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ARTICLE

Prison Grievance Creep

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Abstract. The prison grievance regime is a quagmire. Civil rights literature and prison law scholarship have largely focused on the procedural impact of this regime, which has grown in the shadow of the Prison Litigation Reform Act's (PLRA) exhaustion mandate. When an incarcerated person endures abusive conditions, they must first file an administrative grievance with prison authorities and navigate the prison's complex labyrinth of procedural requirements before seeking relief in federal court. Because a single misstep can close the courthouse doors to incarcerated litigants, the PLRA—and the procedural critiques it has generated—has taken center stage when assessing the profound barriers the prison grievance regime poses to civil rights enforcement.

This Article redirects the spotlight to expose a different malignancy. The prison grievance regime operates not only as a procedural shield for prisons but also as a substantive weapon. Tracing the history and progeny of the Supreme Court's decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, this Article explores what it terms "prison grievance creep": the doctrinal intrusion of prison grievances into constitutional rights-making and remedies in prison. Even when incarcerated litigants overcome the PLRA's exhaustion requirement and reach the merits of their civil rights claim, the prison grievance reemerges to curtail their pursued right.

This Article is the first to theorize and examine this phenomenon. It outlines the evolution of prison grievance creep and explains how grievances have crept into, and significantly undermined, First Amendment and *Bivens* rights enforcement in custody. This analysis

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uncovers a critical pitfall in civil rights jurisprudence that further insulates prisons from accountability. By deconstructing the myths used to justify this creep, this Article offers a foothold to dismantle the creep's underpinnings.

Table of Contents

Introduction

On October 29, 1970, the people incarcerated in California's Folsom State Prison presented a "Manifesto of Demands and Anti-Oppression Platform" to the warden.[1] This collective resistance was itself transformational: The Manifesto's organizers overcame the segregation, isolation, and dehumanization of prison to reach for united liberation. "We the imprisoned men of Folsom Prison," the Manifesto began, "seek an end to the injustice suffered by *all* prisoners."[2] They issued twenty-nine demands to transform the criminal punishment system: In addition to seeking improved prison conditions, they pursued freedom for political prisoners, an end to indeterminate sentencing, the eradication of racism, and the protected right to form labor unions.[3] Central to the demands was an appeal to protect organized protest by "end[ing] the persecution and punishment of prisoners" who assemble in "peaceful dissent."[4]

Five days later, the Folsom prison strike began.[5] Nearly everyone in the prison participated in the work stoppage, which its organizers described as a "unified effort[]" to advocate for the Manifesto's demands.[6] It was an extraordinary demonstration of solidarity.[7] But tragically, as the Manifesto predicted, prison authorities "unleashed a reign of terror" against the people in their custody for the audacity of peaceful dissent.[8] Nineteen days after it began, the Folsom prison strike came to a violent and repressive end.[9]

Legal scholars have recounted the important history of the Folsom prison strike, one of the most significant prison strikes in American history.[10] Recently, Justin Driver and Emma Kaufman identified the Folsom Manifesto as

1. *See Prisoners in Rebellion: The Folsom Prisoners Manifesto*, *in* IF THEY COME IN THE MORNING: VOICES OF RESISTANCE 65, 67-68 (Angela Y. Davis ed., Verso 2016) (1971).
2. *Id.* at 68 (emphasis added) (capitalization altered).
3. *See id.* at 68-74 (reproducing the Folsom Manifesto in full).
4. *Id.* at 70.
5. *Id.* at 66-67.
6. *Id.* at 66, 68 (observing that 2,100 of the 2,400 people incarcerated in Folsom Prison participated in the strike).
7. *See* Frank Browning, *Organizing Behind Bars*, RAMPARTS, Feb. 1972, at 40, 41.
8. *See Prisoners in Rebellion: The Folsom Prisoners Manifesto*, *supra* note 1, at 66; *see also* DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF *JONES V. NORTH CAROLINA PRISONERS' LABOR UNION* 111 (2012) (detailing the brutality and violence of the prison authorities' response).
9. *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 518 (2021).
10. *See id.* at 518-19.

a lodestar that "anticipated the birth of constitutional prison law."[11] But even if the Manifesto presaged the contours of prison civil rights litigation, its imagination did not end with the courthouse. The Manifesto's authors understood that their oppression was not due solely to prison overcrowding or guard brutality, and they recognized that overcoming their subjugation would require collective action.[12] The Folsom prison strike organizers thus sought to reach past the prison's walls with a unified voice to transform not only the carceral system, but also the very status of their exclusion.

The "radical political consciousness" reflected in the Manifesto's collective agency found renewed life even after the strike ended.[13] It was the motivating spark for the first formal incarcerated people's union[14] in the United States.[15] From this initial flame, a movement flourished. Although these incarcerated-led associations referred to themselves as "labor unions,"[16] they transcended a labor

11. *See id.* at 519 (observing that incarcerated people went on to litigate some of the Manifesto's demands in federal court, where they achieved some initial, qualified successes in judicially enforcing their constitutional rights).

12. *See Prisoners in Rebellion: The Folsom Prisoners Manifesto*, *supra* note 1, at 65.

13. *See id.*

14. Commentators have described these associations with terms like "prisoners' unions." *See, e.g.*, Ronald Huff, *The Development and Diffusion of Prisoners' Movements*, PRISON J., Oct. 1975, at 4, 4 (using the term "prisoners' union"); Sidney Zonn, Comment, *Inmate Unions: An Appraisal of Prisoner Rights and Labor Implications*, 32 U. MIAMI L. REV. 613, 614 (1978) (using the term "inmate union"). I choose to identify them as "incarcerated people's unions," which uses people-first language to highlight the humanity of those who are incarcerated.

15. *See* TIBBS, *supra* note 8, at 111-12 ("The end of the Folsom Prison strike officially marked the beginning of the Prisoner Union Movement in the United States."); *id.* at 112-13 (explaining that the United Prisoner Union, "the first prisoner union in the United States," formed "[i]n the months immediately following the Folsom strike"). *See also infra* note 44 and accompanying text (providing a brief history of the union).

16. A brief note on language: An association "refers to various types of combination or joining together for some special purpose," and it can "encompass a vast and diverse category of social organization." Grace Li, *Associations in Prison*, 13 U.C. IRVINE L. REV. 1119, 1124-25 (2023). One type of association in prison is an incarcerated people's union. Because these associations often referred to themselves as "unions," the terms "unions" and "associations" are used interchangeably throughout this Article. This Article does not analyze these associations as traditional labor unions or address the labor law implications of such treatment. For a sample of such scholarship, see, for example, Susan Blankenship, *Revisiting the Democratic Promise of Prisoners' Labor Unions*, STUD. L. POL'Y & SOC'Y, 2005, at 241, 247-54 (explaining how a prison union could operate democratically by using the United Electrical, Railroad, and Machine Workers' union as a model); Sarah M. Singleton, Note, *Unionizing America's Prisons—Arbitration and State-Use*, 48 IND. L.J. 493, 493-96 (1973) (arguing that incarcerated people, as public employees, have the right to join or form a union); Keith Armstrong, Comment, *"You May Be Down and Out, but You Ain't Beaten": Collective Bargaining for Incarcerated Workers*, 110 J. CRIM. L. & CRIMINOLOGY 593, 596 (2020) (arguing that incarcerated people's unions should look to applicable state labor laws); and Kara Goad, Note, Columbia University *and Incarcerated*

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focus by also challenging the broader harms of criminalization, carceral dehumanization, and societal exile.[17] By joining communities across and beyond prison walls, they hoped to collectively shift power and design new modes of social and political life. In the few years these unions were permitted to take root, they thrived.[18]

But as the momentum for incarcerated people's unions grew, so did the responding backlash. The movement ultimately came to a standstill with the Supreme Court's intervention in *Jones v. North Carolina Prisoners' Labor Union, Inc.*[19] There, the Court held that prohibitions on mass organizing by the North Carolina Prisoners' Labor Union (NCPLU)—which included bans on NCPLU solicitation, bulk-mailings, and meetings—did not violate the union's First Amendment rights.[20] *Jones* empowered prison authorities to fashion overwhelming barriers to associational organizing within prisons, and the movement for incarcerated people's unions never fully recovered.[21]

Commentators have rightly criticized the near-limitless amount of deference that *Jones* afforded to prison officials when those officials restrict First

Worker Labor Unions Under the National Labor Relations Act, 103 CORN. L. REV. 177, 193-95 (2017) (asserting that the right to unionize in prisons should exist within the National Labor Relations Act).

17. *See* Zonn, *supra* note 14, at 623. Though assessing whether incarcerated people's unions were properly categorized as labor unions is beyond the scope of this Article, it is important to observe that labor unions also engage in broader advocacy and collective, democracy-enhancing work. *See, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 15-18, 104-07 (1984) (observing that labor unions provide a collective "voice" that not only empowers collective bargaining with employers, but also builds capacity to exert public pressure and engage in a broader democratic process).

18. *See infra* Part I.

19. 433 U.S. 119 (1977).

20. *Id.* at 129-33.

21. This is not to say that incarcerated people's unions disappeared overnight. The courage and leadership of incarcerated organizers persisted. For example, the Texas Prison Labor Union formed in 1995 to "promote social justice, human rights, and workers' rights." *Texas Prison Labor Union*, PRISON LEGAL NEWS (May 15, 1998), https://perma.cc/YG4F-WT9U. Three years later, the Missouri Prison Labor Union emerged to "recognize[] the inherent dignity and inalienable rights" of all incarcerated people. *See The Missouri Prison Labor Union Mission Statement*, OFF THE HOOK (Mo. Prison Lab. Union, St. Louis, Mo.), Winter 2003, at 2 (on file with the *Stanford Law Review*). And more recently, the Incarcerated Workers Organizing Committee—a labor union for incarcerated people—helped organize nationwide prison strikes in 2016 and 2018. *See* Nicole Lewis, *What's Really Happening with the National Prison Strike?*, MARSHALL PROJECT (Aug. 24, 2018, 4:32 PM EDT), https://perma.cc/9JGM-PWST; Daniel A. Gross, *An Inside Account of the National Prisoners' Strike*, NEW YORKER (Sept. 6, 2018), https://perma.cc/8CNC-QGKQ. But this courage stands against the realities of severe repression, which can be fatal to the continued vitality of these associations.

Amendment rights and impede prison protests.[22] Especially illuminating is Andrea C. Armstrong's examination of the racialized context and fears animating the decision.[23] But the literature fails to fully appreciate a different aspect of *Jones*: the Court's reliance on the prison grievance system to displace the enforcement of constitutional rights.[24]

A prison grievance is an individual administrative complaint made to prison authorities regarding prison conditions.[25] In *Jones*, the Court reasoned that First Amendment protections for the NCPLU were largely unnecessary because the prison-controlled grievance process provided a "presumably effective path" for communicating concerns to prison officials.[26] The Court uplifted the prison grievance as a surrogate for exercising a constitutional right without considering its many deficiencies, and it used this false equivalency to constrict the rights of incarcerated-led associations in prison.

Jones opened the door to what I call the "prison grievance creep," the doctrinal intrusion of prison grievances into constitutional rights-making and remedies in prison. In *Jones*'s shadow, this administrative remedy has spread its reach to successfully dismantle broader categories of civil rights enforcement in confinement. What began in *Jones* as a narrowing principle for the free speech and associational rights of incarcerated people's unions has expanded well beyond the four corners of the opinion. Post-*Jones*, the prison grievance has transformed into a critical ingredient of First Amendment prison law that can

22. *See* Li, *supra* note 16, at 1178-81; Note, *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1508-09 (2019) (observing that lower courts have rejected a right to strike in prison by citing or discussing *Jones*); Nicole B. Godfrey, *"Inciting a Riot": Silent Sentinels, Group Protests, and Prisoners' Petition and Associational Rights*, 43 SEATTLE U. L. REV. 1113, 1135-39 (2020); Regina Montoya & Paul Coggins, Case Comment, *The Future of Prisoners' Unions:* Jones v. North Carolina Prisoners' Labor Union, 13 HARV. C.R.-C.L. L. REV. 799, 823-26 (1978) (remarking that although the reach of *Jones* is "unclear," it suffers from the "fundamental error" of placing a critical First Amendment right at the discretion of prison authorities); Lois M. Traub, Comment, Jones v. North Carolina Prisoners' Labor Union*: A Threat to Unionization in Prisons*, 4 NEW ENG. J. ON PRISON L. 157, 163-64 (1977); Zonn, *supra* note 14, at 634.

23. *See* Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW. L.J. 221, 248-57 (2016).

24. Two important contributions on this topic include TIBBS, note 8 above, at 147-48, which provides a history of the relationship between the prison grievance commission and the NCPLU, as well as Amanda Bell Hughett, *A "Safe Outlet" for Prisoner Discontent: How Prison Grievance Procedures Helped Stymie Prison Organizing During the 1970s*, 44 LAW & SOC. INQUIRY 893, 895 (2019), which argues that prison grievance procedures "made it easier for federal judges to justify limitations on prisoners' First Amendment rights to free speech and association." This Article contributes to the literature by tracing the doctrinal creep of prison grievances into and beyond First Amendment jurisprudence. This Article uncovers the creep's evolution by examining its initial emergence in *Jones* and exploring its migration into other dimensions of prison law.

25. *See* Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1149-50 (2023).

26. Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 130 n.6 (1977).

operate to quell any dissent behind bars, whether individual or collective. In a lateral move into substantive doctrine, the prison grievance has also migrated into *Bivens*,[27] an implied cause of action to pursue monetary damages against federal officers for constitutional violations.[28] Prison grievances have therefore escaped the borders of First Amendment jurisprudence to erode a broader swath of constitutional rights for people held in federal custody. This Article situates *Jones* as an inception point to not only study the origins of this creep, but also to follow the creep's evolution as it expands and migrates into these two dimensions of prison law.

In so doing, this Article—as the first to theorize and investigate the prison grievance creep—contributes to three ongoing conversations. First, this Article unveils a significant malignancy of prison grievance systems. The prison grievance regime is not only a procedural shield for prisons—it is also a *substantive* weapon that prisons can wield to evade accountability. Recognizing this under-explored dimension of prison grievances provides a more thorough diagnosis of its harms and offers a more complete consideration of needed reforms.

Much of the robust legal scholarship assessing the prison grievance system analyzes it as a procedural impediment in the shadow of the Prison Litigation Reform Act (PLRA) and its exhaustion mandate,[29] which demands "proper exhaustion"—that is, full compliance with the system's deadlines and rules—

27. *See infra* Part III.

28. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-91 (1971).

29. *See* 42 U.S.C. § 1997e(a) (requiring exhaustion). For an illustrative (but not an exhaustive) list of works, see generally Yang, note 25 above, at 1165 (interrogating the prison's capacity to amend grievance rules to make exhaustion more difficult); KITTY CALAVITA & VALERIE JENNESS, APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC (2015) (studying the prison grievance system in California state prisons); 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, 141, 147-48 (2008) (arguing that the PLRA's exhaustion provision, among others, "obstructs rather than promotes constitutional oversight of conditions of confinement"); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1798-99 (2003) (challenging the imposition of a procedural default into the PLRA's exhaustion regime); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1634, 1658 (2003) (discussing the procedural limitations of the PLRA and providing an empirical analysis of its impact on prison litigation); John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 429-31 (2001) (arguing that the PLRA's procedural rules, including its exhaustion provision, invoke "the new face of court stripping"); Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORN. L. REV. 483 (2001) (exploring the application of PLRA exhaustion to incarcerated plaintiffs who seek monetary relief); and Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1206 (2020) (theorizing how the PLRA manifests procedural animus against incarcerated people).

before an incarcerated plaintiff can challenge any aspect of prison life in federal court.[30] Each prison system defines its own grievance process,[31] an administrative design that empowers prisons to impose oppressive and Kafkaesque rules which, in turn, successfully impede incarcerated people's access to the federal courts.[32] PLRA exhaustion understandably takes center stage in the common critiques of and recommended changes to prison grievance systems, which often include legislative amendments to the Act.[33] This Article's investigations demonstrate the insufficiency of such reforms. Even in a world where advocates succeed in repealing PLRA exhaustion, grievance systems could still permit civil rights abuses to persist within prisons without recourse.

Second, by examining the intertwined history of prison grievances and prison organizing, this Article also uplifts a critical history of collective resistance that denaturalizes the repressive status quo of prison law. Studying these experiences answers calls for legal scholars to learn from the wisdom of subordinated communities to unearth possibilities for transformative reform.[34] The goals, strategies, and successes of prison organizing reflect an "alternative arc[] of history," one disregarded by legal doctrine and administrative structures, that offers "revelatory[] ways of thinking about law, the state, and justice."[35]

30. Woodford v. Ngo, 548 U.S. 81, 84, 91, 93 (2006).

31. Jones v. Bock, 549 U.S. 199, 218 (2007). When I reference *Jones* throughout this Article, I am referring to *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

32. *See* Driver & Kaufman, *supra* note 9, at 552 (describing the "byzantine" and "complex" nature of the grievance process). For example, prisons can impose strict and unforgiving time requirements for submitting a grievance. *See, e.g.*, Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 324 (2022) (discussing the "short filing deadlines of prison grievance procedures"). Other "fatal" trivial mistakes include attaching hand-copied documents rather than the required photocopied documents when the prison's photocopier is broken, sending the grievance to the "Inmate Appeals Branch" rather than the designated "appeals coordinator," or placing multiple grievances into a single envelope in lieu of separately mailing each one. David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2044 (2018).

33. By contrasting my commentary from the preexisting procedural literature on prison grievance exhaustion, I do not mean to silo substantive critiques from procedural ones. Procedural rules, after all, are "instrument[s] of power" that can subvert substantive rights. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010). One need look no further than PLRA exhaustion to understand the devastating substantive outcomes of procedural obstructions. For a more robust discussion on proposed procedural reforms, see Part II.C below.

34. *See, e.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (urging legal scholars to "[l]ook[] to the bottom" and adopt the perspectives of those who have directly experienced discrimination or oppression in order to "fathom[] the phenomenology of law and defin[e] the elements of justice").

35. *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 859-60 (2021) (discussing how "[m]ovement law shifts the focal point of legal studies by centering the epistemes and histories of social movements").

Third, this Article's examination of the prison grievance creep confronts and questions the prison myths advanced by the courts. Myths have actively shaped our (mis)perception of carceral punishment—commentators have observed how myths about carceral intent,[36] prison life,[37] and incarcerated people[38] have invaded regulatory frameworks and legal doctrine to legitimize the institution of imprisonment. Examining the inception and development of the prison grievance creep contributes to this important study of prison mythology.

Through *Jones*, the Court promoted an inaccurate generalization about prison organizing—and paired this depiction with an inflated claim about prison grievances—to retract constitutional protections.[39] And through the doctrinal creep that has followed, federal courts have continued to mythologize the prison grievance as an effective alternative to both protest and federal rights enforcement. This Article recognizes, contextualizes, and deconstructs this mythic prison grievance to offer a foothold to dismantle the creep's underpinnings.

The Article proceeds as follows. Part I discusses the *Jones* opinion and scrutinizes its reliance on the prison grievance system as a substitute for the collective advocacy of incarcerated organizers. Central to this discussion is the movement history of prison organizing that preceded *Jones*, which emphasizes the shortcomings of the Court's mythmaking about the prison grievance as a viable alternative to incarcerated people's unions.

Part II outlines the emergence of the prison grievance creep. I illustrate how the prison grievance grew beyond the limited confines of *Jones* to transform into a key component of First Amendment prison law that silences dissent during confinement. I then unearth critical limitations of prison grievances that expose the remedy's inability to reach outside audiences or embrace collective agency, two key components of prison organizing highlighted in the movement history of Part I. This design renders the prison grievance an inadequate—and indeed, harmful—surrogate for vital speech and associational rights in prison.

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36. *See, e.g.*, Driver & Kaufman, *supra* note 9, at 559 (discussing the myth of rehabilitation).

37. *See, e.g.*, *id.* at 542-48 (discussing contradictory myths regarding the violence of prison life); Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 3-20 (2010) (discussing how myths about sexual violence in prison portray male prisoners of color as inherently violent figures requiring carceral intervention, and how these myths further "serve[] to justify the exemption of prisons from the rule of law").

38. *See, e.g.*, Elizabeth Langston Isaacs, *The Mythology of the Three Liars and the Criminalization of Survival*, 42 YALE L. & POL'Y REV. 427, 449-50, 486-87 (2024) (discussing three myths regarding incarcerated survivors of domestic violence and the impact these myths have on sentencing reform); Jonathan Simon, *Prisoners of Myth*, 56 NEW ENG. L. REV. 23, 26 (2021) (outlining four myths regarding incarcerated people: the myths of the "penal debtor," the "vagrant," the "dangerous degenerate," and the "disorderly").

39. *See infra* Part I.C.

Part III builds on this examination by identifying a second creep that has evolved in *Jones*'s shadow. I explain how the prison grievance has migrated beyond the First Amendment to intrude into *Bivens*, which has eroded the broader enforcement of constitutional rights for those confined in federal custody. A descriptive history of this evolution emphasizes the harms of displacing *Bivens* liability with an administrative remedy that often fails to deter misconduct. And by studying the creep's elasticity, this Part demonstrates the potential double layering of the creep's operation.

Finally, Part IV briefly considers a few proposals to address the harms of the prison grievance creep. Though it may be tempting to accept piecemeal reforms focused on harm mitigation, studying the development of this creep and the movement history that preceded it exposes the malignancy of a continued reliance on prison grievances. This Part ends by contemplating how we might move beyond the prison grievance and its subordinating impacts.

I. *Jones* as Prologue

A study of *Jones* is underdeveloped without first outlining the movement organizing from which it grew. This Part begins with a brief history of the collective prison organizing that preceded *Jones*, which provides a critical backdrop to the NCPLU's creation, the prison's retaliatory reaction, and the resulting litigation. Threaded throughout the litigation history of *Jones* is the prison's—and later, the Court's—invocation of prison grievances to curtail the growing power of incarcerated people's collective agency. This examination highlights the substantial distance between the prison mythmaking advanced by the Court and the realities of both prison organizing and prison grievances. These assumptions explain how *Jones* introduced the underpinnings of the prison grievance creep, and understanding the falsity of these myths highlights the gravity of what was lost in the aftermath of *Jones*.

A. The Stolen Promise of Incarcerated People's Unions

The NCPLU was not the first incarcerated people's union to form. Indeed, as early as 1888, incarcerated people inside the Michigan State Penitentiary engaged in collective action by forming a self-governing "Mutual Aid League" that successfully held monthly meetings with the Warden to voice critiques and concerns.[40] But there were various overlapping influences in the 1960s and 1970s that catalyzed a renewed surge in prison organizing: the civil rights

40. *See* J.E. Baker, *Inmate Self-Government*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 39, 40 (1964).

movement, the Black Power movement, and a swell in labor unionism.[41] Many prison protests in the late 1960s[42] culminated in the nineteen-day Folsom prison strike in 1970, which sparked the creation of the first formal incarcerated people's union in the United States.[43] The resulting Prisoners' Union (PU)[44] in California sought to abolish indeterminate sentencing, restore civil and human rights to incarcerated people, and create wage and workplace protections.[45] Within a few months of its formation, thousands of people in prisons nationwide applied for PU membership.[46]

Following the PU's successes, the early 1970s witnessed a groundswell of incarcerated people's unions. In the summer of 1971, a union was formed at New York's Green Haven Prison[47] that focused on workplace protections as well as the advancement of its members' "political, social and cultural" interests.[48] In 1972, a union at Rhode Island's Cranston Prison sought to abolish prisons, eliminate pre-trial detention, implement alternatives to imprisonment, create a

41. *See* DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 3, 185 (2014) (noting all three influences); TIBBS, *supra* note 8, at xvii (noting the influence of the civil rights movement and the Black Power movement); ORISANMI BURTON, TIP OF THE SPEAR: BLACK RADICALISM, PRISON REPRESSION, AND THE LONG ATTICA REVOLT 3 (2023) (analyzing the Black radical and revolutionary struggle that emerged in New York prisons in the early 1970s). As Donald Tibbs observed, the Black Power movement in particular "became fertile soil to plant the seeds of resistance to American prison culture," and "[t]he outcome was the formation of a national prisoner union movement" that sought to "radically alter prisoners' rights." TIBBS, *supra* note 8, at xvii.

42. For example, in 1968, 2,600 people incarcerated in California's San Quentin prison went on strike to demand parole reform, humane living conditions, and increased wages for their labor. *See* BERGER, *supra* note 41, at 84-85. In 1970, the incarcerated population at San Quentin organized another strike that outlined similar demands. *Id.* at 2-3.

43. *See supra* notes 14-15 and accompanying text.

44. The union, which adopted its constitution in January 1971, was originally named the United Prisoner Union (UPU). TIBBS, *supra* note 8, at 112. However, later that year, disagreements about tactics and platforms resulted in a splintering of the union. *Id.* at 123. The newly formed PU continued the original path of the UPU, while the UPU changed its direction. *Id.* Because the PU continued the UPU's trajectory and achieved a larger membership base in both size and geographic scope, I focus my brief description of history on the PU and use this name to avoid confusion. For a deeper discussion of the political differences between the UPU and the PU, see TIBBS, note 8 above, at 123-24; and BERGER, note 41 above, at 186-87.

45. *See* Prisoners' Union, Informational Pamphlet 2 (n.d.), https://perma.cc/67XT-G3QA. The initial structure of the PU was intended to provide some control to formerly incarcerated members because they were less vulnerable to direct retaliation by prison administrators and could, on a tactical level, push more effectively in negotiations. Huff, *supra* note 14, at 11.

46. TIBBS, *supra* note 8, at 124.

47. Goodwin v. Oswald, 462 F.2d 1237, 1239 (2d Cir. 1972).

48. *See* Paul R. Comeau, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFF. L. REV. 963, 975 (1972); Emanuel Perlmutter, *Prisoners' Union Formed Upstate*, N.Y. TIMES, Feb. 8, 1972, at 1.

minimum wage for incarcerated workers, obtain funds to provide financial support upon release, and incorporate genuine input by incarcerated people in the construction of new penal institutions in the state.[49]

The next union to form was the NCPLU, which emerged in March 1973.[50] Envisioning itself as a "prison reform organization,"[51] its principal aim was to achieve unity among its incarcerated members and, as a collective, identify and remedy critical issues related to their incarceration and post-carceral life.[52] NCPLU membership grew to include over 2,000 members in forty different prison units throughout North Carolina.[53] Jim Grant, a member of the Charlotte Three[54] and an organizer with the NCPLU, explained that there were many issues regarding the criminal punishment system that required transformative change.[55] As he observed, "[w]e felt that we should be the ones to make decisions about those types of things."[56]

The NCPLU was interested in pursuing changes both within and beyond the prison system. The union sought to eradicate the prison's racial division and discrimination[57] and hoped to remedy prison labor abuses by securing wages and other labor protections.[58] The NCPLU also worked toward decarceral goals (such as the abolition of indeterminate sentencing) as well as expanded resources for people reentering society after release.[59] If "free citizens" had access to

49. *See* TIBBS, *supra* note 8, at 155-56; Nat'l Prisoners Reform Ass'n v. Sharkey, 347 F. Supp. 1234, 1236 (D.R.I. 1972).

50. TIBBS, *supra* note 8, at 135.

51. *See* Brief for Appellee, Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119 (1977) (No. 75-1874), 1976 WL 181714, at *6. In fact, the NCPLU clarified that its corporate name, which included the term "labor union," was a "misnomer" and that it did not identify itself as a "true 'labor union.'" *See* N.C. Prisoners' Lab. Union, Inc. v. Jones, 409 F. Supp. 937, 940 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977).

52. TIBBS, *supra* note 8, at 135-36, 139.

53. Brief for Appellee, *supra* note 51, at *7.

54. "The Charlotte Three" were three young Black political activists who were convicted of arson and "harsh[ly]" sentenced following a trial that was "marred by prosecutorial misconduct" and "thin" evidence. *See* Eric L. Muller, *The Fellowships at Auschwitz for the Study of Professional Ethics and the Moral Formation of Lawyers*, 64 J. LEGAL EDUC. 385, 397 (2014).

55. *See* Jonathan Michels, *'The Most Violently Exploited Group in America': Incarcerated Workers*, SCALAWAG MAG. (June 19, 2018), https://perma.cc/DX5T-N6DU (transcribing an interview with Jim Grant).

56. *Id.*

57. Jonathan Michels, *Unions Are Needed Everywhere—Especially Prisons*, SCALAWAG MAG. (July 5, 2018), https://perma.cc/J976-ZFTT (transcribing an interview with Robbie Purner, an NCPLU organizer); *see* Affidavit of Carl L. Williams app. at 168, Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119 (1977) (No. 75-1874).

58. TIBBS, *supra* note 8, at 139.

59. *See id.* at 136, 139.

unemployment benefits, the NCPLU reasoned, then so should an incarcerated person "who has been a continuous state employee" due to their confinement.[60]

To achieve such changes, the NCPLU planned to adopt a multi-pronged approach. First, the union hoped its advocacy could reach the legislature: It sought to galvanize public support to influence legislation and policy.[61] Internally, the NCPLU planned to bargain collectively for changes within the prison, and it hoped to create its own grievance council (modeled after those used by labor unions) that would address individual and collective grievances regarding prison conditions.[62] If prison officials refused to uphold the council's decisions, incarcerated union members could then turn to other forms of advocacy, including a strike, to pursue resolution.[63] Finally, the NCPLU sought to leverage legal mobilization to identify systemic or structural concerns. The union would serve as a clearinghouse for individual complaints, and where patterns emerged, issues could be compiled into class action lawsuits or other forms of collective advocacy.[64] Although the NCPLU placed its incarcerated leadership at the center of all decisionmaking, the association would not work alone. The union utilized inside-outside collaborations to advance its goals: Outside organizers, paralegals, and attorneys became key allies to the union.[65]

The NCPLU was not the last union to form behind bars. More than 11,000 incarcerated people joined unions across seventeen states and the District of Columbia in the ensuing years.[66] These associations did not share identical

60. *Id.* at 139 (quoting N.C. PRISONERS' LAB. UNION, GOALS OF THE NORTH CAROLINA PRISONERS' LABOR UNION 1 (1974) (on file with the University of North Carolina at Charlotte)).

61. *See* Brief for Appellee, *supra* note 51, at *7.

62. Hughett, *supra* note 24, at 898-99.

63. *Id.* at 899.

64. *Id.*; *see also* Affidavit of Deborah G. Mailman app. at 162, Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119 (1977) (No. 75-1874) (explaining that the NCPLU agreed to "coordinate litigation" so that meritorious complaints could be represented by Mailman or other civil rights attorneys in the region).

65. *See* Jonathan Michels, *'Prisoners' Organizations Were Thought to Be Dangerous': Conversations with Organizers of the North Carolina Prisoners' Labor Union*, SCALAWAG MAG. (June 26, 2018), https://perma.cc/3CRX-WF5B (quoting a transcribed interview with Chuck Eppinette).

66. *See* TIBBS, *supra* note 8, at 156 (identifying such unions in Massachusetts, Maine, Michigan, Delaware, Wisconsin, Pennsylvania, Minnesota, and the District of Columbia); Singleton, *supra* note 16, at 501-02 (identifying additional unions in California, New York, and Ohio); BERGER, *supra* note 41, at 185-86 (identifying additional unions in Washington); C. Ronald Huff, *Unionization Behind the Walls*, 12 CRIMINOLOGY 175, 185 (1974) (identifying additional unions in Georgia, Kansas, Vermont, Rhode Island, and New Hampshire); Huff, *supra* note 14, at 14 (identifying a prison union movement in Oklahoma and New Jersey). While Lois Traub identified 11,400 union members in only seven states, Traub, *supra* note 22, at 157, and Donald Tibbs identified over 11,000 members in thirteen states, TIBBS, *supra* note 8, at 155, my

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structures because they were each responding to different needs in different prison systems,[67] but what united them was the need to redress "the problems of inmate powerlessness."[68] Government-controlled grievance procedures and ombudsmen were "failures" from which the movement for incarcerated people's unions grew.[69]

Prison authorities were frequently opposed to this collective organizing.[70] Extending power, however slight, to an incarcerated person was perceived as a dangerous reduction of the prison's authority,[71] and this dissension often

review of the literature reflects the presence of incarcerated people's unions in at least eighteen states. It is therefore possible (perhaps even likely) that the number of union members exceeded 11,000.

67. Huff, *supra* note 14, at 10 (noting there were no "pure types" of incarcerated people's unions).

68. *See* C. Ronald Huff, Joseph E. Scott & Simon Dinitz, *Prisoners' Unions: A Cross-National Investigation of Public Acceptance*, 4 INT'L J. CRIMINOLOGY & PENOLOGY 331, 332 (1976).

69. *Id.*

70. *See, e.g.*, Huff, *supra* note 66, at 186 (quoting a state correctional director following an eleven-day prison strike as saying, "Under no circumstances will I recognize [the prisoners'] so-called union"); Blankenship, *supra* note 16, at 245 (noting that "administrative and staff antagonism took a variety of forms"); B.E. Bergesen III, *California Prisoners: Rights Without Remedies*, 25 STAN. L. REV. 1, 48 (1972) (noting "it is clear" that California state prisons "would not presently agree" to prison unionization within their institutions); Elizabeth Alexander, *The New Prison Administrators and the Court: New Directions in Prison Law*, 56 TEX. L. REV. 963, 970 n.39 (1978) ("[Prison] [g]uards are often the most strident opponents of the recognition of inmate rights.").

71. *See, e.g.*, JOHN M. WYNNE, JR., NAT'L INST. OF L. ENF'T & CRIM. JUST., PRISON EMPLOYEE UNIONISM: THE IMPACT ON CORRECTIONAL ADMINISTRATION AND PROGRAMS 38-39 (1978) (observing that prison staff were dissatisfied by any decisions that tentatively "shift[ed] the balance of power in the institutions away from the prison employee and toward the prisoner"). Commentators have shared similar concerns about the dangers of permitting or expanding collective agency within prisons, and there are certainly risks that must be considered. *See, e.g.*, Huff, *supra* note 14, at 16 (noting that the formation of incarcerated people's unions could be "perceived as threatening by guards," which could result in "increas[ed] polarization" within the prison); Bert Useem & Michael D. Reisig, *Collective Action in Prisons: Protests, Disturbances, and Riots*, 37 CRIMINOLOGY 735, 737, 753 (1999) (explaining that the conditions of prison disturbances can be explained by "administrative-control theory," which posits that "[p]rison disorder is a product of weak, troubled, or otherwise ineffective management" permitting "illicit groups to flourish"). But commentators have also observed that the risks must be balanced against potential benefits. *See, e.g.*, Comeau, *supra* note 48, at 972 (noting the possibility that an incarcerated people's union could "reduce the heightened tensions and frustrations" within a prison given that in the labor context, "employer acceptance of and cooperation with labor organization[s] has resulted in a reduction of union militancy and the stabilization of industrial relations"); Vernon Fox, *Why Prisoners Riot*, FED. PROB., Mar. 1971, at 9, 13 (reasoning that "[s]ome type of inmate self-government" in prisons "could be helpful" because "[t]he constructive use of inmate leadership is an obvious way to avoid riots"); C. Ronald Huff, *The Prisoners' Union: A Challenge for State Corrections*, 48 STATE GOV'T 145, 149 (1975) (reasoning that incarcerated people's unions would "offer much greater certainty" of "regular communications of grievances," thereby "helping to

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transformed into concrete retaliation. Prison officials singled out union leaders and punished them with solitary confinement.[72] When incarcerated people joined these associations, prison officials harassed them or forcibly transferred them to other prisons.[73] And when union members had the opportunity to seek release from prison, their petitions were refused.[74]

Against this tide of opposition, and even in their nascent stages of development,[75] incarcerated people's unions achieved great success. In California, the PU's efforts helped lead to the abolition of indeterminate sentencing.[76] In Washington, an incarcerated people's union successfully negotiated a power-sharing agreement with prison authorities that lasted for three years.[77] Incarcerated representatives were even authorized to call meetings of union members, a power that many other prisons would contest as "an extreme threat."[78] A union in the federal Bureau of Prisons (BOP) repeatedly met with prison officials to discuss critical issues and successfully yielded policy changes, such as the institution and liberalization of a furlough policy for incarcerated people approaching release.[79] By 1975, officials in Rhode Island and Washington formally recognized the incarcerated people's unions in their state.[80]

* * *

prevent the outbreak of violence resulting from long-suppressed grievances which finally crystallize"). The question of how to structure associations within prisons to reasonably minimize threats of disorder is beyond the scope of this Article, but it offers an important reminder of the various considerations needed to build sustainable vehicles for change through collective action.

72. *See, e.g.*, Huff, *supra* note 66, at 187-88 (noting that several incarcerated union leaders in Ohio "were placed in 'administrative isolation' (a euphemism for 'the hole')").

73. Blankenship, *supra* note 16, at 245 (describing "harassment of union members in Ohio, New York and Michigan"); Huff, *supra* note 66, at 187 (observing a trend in California and Ohio of transferring incarcerated people who joined unions to other institutions).

74. *See, e.g.*, Huff, *supra* note 71, at 149 (explaining that prison officials use "divide and conquer" strategies to diminish the power of incarcerated people's unions, including "the denial of parole to inmate union leaders and activists").

75. While domestic incarcerated people's unions were in their "embryonic stages" into the mid-1970s, such organizations had already emerged across the Atlantic. *See* TIBBS, *supra* note 8, at 117-18.

76. *See* Brief of Prisoners' Union, Inc., as Amicus Curiae in Support of Appellees, Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119 (1977) (No. 75-1874), 1977 WL 189841, at *2. For a more detailed history of the move to replace indeterminate sentencing, see Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1230-44 (1998).

77. BERGER, *supra* note 41, at 185-86.

78. Howard Lesnick, *Grievance Procedures in Federal Prisons: Practices and Proposals*, 123 U. PA. L. REV. 1, 36 (1974).

79. *Id.* at 14-15.

80. Hughett, *supra* note 24, at 906.

Legal scholars have long noted the anti-democratic nature of our legal system, especially our criminal punishment system.[81] This "anti-democratic function[]" is especially heightened for incarcerated people,[82] who already "tend not to have much political power" as members of "race-class subjugated communities."[83] Indeed, it is difficult "to imagine a more anemic political group."[84] When "low-status or socially marginal citizens" are by design shut out of majoritarian processes for decisionmaking,[85] collective organizing and other forms of nonconventional advocacy become an essential vehicle for participation. The history of incarcerated people's unions reflects the urgency and need for creative advocacy behind bars. If prisons function as "laboratories of antidemocracy,"[86] then incarcerated people's unions provided a vital vision of how to resist and overcome these barriers.

Against the physical, social, and political marginalization of confinement, incarcerated people's unions offered a significant pathway toward transformational participation. These unions reimagined how incarcerated communities could relate to one another and uplift their own voices. They practiced "contestatory democracy": a vision of democratic governance in which those "subject to the domination of the state" can leverage "direct forms of agonistic contestation" to facilitate countervailing power.[87] And they redefined expertise by centering incarcerated people not as victims or subjects of study, but as "organic intellectuals" who should have a voice and agency.[88] The collective resistance designed by members of these associations aspired to not

81. *See, e.g.*, Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 806 (2021); Nikolas Bowie, Comment, *Antidemocracy*, 135 HARV. L. REV. 160, 172-74 (2021); Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 565; Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1598 (2017).

82. *See* Roberts, *supra* note 81, at 1598 (describing "the ways various aspects of the criminal justice system exclude black people from democratic participation," including disenfranchisement, damaging social networks, and reinforcing racist stereotypes).

83. *See* Simonson, *supra* note 81, at 850.

84. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1282 (2005).

85. *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1508 (2005).

86. Brandon Hasbrouck, *Prisons as Laboratories of Antidemocracy*, 133 YALE L.J. 1966, 1973 (2024).

87. Simonson, *supra* note 81, at 787 (emphasis omitted).

88. *See* Matsuda, *supra* note 34, at 325 (quoting ANTONIO GRAMSCI, *The Intellectuals*, *in* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 5 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1st ed. 1971)); *see also* Simonson, *supra* note 81, at 850-51 (explaining that "directly impacted" people who are "consistently excluded from most forms of public participation in the criminal legal system" should themselves be considered "experts" (emphasis omitted)).

only dismantle the prison industrial complex, but to also transform the very social structure of their marginalization.

As Orisanmi Burton has observed, the dominant approach to studying prison-based movements in academic scholarship is to focus myopically on formalized demands to improve conditions, but this reduction artificially "circumscribe[s] the horizon of incarcerated people's ambitions."[89] Studying the collective prison organizing of this time emphasizes the shortcomings of this mistaken approach. Incarcerated people's unions did seek to improve prison conditions—but more significantly, they sought to join and nourish communities across and beyond prison walls.[90] By shifting and redefining collective power, they hoped to design new modes of social and political life liberated from the dehumanization of the carceral state.[91] They created fertile ground for political education, dialogue, and solidarity that rejected the corrosive alienation of incarceration.[92] They looked to themselves and to each other to unearth new ways of thinking about the carceral state.[93] Their tactics were insurgent as well as extra-institutional. And from their conception, they planned sustained, interactive efforts to defy their imposed exclusion and challenge the legitimacy of the carceral state.

B. The NCPLU and the Prison's Retaliatory Reaction

The above backdrop informs the creation, theories of change, and tactics of the NCPLU. Indeed, when the NCPLU emerged in March 1973, very few avenues existed for incarcerated people to remedy individual or collective complaints. Although North Carolina did have a grievance process in its state prisons, it was considered informal and ineffective.[94] Incarcerated people could send written complaints to the prison superintendent, who could then ignore the communicated grievances.[95]

Such deficiencies were not unique. At the time, grievance mechanisms were known as "tedious and cumbersome process[es]" that were "uniformly slow" and seldom used given the suspected partiality of prison decisionmakers.[96] These

89. *See* BURTON, *supra* note 41, at 5.

90. *See id.*

91. *See id.*

92. *See* Li, *supra* note 16, at 1121 (observing that "associations within prisons serve varied purposes," including "the kinds of learning, thinking, expression, and growth that happens only in relationship with others").

93. *See* Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 59 (2022) (observing that incarcerated people "have initiated ambitious legal and conceptual strategies to reduce prison populations," what she calls "inside decarceral moves").

94. *See* Hughett, *supra* note 24, at 901.

95. *See id.*

96. Traub, *supra* note 22, at 164-65.

defects led some commentators to uplift the utility and potential benefits of incarcerated people's unions.[97]

In August 1974, over a year after the NCPLU's emergence, state officials unveiled a change to the prison's grievance procedure. The North Carolina General Assembly established an Inmate Grievance Commission (IGC) and a multi-step process for reviewing prison complaints, which included a series of appeals if an incarcerated person disagreed with the prison's response.[98] If the grievance resulted in a hearing, the incarcerated grievant could not choose their own legal representation—a prison employee was assigned to perform this responsibility.[99] After the hearing, the adjudicators submitted recommendations to the director of social rehabilitation, who then had fifteen days to accept, modify, or reject the proposals.[100]

The NCPLU was furious. Its members rightfully saw the IGC as "an administrative 'puppet'" that was "designed to keep them powerless and manipulate their right to unionize."[101] The NCPLU's concerns about the IGC were quickly confirmed. It was difficult for incarcerated people to gain access to the grievance forms required to initiate the process.[102] There were also widespread threats of retaliation: Prison officials informed the people in their custody that they would lose their honor grade status (thereby lengthening their sentence) or would be transferred to another prison (resulting in a decrease or prohibition of visits from loved ones) if they submitted a grievance.[103] Prison officials followed through on these threats.[104] Thurman Boykin, a person incarcerated in North Carolina at the time, observed that this grievance process transformed the prison into an inscrutable system that empowered prison

97. *See id.*; Montoya & Coggins, *supra* note 22, at 809 (concluding, in 1978, that "present nonunion grievance procedures are not adequate alternatives" for a prisoners' union); Huff et al., *supra* note 68, at 332 (stating that incarcerated people's unions "evolved from the failures of inmate advisory councils, ombudsmen, and government-controlled inmate grievance procedures").

98. TIBBS, *supra* note 8, at 144-45. The process first required people to submit their grievances to a satellite committee of five commissioners appointed by the governor. *Id.* at 145; Hughett, *supra* note 24, at 904. If the committee found no merit to the complaint, the incarcerated grievant could then petition the IGC senior official for review. TIBBS, *supra* note 8, at 145. If the committee determined that the grievance was "not wholly lacking in merit," there would be a hearing conducted before either a panel of three commissioners or an examiner. Hughett, *supra* note 24, at 904.

99. *See* Hughett, *supra* note 24, at 904.

100. *Id.*

101. *See* TIBBS, *supra* note 8, at 145. Norman Smith, a local legal aid attorney who helped advocate for the IGC's existence, received letters from members of the NCPLU criticizing him for "selling them out." Hughett, *supra* note 24, at 893, 903-04.

102. *See* TIBBS, *supra* note 8, at 149.

103. *Id.* at 148.

104. *See, e.g.*, *id.* at 149 (describing how two individuals were transferred the day after making verbal complaints at a Guilford County prison).

administrators and officials to exercise their powers with impunity.[105] NCPLU attorney Deborah Mailman similarly remarked: "If the lines of communication are open and methods for channeling grievances are as effective as Mr. David L. Jones swears them to be, there is no evidence of it to those outside of the Department of Corrections who receive the pleas and requests of inmates."[106]

Despite these deficiencies, David Jones (the then-Secretary of the North Carolina Department of Corrections) argued there was no need to collectively bargain with the NCPLU—and in fact, believed there was no longer any need for a union at all—because of the IGC's existence.[107] The department went even further to stall the union's growth. Though it did not expressly prohibit the existence of the NCPLU, the department passed regulations that did so implicitly: It censored all union-related mail from entering the prison, and inhibited incarcerated people from soliciting others and holding meetings.[108] This latter policy was not universally enforced—two other organizations within the prison, the Junior Chamber of Commerce and Alcoholics Anonymous, were permitted to hold meetings—but it very effectively restricted the NCPLU.[109]

The NCPLU fought back. On March 18, 1975, the NCPLU filed a complaint seeking monetary damages and injunctive relief for violating multiple constitutional rights, including the right to association and assembly, freedom of speech, and equal protection.[110] But just one week after the NCPLU filed its complaint, the department issued another policy. This new promulgation recognized the IGC's grievance procedures as the "only formally authorized method of handling inmate grievances."[111] It also forbade any prison employees from negotiating with an incarcerated people's union or permitting any such organization to hold meetings or assemble on prison property.[112]

For a moment in time, the NCPLU succeeded in defending its constitutional rights. A three-judge panel heard the case and granted the union's request for preliminary injunctive relief.[113] The panel disregarded the defendants'

105. *Id.* at 148.

106. Affidavit of Deborah G. Mailman, *supra* note 64, app. at 158.

107. TIBBS, *supra* note 8, at 144.

108. *Id.* at 153-54. *See generally* Complaint and Motion for Preliminary Injunction, Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119 (1977) (No. 75-1874) (outlining allegations of the prison's censorship and prohibitions of union-related activities).

109. *See* Complaint and Motion for Preliminary Injunction, *supra* note 108, app. at 3-4; *see also* TIBBS, *supra* note 8, at 154 (referring to the Junior Chamber of Commerce by another name, the "U.S. Junior Chamber").

110. *See* Complaint and Motion for Preliminary Injunction, *supra* note 108, app. at 8-9.

111. *See* Affidavit of David L. Jones app. at 122, *Jones*, 433 U.S. 119 (No. 75-1874).

112. TIBBS, *supra* note 8, at 162.

113. The "three-judge [d]istrict [c]ourt convened pursuant to 28 U.S.C. §§ 2281 and 2284." *See Jones*, 433 U.S. at 123-24.

argument that the NCPLU's "very existence" created a threat to security.[114] It also did not adopt the defendants' position that "already established procedures for the channeling of grievances," namely the IGC, helped justify the prohibitions.[115] The panel instead observed that incarcerated people retain the First Amendment right to "talk about any subject of interest to them that does not conflict with [a prison system's] legitimate penological objectives."[116] And it noted that in a system that permitted membership in a union (as North Carolina did), there could be no substantial governmental interest in suppressing expression about a union.[117] Citing the factual record, the panel determined there was "not one scintilla of evidence" suggesting that the NCPLU has disrupted the prison's operations or that its members intended to "hamper [or] interfere with the proper interests of government."[118] In other words, it rejected the defendants' security concerns as unpersuasively speculative and unfounded.

But the NCPLU's success was short-lived.

C. The Emergence of the Mythic Prison Grievance

The defendants appealed to the Supreme Court. They argued that an incarcerated person's First Amendment interests could not overcome either the legitimacy of the governmental inhibition (based primarily on security concerns) or the availability of effective alternatives provided by the prison. Regarding the latter, they noted that the prison's "internal grievance mechanism" was a viable alternative to the NCPLU because the union's original purpose was nothing more than the "channeling [of] grievances."[119] This argument, which was not accepted by the three-judge panel below, was rehashed before the Court.[120]

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114. *See* N.C. Prisoners' Lab. Union, Inc. v. Jones, 409 F. Supp. 937, 942 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977). The named defendants were David Jones, the Secretary of the North Carolina Department of Corrections, and Ralph Edwards, the Commissioner of the North Carolina Department of Corrections. *Id.* at 937, 940.

115. *Id.* at 941 (sidestepping the issue because "the parties agree that the defendants permit inmates to join the Union"). The defendants' argument reflected a turnabout in strategy given that prior to the litigation, they had recommended abolishing the IGC. *See* Brief for Appellee, *supra* note 51, at *11-12.

116. *N.C. Prisoners' Lab. Union*, 409 F. Supp. at 943.

117. *See id.* at 944.

118. *Id.*

119. *See* Brief for Appellants, *Jones*, 433 U.S. 119 (No. 75-1874), 1977 WL 189838, at *11, *33.

120. *See supra* note 115 and accompanying text. The defendants were not alone in making this argument. In its amicus brief, the Office of the Solicitor General (OSG) similarly mischaracterized the goals of the NCPLU—it described "inmate unionism" as "exclusive[ly] focus[ed] on inmate grievances [within the prison] and their resolution." Brief for the United States as Amicus Curiae, *Jones*, 433 U.S. 119 (No. 75-1874), 1977 WL 189840, at *17. The OSG reaffirmed the defendants' invocation of the internal grievance

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The Supreme Court reversed. The Court faulted the district court for failing to "giv[e] appropriate deference" to the decisions and "expert judgment" of prison administrators, especially regarding security concerns.[121] The Court concluded that when applying the proper amount of deference, the challenged prohibitions were rationally related to the reasonable objectives of prison administrators and did not violate constitutional rights to speech or equal protection.[122]

In light of these substantive rulings, commentators have understandably focused on three consequences of the *Jones* opinion: how its broad deference to carceral authorities led to an "erosion of prisoner' rights,"[123] how it began to mythologize "the deviance theory of prison violence,"[124] and how it "doomed" the efforts of incarcerated people's unions nationwide.[125] Andrea Armstrong has also situated *Jones* in its proper context: It was but one brushstroke in a larger portrait of receding First Amendment protections in and around prisons, which quelled challenges to the racism and systemic injustices of the criminal

procedure as an alternative means of protecting First Amendment rights. The availability of this grievance process was, according to the OSG, "of prime significance" because it diminished the "purported need for a union." *Id.* at *29, *32.

121. *Jones*, 433 U.S. at 125, 128 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

122. *Id.* at 129, 133. But the Court was not unified in its conclusion; Justice Marshall wrote a searing and prescient dissent. *See id.* at 139-48 (Marshall, J., dissenting).

123. Zonn, *supra* note 14, at 630 (describing *Jones* as a "[b]lind abdication of decision making" that failed to recognize the prison's "obvious self-interest in maintaining the status quo"); *see also* Bradley Falkof, Comment, *Prisoner Representative Organizations, Prison Reform, and* Jones v. North Carolina Prisoners' Labor Union*: An Argument for Increased Court Intervention in Prison Administration*, 70 J. CRIM. L. & CRIMINOLOGY 42, 43 (1979) (observing that *Jones* manifested a "dangerous departure" from the Court's history of active judicial review); Traub, *supra* note 22, at 164 (criticizing *Jones*'s "unlimited" deference to prison authorities to hamper prison union activities); Armstrong, *supra* note 23, at 257 (explaining that "*Jones* significantly deepened the Court's degree of deference to the views of prison administrators"). These discussions fall within a broader literature about deference in the prison law and criminal law space. *See, e.g.*, Danielle C. Jefferis, *Carceral Deference: Courts and Their Pro-Prison Propensities*, 92 FORDHAM L. REV. 983, 989-1026 (2023) (tracing the history and impact of judicial deference to prison officials); Dolovich, *supra* note 32, at 302 (noting the "unmistakable consistency" of the Court's "predictably pro-state" deference); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1415 (2022) (asserting that deference "lies at the heart of criminal law's administration"); Rachel E. Barkow, *The Court of Mass Incarceration*, 2021-2022 CATO SUP. CT. REV. 11, 17 (recognizing the Supreme Court's "almost pathological deference to the government" as an "animating principle" of its criminal law jurisprudence).

124. Driver & Kaufman, *supra* note 9, at 542-43. The deviance theory of prison violence, which first "emerged in *Jones*," proposed that "prisons are unsafe because of the malevolent people who populate them." *Id.*

125. Li, *supra* note 16, at 1141; *see also* Traub, *supra* note 22, at 164 (describing the opinion as having "crippling effects on unionization" in prisons); Montoya & Coggins, *supra* note 22, at 799 (noting the decision "threatens to halt the prisoners' union movement"); Zonn, *supra* note 14, at 630 (describing *Jones* as a "death knell" for incarcerated people's unions).

punishment system.[126] Commentators are right to confront these significant impacts and history.

But what has received far less attention is the Court's treatment of the NCPLU and the prison grievance process. The Court seemingly adopted the defendants' characterization of the NCPLU to assert that the "focus" of any incarcerated people's union is limited to "the presentation of grievances to, and encouragement of adversary relations with, institution officials."[127] It then used this description as a basis for stripping protections from the NCPLU's organizing, concluding that First Amendment rights were "barely implicated in th[e] case" because the state's prohibitions had not "hampered the ability of prison inmates to communicate their grievances to correctional officials."[128] According to the Court, the continued availability of the prison grievance process allowed prison officials to learn about and potentially resolve concerns regarding prison conditions.[129] Without a supporting citation, the Court characterized the grievance process as a "presumably effective path available for the transmission of grievances."[130] The fact that the NCPLU's preferred methods for communication may be "more 'desirable'" did not, according to the Court, "convert the prohibitory regulations into unconstitutional acts."[131]

The Court's description of the NCPLU in *Jones* reflects prison myths that undermined the NCPLU's attempt to protect its rights of association and speech. First, the Court diluted the transformative horizons of this collective organizing. It advanced a generalization unsupported by the briefing or movement history: that the only purpose of organizing in prison is to individually and internally advocate for changes to the prison itself.

Advancing this myth required "willful ignorance."[132] Nowhere did the opinion mention the NCPLU's plans for legislative or litigation mobilization, or its extra-institutional goals of changing public perception and influencing

126. *See, e.g.*, Armstrong, *supra* note 23, at 224-25 (situating *Jones* alongside *Adderley v. Florida*, 385 U.S. 39 (1966), which affirmed trespass convictions of civil rights protestors who were challenging racial segregation on the curtilage of a jailhouse); *id.* at 262-63 (observing that the NCPLU, like other prison organizers before it, was "challeng[ing] the legitimacy of the carceral state through a racial lens" and that through the *Jones* opinion, the Court "may have been regulating race and not prisons").

127. *Jones*, 433 U.S. at 133.

128. *Id.* at 130 & n.6.

129. *Id.* at 130 n.6.

130. *Id.*

131. *Id.*

132. *See* Driver & Kaufman, *supra* note 9, at 583 (observing that the judiciary's "[r]efus[al] to understand prisons while populating them" is "an act of willful ignorance that stunts the law").

broader state-wide policy.[133] Nor did it address the critical need for such associations to build community and solidarity among incarcerated people to overcome the participatory exclusion they faced when seeking to influence the very laws and policies that governed them.[134] As the NCPLU had observed in its briefing, "[i]ndividual efforts at improving the lot of prisoners can never be as effective as group advocacy."[135] The PU's amicus brief similarly detailed the need for robust associational rights in prison, which it described as "one of the most precious [rights] available to [its members]" given the realities of marginalization in prison.[136]

Indeed, outside the prison context, the Court had previously recognized the significance of these dimensions to First Amendment protections. The very function of free speech was to "invite dispute," "strike at prejudices and preconceptions," and restrain "dominant" groups from controlling the "standardization of ideas" within legislatures or courts.[137] And the right to assemble and associate was an essential element to "[e]ffective advocacy," especially when advancing a "controversial" perspective.[138] Here, too, the NCPLU and PU had explained why their multi-dimensional advocacy was critical to contesting subordination, why their advocacy was both endangered and vital, and why individual complaints paled in comparison to collective campaigns.[139] But the Court excised these essential organs to advance a hollow myth of prison organizing.

This erasure was, perhaps, strategic. Acknowledging the social and political expression of these unions would require a parallel recognition of the severe erosion of associational rights reflected in the opinion. The Court certainly could not feign ignorance given the unions' thorough explanations. But it could—and did—adopt a strategy of silence, which sidestepped the need to fully account for the associational interests of incarcerated people's unions. And distorting the purpose of prison organizing made it easier for the Court to then point to an administrative process as a viable alternative.

Elevating the prison grievance system in this way advanced a parallel myth: that this circumscribed administrative remedy could serve as a meaningful

133. Brief for Appellee, *supra* note 51, at *19, *37 (explaining that the political, social, and legal organizing goals of the union, both within and beyond the prison, far exceeded the limited scope of administrative grievances).

134. *See id.* at *39-40 (explaining that "[i]ndividual inmates cannot reasonably expect to influence the legislature by writing letters proposing new programs").

135. *Id.* at *19.

136. Brief of Prisoners' Union, Inc., as Amicus Curiae in Support of Appellees, *supra* note 76, at *2.

137. Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963) (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)).

138. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

139. *See supra* Part I.B.

surrogate for union organizing. This internal procedure was, however, an inadequate substitute for the tactics and strategies envisioned by the NCPLU. The individual nature of these prison grievance policies should have revealed how poorly they substituted for the collective agency of prison organizing. Invoking the prison grievance not only diminished the potential of extra-institutional movement power—it also replaced the promise of collective advocacy with the illusion of individual relief.

Scrutinizing these myths explains how *Jones* wielded prison grievances to curtail critical associational rights in prison. The Court justified a refusal of rights by illustrating an incomplete and compressed narrative of incarcerated people's unions alongside a perfunctory depiction of prison grievances.[140] Notably, the Court's reference to prison grievances in the opinion takes the space of only a few sentences, and it is sequestered away in a footnote. It may therefore be tempting (and perhaps even reasonable) to disregard its significance. But as the next two Parts explain, this below-the-line rumination was a seed that *Jones* planted, one that would grow to shape the substantive role of prison grievances. *Jones* introduced an idea of equivalency—equating rights enforcement with the circumscribed remedies offered by prison grievance processes—that further crept into the constitutional boundaries of prison law in two distinct ways. As Part II below outlines, prison grievances have embedded themselves into First Amendment prison law to silence both individual and collective forms of advocacy. And as Part III below explains, prison grievances have migrated beyond the First Amendment to intrude on broader civil rights enforcement in federal custody.

II. The Creep into First Amendment Jurisprudence: An Expansion

The mythmaking of *Jones* has persisted to find renewed life. This Part outlines the first manifestation of the prison grievance creep that has evolved in *Jones*'s shadow. I begin by explaining how the prison grievance grew beyond the confines of a minor footnote in *Jones* to become a key component of First Amendment jurisprudence, which curtails the capacity for other forms of

140. *See supra* notes 127-131, 133-136 and accompanying text. The study of language, narrative, and mythology in judicial opinions is not limited to prison law. For example, in the sphere of labor law, critical legal scholars have observed similar patterns when studying legal doctrines governing boycotts and other actions. *See, e.g.*, GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 8 (1999) (explaining how variations in judicial "metaphors of boycott" reveal "normatively loaded ideas about the meaning of group activity"); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 10 (1983) (arguing that labor law doctrine is explained by underlying "assumptions and values about the economic system and the prerogatives of capital, and corollary assumptions about the rights and obligations of employees").

protest and organized dissent within prisons. I end by explaining the significance and troubling consequences of this expansive creep.

A. Growing Beyond the Footnote

Jones was only the beginning of a broad retrenchment of rights in prison. And notably, this opinion was not the last to consider the role of prison grievances in this constitutional regression. In *Turner v. Safley*, issued just a few years after *Jones*, the Court promulgated a new standard to assess an incarcerated person's ability to enforce constitutional rights.[141] The Court explained that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[142] And it observed the relevance of four factors when determining the regulation's reasonableness: (1) whether there is a "valid, rational connection" between the prison regulation and a legitimate governmental interest, (2) whether there are "alternative means of exercising the right that remain open to prison inmates," (3) whether "accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff," and (4) whether there is an "absence of ready alternatives" to the challenged regulation.[143]

In *Turner*, the Court proclaimed that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[144] Incarcerated people, therefore, retain constitutional rights even while confined, including critical protections under the First Amendment[145]—at least in theory. But the *Turner* Court imposed a new, transsubstantive standard across constitutional claims in prison that reflected a "stark departure" from conventional jurisprudence.[146] Many commentators have studied *Turner*'s significance to the doctrines of both prison law and constitutional law to

141. 482 U.S. 78, 89-90 (1987).

142. *Id.* at 89.

143. *Id.* at 89-90 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

144. *Id.* at 84.

145. *See id.* at 84, 90 (identifying the right to petition the government for the redress of grievances, the right against racial discrimination, the right to due process, and First Amendment rights); *see also* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.").

146. *See* Driver & Kaufman, *supra* note 9, at 536. The Court has, however, declined to apply the *Turner* standard to certain constitutional claims. Strict scrutiny applies to claims challenging racial segregation in prisons. *See* Johnson v. California, 543 U.S. 499, 505-06, 509 (2005). Similarly, the *Turner* standard does not apply to claims alleging cruel and unusual punishment under the Eighth Amendment, *id.* at 511, or to procedural due process claims, *see* Sandin v. Conner, 515 U.S. 472, 483-84 (1995).

critique its unusual affordance of deference to prison administrators.[147] And many have observed *Turner*'s chokehold on civil rights enforcement in prison, where officials can abuse the "obsequious" level of judicial deference granted by the courts to impose destructive restrictions.[148] To study the legacy of *Turner* is to observe how courts have extinguished much of the possibility of enforcing rights claims in prison.[149] The *Turner* standard is only one of many barriers to pursuing accountability in prisons, but it is certainly a "major obstacle."[150]

What remains underexplored is how federal courts have integrated prison grievances into their application of the *Turner* standard. The *Turner* Court did not abandon *Jones* when it promulgated a new constitutional standard. The second of the four *Turner* factors was key: The Court quoted *Jones* to explain that where "other avenues" remain available to exercise the asserted right, courts owe a measurable degree of judicial deference to prison officials regarding the validity of the challenged regulation.[151] Nowhere in *Turner* is there a direct reference to a prison grievance procedure, nor did the *Turner* Court identify prison grievance systems as a relevant consideration when weighing this factor. But as Part I.C above outlines, *Jones* identified prison grievances as an alternative avenue for the exercise of incarcerated people's unions' First Amendment rights. And by quoting this language in *Jones*, *Turner* indirectly resurfaced the prison grievance regime as a relevant consideration in withholding such rights for a broader category of prison organizing and speech.

In its aftermath, lower courts have understood *Turner* as endorsing this substantive relevance of prison grievance systems. When assessing the First Amendment claims of incarcerated plaintiffs, courts have used the second *Turner* factor to conclude that a prison grievance constitutes an alternative means of exercising the right. This is true when an incarcerated plaintiff seeks to exercise free speech against the prison on an individual level, but it is especially heightened when incarcerated people attempt to engage in collective

147. *See* Driver & Kaufman, *supra* note 9, at 538 (describing *Turner* as "a highly unusual way to construe constitutional rights"); Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 246 (2012) ("The most obvious example of deference in its first, doctrine-constructing form is *Turner v. Safley*."); Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1024 (1993) ("The notion that the judgments of prison administrators are entitled to wide-ranging deference is a concept utterly alien and antithetical to the rest of First Amendment jurisprudence.").

148. *See, e.g.*, David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 979-80, 988-1005 (2016) (examining lower court decisions as well as the actions of prison officials to demonstrate how courts and administrators alike have taken advantage of the deference permitted by the *Turner* standard).

149. Driver & Kaufman, *supra* note 9, at 539.

150. Shapiro, *supra* note 148, at 1019.

151. Turner v. Safley, 482 U.S. 78, 90 (1987) (quoting Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 131 (1977)).

advocacy. Courts have enabled prisons to punish incarcerated people for circulating a mass petition protesting prison conditions,[152] circulating a mass petition to protest racial discrimination,[153] stating a desire to stage a sit-in to protest unsupervised searches of people's prison cells,[154] or even possessing a pamphlet that discussed the possibility of an organized work stoppage.[155] These courts rejected the incarcerated plaintiffs' First Amendment right by suggesting they could achieve the same goal by submitting an individual grievance to the prison.[156]

Consider, for example, Mr. Duamutef's experience while confined in New York's Gouverneur Correctional Facility. In an effort to improve the prison's "poor" conditions, Mr. Duamutef prepared a petition demanding changes and gathered over thirty signatures in support before sharing it with the prison's superintendent.[157] This was not the first time that incarcerated people cultivated collective advocacy within the prison's walls—less than two years before Mr. Duamutef's petition,[158] most of the 1,300 people imprisoned in Gouverneur organized a work stoppage and hunger strike to protest the severe overcrowding, denial of medical care, harassment by prison guards, and racism that characterized their experience.[159]

The prison's response to Mr. Duamutef's petition was sharp. Prison guards forced him into solitary confinement for fifty-one days and "suspended certain

152. *See* Nickens v. White, 622 F.2d 967, 968-70 (8th Cir. 1980); Duamutef v. O'Keefe, 98 F.3d 22, 23-25 (2d Cir. 1996); *see also* Edwards v. White, 501 F. Supp. 8, 12-13 (M.D. Pa. 1979) (holding that prisons may punish incarcerated people for a mass petition advocating for the removal of a prison staff member), *aff'd*, 633 F.2d 209 (3d Cir. 1980) (unpublished table decision).

153. *See* Adams v. Gunnell, 729 F.2d 362, 363, 367 (5th Cir. 1984) (explaining that because a prison grievance procedure remained available, incarcerated people's freedoms of individual expression and petition were "not seriously infringed" (citing *Jones*, 433 U.S. at 128)).

154. *See* Liptschen v. Pollock, No. 93 CIV. 6585, 1996 WL 412019, at *1-3 (S.D.N.Y. July 22, 1996).

155. *See* Pilgrim v. Luther, 571 F.3d 201, 203, 205 (2d Cir. 2009).

156. *See id.* at 205; *Nickens*, 622 F.2d at 969-71; *Duamutef*, 98 F.3d at 24; *Edwards*, 501 F. Supp. at 12; *Adams*, 729 F.2d at 367.

157. *See* Appellant's Memorandum, *Duamutef*, 98 F.3d 22 (No. 96-2238), 1996 WL 33667699, at *1, *3; *Duamutef*, 98 F.3d at 23.

158. Though the timing of the petition is unclear from the opinion, the docket indicates that Mr. Duamutef's federal complaint—submitted after he originally circulated his petition—was filed with the district court in April 1994. *See* Docket, Duamutef v. O'Keefe, No. 94-CV-00470, 1996 WL 673125 (N.D.N.Y. Mar. 14, 1996). The work stoppage and hunger strike occurred in September 1992. *See* Barbara Stith, *Gouverneur Inmates Stage Strike*, SYRACUSE HERALD-J., Sept. 22, 1992, at B20.

159. *See* Stith, *supra* note 158; Barbara Stith, *Guards Say State Too Soft with Inmates*, SYRACUSE HERALD-J., Sept. 24, 1992, at B2M.

privileges."[160] Prison officials threatened to discipline him even further, including a transfer to a maximum-security prison, if he refused to abandon his advocacy efforts.[161] Mr. Duamutef persisted despite this intimidation. And after Mr. Duamutef filed a federal lawsuit to challenge the prison's retaliatory response to his petition, prison officials delivered on their threats.[162]

The district court dismissed Mr. Duamutef's First Amendment claims, and the Second Circuit affirmed.[163] Neither court addressed the alleged prison conditions or Mr. Duamutef's plea for improvement inside the prison.[164] The Second Circuit recognized that "preparing and circulating a petition implicates speech and associational rights under the First Amendment," but it concluded under *Turner* that no such rights were violated by the prison's conduct.[165] Key to its analysis was the second factor of the *Turner* standard.[166] The court reasoned that because the prison grievance process constituted an alternative "avenue of communication" that remained "open" to him, the prison's punitive response did not infringe on his First Amendment rights.[167]

Nothing in the opinion supports the court's conclusion that the prison grievance system was an adequate substitute for Mr. Duamutef's advocacy.[168] Indeed, the court disregarded an important fact that Mr. Duamutef had raised in his pro se briefing: He had indeed filed several grievances regarding the relevant issues *before* turning to his petition.[169] In other words, Mr. Duamutef demonstrated that it was functionally futile to rely on the grievance procedure to advance the changes ultimately sought through collective efforts. His lived experience found no purchase in the court's opinion. Instead, the mere existence of the prison grievance system was enough to vindicate the prison's punitive response.

The impact of this creep is profound when we consider the aftermath of *Jones*. Incarcerated people's unions are no longer viable instruments to advocate for needed changes within the prison, and so individuals are forced to find other avenues for speech and expression to challenge the anti-democratic nature of their confinement. But the prison grievance—which was wielded in *Jones* to stall the movement of incarcerated people's unions—reappears to capture these

160. *Duamutef*, 98 F.3d at 23.

161. *Id.*

162. *Id.*

163. *Id.* at 23, 25.

164. *See id.* at 23-25; *Duamutef*, 1996 WL 673125, at *3, *11 (denying the plaintiff's motion for summary judgment and granting the defendants' motion for summary judgment).

165. *Duamutef*, 98 F.3d at 24.

166. *Id.*

167. *Id.*

168. *See id.*

169. *See* Appellant's Memorandum, *supra* note 157, at *4.

alternative strategies. The success of this doctrinal creep permits the mere existence of a grievance system to punish diverse categories of organizing within prisons.

The progress of this creep is troubling. As Part II.B explains in greater detail below, prison grievances are inadequate surrogates for exercising critical speech and associational rights in prison. This discrepancy emphasizes the harms of permitting this creep to persist.

B. The Empty Surrogacy of Prison Grievances

The existing literature on prison grievance exhaustion has demonstrated the systemic futility of relying on prison grievances to achieve change given that the purported efficacy of these grievances is contradicted by their purpose and design.[170] Many commentators have detailed how prisons control the governing architecture of their own grievance processes, which empowers the prison's interest in immunizing itself from liability.[171] Much of this commentary provides a backdrop for explaining the increasingly complex procedural rules that spring from this arrangement. But there are additional, understudied limitations of prison grievances that challenge the remedy's specific expansion into First Amendment enforcement while confined.

Part I above illustrated the multi-dimensionality of prison speech and association through the lens of incarcerated people's unions, and many of the offered lessons apply to other forms of prison organizing. In contrast to the Court's reductive depiction in *Jones*, prison-based advocacy often attempts to reach outside audiences as targets, partners, or audiences. And it is often collective, seeking to nourish community power and solidarity to overcome various barriers that are magnified when pursuing limited, individual relief. Taking these two dimensions as guideposts, this Subpart deconstructs the myth of equivalency—the notion that a prison grievance serves as an adequate alternative for the exercise of a constitutional right—that courts use to justify this doctrinal creep. I assess the contemporary grievance policies belonging to the carceral systems of all fifty states, the BOP, and the District of Columbia to explain why the prison grievance is a vehicle designed to isolate issues and individuals along multiple axes, and why these limitations disqualify it as an alternative to First Amendment protections in prison.[172]

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170. Existing literature on the "procedural complexity [and] difficulty" of prison grievance processes also helps illustrate this incoherence. *See, e.g.*, Schlanger, *supra* note 29, at 1650 (observing that "the sky's the limit for the procedural complexity or difficulty of the exhaustion regime").

171. *See* Yang, *supra* note 25, at 1149-50; *supra* note 29 and accompanying text.

172. The first stage of my investigation was unearthing the relevant prison grievance policies. My starting point was the repository of prison grievance policies published by the Civil Rights Litigation Clearinghouse, the product of incredible efforts by Michigan

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First, the prison grievance is inherently limited as an internal-facing instrument. This designed stricture renders the grievance a poor substitute for vital speech protections. As noted in Part I.A above, incarcerated people are forced to use nonconventional tactics and strategies to overcome the anti-democratic nature of the criminal punishment system. Part I.C above similarly outlines how the Court embraced an expansive view of the First Amendment to protect speech that is "unpopular," "provocative," or "challenging."[173] Indeed, the Court has recognized that speech "serve[s] its high purpose" when it successfully "invite[s] dispute" and "strike[s] at prejudices and preconceptions," which can (and sometimes must) have "profound unsettling effects."[174] Notably, to serve this end, speech must have the capacity to confront "the standardization of ideas" advanced by "legislatures, courts, or dominant political or community groups."[175] It would be debilitating to restrict such significant forms of speech so that they cannot reach their intended audiences, yet that is precisely what is accomplished by displacing the First Amendment with such a circumscribed administrative remedy.

The creation of incarcerated people's unions was one powerful example of incarcerated people challenging the anti-democracy of the carceral state.[176] So too are other forms of organizing within prisons. Efforts ranging from a collective petition to a work stoppage not only communicate issues to prison officials—news of those issues will hopefully reach outside audiences so that people can learn about, and potentially support, the ongoing campaign. In other words, such organizing can help convert an issue that is otherwise hidden behind prison walls into a form of speech that advances transparency and public scrutiny. But a prison grievance, which is submitted to prison officials and remains internal to the prison system, excludes the possibility of outside scrutiny, partnership, or mobilization. Displacing the First Amendment with this administrative remedy ensures that the underlying issue will not reach the public audience waiting outside the prison's walls.

What is more, prison grievances cannot fulfill the *collective* goals of prison speech and association. Part I above vividly explains not only why incarcerated

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Law students in 2015 to collect grievance policies from fifty-three departments of correction (as well as the nation's twelve largest metropolitan jails) through a combination of records requests and online investigations. *See Repository: Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey*, C.R. LITIG. CLEARINGHOUSE (Oct. 18, 2015), https://perma.cc/GX2Z-AKLV. For most departments, I collected and analyzed an updated policy that was available online (including where policies are codified as regulations or statutes). Where an updated policy was unavailable, I relied on the policy published in the Clearinghouse's repository.

173. Edwards v. South Carolina, 372 U.S. 229, 235, 237-38 (1963) (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)).

174. *Id.* at 237 (quoting *Terminiello*, 337 U.S. at 4-5).

175. *Id.* at 237-38 (quoting *Terminiello*, 337 U.S. at 4-5).

176. *See supra* Part I.A.

people sought to build power through unified advocacy to contest their subordination, but also how essential it is to protect the associational rights of such disadvantaged minorities. As the NCPLU itself observed, "[i]ndividual efforts at improving the lot of prisoners can never be as effective as group advocacy."[177] Other commentators have noted the limitations of prison grievance policies that forbid third-party assistance when preparing or filing a grievance,[178] but the capacity to collectively pursue grievances remains critically underexplored. Investigating this dimension reveals another designed deficiency that undermines the creep into First Amendment protections: Prison grievances weaken efforts at internal advocacy by siloing issues and isolating individuals.

No contemporary prison grievance policy provides an affirmative and unqualified right to file what I call a "group grievance," a grievance prepared and submitted by more than one person impacted by the same or similar issue.[179] Of the policies that reference a group grievance, the vast majority expressly reject the possibility.[180] Many such policies state that grievances must be individual in nature[181] or that the inclusion of multiple grievants is a basis for rejecting the form.[182] Others expressly define a "class action" or "group grievance" as non-

177. Brief for Appellee, *supra* note 51, at *19.

178. *See, e.g.*, PRIYAH KAUL, GREER DONLEY, BEN CAVATARO, ANELISA BENAVIDES, JESSICA KINCAID & JOSEPH CHATHAM, MICH. L. PRISON INFO. PROJECT, PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY 16-17 (2015), https://perma.cc/4W4V-DUJ5 (assessing, among other topics, barriers to third-party assistance).

179. *See infra* Appendix.

180. *See infra* Appendix.

181. *See* HAW. DEP'T OF CORR. & REHAB., POLICY NO. COR.12.03, CORRECTIONS ADMINISTRATION POLICY AND PROCEDURES: INMATE GRIEVANCE PROGRAM 6 (2024), https://perma.cc/TBC4-RNDE ("The grievance must be individual in nature, regardless [i]f others may be similarly affected."); N.M. CORR. DEP'T, CD-150500, INMATE GRIEVANCES 10 (2018), https://perma.cc/X49Y-G4JQ ("The inmate must file an individual grievance even though the problem may be shared with other inmates."); STATE OF UTAH - DEP'T OF CORR., AG38, OFFENDER GRIEVANCES 3 (2026), https://perma.cc/P6KD-VUVG ("All grievances shall be filed on an individual basis . . . .").

182. *See* CAL. CODE REGS. tit. 15, § 3999.234(a)(7) (2025) (stating that a grievance can be rejected if it is "submitted as a group grievance by more than one patient related to a policy, decision, action, condition, or omission affecting all members of the group"); 103 MASS. CODE REGS. § 491.11(4) (2025) ("Grievances filed by a group or on behalf of a group of inmates shall not be accepted."); MICH. DEP'T OF CORR., NO. 03.02.130, POLICY DIRECTIVE: PRISONER/PAROLEE GRIEVANCES 2-3 (2024), https://perma.cc/953U-MNUD ("A grievance shall be rejected by the Grievance Coordinator if . . . [t]wo or more prisoners and/or parolees have jointly filed a single grievance regarding an issue of mutual impact . . . ."); N.J. DEP'T OF CORR., INTERNAL MANAGEMENT PROCEDURE NO. IMM.002.IRS.001, INMATE REMEDY SYSTEM 7 (2014), https://perma.cc/Y4PC-W6VC ("Two or more inmates may not jointly file an Inmate Remedy System Form . . . ."); COMMONWEALTH OF PA. DEP'T OF CORR., POLICY NO. DC-ADM 804, POLICY STATEMENT:

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grievable.[183] Some policies are more creative with their prohibitions: They forbid incarcerated people from distributing grievances to collect signatures from others experiencing the same violation,[184] from using a grievant to act as "a spokesperson" for other incarcerated people,[185] or from submitting "identical individual grievances" regarding a shared issue "as an organized protest."[186] Some policies reject group grievances even while recognizing that problems may be shared among multiple people in prison,[187] emphasizing the incongruency between the need for collective advocacy and the prohibition of it.[188]

INMATE GRIEVANCE SYSTEM 1-3 (2015), https://perma.cc/2F4Z-GRQ5 ("A grievance submitted by one inmate for another inmate or a group of inmates is prohibited . . . .").

183. *See* D.C. DEP'T OF CORR., NO. 4030.1N, POLICY AND PROCEDURE: INMATE GRIEVANCE PROCEDURE 8 (2024), https://perma.cc/UL2R-GE5Y (including "[i]nmate class action grievances or petitions" among issues that "cannot be grieved"); IND. DEP'T OF CORR., NO. 00-02-301, POLICY AND ADMINISTRATIVE PROCEDURE: MANUAL OF POLICIES AND PROCEDURES; OFFENDER GRIEVANCE PROCESS 4 (2020), https://perma.cc/S85C-RJWN (including "[c]omplaints on behalf of other offenders, class action complaints, or third party individuals" as "non-grievable issues"); MD. CODE REGS. 12.02.28.05(F)(2) (2018) ("An inmate may not file a request . . . [b]rought as a class action."); N.Y. STATE CORR. & CMTY. SUPERVISION, NO. 4040, INCARCERATED GRIEVANCE PROGRAM 2 (2016), https://perma.cc/7ST7-A5H9 (noting that "[c]lass actions [are] not accepted"); WASH. STATE DEP'T OF CORR., DEPARTMENT OF CORRECTIONS OFFENDER GRIEVANCE PROGRAM MANUAL 14 (2019), https://perma.cc/RM6E-LR3M ("'Class action' complaints and grievances are not acceptable.").

184. *See* KY. CORR., POLICY NO. 14.6, POLICY AND PROCEDURES: INMATE GRIEVANCE PROCEDURE 10 (2025), https://perma.cc/W6Z5-FR6G ("An inmate or group of inmates shall not distribute a previously prepared grievance to another inmate for his signature."); S.D. DEP'T OF CORR., POLICY NO. 500-04, POLICY AND PROCEDURE: GRIEVANCE PROCEDURE 3 (2025), https://perma.cc/6TSU-3ZLY ("Offenders may not have other offenders sign a grievance as a form of petition complaint.").

185. *See* OR. DEP'T OF CORR., PERMANENT ADMINISTRATIVE ORDER 29-2024, GRIEVANCE REVIEW SYSTEM 6-7 (2025), https://perma.cc/SGH5-B3UY (noting that an "adult in custody cannot file a grievance regarding . . . [g]roup grievances representing other adults in custody, or acts where an adult in custody is a spokesperson for other adults in custody"); WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 3.100, INMATE/OFFENDER COMMUNICATION AND GRIEVANCE PROCEDURE 13 (2024), https://perma.cc/8R6W-ERAY ("An inmate may not submit a group grievance that represents other inmates, or act as a spokesperson for other inmate(s).").

186. *See* MICH. DEP'T OF CORR., *supra* note 182, at 2-3 (noting that such grievances "shall be rejected").

187. *See* HAW. DEP'T OF CORR. & REHAB., *supra* note 181, at 6 (acknowledging that "others may be similarly affected" by an individual grievance while requiring the grievance to be individual); N.M. CORR. DEP'T, *supra* note 181, at 10 (requiring an individual grievance "even though the problem may be shared with other inmates").

188. Six policies provide language indicating that on the back end, prison administrators may consolidate related grievances that address the same or similar underlying issue. *See* STATE OF ALA. DEP'T OF CORR., ADMINISTRATIVE REGULATION NO. 406, INMATE GRIEVANCE POLICY 9 (2023), https://perma.cc/Q898-6ZR8; STATE OF IOWA DEP'T OF

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Only two prison systems consider the possibility of a group grievance,[189] but the allowance is significantly circumscribed. The first is the BOP, which permits the president of a "recognized inmate organization" to submit a request regarding "an issue that specifically affects that organization."[190] However, this policy limits the feasibility of a group grievance along multiple dimensions. Only the president of such an organization may submit the request on the organization's behalf.[191] The issue must "specifically" affect the organization as a whole, rather than some proportion of its members. And the organization must first be "recognized."[192] A warden of a BOP facility may approve an inmate organization only upon determining that it "does not operate in opposition to the security, good order, and discipline of the institution."[193] Given the speculative concerns of safety raised in *Jones* against the NCPLU, it is likely that the warden can wield the vagueness of this latter inmate organizations policy to disallow many types of incarcerated associations. The restrictions embedded in the BOP's grievance policy likely render it inaccessible for the vast majority of

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CORR., POLICY NO. IO-OR-06, POLICY AND PROCEDURES: INCARCERATED INDIVIDUAL/CLIENT GRIEVANCE PROCEDURES 6-7 (2025), https://perma.cc/NSL4-3BFS; KY. CORR., *supra* note 184, at 3; LA. ADMIN. CODE tit. 22, pt. I, § 325(F)(3)(a)(x) (2024); MISS. DEP'T OF CORR., SOP NO. 20-08-01, GRIEVANCE PROCEDURES 3 (2021); STATE OF TENN. DEP'T OF CORR., INDEX NO. 501.01, ADMINISTRATIVE POLICIES AND PROCEDURES: INMATE GRIEVANCE PROCEDURES 3 (2025), https://perma.cc/D54P-CXTA. One policy includes mandatory rather than discretionary language. *See* DEL. DEP'T OF CORR., POLICY NO. 4.4, DECISION-MAKING: INMATE GRIEVANCE POLICY 3 (2011), https://perma.cc/3VJX-KZQK ("If more than one inmate files a grievance on the same issue, the IGC will consolidate the staff investigations . . . into a single 'group grievance.'"). Another contains ambiguous language, requiring a consolidated response to complaints "containing the same issue," without clarifying whether this refers to multiple submissions by one person or by different grievants. *See* OKLA. DEP'T OF CORR., NO. OP-090124, INMATE/OFFENDER GRIEVANCE PROCESS 8-9 (2022), https://perma.cc/4GK9-2RWQ. At first glance, these procedures may appear to present an efficient means of collecting and understanding the frequency of reported concerns. Most of these policies, however, are discretionary and provide no assurance that prison authorities will be persuaded by the multiplied impact of the violation. Prison personnel—not incarcerated grievants—decide what qualifies as a "related" or "similar" grievance.

189. Two additional states previously permitted group grievances (or a variation thereof) but have since repealed those provisions. Nebraska's allowed incarcerated individuals to circulate a group petition for signatures when "requesting specific relief concerning a grievance involving a Department policy or practice." *See* 68 NEB. ADMIN. CODE § 012.02 (2022) (repealed 2023). Similarly, California permitted multiple grievants to use a "group appeal" for the same issue. CAL. CODE REGS. tit. 15, § 3084.2(h) (2019) (repealed 2020). That provision was replaced by California Code of Regulations title 15, section 3484, which omits allowance for such group appeals. CAL. CODE REGS. tit. 15, § 3484 (2025).

190. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 1330.18, ADMINISTRATIVE REMEDY PROGRAM § 542.10(b) (2014), https://perma.cc/4M7D-9D2T.

191. *Id.*

192. *Id.*

193. *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 5381.05, INMATE ORGANIZATIONS § 551.31(b)(2) (2001), https://perma.cc/CZ42-79AK.

incarcerated people who would otherwise be interested in collectively resolving a shared issue.

The other permissive prison system is North Carolina's, a possibly surprising fact given the history of the NCPLU and the state prison system's attempts to quell its collective advocacy.[194] The relevant language is very recent, the result of a 2023 overhaul to the prison grievance policy. The grievance policy now contains language that indirectly recognizes the possibility of a group grievance.[195] It explains that a grievance can be "rejected at any level" where an offender "has requested a remedy for another offender," but it then notes that this provision "shall not apply" to a grievance made on behalf of a group.[196] This confusing double negative is the only state-level policy language that can be read to permit a group grievance. But it is notable that nowhere in the policy is there affirmative authorization to submit a group grievance. Based on this policy language alone, it remains to be seen whether incarcerated people are informed of, or actually empowered to, collectively organize a group grievance.

The broad incapacity for collective grievances across carceral institutions questions the very purpose of this administrative remedy. The Supreme Court has optimistically remarked that prison officials can use prison grievances to "resolve disputes concerning the exercise of their responsibilities."[197] But the prohibitions against group grievances tell a different story.

In other contexts, commentators have observed the need for mechanisms for collective action by pointing to the diverse protections they can provide. Such instruments provide "institutional channels for the ongoing exercise of collective power,"[198] which makes remedies accessible even for those with limited resources or incentives.[199] Accountability, deterrence, and institutional

194. *See supra* Part I.

195. Group grievances were not permitted before this 2023 overhaul. *See* STATE OF N.C. DEP'T OF PUB. SAFETY, NO. G.0300, POLICY & PROCEDURES: ADMINISTRATIVE REMEDY PROCEDURE § .0304(c) (2013).

196. *See* N.C. DEP'T OF ADULT CORR., NO. G.0300, POLICY AND PROCEDURE: ADMINISTRATIVE REMEDY PROCEDURES § .0306(c)(3) (2023), https://perma.cc/F2NR-R25P (noting that the rejection "shall not apply to grievances related to policies or conditions made on behalf of a group of offenders, in which the submitting offender is a member").

197. Jones v. Bock, 549 U.S. 199, 204 (2007).

198. *See* Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 151 (2020).

199. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 378 (2005) ("Everyone seems to agree that sound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings.").

reform are much more likely through collective action.[200] The nature of incarceration means that many policies, regulations, or conditions impact multiple people at a time, thereby reflecting issues that "cr[y] out for collective treatment."[201] But the prison grievance system isolates people to make it more difficult to challenge the carceral institution. By omitting the possibility of collectively organized grievances, these prison grievance policies indicate a disinterest in discerning the pervasiveness of an issue or efficiently resolving shared concerns. Even a successful grievance would demand an individual, rather than systemic, remedy from the prison. And especially given the ubiquity of punishment in confinement, requiring individual grievants to come forward on their own fails to adequately protect them from the risks of reprisal.

The isolation of prison grievances is not unique. For example, arbitration clauses have successfully allowed corporate defendants to sidestep "the powers of solidarity" by barring collective proceedings in multiple forums.[202] The dismantling of class actions in the mass tort context may result in the "virtual[] extinct[ion]" of class actions more broadly.[203] Prison grievances therefore comprise one dimension of a broader "assault on collectivity,"[204] but the consequences are especially harmful for incarcerated people who have fewer, if any, avenues for pursuing accountability when they are wronged.

C. The Creep's Significance

Together, the above limitations dismantle the myth that prison grievances serve as effective alternatives for exercising First Amendment rights to association and speech within prisons. But federal courts have failed to recognize these deficiencies when citing the prison grievance system as a reliable

200. *See, e.g.*, *id.* at 378 (observing that it is "beyond dispute that the threat of class action liability plays a vital role in deterring corporate wrongdoing"); Patricia A. Seith, *Civil Rights, Labor, and the Politics of Class Action Jurisdiction*, 7 STAN. J. C.R. & C.L. 83, 89-90 (2011) (observing that civil rights enforcement was "very much the impetus" for expanding the class action device).

201. *See* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 579-80 (2020) (quoting Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting)).

202. *See id.* at 579.

203. Gilles, *supra* note 199, at 375.

204. *See* Keren, *supra* note 201, at 580 (describing the "arbitration revolution" as an "assault on collectivity"); *see also* Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205, 206 (2019) (observing that "in recent years, class actions have been significantly curbed along a variety of dimensions"); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745-823 (2013) (surveying how statutory and judicial shifts have led to a decline in class actions); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 640-52 (2012) (exploring how class waivers in arbitration clauses have impeded class actions).

surrogate. Mr. Duamutef's experience with the *Turner* standard[205] is unfortunately not the exception. Courts conclude that regulations limiting rights to organize are "reasonable restrictions" so long as the prison can point to *any* grievance procedure, even while making no inquiry into whether the grievance system is actually available or capable of meeting the incarcerated person's expressed need.[206] In other words, the mere existence of a prison grievance policy becomes "conclusive evidence" of the reasonableness of the prison's punishment of prison speech.[207] And as noted above, courts decline to question prison officials' conclusory assertions regarding the justifications for administrative grievances, even where the incarcerated plaintiffs opine on the procedure's inefficacy.[208]

Such categorical acceptance by the courts is concerning. As observed in Parts I and II.A above, the consequences of withdrawing First Amendment protections are especially heightened for incarcerated people because the ubiquity of control in prisons renders them even more vulnerable to state intrusion. Mr. Duamutef's experience is again illustrative. Actions as innocuous as preparing and circulating a petition can result in punishment as severe as solitary confinement or maximum-security imprisonment.[209] The prison grievance has become a weapon that can silence and silo incarcerated people with impunity.

It may be tempting to defer to prison officials who justify such punitive responses by pointing to "security" risks. And to be sure, there may be times when certain forms of speech within prisons raise legitimate concerns that warrant deterrence. But we need look no further than *Jones* to see that prison officials can invoke generalized fears of disorder without providing any evidence or specific justifications to support that speculative alarm.[210] Indeed, as

205. *See supra* Part II.A.

206. *See* Pilgrim v. Luther, 571 F.3d 201, 205 (2d Cir. 2009).

207. *See* Edwards v. White, 501 F. Supp. 8, 12 (M.D. Pa. 1979), *aff'd*, 633 F.2d 209 (3d Cir. 1980).

208. *See supra* notes 163-169 and accompanying text; *see also* Nickens v. White, 622 F.2d 967, 969, 971 (8th Cir. 1980) (finding that the prison grievance system constituted an "alternative means for communication" despite the plaintiff's attestation that a prison grievance "would not be effective in obtaining a remedy").

209. *See supra* notes 160-162 and accompanying text; *see also Pilgrim*, 571 F.3d at 203 (explaining that prison officials placed Mr. Pilgrim into solitary confinement for possessing a pamphlet encouraging a work stoppage); *Nickens*, 622 F.2d at 968 (explaining that prison officials transferred Mr. Nickens to a maximum-security prison for refusing to remove his name from a mass petition protesting prison conditions).

210. *See* Shapiro, *supra* note 148, at 988-95 (identifying federal circuit court opinions where "regulations founded on flimsy rationales get upheld" under *Turner*). *See also* Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 143-44 (1977) (J., Marshall, dissenting) (arguing that the restrictions on the NCPLU are not justified given that the three-judge court below found no evidence that the union had disrupted the prison, hampered the government's interests, or posed a danger to security).

Part I above outlined, any power cultivated by incarcerated people is seen as a threat to the prison's control, even if the resulting organizing produces *more* stability, racial solidarity, and overall safety within the prison for a time.

This capacity to extinguish dissent has important consequences. There are very few coordinated counterweights to offset the influence of "the law enforcement lobby," the collection of pro-carceral interest groups (including prison guard unions, police unions, and prosecutorial groups) that captures policymaking power to maintain or expand the carceral state.[211] Such lobbyists have opposed decarceral sentencing reforms,[212] resisted efforts to close or downsize carceral institutions,[213] advocated to expand the prison industry,[214] and endorsed "tough on crime" candidates and policies.[215] Incarcerated people, who directly experience the harms of the carceral state and can speak with lived expertise as a countervailing influence, are uniquely situated to oppose this monopoly. Much of prison organizing seeks to challenge and delegitimize the institution of carceral punishment, and it is these efforts at exercising speech and association that are most vulnerable to state-endorsed retaliation. Empowering and protecting their dissent would nourish a critical counterweight.

Recognizing the largely uncontested power of the law enforcement lobby is critical for another reason: It reveals that collective advocacy *is* permitted within prisons, just not by those who are incarcerated. To exert pressure on prison management or state officials, prison guard unions have engaged in collective activities that have harmed incarcerated people. For example, as recently as March 2025, seven incarcerated people died after thousands of prison guards in New York "walked off the job" to protest various institutional policies, including the recent implementation of the Humane Alternatives to Long-Term Solitary Confinement Act to restrict the use of solitary confinement on

211. *See* Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965, 1973, 1980 (2023).

212. *See id.* at 2008 (detailing opposition to a proposed change to the Three Strikes Law that would limit its application to only violent or serious criminal offenses).

213. *See* Barkow, *supra* note 84, at 1283 (noting that prison guard unions—which have an economic stake in the expansion of prisons—and prosecutors have advocated for longer sentences); Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 104-05 (2016) (noting that a prison guard union worked with community groups to successfully oppose the proposed closure of the Jefferson Correctional Institution in Monticello). *See generally* Joshua Page, *Prison Officer Unions and the Perpetuation of the Penal Status Quo*, 10 CRIMINOLOGY & PUB. POL'Y 735 (2011) (examining how prison guard unions have obstructed decarceral efforts in the United States).

214. Eisenberg, *supra* note 213, at 103.

215. *Id.* at 103-04, 104 nn.188-89 (citing Florida, Michigan, New York, and Rhode Island as examples).

incarcerated people.[216] Other strategies have included lock-ins (holding incarcerated people captive in their cells and refusing to let them out), sick-outs (alleging sickness and staying home en masse to achieve a similar impact as a strike), speedups (excessively writing disciplinary offense reports), and slowdowns (holding up completion of a necessary task).[217] The Court in part justifies widespread deference to prison officials as avoiding operational disruptions and mitigating purported security risks.[218] But prison guard unions use strategies that not only disrupt the prison's operations but also threaten the safety of the people in their custody who are without recourse to contest their subordination. Why, then, is the advocacy of prison guard unions more accepted than that of incarcerated people's unions?

The shared history of prison guard unions and incarcerated people's unions highlights this striking dichotomy between the relative acceptance and rejection of associational rights. The general growth of public-sector unionism—buoyed by legislation empowering public employees to collectively bargain—paved the way for the proliferation of prison guard unions in the 1970s.[219] So too did a unique confluence of carceral conditions, including an accelerated increase in prison populations that ran parallel to a growing fiscal crisis in governmental budgets.[220] The perceived deterioration of working conditions as a result of carceral overcrowding resulted in an upsurge in guard labor activism.[221] In other words, both prison guard unions and incarcerated people's unions were initially responding to similar conditions: the devastating

216. *See* Jon Campbell, *NY Officials Offer Striking Corrections Officers a Deal, Bypassing Union*, GOTHAMIST (Mar. 6, 2025), https://perma.cc/24JL-DMVV. Although the strike was unsanctioned by the union, this action reflects collective advocacy by union members. *See id.*

217. *See* M. ROBERT MONTILLA, NAT'L INST. OF L. ENF'T & CRIM. JUST., PRISON EMPLOYEE UNIONISM: MANAGEMENT GUIDE FOR CORRECTIONAL ADMINISTRATORS 346-49 (1978). Even when prison guards were prohibited by law from labor actions, they nevertheless organized work stoppages, sick-outs, and slowdowns. *See* Scott Christianson, *Corrections Law Developments: How Unions Affect Prison Administration*, 15 CRIM. L. BULL. 238, 244 & n.49 (1979) (noting examples of strikes); MONTILLA, *supra*, at 344 (noting examples in multiple states, including a system-wide strike of prison guards in Ohio that lasted seventeen days).

218. *See* Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 128 (1977).

219. *See* WYNNE, *supra* note 71, at 44-47 (explaining that a variety of factors, including a proliferation of legislation allowing public employees to collectively bargain, resulted in a strong movement toward unionization for correctional employees in the 1960s). Notably, gains made by police officers during this movement of public employee activism helped inspire guard unionism. *See* Christianson, *supra* note 217, at 243.

220. WYNNE, *supra* note 71, at 51.

221. Heather Ann Thompson, *Downsizing the Carceral State: The Policy Implications of Prison Guard Unions*, 10 CRIMINOLOGY & PUB. POL'Y 771, 772 (2011).

consequences of mass incarceration.[222] At the time, commentators observing the rise of both unions remarked that it would be unfair and dangerous to "recognize one and not the other."[223] But that is precisely what happened.

Before ending our discussion of the creep's significance, it is important not to overstate its magnitude. There are, of course, important shortcomings to focusing so narrowly on this doctrinal creep. First, this lens centers our analysis on the development of legal rights in custody. There are rich bodies of work by abolitionist organizers,[224] movement lawyers and scholars,[225] and critical theorists[226] that urge the importance of building power to contest subordination rather than fixating on the curbed promise of rights-making.[227] The related "critique of rights" posits that legal rights are often indeterminate and regressive and that winning a legal victory may hinder progressive change by obstructing political goals.[228] There are real "legitimation costs" to rights-based reform, as recognizing a right can paint a "patina of justice" over both structural injustices and flawed institutions that will remain unchanged by these piecemeal efforts.[229]

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222. *Id.*; *see also id.* (noting that from the "mid-1960s onward . . . states increasingly embraced laws and policies that, in turn, dramatically increased prison populations"); *supra* Part I.A (outlining the rise of incarcerated people's unions in the late 1960s and early 1970s alongside, and in response to, this growth).

223. *See, e.g.*, Christianson, *supra* note 217, at 247 (observing that doing so would "upset the minimum ecological balance of prison environments").

224. *See, e.g.*, CRITICAL RESISTANCE, OUR COMMUNITIES, OUR SOLUTIONS: AN ORGANIZER'S TOOLKIT FOR DEVELOPING CAMPAIGNS TO ABOLISH POLICING 14 (2020), https://perma.cc/G26Y-ZQRT (explaining that one goal of abolitionist campaigns is to "radically transform[] the conditions of power . . . so that our communities can collectively make decisions fully on our own terms").

225. For an illustrative (but not an exhaustive) list of works, see, for example, Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2516-17 (2023); Simonson, note 81 above, at 783-84; Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 150 (2016); and Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001).

226. *See, e.g.*, Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2202-04 (2013) (urging advocates to "abandon rights discourse" and adopt more transformative proposals, such as empowering indigent defendants and engaging in "public demonstrations and civil disobedience").

227. The building of power is more expansive than the pursuit of legal rights. *See, e.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 106 (2020) (describing the building of people power as creating the capacity to control "the conditions of [people's] own lives" by establishing "a vast extension of democratic participation in all areas of civic life—amounting to a very considerable transformation of the character of the state and of existing bourgeois democratic forms" (quoting RALPH MILIBAND, MARXISM AND POLITICS 188 (1977))).

228. *See* Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32-33 (1993).

229. *See* Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1480 (2006).

But the more transformative study of power is not wholly siloed from the circumscribed study of rights. As critical race theorists have observed, the critique of rights can be incomplete when considering the limited (but nonetheless present) utility of rights rhetoric for marginalized communities.[230] Rights enforcement can play an important role in recognizing modes of subordination, transforming status, and building solidarity among rights holders.[231] That is especially true when considering assembly and speech, which nourish the capacity to build collective power.[232] Establishing rights to assemble and dissent in custody could be an incremental step—but perhaps, a significant one—toward empowering and protecting incarcerated people within a system of omnipresent punishment. In other words, such rights could be considered antecedent to overcoming the antidemocracy of the carceral state.[233] Even within the isolation of prisons, even where outside audiences and stakeholders are not readily present to witness demonstrations, even though the possibility of influence over policy or other forms of decisionmaking may feel quite distanced, the ability to nourish solidarity and cultivate community education is itself a profound goal of building collective power.[234]

The second shortcoming relates to the limited role of the prison grievance creep within the *Turner* standard. If the *Turner* standard broadly imposes onerous barriers to prison civil rights enforcement, and if other limitations also preclude success for incarcerated litigants,[235] what difference does it make to recognize this prison grievance creep into First Amendment jurisprudence during confinement? Certainly, recognizing and remedying this creep will not solve the systemic issues of rights retrenchment within the criminal punishment system.

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230. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988) (providing a limited defense of rights rhetoric); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 409-14 (1987) (same).

231. *See* Williams, *supra* note 230, at 409-14.

232. *See supra* Part I.

233. *See supra* Part I.A; *see also* Akbar et al., *supra* note 35, at 854 (observing that when a consideration of legal rights is situated within a broader movement, "rights can politicize, contest, and expand the power of [marginalized] people").

234. *See, e.g.*, Simonson, *supra* note 81, at 805 (observing that social movements are not content with focusing solely on formal reforms but instead "also engage in political education, in organizing, [and] in mutual aid").

235. For example, the PLRA imposes many other barriers to prisoners' rights litigation beyond exhaustion, including constraints on remedies, attorneys' fees, and equitable relief. *See* Yang, *supra* note 25, at 1155. Beyond the PLRA, local rules governing pro se prisoner litigation are both procedurally and substantively arduous. *See* Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L. 121, 143-49 (2015). And even if incarcerated plaintiffs overcome these barriers, they still lack meaningful access to civil discovery. *See* James Stone, *The Prison Discovery Crisis*, 134 YALE L.J. 2751, 2764-67 (2025).

Though an examination of this creep cannot offer us a panacea, it is significant as a diagnostic tool. As outlined above, recognizing this creep reveals the substantive role that prison grievances play in safeguarding the prison's capacity to punish and silence incarcerated dissent. This expands our understanding of the reach of prison grievance systems and informs the inadequacies of many proposed reforms.

A procedural focus on prison grievance exhaustion has led to a procedural focus on possible solutions. Many proposals attack the PLRA, including demands to amend its exhaustion provision,[236] to carve out broader exceptions to the Act,[237] or, more exhaustively, to repeal the Act.[238] Others focus on structural improvements to prison grievance procedures that would make them more accessible or responsive to incarcerated grievants, operating under the assumption that administrative exhaustion defines grievants' relationship to this administrative remedy.[239] If the prison grievance operated solely as a procedural impediment, such reforms could be comprehensive. But the creep demonstrates the potential myopia of such changes. Even when an incarcerated person overcomes administrative exhaustion to reach the merits of their claim in court, the prison grievance can reemerge in critical ways to hollow out the contents of their pursued right. Even in a world where advocates successfully repeal the PLRA, prison grievance systems could continue to silence dissent with impunity.

Significantly, this diagnosis of the prison grievance creep does not end with the First Amendment. Recognizing this creep allows us to see the different paths that the prison grievance has taken to escape the confines of *Jones*. As Part III outlines below, this creep has continued to grow—and it has enabled *Jones*'s shadow to intrude into a wider breadth of constitutional rights enforcement in prison.

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236. *See, e.g.*, Hannah E. Mirzoeff, Note, *The Prison Litigation Reform Act Exhaustion Requirement: How a Legislative Decision from 1996 Is Controlling COVID-19 Conditions Inside Correctional Facilities, and What Can Be Done to Fix It*, 43 CARDOZO L. REV. 2071, 2072 (2022) (proposing an amendment to the PLRA that would waive the exhaustion requirement in life-threatening emergencies).

237. See, for example, the Justice for Juveniles Act, H.R. 5053, 116th Cong. § 2 (2020), legislation introduced by a bipartisan group of congresspeople that would exempt children from the PLRA.

238. *See, e.g.*, H.R. Res. 702, 116th Cong. (2019) (proposing the repeal of the PLRA); Jailhouse Lawyers Speak (@JailLawSpeak), TWITTER (Apr. 24, 2018, 6:28 AM), https://perma.cc/4R3A-CJCG (announcing a nationwide prison strike to advocate for, among other demands, the repeal of the PLRA); Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://perma.cc/4LYA-T5KN (calling for the PLRA's repeal).

239. *See, e.g.*, KAUL ET AL., *supra* note 178, at 1-2 (recommending that prison grievance policies provide more concrete definitions, expand access, provide more notice, and expand time limits to exhaust).

III. The Creep into *Bivens* Enforcement: A Migration

The prison grievance creep reflects an incremental intrusion that can be traced directly back to *Jones*. But the doctrinal intrusion of prison grievances does not end with *Turner* and its progeny. This Part identifies a second type of prison grievance creep that merits scrutiny. I explain how the prison grievance has traversed the First Amendment to intrude into *Bivens* causes of action, which has eroded the broader enforcement of constitutional rights in federal prisons.

Before we begin our historical discussion of *Bivens*, it is important to recognize that the Roberts Court "sounded a full-scale retreat" from the remedy when it imposed a restrictive two-step framework for permitting a *Bivens* claim.[240] Though the doctrine is technically alive (and has been successfully used to vindicate some rights), it is generally considered a "relic" on its last legs.[241] Moreover, the *Bivens* remedy is particularly elusive for incarcerated plaintiffs, who comprise the largest category of *Bivens* plaintiffs yet face extraordinarily low rates of success.[242] Resolving the migratory prison grievance creep into *Bivens* will not singlehandedly resuscitate this dying doctrine. Why, then, is the creep worthy of study?

Despite the bleak outlook for *Bivens*, this examination provides a diagnostic framework that merits attention. By studying the elasticity of this creep, this Part explores the spreading influence and repressive consequences of prison grievances in constitutional rights-making. It provides a unique descriptive account that challenges this migration into *Bivens*,[243] and I hope this

240. *See* Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 13-15 (2023). At the first step, the court determines whether the case presents "a new *Bivens* context," which asks whether the case is "'meaningful[ly]' different" from the *Bivens* trio. Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022) (alteration in original) (quoting Ziglar v. Abbasi, 582 U.S. 120, 139 (2017)). If the answer is no, there is a *Bivens* claim. *Id.* If the answer is yes, then the remedy remains "unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress 'to weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* (quoting *Ziglar*, 582 U.S. at 136).

241. Byrd v. Lamb, 990 F.3d 879, 884 (5th Cir. 2021) (per curiam) (Willett, J., concurring) ("*Bivens* today is essentially a relic, technically on the books but practically a dead letter, meaning this: If you wear a federal badge, you can inflict excessive force on someone with little fear of liability.").

242. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 66 & n.6 (1999) (reporting that of more than 1,500 *Bivens* claims filed against BOP officials between 1992 and 1994, only two resulted in monetary judgments and approximately sixteen resulted in monetary settlements). Potential barriers to success included lack of counsel, lack of legal knowledge, and qualified immunity. *See id.* at 83-84, 96 n.136.

243. Other commentators have noted the federal courts' reliance on the BOP's prison grievance system as an alternative remedial scheme to foreclose a *Bivens* remedy. *See* Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 959-60

footnote continued on next page

examination will prove useful should prison grievances seek entry into other dimensions of substantive doctrine.

A. Eroding Constitutional Protections in Federal Custody

A discussion of this migratory form of creep requires us to first dive into a related but distinct history. A *Bivens* claim is an implied cause of action to pursue monetary damages for constitutional violations against federal officers.[244] The Court recognized that even in the absence of express statutory authorization, people should retain the capacity to recover damages from federal officials who infringe on their constitutional rights.[245] Between 1971 and 1980, the Court issued a trio of decisions (what I will call "the *Bivens* trio") that applied this cause of action to three specific circumstances: an unreasonable search and seizure,[246] sex-based employment discrimination,[247] and deliberate indifference to serious medical needs during incarceration.[248] But the Court also delineated boundaries to *Bivens* claims. At the time, this implied right of action was defeated in two scenarios: if defendants demonstrated "special factors counselling hesitation" or if Congress provided an "equally effective" alternative that supplanted a *Bivens* remedy.[249]

The last of the *Bivens* trio, *Carlson v. Green*, is especially relevant to our discussion. The case centered around the horrific death of Joseph Jones, Jr., while incarcerated at a federal prison in Terre Haute, Indiana.[250] He was diagnosed with chronic asthma when he entered the federal prison system in 1972, and three years later, his condition required hospitalization for eight days at an outside facility.[251] The treating physician prescribed Mr. Jones steroid treatments, which should have continued after he returned to the prison, and recommended his transfer to a prison in a more favorable climate.[252] But the

(2018); Madeline Prince, Comment, Bivens *and* Ward*—Constitutional Remedies in the United States and Canada*, 36 EMORY INT'L L. REV. 351, 357-58 (2022); Hannah M. Wilk, Note, Bivens *and Beyond: Creating a Meaningful Remedy for Federal Prisoners in a Post-*Boule *Landscape*, 30 WASH. & LEE J. C.R. & SOC. JUST. 333, 363 (2024). This Article's contribution is to trace the evolution of this displacement and to situate it within a broader creep of prison grievances into constitutional rights-making in prison.

244. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). The cause of action takes its name from *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, the first Supreme Court case to recognize it. *See id.*

245. *Id.* at 391-92.

246. *See id.*

247. Davis v. Passman, 442 U.S. 228, 230-31 (1979).

248. Carlson v. Green, 446 U.S. 14, 16 (1980).

249. *See Bivens*, 403 U.S. at 396, 397.

250. *Carlson*, 446 U.S. at 16 n.1.

251. Brief for the Respondent, *Carlson*, 446 U.S. 14 (No. 78-1261), 1979 WL 213534, at *3.

252. *Id.*

BOP returned Mr. Jones to the Terre Haute prison—and once there, prison staff failed to give him his medication.[253]

Just one month later, Mr. Jones had an asthmatic attack and was admitted to the prison hospital.[254] No physician was on duty, and prison officials did not summon one.[255] Instead, the prison left Mr. Jones untreated for eight hours.[256] A nonlicensed nurse eventually attempted to use a respirator (one that the nurse knew to be broken),[257] and when that did not work, administered two injections of a medication that was contraindicated for an asthmatic attack.[258] Thirty minutes after the second injection, Mr. Jones went into respiratory arrest.[259] The nurse and a prison official then attempted to use emergency equipment to "administer an electric jolt" to Mr. Jones, but neither knew how to operate the machine.[260] Although Mr. Jones was eventually transferred to an outside hospital, he passed away before receiving treatment.[261]

Mr. Jones's mother, Marie Green, filed a complaint on behalf of his estate.[262] She alleged that federal prison officials were deliberately indifferent to her son's serious medical needs, that their indifference was attributable to racial prejudice, and that their actions violated her son's due process, equal protection, and Eighth Amendment rights.[263] In response, the defendants[264] argued that a *Bivens* claim was unavailable.[265] They submitted that in this case, the Federal Tort Claims Act (FTCA)—an act that imposes liability on the United States for torts committed by federal employees acting within the scope of their official duties[266]—was "a complete and sufficient compensatory mechanism" that fully supplanted *Bivens*.[267]

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253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at *4.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *See id.* at *3; *Carlson*, 446 U.S. at 16.

263. *Carlson*, 446 U.S. at 16 n.1.

264. The complaint named the following defendants: "Norman A. Carlson, the Director of the Federal Bureau of Prisons; Robert T. Brutshe, the Assistant Surgeon General; various officials at the Terre Haute Penitentiary; and the Joint Commission on the Accreditation of Hospitals." Brief for the Petitioners, *Carlson*, 446 U.S. 14 (No. 78-1261), 1979 WL 213535, at *8 (footnotes omitted).

265. *Id.* at *11-12.

266. *See* 28 U.S.C. § 1346(b).

267. Brief for the Petitioners, *supra* note 264, at *11-12.

The Court disagreed, observing that nothing in the FTCA's statutory language or legislative history demonstrated that Congress intended to preempt a *Bivens* remedy in this context.[268] Indeed, when Congress amended the FTCA in 1974, congressional comments "made it crystal clear" that Congress viewed the FTCA as running parallel to *Bivens*.[269] The Court therefore viewed the FTCA as a complementary counterpart to, not a replacement of, *Bivens* and its progeny.[270] What is more, the Court recognized four ways in which a *Bivens* remedy was "more effective" than the FTCA.[271] In contrast to the FTCA, *Bivens* claims permitted punitive damages, resolution by jury, awards against individual defendants, and the ability to pursue liability in the absence of a parallel state-law claim.[272] The potential for individual responsibility was important to the Court's analysis given the "deterrent purpose" of *Bivens*—one shared by 42 U.S.C. § 1983,[273] another critical vehicle for civil rights enforcement. Together, these differences "[p]lainly" indicated that the FTCA was "not a sufficient protector of the citizens' constitutional rights."[274]

Legal scholarship has referenced *Carlson* for its significance to *Bivens* enforcement, especially within prisons.[275] But there are two overlooked dimensions of the suit in *Carlson* that merit our attention. First is the context in which the suit arose: Mr. Jones's death was the fourth death "from medical care inadequacies" in the prison during a seven-month period.[276] Incarcerated people and their allies had for several months advocated for changes to the prison's inadequate medical care system; these efforts escalated after the third death that year.[277] For example, 900 people within the prison organized a work stoppage to protest the deaths, with some writing letters of protest to prison officials.[278] But no changes were made to the prison's "blatantly inadequate medical conditions" before Mr. Jones's death.[279] This preceding mobilization—and the prison's willful ignorance of it—were omitted from the opinion.

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268. *Carlson*, 446 U.S. at 19.

269. *Id.* at 19-20.

270. *Id.* at 20.

271. *Id.* at 20-21.

272. *Id.* at 21-23.

273. *Id.* at 21 & n.6.

274. *Id.* at 23.

275. *See, e.g.*, Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 549 (2013) (explaining *Carlson*'s place in *Bivens* doctrine and history).

276. Brief for the Respondent, *supra* note 251, at *4.

277. *See id.*

278. *Id.*

279. *Id.*

Second is the relevance of prison grievances to the parties' arguments. The FTCA requires administrative exhaustion, an obligation that could be satisfied only through the prison grievance system.[280] And in its briefing, the defendants relied on both the judicial *and administrative* remedies provided by the FTCA when arguing that it displaced *Bivens*.[281] They argued that permitting the plaintiff to bring a *Bivens* claim would be "especially inappropriate" because it would "bypass the administrative process, which plays such a crucial role" in the FTCA's design.[282] Mr. Jones's mother challenged this sanitized depiction of prison grievances by explaining why filing a prison grievance was "all but a useless act" to obtain redress, which would be "extremely unlikely" given the "unfortunate reality" of the remedy's futility.[283] Despite the parties' attention to these arguments, the *Carlson* Court did not discuss the prison grievance process in its opinion. But the Court's rejection of the FTCA as a viable alternative to *Bivens* suggests that the Court, too, rejected as an effective substitute the prison grievance system that the Act incorporated.

The Court issued *Carlson* just three years after deciding *Jones*—and yet, its consideration of the prison grievance system was markedly different. One could expect the *Carlson* Court to adopt the reasoning from *Jones* and embrace a similar myth of "alternative" equivalency to undermine the pursued constitutional right. But in *Carlson*, the Court declined its chance to displace a *Bivens* cause of action with the FTCA administrative remedy. While the NCPLU's First Amendment claim in *Jones* was more readily replaced by the prison grievance, the Eighth Amendment claim in *Carlson* was not so easily supplanted. A possible explanation for this divergence relates to the content and context of the pursued rights. As noted in Part I above, the Court used *Jones* to quell the capacity for organized dissent and protest in prisons at a time when such advocacy began to grow in power. Perhaps, for the Court, the absence of such concerns in *Carlson* provided the space to examine the deficiencies of this administrative remedy with much more clarity.

The subtle dismissal in *Carlson* became explicit in *McCarthy v. Madigan*.[284] Over a decade after issuing *Carlson*, the Court confirmed that a prison grievance process does not constitute an "effective alternative" that would supplant a *Bivens* remedy.[285] The Court made two primary observations to support this

280. Brief for the Petitioners, *supra* note 264, at *25-26, *26 n.23 (explaining the FTCA's administrative exhaustion requirement).

281. *Id.* at *11-12 (submitting that the FTCA's "comprehensive *administrative* and judicial procedures . . . constitute an adequate federal remedy" (emphasis added)).

282. *Id.* at *12 (quoting Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979)).

283. Brief for the Respondent, *supra* note 251, at *27.

284. 503 U.S. 140, 151 (1992), *superseded in other part by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-71 (codified as amended at 42 U.S.C. §§ 1997b, 1997c, 1997e).

285. *Madigan*, 503 U.S. at 151.

conclusion: It was impossible to obtain monetary damages through a prison grievance, and it was an executive agency (the BOP), not Congress, that created and shaped the administrative scheme.[286] The Court's express language in *Madigan* should have closed the door to the creep of prison grievances into *Bivens*.

But as *Madigan* neared its ten-year anniversary, the prison grievance reemerged. In *Correctional Services Corp. v. Malesko*, the Court considered whether to extend *Bivens* and allow an Eighth Amendment claim against a private corporation that operated a halfway house for the BOP.[287] The plaintiff, John E. Malesko, had been diagnosed with a heart condition during his imprisonment in the BOP that limited his ability to engage in physical activity.[288] It was difficult for him to perform routine tasks, such as climbing stairs.[289] A year into his sentence, the BOP transferred Mr. Malesko to Le Marquis Community Correctional Center, a halfway house operated by the defendant, Correctional Services Corporation (CSC).[290] CSC assigned Mr. Malesko to live on the fifth floor of the building, and about a month after his transfer, it instituted a policy requiring everyone below the sixth floor to use the staircase rather than the elevator.[291] Although Mr. Malesko's health condition exempted him from the policy, a CSC employee nevertheless prohibited him from using the elevator.[292] When the CSC employee forced Mr. Malesko to climb the stairs, Mr. Malesko suffered a heart attack, fell, and suffered serious injuries.[293]

The Court declined to extend *Bivens*.[294] The dissenting justices described this case as a "straightforward application of *Bivens* and *Carlson*,"[295] but the majority opinion disagreed.[296] Although here, as in *Carlson*, the underlying claim arose under the Eighth Amendment, the Court was unwilling to expand *Bivens* liability to a corporate defendant that contracted with a federal agency—it deemed this to be a "fundamental[] differen[ce]" that exceeded the "core premise" of the *Bivens* trio.[297]

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286. *See id.* at 150-51.

287. 534 U.S. 61, 63, 73 (2001). The only defendant before the Court was the private corporation that operated the halfway house; the *Bivens* claims against individual defendants were dismissed on statute of limitations grounds. *Id.* at 65.

288. *Id.* at 64.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 63.

295. *Id.* at 76-77 (Stevens, J., dissenting).

296. *See id.* at 70-74 (majority opinion).

297. *Id.* at 70-71.

Malesko reaffirmed that "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."[298] But the Court also noted that in its intervening decisions, it had reshaped the types of existing remedies that should foreclose a *Bivens* claim.[299] What mattered now was whether the plaintiff "had an avenue for *some* redress."[300] Even if the remedy "d[id] not provide complete relief for the plaintiff,"[301] and even if Congress had not prescribed statutory relief for the constitutional violation, the presence of an alternative remedial process displaced liability under *Bivens*.[302] In *Malesko*, the Court pointed to a few purportedly "effective" remedies: state tort remedies, injunctive suits in federal court, and parallel tort remedies for federal prisoners held in private facilities.[303] But most relevant to our discussion was the invocation of prison grievances, which the Court described as "yet another means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring."[304]

It is unclear whether the Court intended to overrule *Madigan* through its two-sentence discussion of prison grievances in *Malesko*. *Madigan* occupied very little space in the parties' or the Court's consideration of the issues. The oral argument and the majority opinion are devoid of any reference to *Madigan*,[305] and it is referenced only once in the dissent to support the assertion that the Court had never before "qualified [its] holding that Eighth Amendment violations are actionable under *Bivens*."[306] Indeed, it was cited only once in the parties' merits briefing before the Court, when CSC remarked in a footnote that the PLRA's exhaustion requirement superseded *Madigan*'s holding that exhaustion was not a prerequisite for filing suit under *Bivens*.[307]

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298. *Id.* at 70.

299. *See id.* at 68-69.

300. *Id.* at 69 (emphasis added).

301. *Id.* (quoting Bush v. Lucas, 462 U.S. 367, 388 (1983)).

302. *Id.*

303. *Id.* at 72-74.

304. *Id.* at 74.

305. *See id.* at 63-74; Transcript of Oral Argument at 3-56, *Malesko*, 534 U.S. 61 (No. 00-860), 2001 WL 1182728.

306. *See Malesko*, 534 U.S. at 76 (Stevens, J., dissenting).

307. Brief of Petitioner, *Malesko*, 534 U.S. 61 (No. 00-860), 2001 WL 535666, at *17 n.16. The United States's amicus brief also fails to refer or cite to *Madigan*. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *Malesko*, 534 U.S. 61 (No. 00-860), 2001 WL 558228, at *1-30. One exception was an amicus brief filed by the American Civil Liberties Union, which cited *Madigan* to argue that the Court had already "rejected the argument that prison grievance systems, which are not created by Congress, displace *Bivens* relief." Brief of the American Civil Liberties Union as Amicus Curiae in Support of Respondent at 6 n.3, *Malesko*, 534 U.S. 61 (No. 00-860), 2001 WL 830576, at *7 n.3 (citing McCarthy v. Madigan, 503 U.S. 140, 149-50 (1992)).

Of course, as *Malesko* recognized, the Court's *Bivens* test had shifted in the intervening years between *Madigan* and *Malesko*. The limitations discussed in *Madigan*—that the agency had designed it rather than Congress and that the remedy could not produce the monetary damages sought through *Bivens*—were no longer the prohibitory conditions they once were. By that point, the Court considered remedies designed by the executive, even ones that could not provide complete relief for the plaintiff, to be effective alternatives that supplanted *Bivens*. But there is no express indication that the Court realized *Madigan*'s relevance to the issue, or that the Court intended to overrule it. And what of *Carlson*? The BOP's grievance system was available at that time—in fact, the defendants argued that this administrative remedy helped qualify the FTCA as a meaningful alternative to a *Bivens* remedy when litigating the case.[308] If the prison grievance process did not displace *Bivens* in *Carlson*, and if *Carlson* remains good law,[309] how could this same administrative remedy supplant *Bivens* in similar prisoners' rights suits?

The lack of clarity resulting from *Malesko* created conflicts in the lower courts. The Sixth Circuit, for example, disagreed that the BOP's grievance procedure displaced *Bivens* for two reasons: It observed that the Court "explicitly held" in *Madigan* that this administrative remedy is "not an effective substitute" for a *Bivens* action, and it observed that the existence of prison grievances did not affect the Court's conclusion in *Carlson*.[310] But others, like the Third[311] and Ninth Circuits,[312] cited *Malesko* and the BOP's existing grievance process to forgo *Bivens* enforcement of constitutional claims in prison. Even the Sixth Circuit came to disagree with itself. Just four years after issuing its prior opinion, it determined that the BOP's grievance system *did* offer an alternative remedy that foreclosed *Bivens* for incarcerated litigants.[313]

This consensus has only continued to grow.[314] And in 2022, the Court reaffirmed its language from *Malesko* to observe that *Bivens* relief is unavailable

308. Brief for the Petitioners, *supra* note 264, at *11-12.

309. Although this is technically true, some members of the Court have signaled an openness to reconsider *Bivens* and its progeny. *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793, 1809 (2022) (identifying detractors from *Bivens* over the years and observing that "if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution").

310. *See* Koprowski v. Baker, 822 F.3d 248, 256-57 (6th Cir. 2016).

311. *See, e.g.*, Mack v. Yost, 968 F.3d 311, 320-21 (3d Cir. 2020).

312. *See, e.g.*, Vega v. United States, 881 F.3d 1146, 1154 (9th Cir. 2018) (declining to extend *Bivens* to the plaintiff's First and Fifth Amendment claims).

313. *See* Callahan v. Fed. Bureau of Prisons, 965 F.3d 520, 524 (6th Cir. 2020). The Sixth Circuit distinguished *Callahan v. Federal Bureau of Prisons* from *Koprowski v. Baker* by arguing that "the brief discussion" in the former "observed only that the grievance system's existence did not suffice to reject a *Bivens* claim already in existence," but that it "said nothing about its relevance to the creation of a *new Bivens* claim." *Id.* at 525.

314. *See infra* Part III.C.

when "federal prisoners c[an], among other options, file grievances" to the BOP.[315] Although it did not engage in a robust discussion of this issue or formally overrule this aspect of *Madigan*, the Court's language has allowed this migratory creep to percolate throughout the lower federal courts.

B. The Complicity of Prison Grievance Systems

As Part III.A explains above, deterrence occupies a critical role in the Court's formulation and understanding of civil rights causes of action, including Section 1983 and *Bivens*. But as this Subpart outlines, prison grievance policies fail to provide the deterrence necessary to serve as an alternative surrogate for *Bivens* enforcement. This deficiency in the prison grievance regime—in addition to those outlined in Part II.B above—emphasizes the harms of permitting this creep to persist.

What types of relief could potentially serve a deterrent purpose? Not all remedies carry the necessary bite to prevent repeated misconduct. The "prospect of an injunctive order" often carries "little incentive to shun practices of dubious legality" when unaccompanied by other consequences.[316] Nor is compensation itself always sufficient. After all, civil rights claims are designed to advance multiple policies, and courts have distinguished their compensatory aim (to make whole those who have been injured) from their preventive aim (to deter abuses).[317] While compensation is a backwards-looking assessment of fairness to the aggrieved individual(s), deterrence is a forward-looking assessment that considers the broader costs of continued misconduct.[318] This is not to say that these two types of relief are always siloed from each other—as *Carlson* acknowledged, "[i]t is almost axiomatic that the threat of damages has a deterrent effect," especially when the individual official must confront the risk of "personal financial liability."[319]

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315. Egbert v. Boule, 142 S. Ct. 1793, 1806 (2022).

316. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (reasoning that backpay awards for Title VII lawsuits provide the necessary "catalyst" for employers to "self-evaluate" and "eliminate" discriminatory employment practices (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973))).

317. Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) (identifying these two policies of Section 1983).

318. *See* Dobson v. Camden, 705 F.2d 759, 764-65 (5th Cir. 1983) (discussing the differences between the two policies of Section 1983: "compensation and deterrence").

319. Carlson v. Green, 446 U.S. 14, 21 (1980). This distinction between personal and entity damages liability can be important when it comes to the function of deterrence. *See generally* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (challenging the judicial and scholarly assumption that government policymakers gather sufficient information about civil rights damages actions to adequately confer a deterrent effect).

Because a *Bivens* cause of action is against federal officials, the most relevant grievance policy is the one belonging to the BOP. Monetary damages are unavailable in the BOP's grievance process.[320] In fact, the written rules governing the process fail to identify any available forms of relief.[321] There is no indication that prison officials will be disciplined for meritorious grievances.[322] There is no reference to changing a policy or practice, to stopping violative conduct, or to issuing apologies.[323] The governing rules are silent as to remedies,[324] which ensures the BOP will not be held to any specific form of relief through the process. Not only does the policy exclude monetary compensation—it also fails to reflect *any* deterrent effect.

The BOP is not alone in this.[325] The lack of deterrence reflected throughout the prison grievance regime illuminates a systemic concern that merits additional scrutiny. Two studies have investigated the absence of compensatory damages in prison grievance systems nationwide. In 2001, Lynn S. Branham published a telephone study that asked correctional representatives from forty-five state prison departments about the availability of monetary damages.[326] She reported that no prison grievance process awarded damages for claims of excessive force or unconstitutional conditions.[327] Where monetary payments were possible, such relief was available for only "very limited types of claims," primarily those seeking restitution for lost or damaged property or miscalculated charges.[328] In 2015, the Michigan Law Prison Information Project undertook a robust analysis of prison grievances that considered many dimensions of the process, including but not limited to remedies.[329] Unlike Branham's telephonic survey, this report first obtained and then analyzed the prison grievance policies of all fifty states, the District of Columbia, and the

320. *See, e.g.*, Bulger v. Hurwitz, 62 F.4th 127, 140 (4th Cir. 2023).

321. *See* FED. BUREAU OF PRISONS, *supra* note 190.

322. *See id.*

323. *See id.*

324. *See id.*

325. It may seem extraneous to consider prison grievance policies outside the BOP, but I argue it is relevant for two reasons. First, doing so situates the BOP's grievance process in its proper context—the lack of deterrence throughout the prison grievance regime. It is a systemic problem, not an individual one. Second, a study of this doctrinal creep recognizes the migration of prison grievance displacement to new dimensions of substantive law and to other types of constitutional claims. Given this migratory potential, it is worthwhile to confront the broader myth that deterrence is integrated into the prison grievance system as a whole.

326. Branham, *supra* note 29, at 507-08, 518.

327. *Id.* at 518.

328. *Id.*; *see also id.* (observing that in six states, incarcerated people could recover monetary compensation for medical claims).

329. *See generally* KAUL ET AL., *supra* note 178.

BOP.[330] It observed that thirty-one policies failed to address the question of remedies entirely.[331] Of the policies that *did* discuss remedies, six allowed for apologies or assurances that misconduct would not recur, fifteen mentioned the possibility of corrective measures, and eighteen referenced changes to institutional policies or practices.[332] The report noted that twelve policies permitted restoration or restitution, but going beyond the report text to the underlying analysis reveals that compensation was limited to personal property loss, damage, or confiscation.[333] Only one state's grievance procedure allows a limited amount of "[m]onetary reimbursement" for "personal injury, tort, or civil rights claims" arising out of prison misconduct.[334] Given this broadscale erasure of compensatory damages, it is perhaps unsurprising that no prison grievance policy permits punitive damages.[335]

This inverted scale for compensation is significant. In all but one state, the most egregious violations are afforded *no* possibility of damages, neither compensatory nor punitive.[336] Only a minority of prison systems permits the

330. *See id.* at 1 (explaining that the study gathered prison grievance policies through the web or by Freedom of Information Act requests). The grievance policies of Puerto Rico and the nation's twelve largest metropolitan jails are omitted from my analysis.

331. *See id.* at 10.

332. *See id.*

333. I used the twelve states identified in the report as "expressly provid[ing] the remedy of restitution and/or restoration" (Arizona, Colorado, Connecticut, Missouri, Montana, Nebraska, New Mexico, North Carolina, South Dakota, Texas, Washington, and Wyoming). *See* KAUL ET AL., *supra* note 178, at 11. I then investigated the specific remedies-related information documented in the accompanying Excel spreadsheet that coded various aspects of the grievance policies. *See* Mich. L. Prison Info. Project, *Database of Prison/Jail Grievance Policy Characteristics (Excel)*, C.R. LITIG. CLEARINGHOUSE (Oct. 18, 2015), https://perma.cc/PK2H-58ZV.

334. *See* NEV. DEP'T OF CORR., ADMINISTRATIVE REGULATION 740, OFFENDER GRIEVANCE PROCEDURE 8 (2022), https://perma.cc/95V2-VPSD (permitting the Deputy Director of Support Services the discretion to award monetary damages at any level of the grievance process, but limiting such compensation to a maximum of $500); Mich. L. Prison Info. Project, *supra* note 333. Although the report did not identify Nevada as a state that "expressly provide[d] the remedy of restitution and/or restoration," *see* KAUL ET AL., *supra* note 178, at 11, the accompanying excel sheet included information that did, *see* Mich. Law Prison Info. Project, *supra* note 333 (noting that Nevada permits this type of monetary reimbursement).

335. When a policy did mention punitive damages, it was to expressly prohibit them. *See* COLO. DEP'T OF CORR., REGULATION NO. 850-04, ADMINISTRATIVE REGULATION: GRIEVANCE PROCEDURE 1 (2024) (noting that "exemplary or punitive damages are not remedies available to offenders"); MO. DEP'T OF CORR., NO. D5-3.2, DEPARTMENT MANUAL: OFFENDER GRIEVANCE 8 (2009), https://perma.cc/8DFR-TXB6 ("Consequential or punitive damages will not be provided."); TEX. DEP'T OF CRIM. JUST., NO. OGOM 1.01, OFFENDER GRIEVANCE OPERATIONS MANUAL 3 (2014), https://perma.cc/XZT7-H9CE (identifying a request for "consequential or punitive damages" as an "[i]nappropriate" grievance that will be rejected unprocessed).

336. *See infra* Appendix.

relatively modest claim of personal property damage or loss as an avenue for restitution. And even then, the compensation is not without its financial limits.[337] One possible explanation for this divergence is ease of administration; restitution is much simpler to calculate than, for example, damages for excessive force. But the impact of this divergence is profound. The broadscale absence of compensatory damages both minimizes the prison's self-accountability and maximizes its convenience, and the limited presence of minimal restitution provides no incentives to deter misconduct against this broader backdrop.

Given the importance of monetary damages to *Bivens* claims, the above deficiency should be lethal to establishing equivalency between prison grievances and constitutional rights enforcement in federal custody. But even if we consider nonmonetary forms of relief, prison grievance policies fail to provide the deterrence necessary to meaningfully supplant *Bivens* enforcement. Although some policies suggest that changes to institutional policy or practice can result from a prison grievance,[338] such remedies are arguably the types of injunctive relief that courts have found to lack a sufficient deterrent impact.[339] But there is one type of nonmonetary relief that might, at least on an individual level, provide a measurable type of deterrence: disciplinary action.

Such a remedy carries a threat of personal consequence that could provide some measure of deterrence for specific wrongdoers.[340] But the vast majority of prison grievance policies fail to expressly identify disciplinary action as an available form of relief.[341] Of the ones that do reference disciplinary action, many prescribe limitations to the relief or prohibit it entirely.[342] Some cabin the reference to only specific forms of misconduct, such as violating the procedural rules laid out in the prison grievance procedure[343] or thwarting access to the

337. *See, e.g.*, STATE OF IOWA DEP'T OF CORR., *supra* note 188, at 2-3 (limiting grievances of lost or damaged personal property to those "with value of less than $100.00").

338. *See* KAUL ET AL., *supra* note 178, at 10 (identifying policies that list, as remedies, changes to institutional policies or corrective measures).

339. *See supra* note 316 and accompanying text.

340. The need for nonmonetary forms of deterrence may be especially heightened in instances where indemnification insulates an individual defendant from personal financial liability. *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912-17 (2014) (conducting a national study of police indemnification and concluding that police officers are almost always indemnified).

341. *See infra* Appendix.

342. *See infra* Appendix.

343. OHIO ADMIN. CODE 5120-9-31(G) (2021) ("Appropriate disciplinary action shall be taken against any employee found to be in violation of this rule"); STATE OF TENN. DEP'T OF CORR., *supra* note 188, at 3 ("The failure of staff to comply with a directive by the Warden/Superintendent as a result of the Warden/Superintendent's review of the grievance may result in disciplinary action.").

process.[344] Others provide a list of possible remedies but omit disciplinary action from the offered index.[345] Most alarmingly, a number of states do not permit disciplinary action against prison officials through the grievance process.[346] Some states even go so far as to prohibit incarcerated people from requesting disciplinary action against a prison employee,[347] even when they are required to identify a specific form of relief in the grievance.[348] Only five policies appear to suggest that disciplinary action may be available,[349] but four of those policies are

344. ARIZ. DEP'T OF CORR., REHAB. & REENTRY, DEPT. ORDER 802, INMATE MANAGEMENT: INMATE GRIEVANCE PROCEDURE 4 (2025), https://perma.cc/UJ6R-HZMF (noting that employees who violate provisions that protect against reprisal "shall receive disciplinary action"); FLA. ADMIN. CODE ANN. r. 33-103.017(1) (2025) (recognizing disciplinary action only when employees "obstruct[] an inmate's access to the grievance process"); N.M. DEP'T OF CORR., *supra* note 181, at 8 ("Employees engaging in reprisals against inmates for good faith use of . . . the grievance procedure shall be subject to disciplinary action."); N.C. DEP'T OF ADULT CORR, *supra* note 196, § .0301(e) ("Employees who intentionally obstruct the grievance process shall be subject to disciplinary action."); STATE OF VT. DEP'T OF CORR., NO. 320, GRIEVANCE SYSTEM 7 (2023), https://perma.cc/R3PW-8GK2 (recognizing that staff "shall be subject to disciplinary action" if they "retaliate, or threaten to retaliate" for filing or withdrawing a grievance).

345. *See, e.g.*, STATE OF CONN. DEP'T OF CORR., DIRECTIVE NO. 9.6, ADMINISTRATIVE DIRECTIVE: INMATE ADMINISTRATIVE REMEDIES 4 (2021), https://perma.cc/B9BA-95ZS; DEL. DEP'T OF CORR., *supra* note 188, at 3; MD. CODE REGS. 12.02.28.13(B) (2025).

346. ARK. DEP'T OF CORR., NO 12-16, ADMINISTRATIVE DIRECTIVE: GRIEVANCE PROCEDURE FOR OFFENDERS 3 (2012), https://perma.cc/TC4L-MQK9 ("Remedies available do not include disciplinary action against employees, contractors, or volunteers . . . ."); COLO. DEP'T OF CORR., *supra* note 335, at 1 ("DOC employee, contract worker, or volunteer discipline/reprimand . . . are not remedies available . . . ."); IND. DEP'T OF CORR., *supra* note 183, at 4 (identifying "[s]taff discipline" as a "non-grievable issue[]"); OKLA. DEP'T OF CORR., *supra* note 188, at 4 (identifying "requests for disciplinary action against staff" as a non-grievable issue).

347. TEX. DEP'T OF CRIM. JUST., *supra* note 335, at 3 (identifying a request for "disciplinary action against an employee" as an "[i]nappropriate" grievance that will be rejected unprocessed); *see also* UTAH DEP'T OF CORR., NO DIOGO 13-007, FD02 INMATE GRIEVANCES, at FDO2/02.05 (2013), https://perma.cc/342U-99HS (noting that "the grievance process may not be used to pursue . . . disciplinary . . . action against department employees"); KY. CORR., *supra* note 184, at 8 ("An inmate filing a grievance concerning a staff member shall not suggest a specific form of disciplinary action.").

348. *See, e.g.*, TEX. DEP'T OF CRIM. JUST., *supra* note 335, at 2 (screening grievances that do not "include a request for relief").

349. CAL. CODE REGS. tit. 15, § 3486.3(a)(2) (2025) (suggesting that "personnel action" may be available); MO. DEP'T OF CORR., *supra* note 335, at 8 (same); S.C. DEP'T OF CORR., NO. GA-01.12, INMATE GRIEVANCE SYSTEM § 10.5 (2023) (identifying "employee discipline" as a possible remedy where "appropriate"); VA. DEP'T OF CORR., OPERATING PROCEDURE 866.1, OFFENDER GRIEVANCE PROCEDURE 10 (2024), https://perma.cc/DVG7-4KM9 (suggesting that the remedy may be available); WYO. DEP'T OF CORR., *supra* note 185, at 16 (identifying "discipline of or other corrective action for staff" as a remedy).

without teeth as they refuse to disclose any such consequences through the grievance process.[350]

The general dearth of internal accountability measures is especially concerning given that prison grievances are shielded from public scrutiny. As observed in Part II.B above, prison grievances are inherently limited as an inward-facing instrument—they are submitted to prison officials and remain internal to the prison system.[351] Accordingly, prison grievances provide no public-facing levers that could reach outside audiences or exert pressure on relevant decisionmakers. This critical shortcoming insulates prison officials from public accountability for their misconduct. Some policies make this self-interest transparent: Texas's grievance procedure, for example, recognizes that "[g]rievances are self-monitoring tools" that permit the prison system to avoid "external monitoring, such as . . . judicial oversight."[352]

The regime's design favors convenience and insulation over deterrence. Prison grievances fail to provide an adequate measure of deterrence, and this critical shortcoming renders it a deficient substitute for *Bivens* liability.

C. The Consequences of Migration

Despite their designed shortcomings, prison grievances have helped displace *Bivens* enforcement in custody. Here too we see the Court promote a mythology of the prison grievance—a superimposed generalization that it is an effective-enough alternative—to uproot the enforcement of critical rights in prison and install an ineffective surrogate.

This creep is different in scope than the one outlined in Part II above. A *Bivens* remedy, after all, is limited to damages claims against federal officials.

350. *See* CAL. CODE REGS. tit. 15, § 3486.3(a)(2) (2025) (clarifying that any such remedy will not be disclosed); MO. DEP'T OF CORR., *supra* note 335, at 8 (same); S.C. DEP'T OF CORR., *supra* note 349, at 5 (same); VA. DEP'T OF CORR., *supra* note 349, at 10 (same).

351. In certain jurisdictions and contexts, it is possible to demand some limited access to prison grievances. *See, e.g.*, Stone, *supra* note 235, at 2818 & n.322 (noting that in civil prisoners' rights litigation in Illinois, initial disclosure requirements include relevant prison grievances); Kozol v. Wash. State Dep't of Corr., 366 P.3d 933, 934 (Wash. Ct. App. 2015) (observing that the Washington Department of Corrections provided copies of the requested grievance forms under the state's public records law). But prison grievances, as well as the prison's investigations or responses to them, are not always subject to public records requests. *See, e.g.*, N.C. GEN. STAT. § 148-118.5 (2024) (noting that "[a]ll formal written responses to the prisoner's request [for an administrative remedy] shall be furnished to the prisoner as a matter of course," but otherwise "[a]ll reports, investigations, and like supporting documents prepared by the Division for purposes of responding to the prisoner's request . . . shall be deemed to be confidential"); State *ex rel.* Mobley v. Ohio Dep't of Rehab. & Corr., 201 N.E.3d 853, 857 (Ohio 2022) (declining to decide whether prison grievances constitute public records under Ohio's public records law because the plaintiff conceded he was not entitled to grievance-related records under the law).

352. TEX. DEP'T OF CRIM. JUST., *supra* note 335, at 7.

Given the relatively smaller footprint of the BOP within the prison industrial complex,[353] it could be argued that this intrusion is less concerning. But seen through another lens, this encroachment reflects a troubling migration beyond the borders of the First Amendment. Here, the existence of a prison grievance system provides a basis for declining liability for *any* constitutional violation within a federal prison that falls outside the very narrow parameters of *Carlson*.

Lower courts have cited the prison grievance process to decline the *Bivens* remedy for a diverse array of misconduct in prison. Due to the existence of a prison grievance, incarcerated plaintiffs have been unable to pursue *Bivens* liability against federal prison officials who engaged in excessive force,[354] harassed and threatened people in their custody,[355] refused necessary medication for debilitating injuries,[356] repeatedly forced people to submit to unnecessary strip searches,[357] performed other unreasonable searches,[358] arbitrarily placed people in solitary confinement,[359] or violated rights to religious exercise.[360] And as was true in the preceding Part, federal courts do not consider the quality or even the availability of the prison grievance process when relying on it. Courts have declined *Bivens* enforcement even when the incarcerated plaintiffs argued that the grievances they filed were predictably unsuccessful,[361] and even when the court expressly recognized that the administrative process was "not enough to deter [the federal official] from misconduct."[362]

This displacement of *Bivens* is especially troubling given the grievance regime's designed incapacity for deterrence. Deterrence is a critical objective when considering the powers granted to state and federal officials. As the *Bivens* Court explained, an official "possesses a far greater capacity for harm than an

353. *See Appendix: State and Federal Prison Populations 2019-2023 and Sources*, PRISON POL'Y INITIATIVE, https://perma.cc/PM3W-95ZL (archived Feb. 2, 2026). In 2022, for example, there were approximately 159,309 people held in BOP custody, as compared to the over one million people held in state prisons across the country. *See id.*

354. *See, e.g.*, Brown v. Nash, No. 18-cv-528, 2019 WL 7562785, at *1, *6 (S.D. Miss. Dec. 13, 2019); Landis v. Moyer, No. 22-2421, 2024 WL 937070, at *3 (3d Cir. Mar. 5, 2024).

355. *See, e.g.*, Hower v. Damron, No. 21-5996, 2022 WL 16578864, at *3 (6th Cir. Aug. 31, 2022).

356. *See, e.g.*, Wiley v. Fernandez, No. 19-cv-00652, 2024 WL 779392, at *6-7 (N.D.N.Y. Jan. 19, 2024).

357. *See, e.g.*, Liggins v. O'Sullivan, No. 19-cv-50303, 2022 WL 787947, at *1, *5 (N.D. Ill. Mar. 15, 2022).

358. *See, e.g.*, Leinheiser v. Decker, No. 20-4380, 2024 WL 1298880, at *8 (D.N.J. Mar. 27, 2024).

359. *See, e.g.*, Gonzalez v. Hasty, 269 F. Supp. 3d 45, 59-60, 65 (E.D.N.Y. 2017).

360. *See, e.g.*, Coe v. United States, No. 16-3006, 2020 WL 1977321, at *2 (W.D. Tenn. Apr. 24, 2020).

361. *See, e.g.*, *Gonzalez*, 269 F. Supp. 3d at 60; Hower v. Damron, No. 21-5996, 2022 WL 16578864, at *3 (6th Cir. Aug. 31, 2022).

362. *See, e.g.*, *Hower*, 2022 WL 16578864, at *3.

individual trespasser exercising no authority other than his own."[363] And importantly, once an official is granted the power of the government, that power "does not disappear like a magic gift when it is wrongfully used."[364]

I argue this concern is especially magnified within prisons, where prison officials do more than simply wear the badge of state or federal authority—they also wield that power in an institution where the state's domination over people is at its apex.[365] Courts and legislatures often justify the diminishment of rights in prison by adopting a punitive theory of carceral consequences and deferring to the security concerns raised by prison officials,[366] but the state's supremacy over prisons and the people inside them exposes a unique susceptibility. Incarcerated people, who are exceedingly vulnerable to state retaliation and abuse, are in this way *more* deserving of protections from such misconduct. And yet, one key tool for deterring state misconduct has been supplanted by a toothless regime that insulates the prison from both external and internal accountability.

This migration into *Bivens* also demonstrates that the prison grievance can work at multiple levels, in tandem, to curtail the possibilities of transformative advocacy. The history of *Carlson* provides one possible illustration. Various forms of prison organizing to demand necessary change—such as collectively organizing a work stoppage or sending petitions to address fatal medical neglect throughout the prison—can be stripped of protection by citing the mere existence of a prison grievance system as an alternative remedy.[367] And if the issue arises in federal custody, the existence of the prison grievance system also empowers courts to reject the availability of a federal claim that could otherwise publicize, shame, and deter the prison's misconduct as a backstop when other efforts at collective advocacy fail.[368]

IV. Moving Beyond the Prison Grievance

The preceding pages explain the mismatch between prison grievances and critical rights enforcement in custody. Just as prison grievances are ineffective surrogates for exercising speech and associational rights in prison, they are

363. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

364. *Id.*

365. The systemic dehumanization of incarcerated people also plays a significant role in reinforcing the dominant force wielded by carceral institutional actors. *See, e.g.*, Sharon Dolovich, *Excessive Force in Prison*, 114 J. CRIM. L. & CRIMINOLOGY 415, 425-51 (2024) (exploring the cultural, institutional, and psychological dynamics that shape prison officials' use of force against incarcerated people).

366. *See* Jefferis, *supra* note 123, at 991-99, 1025-26.

367. *See supra* Part II.

368. *See supra* Part III.

ineffective surrogates for enforcing *Bivens* liability against federal prison officials committing constitutional violations. This Part briefly contemplates how the above discussions can support efforts to challenge the intrusion of prison grievances into this substantive doctrine. I consider a few potential reforms that could help mitigate, or perhaps even eradicate, the harms of the prison grievance creep.

One potential solution is to clarify the relevant legal standards so that prison grievances can no longer take root. Parts II and III above deconstruct the equivalency myth of prison grievances by explaining how this administrative remedy fails to constitute an adequate alternative to the enforcement of a constitutional right. In the First Amendment context, advocates could push courts to clarify that an "alternative means of exercising the right [at issue]"[369] under *Turner* must be limited to *meaningful* alternatives, which would not include a prison grievance given the inadequacies highlighted in Part II.B above. There may be a small, potential foothold in Supreme Court precedent for this approach. Though the Court has clarified that alternatives "need not be ideal," it has also observed that alternatives must be "*of sufficient utility*" to "give some support to the [challenged] regulations,"[370] and courts have successfully used this language to conclude that the proposed alternative was indeed insufficient.[371]

There may be two approaches to excising the relevance of prison grievances from *Bivens*. First, advocates could point to the reasoning of *Carlson*, which remains binding precedent, to extend its disregard of the FTCA to the administrative remedies that were part and parcel of the defendants' arguments in that case.[372] If successful, this argument could omit prison grievances from the consideration of "alternative remedial structures" altogether.[373] Second, for all the reasons articulated in Part III.B above, advocates could point to the ongoing inadequacies of the prison grievance system to emphasize the distance between this administrative remedy and the constitutional enforcement offered by *Bivens*. A prison grievance should not displace *Bivens* when it fails to provide the necessary deterrence underlying the very purpose of a *Bivens* claim.[374]

Because the above solutions rely on judicial agreement, they arguably reflect an ideal hope that will likely be difficult to achieve in practice. After all, Parts II and III above illustrate how some courts have been active partners in establishing, maintaining, and growing this doctrinal creep. If courts have failed

369. *See* Turner v. Safley, 482 U.S. 78, 90 (1987).

370. Overton v. Bazzetta, 539 U.S. 126, 135 (2003) (emphasis added).

371. *See, e.g.*, Heyer v. U.S. Bureau of Prisons, 984 F.3d 347, 360 (4th Cir. 2021) ("Visitation is . . . not of 'sufficient utility' to constitute an alternative to point-to-point calls." (quoting *Overton*, 539 U.S. at 135)).

372. *See supra* Part III.A.

373. *See* Egbert v. Boule, 142 S. Ct. 1793, 1804 (2022).

374. *See supra* Part III.B.

to recognize the deficiencies of prison grievances in the preceding decades, it may be challenging to imagine they will do so now. I offer this proposal with the hope it may be helpful for lower courts interested in grappling with these questions anew, and with a desire to "envision[] a version of the law that is bold enough" to recognize the substantive harms of the prison grievance regime.[375]

Skepticism about the viability of this first proposal may lead some to consider different interventions that turn our focus away from the substantive doctrine to instead concentrate on the prison grievance system itself. If we demand improvements to prison grievance procedures, could the process become a more meaningful surrogate to rights enforcement in court such that we are less concerned about the prison grievance creep? Two potential ideas could align with this thinking. The first is reflected within the PLRA: We could borrow from its statutory language and allow courts to rely on prison grievance processes as an alternative remedial scheme under *Turner* or *Bivens* only when the administrative remedy is suitably "available" to incarcerated people.[376] Another proposal lies in history: Commentators have urged a return to the PLRA's predecessor,[377] the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), which enumerated "minimum standards" to measure whether a prison grievance system was sufficiently "plain, speedy, and effective" to trigger the exhaustion requirement.[378] The incentive of exhaustion was intended to motivate states to "substantial[ly] compl[y]" with these standards and seek the required certification from the Attorney General.[379]

Such solutions aimed at reforming the prison grievance regime are tempting because they carry the promise of administrability, but there are legitimation costs to prioritizing this as a normative goal. These proposals are superficially manageable precisely because they do not disturb the scaffolding of the existing structure. Taken to their logical end, such solutions legitimize the prison grievance as a purported good that merits preservation. Two

375. *See* Daniel S. Harawa, *Coloring in the Fourth Amendment*, 137 HARV. L. REV. 1533, 1540 (2024).

376. *See* 42 U.S.C. § 1997e(a) (requiring exhaustion when "such administrative remedies . . . are available").

377. *See, e.g.*, JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT 87 (2006), https://perma.cc/6SAE-3FG5 ("Congress should encourage reliance on meaningful grievance procedures—and meaningful procedural justice—by returning to the CRIPA exhaustion rule . . . ."); Joseph Alvarado, Note, *Keeping Jailers from Keeping the Keys to the Courthouse: The Prison Litigation Reform Act's Exhaustion Requirement and Section Five of the Fourteenth Amendment*, 8 SEATTLE J. FOR SOC. JUST. 323, 348 (2009) (recommending that Congress "reinstate the five minimum standards required . . . under CRIPA").

378. The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. § 1997e(b)(1)).

379. *See id.* (detailing the certification procedure that states must undergo before benefitting from the exhaustion requirement).

considerations counsel against this framing—and acceptance—of prison grievances.

The first is the operational reality of these proposals, which largely reflects their failure to produce fair processes. In practice, the "availability" standard can rubber-stamp inaccessible prison grievance processes, including those tainted by violent intimidation[380] or an outright denial of access.[381] CRIPA similarly did not succeed in elevating uniform standards across prison grievance systems. After nearly a decade following the Act's passage, only seven states had certified grievance procedures that were in compliance with the mandated minimum standards.[382] The standards included undemanding and commonsensical norms like safeguards against retaliation, priority processing of emergency grievances, time limits to reply to submitted grievances, some independent review of grievance dispositions, and an "advisory role" for incarcerated people and prison employees "in the formulation, implementation, and operation of the [grievance] system."[383] This last requirement may appear radical but was ultimately far from it—for example, one state's certified procedures established a semiannual evaluation of the grievance process by a committee, composed primarily of the state's carceral officials, that accepted comments by prison employees and incarcerated people with no formal obligation to actually consider or incorporate those comments.[384] Many states expressed dissatisfaction with any external oversight or federal influence over their

380. *See, e.g.*, Bryant v. Rich, 530 F.3d 1368, 1372, 1379 (11th Cir. 2008) (concluding that a grievance process was available even though the plaintiff was repeatedly beaten to discourage the filing of the grievance and, once transferred to a new facility, filing a new grievance would have been deemed untimely).

381. *See, e.g.*, Moss v. Harwood, 19 F.4th 614, 617-18, 621-23 (4th Cir. 2021) (concluding that a grievance process was available even though the plaintiff was in lockdown, jail officials refused to provide paper grievance forms, and officials denied him access to the electronic kiosk).

382. *See* REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 391-92 (1990) [hereinafter REPORT TO THE FEDERAL COURTS STUDY COMMITTEE] (noting that the Attorney General had certified the grievance procedures of Iowa, Missouri, Nebraska, Ohio, Tennessee, Virginia, and Wyoming, as well as several local jail systems in Virginia and Maryland).

383. *See* 42 U.S.C. § 1997e(b)(2) (1982).

384. *See* Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 945-46 (1986) (concluding that if the minimum standard can be met by such a provision, certification "should not be difficult to obtain").

grievance processes,[385] and the advisory requirement was so unpopular[386] that it became "the greatest source of state reluctance" to seeking certification.[387] The majority of states chose not to pursue certification at all.[388] As I have previously written, the history of CRIPA suggests that when the majority of states are given the opportunity to take "nominal steps toward holding their prison systems accountable," they decline to do so.[389]

This observation leads to a second, related concern regarding the impact of prison grievances over time. Commentators have considered the relevance of history when assessing contemporary doctrines or structures: The past can be both prologue and present. For example, scholars have observed that discrimination adapts to the relevant legal environment and mutates over time to evade existing prohibitions,[390] thereby implementing a "dynamic of preservation-through-transformation."[391] Commentators have remarked how this historical throughline reflects the insufficiencies of superficial reforms, which would maintain subordination where it should be abolished.[392]

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385. *See* REPORT TO THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 382, at 394. But as Donald Lay observed, compliance with CRIPA would actually "reduce[] federal intrusion" by "plac[ing] the grievance within the primary control of the state authorities" and "decreas[ing], not increas[ing], federal interference in state prison administration." *See* Lay, *supra* note 384, at 948.

386. Schlanger, *supra* note 29, at 1696 n.482 (citing 42 U.S.C. § 1997e(b)(2)(A) (1994)); *see also* REPORT TO THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 382, at 393 (observing that many prison administrators were "reluctant to accede to a federal rule that gives inmates even a peripheral role in the administration of state prisons").

387. Lay, *supra* note 384, at 939.

388. *Id.* at 950 & n.93 (citing only thirteen states that pursued certification).

389. *See* Yang, *supra* note 25, at 1190-91.

390. *See, e.g.*, Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1240-41 (2016) ("Understanding racial discrimination as a complex, adaptive system—rather than as aberrational or as a historical artifact unconnected to present disadvantage—alerts us to its multidimensionality and persistence across generations.").

391. *See, e.g.*, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179-80 (1996) ("[T]he manner in which a legal system enforces social stratification will evolve over time, changing shape as it is contested."). For example, when subsequent manifestations of a discriminatory policy are refined into facially neutral text, the persistent continuity of the earlier policy's operative core can embody a "discriminatory taint" that impugns the subsequent policy. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1194-96 (2022) (articulating a theory of "discriminatory taint" as "a detectable type of relationship between an earlier policy and a later policy").

392. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7-8, 19 (2019) (explaining that prison abolition theory is concerned with the "past, present, and future," and that "[t]he case for abolition that is grounded in history and politics provides a compelling framework for understanding the need to eradicate the entire carceral punishment system"); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 184, 193-94 (2022) ("The racialized history of the

footnote continued on next page

In this vein, a study of prison grievances is also a story of the persistent reach of history. As Part I above observed, early prison grievance systems capitalized on the "powerlessness" of incarcerated people, and their failures helped motivate the collective prison organizing from which the unionization movement grew.[393] Consider the case study offered by the NCPLU and North Carolina's prison grievance system. After the NCPLU emerged, its members viewed the grievance procedure as a tool manipulated by North Carolina's correctional department—one that "ke[pt] them powerless and manipulate[d] their right to unionize."[394] And as recently as 2023, people incarcerated in North Carolina state prisons noted that not much had changed in the intervening decades.[395] As one incarcerated person explained, the grievance system was not for them, but for the prison, to help staff "cover . . . up" and "conceal" systemic issues in confinement.[396] Regardless of intent,[397] the historical and contemporary impact of prison grievances has functioned to silence incarcerated people. Prioritizing superficial repairs to the regime may reconstitute critical issues that have long required more transformative reform.

The above discussion suggests that much more may be needed: the elimination of the prison grievance regime. As a threshold matter, reluctance to questioning the very existence of this administrative remedy is understandable. There *should* be some way for incarcerated people to communicate issues and concerns with prison officials without resorting to federal court litigation, just as there should be some way for prison officials to investigate and resolve issues that may not rise to the level of a federal law claim. These well-meaning and well-founded intuitions can lead to an acceptance of prison grievances. But the

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criminal legal system, particularly in relation to the enslavement of Black people, is so apparent in the current system that dismantling structural racism plays a key role in abolitionists' mission.").

393. Huff et al., *supra* note 68, at 332.

394. TIBBS, *supra* note 8, at 145.

395. In early 2023, NC-CURE—a nonprofit organization advocating for the humane treatment of people in North Carolina's prisons—issued a report on the state prison grievance system. NC-CURE, REPORT ON THE NCDPS ADMINISTRATIVE REMEDY PROCEDURE (2023), https://perma.cc/W4TX-E7EN. The report reflected a careful study of policy terms, a qualitative analysis of communications from incarcerated people about their experiences, and a review of reports published by the Inmate Grievance Resolution Board. *Id.* at 1.

396. *See id.* at 3.

397. This is not to suggest that the design or evolution of prison grievances was always well-meaning. *See, e.g.*, Yang, *supra* note 25, at 1165-74 (exploring examples of the "prison pleading trap," whereby prisons amended their grievance rules to impose a more onerous pleading standard when an incarcerated litigant successfully defeated the prison's exhaustion defense); Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 498-518 (2012) (studying how states reconfigured their grievance procedures with increasingly onerous requirements in response to the PLRA).

problem is that prison grievances have largely failed to accomplish either aim. Given its history, the prison grievance regime is not broken; it is instead operating as designed.[398]

If we eliminate prison grievances, what should exist in their place? The prominence of prison grievances has generally left little room for creative alternatives that wholly supplant rather than adjust the existing system, but commentators have envisioned some possibilities. A growing number of scholars have argued that restorative justice[399] could help erode society's reliance on criminalization and carceral punishment.[400] A smaller slice of this literature situates restorative justice within prisons themselves,[401] positing that disciplinary adjudication processes[402]—and even complaints against prison staff[403]—should be replaced by restorative methods that are collective and

398. *See supra* Parts I.A-.B.

399. Though restorative justice defies a singular definition, it is a reconceptualization of repair and accountability that (1) "reframes how we consider harm"; (2) "involves a process that brings together the interests of the responsible party, the harmed party, and community stakeholders"; (3) embraces an "exploration of the harm and the circumstances surrounding it"; (4) "includes collaborative determination of what accountability looks like"; and (5) "seeks to support the responsible party in arriving at accountability and reintegrating into the community." *See* Aparna Polavarapu, *Myth-Busting Restorative Justice: Uncovering the Past and Finding Lessons in Community*, 13 U.C. IRVINE L. REV. 949, 959-70 (2023) (considering various definitions and proposing a unified "set of elements" that comprise the restorative justice movement).

400. For a few examples of recent scholarship on this topic, see Olwyn Conway, *Grasping the Third Rail: Restorative Justice and Violent Crime*, 81 WASH. & LEE L. REV. 1379, 1383 (2024) (arguing that "restorative justice is most needed—and has the greatest potential impact—in addressing acts of interpersonal violence"); Daniel S. McConkie, Jr., *Restorative Justice as a Democratic Practice*, 55 LOY. U. CHI. L.J. 667, 671 (2024) (arguing that broader applications of restorative justice in the criminal justice system would not only "strengthen[] criminal justice citizenship" but would also "help shrink the carceral state"); Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 640 (2021) (arguing that restorative justice can and should be expanded to reduce incarceration); and Michelle Alexander, Opinion, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), https://perma.cc/7CA3-QJ5R (observing "[a] growing body of research strongly support[ing] the anecdotal evidence that restorative justice programs increase the odds of safety, reduce recidivism and alleviate trauma").

401. Rebecca Banwell-Moore & Philippa Tomczak, *Complaints: Mechanisms for Prisoner Participation?*, 20 EUR. J. CRIMINOLOGY 1878, 1892-93 (2023) (observing calls for restorative justice in prisons).

402. *See, e.g.*, Michelle Butler & Shadd Maruna, *Rethinking Prison Disciplinary Processes: A Potential Future for Restorative Justice*, 11 VICTIMS & OFFENDERS 126, 140 (2016) (concluding that "prisons would benefit enormously by replacing their adjudication process with a restorative procedure").

403. *See, e.g.*, Mandeep K. Dhami, Greg Mantle & Darrell Fox, *Restorative Justice in Prisons*, 12 CONTEMP. JUST. REV. 433, 435-36 (2009) (noting that restorative justice would "build[] trust and confidence" when handling "complaints against staff").

participatory.[404] Incarcerated people's councils that collectively raise and negotiate issues with prison administrators, associations that can be similar in vision to incarcerated people's unions, have also proven successful when studied.[405] Incorporating public accountability and scrutiny over these otherwise internal processes may also help counter the antidemocratic capture of the carceral state.[406]

Proposals for a more participatory or transparent resolution of issues may appear to be "a radical challenge" to carceral institutions that are "constructed on fundamentally undemocratic premises."[407] But commentators have opined that creative alternatives should be explored where existing mechanisms invite a lack of trust, which can exacerbate rather than mitigate violence and harm within prisons.[408]

Our current grievance system results in staggering disconnect, where participants "speak past each other"—one speaking in the language of civil rights and human needs and the other responding with "bureaucratic mandates."[409] The prison operates as "both defendant and judge" in the resolution of grievances, and its prevailing authority ultimately "determines the outcome of the exchange."[410] Imagine instead a different approach that operates outside the borders of this existing regime, that moves beyond the disconnect, carceral self-interest, and antagonism of our prison grievance system. Designing new modes of addressing individual and shared issues during incarceration may "provide

404. It is important to recognize concerns raised by restorative justice advocates that existing prison policies will be repackaged as aligning with restorative justice theories to create a "new legitimation of imprisonment." *See* Luc Robert & Tony Peters, *How Restorative Justice is Able to Transcend the Prison Walls: A Discussion of the 'Restorative Detention' Project*, *in* RESTORATIVE JUSTICE IN CONTEXT: INTERNATIONAL PRACTICE AND DIRECTIONS 95, 116 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2003).

405. *See id.* at 66 (noting that the Prison Reform Trust study on prisoner councils increased administrators' awareness of issues and "greatly improved the relationships between management, staff and prisoners").

406. *See supra* Parts I.A, II.B.

407. Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 95 (2022).

408. *See, e.g.*, Butler & Maruna, *supra* note 402, at 130 (observing the impacts of "procedurally unjust treatment in prison"); Goodwin v. Oswald, 462 F.2d 1237, 1245-46 (2d Cir. 1972) (Oakes, J., concurring) (opining that given "the tragic experience" of the Attica uprising and its aftermath, prison officials should "seek more peaceful ways of resolving prison problems than the old, ironclad . . . methods that have worked so poorly in the past," and that "[p]romoting or at least permitting the formation of a representative agency might well be, in the light of past experience, the wisest course for [prison] officials to follow").

409. *See* CALAVITA & JENNESS, *supra* note 29, at 169, 178.

410. *See id.* at 171. Even the Supreme Court has acknowledged this dynamic. *See* Cleavinger v. Saxner, 474 U.S. 193, 203-04 (1985) (recognizing that BOP prison officials who serve as members of a prison discipline committee are "under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee," and to claim that such officials are independent would "ignore reality").

the seeds of a different, more egalitarian model of social relations" within prisons that are "potentially transformative."[411] This was one of the most profound goals of incarcerated people's unions, and that vision can find new life outside the recitations of history.

How to replace prison grievances is a complex question with no easy answers. But we should not let the absence of straightforward solutions deter our collective imaginings.[412] And in the spirit of the "contestatory democracy"[413] and critical positionality at the heart of incarcerated people's unions,[414] we should look to the expertise of incarcerated people themselves as we continue the process of devising and iterating proposals.

Conclusion

In his dissenting opinion in *Jones*, Justice Thurgood Marshall incisively predicted that incarcerated people would effectively retain few, if any, substantive First Amendment rights.[415] But he optimistically asserted that incarcerated people would nonetheless "be left with a right of access to the courts."[416] Even he could not predict that in the following decades, the PLRA would obliterate his procedural optimism—and that substantively, the prison grievance creep would act to further excise the content of constitutional rights in prison.

The doctrinal creep that has surfaced in *Jones*'s shadow has severe consequences for rights enforcement in confinement. As this Article illustrates, the prison grievance regime has transformed into a substantive weapon that curtails critical First Amendment and *Bivens* protections in custody. *Jones* planted a seed that has migrated well beyond the four corners of the opinion. And the pervasive harms of this displacement emphasize the need to consider more transformative reforms that disrupt, rather than legitimize, our continued reliance on prison grievances.

411. Lobel, *supra* note 407, at 95 (discussing a participatory model to prisoners' rights litigation).

412. The insights of prison abolitionists provide helpful guidance. *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 105-06 (2003) (recognizing how "difficult" it can be to "imagine alternatives to our current system of incarceration" but urging advocates to "let go of the desire to discover one single alternative system of punishment that would occupy the same footprint as the prison system").

413. *See supra* note 87 and accompanying text.

414. *See supra* Part I.

415. *See* Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 147 (Marshall, J., dissenting).

416. *Id.*

Appendix

This Appendix documents two dimensions of the prison grievance policies[417] of the fifty states, the District of Columbia (D.C.), and the BOP: (1) whether the policy permits incarcerated people to file a "group grievance," a grievance identifying multiple grievants who experienced the same or similar issue; and (2) whether the policy permits incarcerated people to pursue disciplinary actions against prison officials as an administrative remedy to their grievance. Where the Article cites and provides more context for the relevant rule, the Appendix cites to the relevant text or footnote.

Table 1

The (Un)Availability of Group Grievances and Disciplinary Action in Prison Grievance Systems

Jurisdiction	Group Grievances	Disciplinary Action
AL	Policy is silent (but allows the prison to consolidate responses to similar grievances).[418]	Policy is silent.
AK[419]	Policy is silent.	Policy is silent.
AZ	Policy is silent.	Policy is silent (but recognizes disciplinary action if employees retaliate against grievants).[420]
AR	Policy is silent.	Unavailable.[421]
BOP	Available with limitations.[422]	Policy is silent.

417. For information about how I gathered the relevant policies, see note 172 above and the accompanying text.

418. *See* STATE OF ALA. DEP'T OF CORR., *supra* note 188, at 9; *see also supra* note 188.

419. *See* STATE OF ALASKA DEP'T OF CORR., INDEX NO. 808.03, POLICIES AND PROCEDURES: PRISONER RIGHTS; PRISONER GRIEVANCES 1-12 (2006), https://perma.cc/8WJQ-HLXX.

420. *See* ARIZ. DEP'T OF CORR., *supra* note 344, at 4; *see also supra* note 344 and accompanying text.

421. ARK. DEP'T OF CORR., *supra* note 346, at 3; *see also supra* note 346 and accompanying text.

422. *See supra* notes 190-193 and accompanying text.

Jurisdiction	Group Grievances	Disciplinary Action
CA	Unavailable for healthcare grievances.[423] Prior allowance of group appeals was repealed.[424]	Policy suggests the remedy may be available,[425] but it will not be disclosed.[426]
CO	Policy is silent.	Unavailable.[427]
CT	Policy is silent.	Policy is silent (but disciplinary action is not included in the list of possible remedies).[428]
DE	Policy is silent (but requires the prison to consolidate investigations of similar grievances).[429]	Policy is silent (but disciplinary action is not included in the list of possible remedies).[430]
D.C.	Unavailable.[431]	Policy is silent.
FL	Policy is silent.	Policy is silent (but recognizes disciplinary action if employees obstruct access to the process).[432]
GA[433]	Policy is silent.	Policy is silent (but disciplinary action is not included in the list of possible remedies).

423. *See* CAL. CODE REGS. tit. 15, § 3999.234 (2025).

424. *See* CAL. CODE REGS. tit. 15, § 3084.2(h) (2019) (repealed 2020); *see also supra* note 189 and accompanying text.

425. *See* CAL. CODE REGS. tit. 15, § 3486.3(a)(2) (2025); *see also supra* note 349 and accompanying text.

426. *See* CAL. CODE REGS. tit. 15, § 3486.3(a)(2) (2025); *see also supra* note 350 and accompanying text.

427. *See* COLO. DEP'T OF CORR., *supra* note 335, at 1; *see also supra* note 346 and accompanying text.

428. *See* STATE OF CONN. DEP'T OF CORR., *supra* note 345, at 4; *see also supra* note 345 and accompanying text.

429. *See* DEL. DEP'T OF CORR., *supra* note 188, at 3; *see also supra* note 188.

430. *See id.*; *see also supra* note 345 and accompanying text.

431. *See* D.C. DEP'T OF CORR., *supra* note 183, at 8.

432. *See* FLA. ADMIN. CODE ANN. r. 33-103.017(1) (2025); *see also supra* note 344 and accompanying text.

433. *See* GA. DEP'T OF CORR., POLICY NO. 227.02, STANDARD OPERATING PROCEDURES: STATEWIDE GRIEVANCE PROCEDURE 1-19 (2019), https://perma.cc/9U6L-S6NA.

Jurisdiction	Group Grievances	Disciplinary Action
HI	Unavailable.[434]	Policy is silent (but recognizes the possibility of disciplinary action if employees retaliate against grievants).[435]
ID[436]	Policy is silent.	Policy is silent.
IL[437]	Policy is silent.	Policy is silent.
IN	Unavailable.[438]	Unavailable.[439]
IA	Policy is silent (but allows the prison to consolidate responses to similar grievances).[440]	Policy is silent (but disciplinary action is not included in the list of possible remedies).[441]
KS[442]	Policy is silent.	Policy is silent.
KY	Unavailable.[443]	Forbids grievants from requesting "a specific form of disciplinary action."[444]
LA	Policy is silent (but allows the prison to consolidate responses to similar grievances).[445]	Policy is silent.

434. *See* HAW. DEP'T OF CORR. & REHAB., *supra* note 181, at 6.

435. *See id.* at 4.

436. *See* IDAHO DEP'T OF CORR., CONTROL NO. 316.02.01.001, GRIEVANCE AND INFORMAL RESOLUTION PROCEDURE FOR OFFENDERS 1-19 (2018), https://perma.cc/2YPV-7EMD.

437. *See* ILL. DEP'T OF CORR., NO. 04.01.114, ADMINISTRATIVE DIRECTIVE: LOCAL INDIVIDUAL IN CUSTODY GRIEVANCE PROCEDURES 1-6 (2023), https://perma.cc/2257-9BGX.

438. *See* IND. DEP'T OF CORR., *supra* note 183, at 4.

439. *See id.* at 4; *see also supra* note 346 and accompanying text.

440. *See* STATE OF IOWA DEP'T OF CORR., *supra* note 188, at 6-7; *see also supra* note 188.

441. *See* STATE OF IOWA DEP'T OF CORR., *supra* note 188, at 7.

442. *See* KAN. ADMIN. REGS. §§ 44-15-101 to 44-15-106 (2025).

443. *See* KY. CORR., *supra* note 184, at 10.

444. *See id.* at 8; *see also supra* note 347 and accompanying text.

445. *See* LA. ADMIN. CODE tit. 22, pt. I, § 325(F)(3)(a)(x) (2024); *see also supra* note 188.

Jurisdiction	Group Grievances	Disciplinary Action
ME[446]	Policy is silent.	Policy is silent (but disciplinary action is not included in the list of possible remedies).
MD	Unavailable.[447]	Policy is silent (but disciplinary action is not included in the list of possible remedies).[448]
MA	Unavailable.[449]	Policy is silent.
MI	Unavailable.[450]	Policy is silent.
MN[451]	Policy is silent.	Policy is silent.
MS	Policy is silent (but allows the prison to consolidate responses to similar grievances).[452]	Policy is silent.
MO	Policy is silent.	Policy suggests "personnel action" may be available but will remain confidential.[453]
MT[454]	Policy is silent.	Policy is silent.
NE	Repealed prior allowance of group grievances.[455]	Policy is silent.

446. *See* STATE OF ME. DEP'T OF CORR., POLICY NO. 29.1, ADULT RESIDENT GRIEVANCE PROCESS, GENERAL 1-17 (2022), https://perma.cc/5JFT-DLET.

447. *See* MD. CODE REGS. 12.02.28.05(F)(2) (2018); *see also supra* note 183 and accompanying text.

448. *See* MD. CODE REGS. 12.02.28.13(B) (2025); *see also supra* note 345 and accompanying text.

449. *See* 103 MASS. CODE REGS. § 491.11(4) (2025); *see also supra* note 182 and accompanying text.

450. *See* 103 MASS. CODE REGS. § 491.11(4) (2025).

451. *See* MINN. DEP'T OF CORR., POLICY NO. 303.100, GRIEVANCE PROCEDURE (2024), https://perma.cc/9MDU-V9UD.

452. *See* MISS. DEP'T OF CORR., *supra* note 188, at 3; *see also supra* note 188.

453. *See* MO. DEP'T OF CORR., *supra* note 335, at 8; *see also supra* notes 349-350 and accompanying text.

454. *See* MONT. DEP'T OF CORR., POLICY NO. DOC 3.3.3, INMATE GRIEVANCE PROGRAM 1-4 (2024), https://perma.cc/584K-4FPN.

455. *See* 68 NEV. ADMIN. CODE § 012.02 (2022) (repealed 2023); *see also supra* note 189 and accompanying text.

Jurisdiction	Group Grievances	Disciplinary Action
NV[456]	Policy is silent.	Policy is silent (but disciplinary action is not included in the list of possible remedies).
NH[457]	Policy is silent.	Policy is silent.
NJ	Unavailable.[458]	Policy is silent.
NM	Unavailable.[459]	Policy is silent (but recognizes disciplinary action if employees retaliate against grievants).[460]
NY	Unavailable.[461]	Policy is silent.
NC	Language suggests a group grievance may be available.[462]	Policy is silent (but recognizes disciplinary action if employees obstruct the grievance process).[463]
ND[464]	Policy is silent.	Policy is silent.
OH	Policy is silent.	Policy is silent (but recognizes disciplinary action if employees violate grievance rules).[465]

456. *See* NEV. DEP'T OF CORR., *supra* note 334.

457. *See* N.H. CODE ADMIN. R. ANN. CORR. 313.01-313.06 (2024).

458. *See* N.J. DEP'T OF CORR., *supra* note 182, at 7; *see also supra* note 182 and accompanying text.

459. *See* N.M. CORR. DEP'T, *supra* note 181, at 10; *see also supra* note 181 and accompanying text.

460. *See* N.M. CORR. DEP'T, *supra* note 181, at 8; *see also supra* note 344 and accompanying text.

461. *See* N.Y. STATE CORR. & CMTY. SUPERVISION, *supra* note 183, at 2; *see also supra* note 183 and accompanying text.

462. *See supra* notes 195-196 and accompanying text.

463. *See* N.C. DEP'T OF ADULT CORR., *supra* note 196, § .0301(e); *see also supra* note 344 and accompanying text.

464. *See* N.D. DEP'T OF CORR. & REHAB., POLICY AND PROCEDURES NO. 3C-10, GRIEVANCE PROCEDURES 1-8 (2020), https://perma.cc/Y43M-4499.

465. *See* OHIO ADMIN. CODE 5120-9-31(G) (2021); *see also supra* note 343 and accompanying text.

Jurisdiction	Group Grievances	Disciplinary Action
OK	Policy is silent (but allows the prison to consolidate responses to similar grievances).[466]	Unavailable.[467]
OR	Unavailable.[468]	Policy is silent.
PA	Unavailable.[469]	Policy is silent.
RI[470]	Policy is silent.	Policy is silent.
SC	Policy is silent.	Available but will not be disclosed if provided.[471]
SD	Unavailable.[472]	Policy is silent.
TN	Policy is silent (but allows the prison to consolidate responses to similar grievances).[473]	Policy is silent (but recognizes the possibility of disciplinary action for employee violations of directives).[474]
TX	Policy is silent.	Prohibits the request of disciplinary action.[475]
UT	Unavailable.[476]	Unavailable.[477]

466. *See* OKLA. DEP'T OF CORR., *supra* note 188, at 8-9; *see also supra* note 188.

467. *See* OKLA. DEP'T OF CORR., *supra* note 188, at 4; *see also supra* note 346 and accompanying text.

468. *See* OR. DEP'T OF CORR., *supra* note 185, at 6-7; *see also supra* note 185 and accompanying text.

469. *See* COMMONWEALTH OF PA. DEP'T OF CORR., *supra* note 182, at 1-3; *see also supra* note 182 and accompanying text.

470. *See* R.I. DEP'T OF CORR., POLICY NO. 13.10-4 DOC, POLICY AND PROCEDURE: INMATE GRIEVANCES 1-13 (2019), https://perma.cc/FN2G-75PS.

471. *See* S.C. DEP'T OF CORR., *supra* note 349, § 10.5; *see also supra* notes 349-350 and accompanying text.

472. *See* S.D. DEP'T OF CORR., *supra* note 184, at 2; *see also supra* note 184 and accompanying text.

473. *See* STATE OF TENN. DEP'T OF CORR., *supra* note 188, at 3; *see also supra* note 188.

474. *See* STATE OF TENN. DEP'T OF CORR., *supra* note 188, at 3; *see also supra* note 343 and accompanying text.

475. *See* TEX. DEP'T OF CRIM. JUST., *supra* note 335, at 3; *see also supra* note 347 and accompanying text.

476. *See* STATE OF UTAH - DEP'T OF CORR., *supra* note 181, at 3; *see also supra* note 181 and accompanying text.

477. *See* UTAH DEP'T OF CORR., *supra* note 347, at FD02/02.05; *see also supra* note 347 and accompanying text.

Jurisdiction	Group Grievances	Disciplinary Action
VT	Policy is silent.	Policy is silent (but recognizes disciplinary action if employees retaliate against grievants).[478]
VA	Policy is silent.	Policy suggests the remedy may be available, but it will not be disclosed.[479]
WA	Unavailable.[480]	Policy is silent.
WV[481]	Policy is silent.	Policy is silent.
WI[482]	Policy is silent.	Policy is silent.
WY	Unavailable.[483]	Available.[484]

478. *See* STATE OF VT. DEP'T OF CORR., *supra* note 344, at 7; *see also supra* note 344 and accompanying text.

479. *See* VA. DEP'T OF CORR., *supra* note 349, at 10; *see also supra* notes 349-350 and accompanying text.

480. *See* WASH. STATE DEP'T OF CORR., *supra* note 183, at 14; *see also supra* note 183 and accompanying text.

481. *See* W. VA. DIV. OF CORR. & REHAB., NO. 335.00, POLICY DIRECTIVE: INMATE GRIEVANCE PROCEDURE 1-12 (2024), https://perma.cc/V8MC-97PU.

482. *See* WIS. ADMIN. CODE DEP'T OF CORR. §§ 310.01-310.16 (2025).

483. *See* WYO. DEP'T OF CORR., *supra* note 185, at 13; *see also supra* note 185 and accompanying text.

484. *See* WYO. DEP'T OF CORR., *supra* note 185, at 16; *see also supra* note 349 and accompanying text.