarly, during this time, the PLO was also generally viewed as a race-based terrorist organization using violence to achieve its objectives. Another Justice, while noting that the PLO did not "openly advocate terrorism," also stated that the Court could take judicial notice that the PLO "practiced it."[223] These comparisons are all the more surprising because the NCPLU had neither advocated racial/ethnic superiority nor violence during its brief existence.

Re-situating Jones within its racial context makes the underlying concerns of Justice Stewart more visible. The prisoners' union movement originated in facilities in California, which had its share of racial violence and riots. The union effort was linked to individuals and tactics adopted by the Black Panther Party. The NCPLU began its operations, in part, because of the assistance of a California-based prisoners' union. Rightly or wrongly, these racial concerns were at the forefront of Justice Stewart's questioning during oral argument and may have influenced others.

B. Jones' Impact

The clearest impact of *Jones* is in the "major setback" to a growing prisoners' labor movement.[224] By the time *Jones* was decided, unions had been established in at least ten other states.[225] By limiting protection for prisoners' First Amendment rights to speech, expression, and association, the Court also limited their ability to bargain for improved working conditions.[226] But *Jones* also has a more subtle impact as authority for subsequent doctrine-shifting cases.

More broadly, *Jones* is jurisprudentially influential in two distinct ways. First, *Jones* significantly deepened the court's degree of deference to the views of prison administrators. This enhanced deference was later solidified in *Turner v. Safley*, [227] which provided the doctrinal architecture for courts to defer. Second, *Jones* is interpreted by analogy to prohibit any non-sanctioned group

[221] *Id*.
[222] Anti Defamation League, *The Ku Klux Klan and Resistance to School Desegregation*, ADL http://archive.adl.org/issue_combating_hate/uka/rise.html (last visited, Aug. 12 2016).
[223] *Id*. at 53:53.
[224] Thompson, *supra* note 15, at 30.
[225] *Id*. at 24.
[226] *Id*.
[227] 482 U.S. 78 (1987).

activity, including non-violent activity, because of the potential of a threat to the order or security of the facility.

As to deference, the Supreme Court relied on *Jones* in deciding *Turner v. Safley*,[228] one of the most influential cases on prisoners' rights.[229] In *Turner*, the Supreme Court was confronted with two Missouri regulations: 1) preventing correspondence among inmates at different institutions and 2) requiring the superintendent's permission for an inmate to marry. The *Turner* Court sought to articulate a broader "standard of review" for prisoners' claims of constitutional violations.[230] The Court reviewed in detail four recent decisions involving prisoners' constitutional rights, including *Jones*.[231] Based on those cases, the Court concluded that deference is due to the judgments of prison administrators because otherwise, prison administrators would be unnecessarily hindered in addressing security and devising creative solutions.[232] Moreover, courts would be engaged in second-hand micromanaging of carceral facilities, an area where the Courts may lack specific expertise.[233] Accordingly, relying in part on *Jones*, the Court clarified the applicable standard and identified specific factors governing prisoners' challenges to prison rules. *Turner* required that a regulation be "reasonably related to legitimate penological interests."[234] To determine whether the regulation is reasonable, the Court examined the following four factors : 1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest"[235]; 2) "whether there are alternative means of exercising the right that remain open to prison inmates"[236]; 3) the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"[237]; and 4) whether "ready alternatives"[238] to accommodate the prisoner's rights are available, with the absence of such alternatives demonstrating the reasonableness of the prison regulation at issue. Nor is Turner limited to only situations of "presumptively dangerous" determinations. The

[228] *Id.*
[229] For an excellent and practical critique of the *Turner* decision itself, see David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 975 (2016).
[230] *Turner*, 482 U.S. at 85.
[231] *Id.* at 86-88.
[232] *Id.* at 89.
[233] *Id*.
[234] *Id*. at 78.
[235] *Id*. at 89.
[236] *Id*. at 90.
[237] *Id*.
[238] *Id*. at 90-91

Court specifically relied on *Jones* to establish that the "reasonableness" inquiry applies and takes account of any articulated security concerns.[239] *Turner* thus established a "lenient"[240] standard for prison administrators to satisfy.

Following *Turner,* deference is one of the primary drivers of the Supreme Court's jurisprudence when deciding prisoners' claims of constitutional violations.[241] For example, the Seventh Circuit upheld censorship of a prison newsletter that was critical of the parole board and the facility, even though the newsletter did not suggest group action or protest.[242] The Circuit Court applied *Turner* and held that the prison's restriction on the distribution of the critical articles was reasonable because of the warden's testimony of the articles would threaten security by "encouraging distrust of staff and unrest among inmates" and "encourage disrespect on the part of the inmate."[243] Thus in *Van den Bosch v. Ramisch*, the court deferred to the warden's assessment that speech, whether describing true or fabricated events, may cause unrest simply by changing an inmate's attitude without any physical act. Arguably, under *Ramisch*, any speech critical of the facility would cause unrest and therefore not be constitutionally protected.

Turner deference now applies to virtually all First Amendment challenges of prison and jail regulations, as well as some Fourth and Fourteenth Amendment due process claims. Courts will defer to the judgment of the prison administrators when deciding restrictions on access to the courts,[244] attendance of religious services,[245] receipt of mail[246] and publications,[247] and visitation.[248] The Court also applied Turner to uphold a jail's policy of mandatory strip-searches for detainees entering general population[249] and the involuntary medication of mentally ill prisoners.[250] Thus far, the Court has held only two areas exempt from Turner analysis: claims of racial discrimination under the Equal Protection Clause and claims of "cruel and unusual punishment" under

[239] *Id*. at 88-89.
[240] *Johnson v. Cal.*, 543 U.S. 499, 513 (2005) (holding Turner does not apply to claims of racial discrimination within prisons)
[241] Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT. REP. 245 (April 2012).
[242] *Van den Bosch v. Ramisch*, 658 F.3d 778 (7th Cir. 2011).
[243] *Id*. at 787.
[244] *Lewis v. Casey*, 518 U.S. 343 (1996).
[245] *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987).
[246] *Shaw v. Murphy,* 532 U.S. 223 (2001).
[247] *Thornburgh v. Abbott*, 490 U.S. 401 (1989).
[248] *Overton v. Bazzetta,* 539 U.S. 126 (2003).
[249] *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1515 (2012).
[250] *Washington v. Harper*, 494 U.S. 210 (1990).

the Eighth Amendment. [251] *Turner* has had a "pervasively powerful impact on prisoners' constitutional cases,"[252] an impact which in part was enabled by the decision in *Jones*.

Several courts have also expanded the realm of prohibited protest activities beyond the circumstances presented in *Jones*. *Jones* concerned the actual solicitation to join an organized group, which had as its mission, among other things, the presentment of group inmate grievances. Simply put, *Jones* involved group solicitation of individuals to engage in group activity. But in a Second Circuit case, the court upheld discipline for an individual's possession of a self-authored pamphlet urging group activity, namely a work stoppage to protest prison conditions. Nor was there any direct evidence of actual or attempted distribution by the inmate, although certainly possessing three copies[253] could be construed at most as an implicit attempted violation.

The influence of *Jones* is also evident in cases prohibiting the signing of petitions. Several courts have cited to *Jones* in upholding disciplinary violations for signing group petitions protesting prison conditions.[254] As in *Jones*, none of these cases concerned actual or threatened violence. Rather the prohibited act in these cases was simply the act of signature, which at least superficially would appear to be less of a "group" activity than joining an existing advocacy group. While these cases are harder to distinguish from *Jones*, it is nevertheless worth asking whether signing a group petition is the equivalent to joining a group activity? Is a petition prohibited because it signals a group consensus? Or because failure to respond positively to a petition's demands could lead to the

[251] *Johnson v. Cal.*, 543 U.S. 499, 510 (2005). For Eighth Amendment claims alleging "cruel and unusual punishment," the "deliberate indifference" test applies. *Id*. at 511 (citing *Hope v. Pelzer,* 536 U.S. 730, 738 (2002)).

[252] Christopher E. Smith, *Justice Sandra Day O'connor and Corrections Law*, 32 HAMLINE L. REV. 477, 495 (2009); *see also* Shapiro, *supra* note 242, at 975 (noting Turner has been cited in over 8000 court opinions).

[253] *Pilgrim v. Luther*, 571 F. 3d. 201, 203 (2009). The incarcerated plaintiff had admitted to writing a pamphlet called "Wake Up!," which called for work stoppages in protest of prison conditions. After finding three copies of the pamphlet after searching his cell, the plaintiff was issued a disciplinary report for violation of prison rule 104.12, which prohibits "lead[ing], organiz[ing], participat[ing] or urg[ing] other inmates to participate in a work-stoppage, sit-in, lock-in, or other actions which may be detrimental to the order of [the] facility." *Id*. at 203.

[254] *Adams v. Gunnell*, 729 F.2d 362 (5th Cir. 1984) (two federal prisoners who had been disciplined for engaging in "conduct which disrupts the orderly running of the institution" by signing a petition along with 34 other inmates complaining of racial discrimination in the opportunities to participate in prison programing.). *See also Ajala v. Swiekatowski*, 2015 WL 1608668 (W.D. Wis. Apr. 10, 2015) (correctional officers confiscated a petition signed by 100 inmates that had been circulated by the plaintiff with a list of demands concerning the conditions of confinement and threatened a month long strike.).

types of organized activity (work stoppages, etc) that the *Jones* court feared? Courts have failed to ask these questions, and thus expanded Jones to prohibit all non-individualized grievances. Moreover, citing *Jones*, at least one court has held that courts should defer to prison administrators in determining whether a given document constitutes a group petition.[255]

V. RACE, PROTEST, AND INCARCERATION

> Across the United States in the 1950s and 1960s, African Americans engaged with institutions of American law enforcement in diverse ways as part of the wider struggle for black freedom. They courted arrest and imprisonment through nonviolent demonstrations, found protection in armed self-defense from white supremacist violence that was tolerated by southern police, fought against police brutality in race riots, and made prisons sites of revolutionary activism.[256]

It is no accident that jails and prisons are a part of our nation's race and civil rights story. "For the civil rights movement, jail served many purposes: it was a rite of passage, a form of community, and a tool for political mobilization."[257] Localities engaged in mass arrests to subdue and punish civil rights demonstrators. For example, in 1963 alone, approximately 20,000 people were arrested in demonstrations across 115 cities.[258] Civil rights activists also deliberately broke unjust laws and used their carceral detention to advocate for equality.[259] Martin Luther King's "Letter from a Birmingham Jail" is emblematic of a larger strategy of reclaiming carceral spaces to highlight injustice.[260] "Overflowing jails joined overflowing church pews to sustain the movement's energy."[261] In fact, many civil rights organizations deliberately

[255] *Felton v. Eriksen*, 2009 WL 1158685 at 1 (W.D. Wis. Apr. 28, 2009), *aff'd* 366 F. App'x 677 (7th Cir. 2010).
[256] JAMES CAMPBELL, CRIME AND PUNISHMENT IN AFRICAN-AMERICAN HISTORY 191 (2013)
[257] BERGER, *supra* note 188, at 23.
[258] CAMPBELL, supra note 272, at 177.
[259] *See* BERGER, *supra* note 188, at 12.
[260] Martin Luther King, Jr., Letter from a Birmingham Jail, August, 1963, *reprinted in The Negro Is Your Brother* THE ATLANTIC MONTHLY, August 1963, at 78 – 88, *availibe at* https://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf; *see also* BERGER, *supra* note 188, at 36 (quoting Reverend Martin Luther King Jr. as "praising the movement's success at having 'transformed jails and prisons from dungeons of shame to havens of freedom and justice.").
[261] BERGER, *supra* note 188, at 36.

called for demonstrators to "fill the jails."[262] "[Civil rights and Black power movements] relied on at some level turning incarceration into a spectacle of freedom."[263] Civil rights organizations also questions the broader criminal justice system. For example, the Southern Christian Leadership Conference, founded by Dr. Martin Luther King Jr., explicitly called for the "dismantling the present penal system."[264] Thus, challenging criminal justice policies and incarceration were part of a broader civil rights movement demanding equal rights regardless of race.

Yet, criminal justice is different in kind from most other public government functions. The power and authority of the government is at its apex in the criminal justice context. Although there are significant questions about the privatization of prison operations and services, only the state has the authority to involuntarily deprive a person of their liberty. This fulsome expression of authority has its roots in the "social contract theory" of government as preferable to anarchy.[265] A challenge to the moral authority of the government to detain an individual is a challenge to heart of government itself.

Both *Adderley* and *Jones*, in different ways, challenged the legitimacy of the carceral state through a racial lens. The protesters in *Adderley* had protested at a private establishment the day before, the Joy Theater. The protesters could have marched towards any number of segregated facilities, private or public, that day. Instead, they chose the jail as their target. Their protests at the jail sought to highlight the jail was a site of racial oppression, rather than an objectively neutral arbiter of criminality. Similarly, although the NCPLU in *Jones* was carefully presented to the Courts as a multi-racial coalition, it began – and was perceived at the time – as a race-based resistance movement. The NCPLU represented an assertion of rights of people deemed to be "criminals."

In many ways, the *Adderley*/*Jones* cases exemplify the "preservation-through-transformation" dynamic articulated by Prof. Reva Siegel.[266] "Preservation-through transformation" is a shorthand term to describe how contested legal status changes can spawn new regimes that may nevertheless include aspects of the prior status. For example, Siegel argues that the formal abolition of slavery led to legally-sanctioned segregation, which allowed for

[262] *See* discussion of civil rights strategies in *Id.* at 35-46; see also MARTIN LUTHER KING, JR. *The Sword That Heals*, *in* WHY WE CAN'T WAIT 30 (1968) (discussing the brutalities of imprisonment and the willingness to endure unjust incarceration to advance the cause of justice).
[263] BERGER, *supra* note 188 at 26
[264] Paul Delaney, S.C.L.C. Says It Is 'Broke' but 'Proud,' N.Y. TIMES, Aug. 20, 1972. at 60.
[265] John Bronsteen, Retribution's Role, 84 IND. L.J. 1129, 1131 (2009).
[266] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action,* 49 STAN. L. REV. 1111 (1997).

maintaining the legal inferiority of African-Americans.[267] Thus the regime was "transformed" from slavery to segregation, and yet many of the contested norms of slavery were "preserved" within the new regime. Michelle Alexander, drawing upon Prof. Siegel's work, identifies this same dynamic at work today in the age of mass incarceration.[268] While the civil rights movement may have achieved notable gains, Alexander argues that the locus of racial control and subordination shifted to our criminal justice system.

This shift was neither instantaneous or immediate, but rather evolved from a series of cases and shifts by the Supreme Court. Three years before *Adderley*, the Supreme Court summarily reversed the lower courts' holding that an inmate failed to state a cause of action when raising a claim under 42 U.S.C. § 1983 in *Cooper v. Pate*.[269] The plaintiff in that case, a Black Muslim, claimed the prison had denied his constitutional right to freedom of religion. In another case decided one year after *Adderley*, the Court in *Lee v. Washington*, in a per curiam opinion, held that mandatory racial segregation in jails was unconstitutional.[270]

VI. CONCLUSION

In major cities across the U.S., we have seen a rise in non-violent actions to protest police involved killings.[271] Over 1000 people have been arrested during non-violent demonstrations, while protesting the killings of Eric Garner,

[267] *Id*. at 1120-29.
[268] MICHELLE ALEXANDER, THE NEW JIM CROW 197 (2010).
[269] *Cooper v. Pate*, 378 U.S. 546 (1964).
[270] 386 U.S. 952 (1967)
[271] For example, protests after the death of Eric Garner lasted for days, *see* Pervaiz Shallwani, *300 Arrests After 2 Days of Eric Garner Protests, More Demonstrations Planned*, WALL ST. J. (Dec 5, 2014), http://www.wsj.com/articles/more-than-200-arrested-in-second-night-of-new-york-city-protests-1417792930. Protests after the death of Michael Brown spanned the country, see Dan Keating, Cristina Rivero and Shelly Tan, *A breakdown of the arrests in Ferguson,* WASH. POST (Aug. 21, 2014), http://www.washingtonpost.com/wp-srv/special/national/ferguson-arrests/(detailing the arrests after protests in Ferguson, MO); and, Associated Press, *159 arrested in Berkeley as protests continue over Eric Garner, Michael Brown grand jury decisions*, TIMES-PICAYUNE (Dec. 9, 2014), http://www.nola.com/crime/index.ssf/2014/12/berkeley_arrests_protest_eric.html (Describing protests in both Oakland, CA and Berkeley, CA in response to police involved shootings). Also, after the police involved shootings in St. Paul, MN and Baton Rouge, LA both cities saw large protest actions, Phil Helsel, Elisha Fieldstadt, Matthew Grimson, and The Associated Press, *Hundreds Arrested in Protests Over Police Shootings in St. Paul, Baton Rouge*, NBC NEWS (Jul. 10,2016), http://www.nbcnews.com/news/us-news/black-lives-matter-protests-span-country-fourth-day-n606556.

Michael Brown, Freddie Gray, and Laquan McDonald, Alton Sterling, and Philandro Castille.[272] The speeches of today mirror the speeches during the civil rights movement in the 1960s and 1970s: that criminal justice systems in many places were complicit in continuing civil rights abuses.[273]

The protests of today, like the civil rights protests, are linked to broader claims about the illegitimacy of the criminal justice system. In a sweeping policy platform, the Movement for Black Lives specifically targets the criminalization and incarceration of Black Youth.[274] Over 50 Black-led organizations, including the Black Youth Project 100, contributed to the development of the policy platform.[275] Many of the platform demands recall the Black Panthers' Party "Ten Point Program."[276] The platform demands, among other things, the demilitarization of law enforcement, an end to capital punishment, and significant overhauls of the conditions detention facilities.[277] Other Black-led movements have also questioned the legitimacy of current incarceration practices by focusing on police violence. Black Lives Matter activists Johnetta Elzie and DeRay McKesson are part of the planning team for "Campaign Zero," which advocates for limiting police intervention, improving community relations, and holding law enforcement accountable.[278] Protests

[272] *See* Shallwani, *supra* note 287; Dan Keating, Cristina Rivero and Shelly Tan, *supra* note 287; Natalie Neysa Alund, *Ferguson protest: 92 arrests in Oakland during 2nd night of looting, vandalism*, MERCURY NEWS (Nov. 26,2014), http://www.mercurynews.com/crime-courts/ci_27016139/ferguson-protest-oakland-cleans-up-after-2nd-night; Associated Press, *supra* note 287; Patrick M. O'Connell , Grace Wong and Tony Briscoe, *4 arrested in 2nd night of Laquan McDonald shooting protests*, THE CHICAGO TRIBUNE (Nov. 26, 2015), http://www.chicagotribune.com/news/local/breaking/ct-chicago-cop-shooting-laquan-mcdonald-protest-met-1126-20151125-story.html; Phil Helsel, Elisha Fieldstadt, Matthew Grimson, and The Associated Press, *supra* note 287; *21 Arrested Following March For Philando Castile,* WCCO (Jul 20, 2016), http://minnesota.cbslocal.com/2016/07/20/arrests-philando-castile-protests/; Juan Sanchez, *30 people arrested during Alton Sterling protest in Baton Rouge*, WDSU (Jul 9, 2016), http://www.wdsu.com/news/local-news/new-orleans/30-people-arrested-during-alton-sterling-protest-in-baton-rouge/40435214.

[273] *See* CAMPBELL, *supra* note 272, at 177 (describing how "local courts [] upheld the use of injunctions, trespass, and breach of peace charges to police civil rights demonstrations.").

[274] The Movement for Black Lives, "A Vision for Black Lives: Policy Demans for Black Power, Freedom and Justice," 5-7 (Aug. 1, 2016) https://policy.m4bl.org/wp-content/uploads/2016/07/20160726-m4bl-Vision-Booklet-V3.pdf

[275] Movement for Black Lives, "About Us," https://policy.m4bl.org/about/

[276] Vann R. Newkirk, *The Permanence of Black Lives Matter*, THE ATLANTIC (Aug. 3, 2016). http://www.theatlantic.com/politics/archive/2016/08/movement-black-lives-platform/494309/

[277] Movement for Black Lives, *supra* note 274 at 6-7.

[278] Campaign Zero, http://www.joincampaignzero.org/#vision

today have targeted police stations,[279] city government offices,[280] and police union offices[281] among others.

But today's protesters face a demonstrably different doctrinal landscape, should they protest within the prison or jail walls. While the content of speech by a "Black Lives Matter" activist may not change, the constitutional protection afforded to that speech will be radically different depending on where she speaks. And that difference may in fact be linked to racial fears of the past.

[279] Lolly Bowean, *Protesters chain themselves together in front of Chicago police station*, CHIC. TRIB., July 21, 2016, http://www.chicagotribune.com/news/local/breaking/ct-black-lives-matter-march-lawndale-police-strategies-20160720-story.html

[280] City New Service, *Protesters ordered out of Los Angeles City Hall East continue vigil*, L.A. Daily News, Aug. 16, 2016 http://www.dailynews.com/general-news/20160816/protesters-ordered-out-of-los-angeles-city-hall-east-continue-vigil

[281] Kelly Weill, *Black Lives Matter Activists Take on a New Foe: Police Unions*, The Daily Beast (July 21, 2016), http://www.thedailybeast.com/articles/2016/07/21/black-lives-matter-activists-take-on-a-new-foe-police-unions.html