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## Eating and Being: The Constitutive Process of Consuming Food at Odds with the Experience of Incarceration in American Prisons and Jails

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Eating and Being: The Constitutive Process of Consuming Food at Odds with the Experience of  
Incarceration in American Prisons and Jails

Senior Project Submitted to  
The Division of Social Studies  
of Bard College

By  
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This project is dedicated to the revolutionaries at Attica in 1971 who “sought to change what was for them an unbearable human condition,” (Schumach 1971).

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## INTRODUCTION

American prison food is notoriously bad. This project began as my own confusion with what I perceived as discordance between knowing people who have life or death convictions about everything—food specifically--have served time and the nature of eating in confinement. I assumed what people ate in prison was not a matter of choice. This curiosity led me to wonder how people maintain ethically reasoned food beliefs and practices in prison. At first I sought to consider solely the extent to which people are allowed to exercise control over their bodies through their food choices in prison. I began by reviewing the history of prisoners' rights in the United States; this research indicated that beyond bare constitutional minimums, prison administrations have license to determine food-related entitlements in US prisons subjectively. Thus, I sought accounts of subjective experiences with prison food systems.

My friend Zach Baker graciously agreed to be interviewed. Zach is a vegan and incredible cook. We talked for a while about the significance of food and eating—where our ideas about it have come from, assigning moral meaning to it, the value of a home-cooked meal and the role food plays in being healthy. We each ate a massive bowl of popcorn. In 2001 Zach was incarcerated at Rikers Island Jail for four months. When I asked Zach to describe the landscape of eating at Rikers he shared stories of being underfed and therefore waiting for COs to look away to sneak under chow hall railings to steal extra food, smuggling the extra food back to his dorm in his socks, faking hypertension to receive a different diet, and covertly gifting the card that granted him the hypertension diet to a friend on his way out of Rikers. Zach told me, “you’re just playing cat and mouse with the COs in order just to like, keep your belly full.”<sup>1</sup> The methods Zach described for solving the issues he encountered with the food system at Rikers astounded me. After interviewing Zach I was interested in food-related subversion in prisons.

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<sup>1</sup> Interview in possession of author

While reading published accounts of people's experiences in incarceration I found over and over again that food was a point of contention in US prisons such that it is a distinct cause of noncompliance.

These findings prompted me to consider the ways in which people in US jails and prisons accept and conversely challenge extant structures of oppression through food consumption. In this project I hoped to answer a series of questions to deconstruct an enigmatic quality of the organization of prisons and jails. People express that their relationships to food are significant--should control over these relationships be considered a right? What kind of food-related rights do people have in prison? What allows prison food to be so inadequate that prisoners constantly steal food? Why do prisoners steal food when prisons are supposed to teach people to follow rules? This project seeks to offer perspective on each of these inquiries.

The first section of this project examines the significance of food in the cultivation of self against the institutional architecture that informs US prison food systems. The second recounts the evolution of the legal framework that determined extant standards for prison conditions--the category the Court has situated food in--and possibilities for litigating against inhumane conditions. The third section sheds light on the ways prisoners respond to the limitations prison administrations place on their ability to retain agency over themselves through prison food regulations.

## SECTION 1: FOOD AND THE SELF

### 1.1 INTRODUCTION

To what extent is eating a part of self-fashioning? In civilian life the significance of eating can become taken for granted as automatic. Yet, the constitutive power of food is substantial. The constitutive qualities of food become extreme in prison. In prison, the significance of eating becomes magnified and, “the everyday act of defining one’s self through the consumption of food becomes a highly charged issue” (Godderis 2010: 61). The prison environment--a setting where the institution aims to eliminate individual agency and “the sense of one’s personal identity is transformed,” (Godderis 2010: 61) minimizes the potential of consumption to function as a means of expression. Scholars argue that “the carceral experience” derives its structure and is more broadly “lived through” consistent, repetitive events such as mealtimes (Smoyer 2017). Thus, food “is a central preoccupation, if not obsession of prison inmates,” (George 2010: 196). The way the architecture of prison heightens the significance of food to prisoners creates a decisive difference between relationships to food in carceral society versus civil society.

En masse, existence mandates human relationships to food. All foodstuffs are products of people and environments; any change in the possibilities for food content afforded to humans by converging geographies and their cultures yield changes in the things people eat. These changes may become trend or tradition but, either way gastronomic eventuations are clear reflections of the tangible and intangible resources of populations of a time and place.

People’s relationships to food are subject to sets of constraints that correlate with the economic and political process in their proximity as is the case with any commodifiable form. The academic consensus on food’s symbolic import is its representation of “our individual and



collective identities,” (Godderis 2006). Factors as observably macro as collective identity tied to a people or place and as micro as individual-specific circumstantial experiences inform one’s relationship to eating. The role of food in identity construction and self-fashioning is subject to critique as patterns of consuming food contribute to the creation of oppressive subjectivities. While it is true that these subjectivities are the product of people’s subjection to corrupt global hierarchies and their histories, the means by which people understand themselves are critical in asserting the individuality requisite of feeling and acting like a free person. An individual’s relationship to food is derivative of the choices they make in relation to the cultural, political and socioeconomic structures present in their lives. Thus, relationships to food can be studied as expressions of self.

Throughout history people have made conscious associations between dietetics and cultivating oneself. Across the globe people have assigned moral, political and genealogical value to dietary choices with the intention of asserting a sense of selfhood fueling these practices as either an explicit or underlying factor. This chapter will demonstrate how one’s relationship to food plays a constitutive role in how one perceives themselves and defines their existence for themselves. Further, this chapter will examine the ways in which the experience of eating in US prisons and jails forces the incarcerated to reconfigure their relationships to food.

## 1.2

### CONSTRUCTION OF THE SELF AND INCARCERATION

In his *History of Sexuality* French philosopher Michel Foucault sought to serve readers what he referred to as a genealogical analysis of the history of sexuality. This genealogical method of analysis, “attempts a diagnosis of ‘the present time, and of what we are, in this very

moment' in order 'to question ... what is postulated as self-evident ... to dissipate what is familiar and accepted' (Foucault 1988a: 265)” (Armstrong 2003). Foucault credited genealogical analysis with the comprehensive quality of, “investigat[ing] the complex and shifting network of relations between power, knowledge and the body which produce historically specific forms of subjectivity,” (Armstrong 2003). Within his genealogical analysis of sexuality Foucault produced a genealogical analysis of dietetics. Foucault found the modern Western fixation on sexuality both parallel to and derivative of the use of food and diet as technology for informed self-cultivation prevalent in Ancient Greece. Though Foucault, concerned with comparing the relevance of the two, was convinced that sex replaced food as the primary means of moral and aesthetic self-fashioning, both are thoroughly relevant in the matrix of self-constitution.

Prisons affect the constitutive power of both food and sex. However, as total institutions, prisons set out to administer prisoners’ relationship to food through controlling all of the logistical factors of a person’s consumption without considering the role of food in prisoners’ understandings of themselves. Life in prison is in large part defined by the experience of eating as the experience of incarceration in a penal institution is defined by, “the daily interactions that constitute that prison” (Sexton 2012: 150). The ways in which eating is institutionally controlled in prison becomes a particular site of loss of control for the incarcerated as:

The symbolic relationship that humans have to food is intensified inside of prisons because consumption is a constantly recurring act and, within the context of a total institution, life is acts that are done on a consistent and repetitive basis.

Godderis 2006: 62

The loss of control over the constitutive process of eating has the potential to distort a prisoner’s sense of self.

Sociological scholarship on prison environments has examined “the power of total institutions to orchestrate a very specific type of deprivation: the loss of self” (Sexton 2012: 116). Prison environments--including their food systems--are designed to facilitate offenders’ confinement using state-allocated resources as efficiently as possible; prisons are not constructed with the intention of cultivating self-development in prisoners as a priority. The way prisons are designed to function induces the experience of loss of self in prisoners through:

the institution’s ability to disrupt or defile precisely those actions that in civil society have the role of attesting to the actor and those in his presence that he has some command over his world--that he is a person with ‘adult’ self-determination, autonomy and freedom of action.

Sexton 2012: 116

As a correctional facility’s administration aims to control all constitutive processes, prisoners are denied control over themselves in a fundamental sense.

Diet and identity are mutually constitutive--identities are both derived from and influenced by dietary choices. The experience of eating in the majority of US prison does not encourage prisoners to self-improve, maintain a sense of self, or identify as independent adults. Loss of control over consumption is a significant yet overlooked facet of the loss of self; prison administrations induce this particular form of loss of self through saturating food systems with excessive regulations. Prison food systems promote abnormal, sophmoric relationships to eating; adult prisoners in the US are escorted by guards to rushedly consume a strictly limited portion of food in a chow hall a few times a day while being surveilled, keep perishable food cold in toilets, and cook with garbage bags and junk food either purchased or smuggled from commissary or the facility’s kitchen (Smoyer and Lopes 2017: 246). The circumstances of eating in prison reflect

the distance between the incarcerated and “outside community norms” (Smoyer and Lopes 2017: 246) of being treated with dignity, empathy and respect as humans. The provisioning of food in prison replaces prisoners’ ability to formulate and execute ideas of themselves as:

Prisoners are constantly subject to institutional rules and regulations about the personal experience of consumption, which restrict their capacity to make individual choices about their consumptive preferences. This, in turn, affects not only their sense of self but also their physical bodies.

Godderis 2006: 62

The experience of consumption is deeply personal, yet prison administrations seek to make consumption a generic process. When prison administrations deny prisoners acknowledgement as agents over the circumstances of their consumption through employing institutionalized regulations around eating, prisoners’ methods for understanding themselves can be warped.

It is clear that the purpose of incarceration is to punish those who have committed crimes. Moreover, the effects of incarceration on prisoners are seemingly secondary to the goal of punishment. Disregard for the effects of punishment leaves a significant issue unresolved for criminal justice as:

The crucial element missing from our consideration of penal harshness is the role of subjectivity in punishment, specifically the subjectivity of those who are being punished. Punishment is not just something that is done--it is something that is done to people and experienced by people. And the subjectivity of the people who are punished matters.

Sexton 2012: 115

If punishment is supposed to be corrective, failure to contemplate the effects of the experience of incarceration on the subjectivity of people who are incarcerated as punishment for a crime

diminishes the potential for incarceration to be rehabilitative. Among other elements of factors that constitute the experience of being incarcerated, the logistics of eating specifically require consideration.

1.3

### DIETETICS AND CONSTRUCTION OF THE SELF

The Ancient Greeks maintained significant discursive interest in regimen. In ‘Dietetics’ the second part of *The Use of Pleasure*, the second volume of *The History of Sexuality*, Foucault examined the “freedom which the ‘free’ man exercised in his activity,” (Foucault 1985) his activity being dictated by extremely calculated regimentation which included both sexuality and food. However, Foucault was primarily concerned with an examination of the Greeks’ perspective on sexuality--specifically the origins of the moral limitations the Greeks placed on sexuality. According to Foucault, the Ancient Greeks imposed morality on sexual behavior in order, “to stylize a freedom,” rather than, “to justify interdictions,” (Foucault 1985:97). Foucault found that this freedom served attempts at self-fashioning. In Ancient Greek political thought “the freedom that needed establishing and preserving was that of the citizens and a collectivity of course, but it was also, for each of them, a certain form of relationship of the individual with himself,” and “the freedom of individuals, understood as the mastery they were capable of of exercising over themselves, was indispensable to the entire state,” (Foucault 1985:79). This manifestation of individual agency was not only critical to the success of the individual--the functionality or health of the entire state required citizens who could choose for themselves to become good through the process of regiment.

These self-fashioning exercises included all activity that is recognizably constitutive. The Greeks placed sexuality in a group of factors including food to be thought about quantifiably in

order to formulate day to day prescriptions for ideal living as, “the role of regimen was to negotiate qualitative changes and make such readjustments as were necessitated by circumstances,” (Foucault 1985: 115). Foucault argued that in these self-negotiations the Greeks assigned food greater import than sex. ‘Dietetics’ reviews the prominence of food as technology for self-fashioning among the Ancient Greeks.

In his observations of Ancient Greek medical philosophy, Foucault found that becoming good--or cultivating an ethical and aesthetically sound perception of self--was the desired product of the ostensibly medicinal approach to consumable forms and all activities that factor into the constitutive (i.e. sex, eating, vomiting, sleeping and exercise). The Greeks privileged dietetics as the primary means of self-fashioning:

In short, the practice of regimen as an art of living was something more than a set of precautions designed to prevent illnesses or complete their cure. It was a whole manner of forming oneself as a subject who had the proper, necessary and sufficient concern for his body. A concern that permeated everyday life, making the major or common activities of existence a matter of both health and of ethics. It defined a circumstantial strategy involving the body and the elements that surrounded it; and finally, it proposed to equip the individual himself for a rational mode of behavior.

Foucault 1985: 101

This preoccupation with regimen rendered the Greek perspective on sex a mere factor in an overall prescriptive approach to a “certain way of caring for one’s body” (Foucault 1985: 97). According to Foucault, the Greeks idealized a formulaic mode of consumption for constitutive measures that placed all phenomena with power over the body in the realm of the medical. Foucault found that this practice of regimentation put food above all else as the premier site of

self-regulation and self-transformation. The Greeks formulated extremely measured and highly individualized alimentary regimes:

food and drink--had to take into consideration the nature and quantity of what one ingested, the general condition of the body, the climate, and the activities one engaged in. Evacuations--purges and vomiting--served to correct alimentary practice and its excesses.

Foucault 1985: 101

The prescriptive quality of the Greek approach to consumption was not merely biological, but also assigned a moral quality to the tangibly constitutive. Foucault explained that in the development of dietetics the Pythagoreans:

Strongly emphasized the correlation between the care given the body and concern for preserving the purity and harmony of the soul [...] the many alimentary taboos they set for themselves had cultural and religious significance; and the criticism they directed against every abuse connected with eating [...] had both the authority of a moral precept and the utility of sound advice for health.

Foucault 1985: 119

To be healthy was to be good. The Ancient Greeks realized overall concern for the body in an attempt to constitute a self and representative identity that both adhered to Greek ideals of a healthy, thereby moral existence and was tailored to the individual's needs. Foucault contended that, "a regimen was not good if it only permitted one to live in one place, with one type of food, and if it did not allow one to be open to any change," as "the usefulness of regimen lay precisely in the possibility it gave individuals to face different situations," (Foucault 1985: 105).

Clarification that effective regimen was understood to be necessarily fluid in synchronization with the changing best interests of the individual is critical--this tradition of self-fashioning

relied on an individual exercising their autonomy to pursue their best interests. In her discussion of Foucault and the ethics of eating, Foucault scholar Chloe Taylor observed:

Foucault makes clear that moral reasoning is important to rather than opposed to an ethics of the self: first one needs to rationally consent to a rational ideal, and then one needs to practice it until it re-shapes one's existence.

Taylor 2010: 85

The Greeks consumed food through intensely-reasoned prescriptive processes as a mechanism for self-transformation. This model for understanding the role of eating in self-transformation is relevant when considering modern practices of assigning ethical qualities to consuming food.

The Greek articulation of methodology as observed by Foucault sheds light onto the ways people use food to manage and control their lives for the sake of individual interests in being free thinking and acting people and collective interests in societies constituted of good, thoughtful people.

Studying the prominence of dietetics in Ancient Greek philosophies of self-fashioning provides a model that contextualizes the role of consumption in processes of self-transformation. Human survival necessitates the timelessness of constitutive processes tie to consuming food at its most basic level. Foucault provides a genealogical analysis of the origin of thought behind constitutive processes to demonstrate how Western civilization has come to modern understandings of what constitutes consumption and the relationship between consumption and self. Foucault's examination of the genealogy of sexuality identifies a point at which people were prompted to think of themselves as not only as individuals, but as projects to be constructed at their discretion through regimenting how they eat.



Foucault calls the relationship one ought to have with oneself ethics, "which determines how the individual is supposed to constitute himself as a moral subject of his own actions<sup>2</sup>," rather than as a unit of a collective. These ethics of the self require a substance through which individuals might constitute themselves as subjects of their own actions and develop a sense of themselves as individuals. Foucault's *Dietetics* details the ways in which the methodology of regiment was designed with the ultimate goal of guiding the individual who chose to become a fully-formed moral subject.

A key component to fashioning the kind of singular existence Foucault describes is approaching the self as a project to be constructed by individual subjects. Through constitutive processes individuals appropriate a sense of authority over who they are. Foucault asked, "what is the means by which we can change ourselves in order to become ethical subjects," and "which is the kind of being to which we aspire when we behave in a moral way" (Foucault 1984: 354). People are not born with an innate sense of self--this sense of self must be cultivated through choice, which necessarily requires licensed agency. Rather than basing subjectivity on any "previously established doctrine," Foucault suggested rethinking an approach to embodying modernity as a:

mode of relating to contemporary reality; a voluntary choice made by certain people; in the end, a way of thinking and feeling; a way, too, of acting and behaving that at one and the same time marks a relation of belonging and presents itself as a task

(Foucault 1984: 303)

rather than living an "epoch" constituted of the phantoms of preceding epochs. In this mode of relating to contemporary reality individuals would constitute themselves consciously and freely

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<sup>2</sup> Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress'

in order to actively liberate themselves from oppressive historical patterns--when food is a factor of this process, consumption becomes a powerful medium for expression.

Food is the kind of ethical substance people constitute themselves through. Through meanings assigned to food, "people are invited or incited to recognize their moral obligations," the "mode of subjection" being whatever aesthetics the food is associated with (Foucault 1984). By making dietary choices imbued with ethical reasoning individuals demonstrate the capacity to choose to be a certain way; the thinking that informs these dietary choices render food an ethical substance people use to constitute themselves as "material of their moral conduct" (Foucault 1985: 26). Thus, dietary choices that are fueled by moral precepts are indicative of acting on an inclination to understand oneself as a representation of particular choices. Institutional approaches to eating in correctional facilities strips prisoners of the capacity to act in accordance with the constitutive process of eating that civilian life allows for. Thereby, prisoners have to find and acquire new means to reconstitute the selves they know in order to maintain a semblance of sense of self.

In the last century eating in US prisons and jails has been a site of diverse struggles for self-expression. Uniquely American aesthetics necessarily inform how individuals in US prisons and jails constitute themselves as moral subjects of their own actions. Some have and continue to consciously cultivate self-transformative processes that privilege food and its consumption as a site of political and or moral agency in response to the trajectory of American history. The aesthetics of these ethics of self are imbued with genealogical histories of race, class and gender that have defined and continue to define American culture. This freedom to consider the circumstances of consuming food through the lens of self-determination in light of largely uncontrollable structures grants individuals the ability to ally themselves against or critique "the

prevailing social order” at will (Witt 1999: 17). Retaining the agency required to maintain a sense of self through food in the face of oppressive structures forces some prisoners to resist institutional mandates that prevent specifically cultivated ethical processes. Others respond specifically to the oppression of incarceration by reclaiming agency in self-determination through resisting institutional control of the constitutive process of consumption.

Prisons are not designed to stimulate or even facilitate independent ethical reasoning through eating. Rather, institutional mandates replace an individual’s agency in deeply intimate processes that function as methods of self-fashioning in civilian life. Prisoners “not only lose control over this personal, self-defining ritual, but also their own bodies,” (Godderis 2006: 63) through the institutional provisioning of food. Without an ability to have a say in who one is, “the process of estrangement between self and body makes it difficult, if not impossible to maintain one’s unique identity--a process that Goffman [1961] terms the ‘mortification of self’” (Godderis 2006: 63). When people are incarcerated, absolute freedom to consider the self as a project is no longer available. Prisons are total institutions (Goffman 1961) in that they are designed to control every aspect of the lives of the people who live in them. Any self-fashioning a person hopes to cultivate through eating is necessarily mediated by the institution’s intention to supervise all material substances inmates encounter. Incarcerated and formerly incarcerated people articulate that the landscape of eating in prison--one of surveillance coupled with restrictions on individual capacities to choose what to consume in line with individually-determined preferences--essentially deprives a prisoner of the liberty and autonomy that maintaining a sense of self requires. Thus, prisoners have to challenge institutional mandates specific to food and its consumption in order to prevent the mortification of self.

## SECTION 2: THE EVOLUTION OF THE LAW AND PRISONERS' RIGHTS

### 2.1 INTRODUCTION

One way for prisoners in the US to vindicate deprivations of basic expressions of agency is by asserting their rights through litigation. There are hardly any other viable methods of challenging the official actions of prison administrations without breaking rules. Of the many methods of advocating for prisoners' agency and autonomy, litigation has forced courts to intervene in prison administrations. The American cultural standard for agency has historically relied upon the idea that people have fundamental rights. The rights of American citizens are enshrined in the US Constitution and established through the US Supreme Court's interpretations of the Constitution. While American judges have always sentenced people to spend periods of time in incarceration, until the 1960s it was unusual for courts to intervene in prison or jail administrations on prisoners' behalfs. In fact, courts actively refrained from intervening in prisons until a prisoners' rights movement grew out of the larger American Civil Rights movement.

Prisoners have ostensibly always had constitutional rights as citizens, though prisoners were notoriously deprived of their rights by unchecked state actors until the 1960s. Since the judiciary overall subscribed to doctrine that barred courts from mediating prison affairs, prisoners' rights issues were largely impossible to litigate. However, during the 1960s the judiciary began to respond to changing societal attitudes. Litigation was a primary tactic for inciting legal desegregation within the larger Civil Rights movement. After success with litigation in desegregation efforts, the civil rights groups that became involved in the resultant prisoners' rights movement sought reform through litigation. The legal departments of civil rights groups challenged deprivations of constitutional rights in incarceration on prisoners'

behalfs. Cases brought by radicalised prisoners and litigation campaigns of civil rights groups emerged after the Civil Rights movement gained traction. High profile litigation campaigns surrounding the use of capital punishment in southern states pressured the US Supreme Court to begin to consider reinterpretations of the Eighth Amendment. The resolutions of these capital punishment cases became the basis of rulings when the Court considered the role of rights in establishing standards for conditions of confinement.

Today, the process of taking legal action as a prisoner requires exhausting the administrative resources of incarceration facilities before seeking redress in court. Though today's process of litigating prisoners' rights issues is imperfect, it is the result of a long struggle for previously nonexistent means of realizing the rights of the incarcerated. This chapter will examine the history of prisoners' rights litigation in the United States. The prisoners' rights struggle of the 1970s eventually resulted in law regarding standards for conditions of confinement. The Supreme Court has designated food and eating a factor that contributes to the aggregate concordance of conditions of confinement, thus this conditions law regulates food in prison.

## 2.2 JUDICIAL NONINTERFERENCE IN PRISONS

The idea that prisoners could have rights in America was nonsensical until the prisoners' rights movement brought prisoners' rights cases to federal courts. In 1866 the Supreme Court ruled that prisoners have no constitutional rights in *Pervear v. Massachusetts*<sup>3</sup>; there could not have been a point of departure farther from the ambitions of any potential prisoners' rights struggle. It was eventually legally determined that prisoners could not nominally be withheld

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<sup>3</sup> *Pervear v. The Commonwealth*, 72 U.S. 5 Wall. 475 475 (1866)

rights, but those rights could be more or less limitlessly truncated. Besides the few concessions to the idea that prisoners once had the rights of citizens but as a legal caste had forfeited those rights as a consequence of their crimes, there was an ideological leviathan between prisoners and courtrooms until the 1960s. Prior to the prisoners' rights advents of the 1960s, "the historical role of prison as a place of punishment, and the admitted complexities of the penologist's task [...] resulted in a deep reluctance on the part of the courts to review the decisions and actions of prison administrators," when examining the "growing judicial interest in the rights of the convicted felon," in 1967 (Friend 1967). The judiciary's absence from prisons was intentionally established as, "this policy of non-interference with the internal affairs of penal institutions has been generally referred to as the 'hands off'<sup>4</sup> doctrine," (Friend 1967). The hands-off doctrine dominated judicial attitudes toward the rights of the incarcerated until the late 1960s. The judiciary's widespread adoption of the hands-off doctrine is held "almost solely responsible for the inefficacy of all modes of redress theoretically available to prisoners<sup>5</sup>". Courts believed the judiciary lacked the experiential expertise to evaluate prison management and that intervention could subvert penological objectives. Moreover, judges held that judicial intervention in prison administrations would constitute an overstep equivalent to violating federal separations of power. The direct result of the hands-off precedent saw judges recuse themselves from mediating the internal affairs of prisons--with judges were unwilling to hear cases, litigation was near impossible.

The hands-off doctrine was explicated in a document prepared for the Federal Bureau of Prisons in 1961. Though theoretically the judiciary could have intervened in prison administrations at any time, the hands-off doctrine prevented any impetus for judicial review of

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<sup>4</sup> "Apparently so christened in Fritch, *Civil Rights of Prison Inmates* 31 (1961)," (Friend 1967)

<sup>5</sup> "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts." *The Yale Law Journal*, vol. 72, no. 3, 1963, p. 506

prison administrations. Given the absence of judicial supervision, prison administrations were granted almost complete autonomy over prison affairs. Friend maintained that, “a natural corollary of the historical development of the penal system as a means of punishment and deterrence has been the popular view of the prisoner as a person who has forfeited a substantial portion of his civil and human rights,” (Friend 1967). *Ruffin v. Commonwealth*, a Virginia Supreme Court case from 1871 explains the foundation of the construction of the cultural perception of prisoners and the judiciary’s norms, which in turn explain why the judiciary historically refrained from intervening in the administrations of prisons and jails.

In 1871, the highest judicial authority in Virginia, a state in which slavery had been abolished just six years earlier, declared prisoners slaves. The 13th Amendment allowed for forced penal labor, thereby, in *Ruffin* the court held, “(the prisoner) has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State,” (Friend 1967). In 1871 the normative foundation of the law in its humanity in Virginia was not any notion of human rights. Rather, the normative foundation of the law had just begun to transition away from explicitly justifying the systemic denial of an entire racial population’s rights. This draconian pseudo-moral principle suggested that because the State spared a criminal’s life his debt to the state was all of his agency. Equating criminality to earned slavery defined the actual actions of southern criminal justice systems until the practice of convict leasing ended in the late 1920s. Moreover, the idea that criminals were not entitled to rights pervaded judicial review and societal perceptions of criminals.

The legacy of slavery was perpetuated in the criminal justice system outrightly through the practice of convict leasing in the South after slavery was abolished. Those who study convict

leasing have found that Southern states in economic downturn after the Civil War benefited immensely from the cheap forced labor convict leasing provided (Dolovich 2005: 451). Records of convict leasing indicate that racial discrimination in the sentencing that fated people to live as a leased convict--essentially a slave--was rampant. The South, the area of the United States that produced the holding that provided the basis for absolute denials of criminals' agency had a legacy of depriving people of not only legal rights, but the most basic exercises of autonomy. In any society that pursued and acted on justifications of slavery, notions of agency were obviously deeply distorted. Nevertheless, the rest of the country followed Virginia's example. The decision in *Ruffin* was a development in the national criminal justice perspective that echoed the Southern fixation on forced labor that was once solved through slavery. In thought and practice, the criminal justice system and judiciary adopted this Virginia model nationwide. The cultural perception of prisoners was informed by the notion that prisoners, being slaves, did not have rights.

Even if deprivations of constitutional rights were alleged, the judiciary's consensus was that the administration of prisons was beyond judicial scrutiny as according to the holdings in *Ruffin*, "inmates could have been put to death but for the state's humanity," (Gluck 1977 :659); this rhetoric normalized the dehumanization of prisoners for years. An enslaved person is the polar opposite of the individual Foucault idealizes; this person becomes an ethical, informed member of collective society through enacting serieses of self-fashioning exercises that manifest through choices regarding the consumption of food as described by Foucault. Yet, the rendering of prisoners as slaves and the inhumane treatment prisoners endured remained invisible due to the nature of confinement coupled with societal and judicial attitude. The US judiciary's widespread acceptance of the hands-off doctrine barred prisoners from the only way to challenge



deprivations of human rights outside of prison administrations provided by the law. Since those holding power in the judiciary and American society operated under the impression that prisoners earned deprivations of their rights, they were unconcerned with the opacity of prison affairs and uninterested in the realizations of prisoners' rights.

The traction of prisoners' rights litigation increased with the help of the Warren Court's judicial activism and the social activism of the 1960s. In 1958 the Warren Court held in *Trop v. Dulles*<sup>6</sup> that, "the Eighth Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society". The Civil Rights movement urged society to mature and evolve standards of decency in an endeavor to oust legalized racism in the US. In accordance with the ideals of the Civil Rights movement, civil rights activists dragged the judiciary into dialogues surrounding unjust withholdings of prisoners' rights. This development followed societal trend:

The prisoners' rights movement must be understood in the context of a "fundamental democratization" (Mannheim 1940) which has transformed American society since World War II, and particularly since 1960. Starting with the black civil rights movement in the mid-1950s, one marginal group after another [...] has pressed for admission into the societal mainstream. While each group has its own history and a special character, the general trend has been to extend citizenship rights to a greater proportion of the total population by recognizing the existence and legitimacy of group grievances.

Jacobs 1980: 432

Black Muslims were the first to break through the hands-off doctrine with prisoners' rights claims. These cases are credited with bringing prisoners' rights issues to a position of

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<sup>6</sup> *Trop v. Dulles*, 356 U.S. 86 (1958)

litigability. Inspired by Black Muslim teachings, prisoners were invigorated with ideas of self-fashioning that evolved into the development of right-based legal rhetoric for demanding prisoners' rights reform in court. In the early 1960s, members of the Nation of Islam pioneered the use of litigation to challenge the actions of prison administrations; they provided the foundation of the eventual prisoners' rights movement. The NAACP tackled cases involving the distribution of capital punishment cases during the 1960s and 1970s. Eventually the Court was forced to define some of the parameters of prisoners' rights--the judiciary overall had to acknowledge that prisoners' rights issues were of urgent concern.

As these cases forced courts to consider the constitutional rights of prisoners, judicial review became concerned with defining the parameters of a prisoner's right to maintaining a sense of individual personhood. Discussions of the significance of agency, autonomy and dignity became central to these arguments. Courts considered the degree to which the State is obligated to protect the rights of those it incarcerates from varied perspectives. While some cases took into account the idea of incarceration as a temporary state and thereby considered the rehabilitative potential of containment, others simply were concerned with interpreting existing law. In some conditions cases, the intricacies of the distribution of food in incarceration has been understood as an essential contributing factor to the incarcerated individual's sense of self.

## 2.3 THE CIVIL RIGHTS MOVEMENT AND THE LEGITIMATION OF PRISONERS' RIGHTS

### 2.3 a. Black Muslims, Diet and the Emergence of Prison Litigation

Friend analyzed the judiciary's entrance into the realm of American prisons and projected the expansion of its role in regulating the administration of prisons, observing that, "the most prolific source of prisoner litigation has been the effort of members of the Black Muslim sect to secure what they consider to be their religious rights," (Friend 1967). In line with the directive to "go after the black man in the mud," (Witt 1999) from Elijah Muhammad, the Nation of Islam's leader during its rise to prominence, Black Muslims made deliberate attempts to recruit members in prisons. The Black Muslims' success with prisoner conversions has been attributed to, "an environmental situation permitting 'the oppressed person' to gain insights about himself and society'" (Smith 1993). Black Muslims offered disempowered prisoners the promise of religious salvation in addition to an opportunity to follow a clear structure for reclaiming "their own fate and defining their own values" (Smith 1993). In his article 'Black Muslims and the Development of Prisoners' Rights In the 1960s and early 1970s, legal scholar Christopher Smith maintained:

Lincoln (1961) characterized the Black Muslims as constituting 'a dynamic social protest that moves upon a religious vehicle' and as placing their main emphasis upon social action. This social action was oriented toward independence and self-development, rather than participation in political processes aimed at changing the larger American society.

(Smith 1993)

Social action for the independence and self-development of incarcerated people necessitated working with the institutions that incarcerate people.

A significant part of identifying as a Muslim is following the distinct dietary laws of the religion. Elijah Muhammad interpolated dietary restrictions followed by members of the Nation

of Islam beyond general Islamic practice to a greater sociopolitical vision that demanded the prohibition of all foods associated with slavery. Members of the Nation of Islam used litigation to force the judiciary to situate diet in a discussion of prisoners' rights versus the interests of correctional facilities' administrations. Examinations of the construction of prisoners' rights to religious diets indicate that, "prison diet jurisprudence developed from a line of Eighth Amendment challenge redressing the plight of Muslim inmates in the 1960s," (Liu 2004). At their core, religious challenges to the distribution of food in correctional facilities are expressions of agency and identity as these ideas manifest through consumption. Black Muslims channeled, "the assertive, self-determination philosophy of the movement" into legal stamina combined with the courts' greater receptivity to claims by prisoners to create opportunities to define and expand the scope of constitutional rights of all prisoners through the vehicle of Muslim-initiated lawsuits,"

Liu cited *Barnett v. Rodgers*, a D.C. Circuit Court case from 1969 in which the court considered, "the degree to which officials of the District of Columbia Jail are constitutionally compelled to accommodate the dietary laws of the Muslim faith in the bill of fare afforded Muslim inmates," (*Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969)) to exemplify the line of Eighth Amendment challenges that informed judicial review of religious diets in incarceration. *Barnett* was brought to the court via, "pro se petitions for writs of habeas corpus filed in the District Court" in which Muslim prisoners took issue with the food made available to them, "citing the doctrinal prohibition of their religion against the consumption of swine," (*Barnett v. Rodgers* 1969). The petitioners could not accept that "authorities had denied their request to 'be fed, at least, one full-course pork-free diet once a day'," (*Barnett v. Rodgers* 1969) in the District of Columbia jail, so they entreated the court to respond to violations of their First Amendment

right to practice their religion hoping to see the conditions of their confinement ameliorated. The petitioners, “sought an order directing the superintendent of the jail to respect, [...] Muslim dietary tenets in the provision of their meals,” arguing that, “continued confinement of existing terms constituted cruel and unusual punishment,” (*Barnett v. Rodgers* 1969). The petitioners constructed a rights-based argument and called on the judiciary to monitor the realization of their rights while in the custody of the state.

Though both state actors, the judiciary functions as an intermediary institution acting in the interest of the law and actualizing rights whereas a correctional facility acts in the interests of its penal agenda. The court in *Barnett* evaluated the petitioners’ legal claims, noting:

Their request for 'one full-course pork-free diet once a day and coffee three times daily' is essentially a plea for a modest degree of official deference to their religious obligations. Certainly if this concession is feasible from the standpoint of prison management, it represents the bare minimum that jail authorities, with or without specific request, are constitutionally required to do, not only for Muslims but indeed for any group of inmates with religious restrictions on diet

In addition to the prison administration’s constitutional obligations, the court reviewed the role of Islam in self-fashioning and coping with incarceration during its contemplation of the cognizability of the petitioners’ claims. Having acquiesced that the injunction against consuming pork was indeed absolute in Islam, the court considered the significance of identifying as a Muslim to an African American prisoner:

“the main attraction of the Muslim faith is that it gave [the prisoner] something to associate himself with, something to uplift him from the degradation to which he had fallen.' [...] . And as a prison official similarly commented, it ‘is in some way related to

increasing his status as a negro [...] It has been observed served that Muslims have had amazing success in reforming apparently hopeless recidivists [...]"

(Barnett v. Rodgers 1969)

Moreover, in addition to recognizing the innate power of constitutional mandates, the court deviated from case law to contemplate the importance of prisoners' rights to agency and the role religion can play in from the perspective of re-entry:

That penal as well as judicial authorities respond to constitutional duties is vastly important to society as well as the prisoner. Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.

(Barnett v. Rodgers 1969)

Here the court concerned itself with desistance--the process by which people learn to be law-abiding--which is an indicator of concern for equality under law and deviation from hands-off doctrine that abandoned people in prisons. The D.C. Circuit court "in an unusual decision" ultimately ruled in favor of the petitioners in *Barnett*, finding, "that there is no justification for failing to identify foods prepared with pork in prison dining facilities," and "ordered the immediate implementation of such procedure on behalf of Muslim inmates," (Haddad 1995).

Yet, in *Barnett* the judges were divided on the issue of realizing prisoners' constitutional rights. Judge Tamm concurred only in the result of the Circuit Court's decision, finding fault with the idea that failing to accommodate dietary restrictions "in some way restricts an appellant or other prisoner from "reclaim(ing) his dignity and reassert(ing) his individuality' and 'frustrates the

ability to choose pursuits through which he can manifest himself and gain self-respect,'” (Barnett v Rodgers 1969). Judge Tamm argued that the decision in *Barnett* would manifest as a foray on to a slippery slope of negotiating prisoners’ rights:

I fear that my learned brethren of the majority are in this case pursuing an abstract constitutional issue for its own sake and are creating an opus monstrous of ends without means. If the ultimate outcome of these proceedings is to be judicial supervision of penal institutions in such minute detail as to encompass even the selection and makeup of daily menus and direction of the service of coffee three times a day (as appellants demand) all bottomed upon the theory that there is religious freedom involved, the court having opened this Pandora's Box must not hereafter complain about hornets.

Tamm framed the possibility of the court having developed of a means for prisoners to advocate for the ability to act to retain agency in incarceration as a potentially troublesome innovation.

The perspective of the potential of erring toward unwarranted judicial intervention Tamm expressed in his critique of the initiation of a framework for prisoners’ rights has been echoed in subsequent prisoners’ rights cases.

Many prisoners’ rights cases brought to courts by Black Muslims were quashed by judges. Nevertheless, the support for prisoners’ rights that Black Muslims marshaled was instrumental in pioneering prisoners’ use of litigation. In select courts that were responsive to the political and social energy of the Civil Rights movement, Black Muslims won rights to “worship, to wear religious symbols, and to be free of punishment for their faith”<sup>7</sup>. The successes of the Civil Rights movement paved the way for the nation to change through legitimizing central figures of the movement for further work. One such figure was US District Court Judge Constance Baker Motley, a former NAACP LDF lawyer who wrote the initial complaint for

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<sup>7</sup> <https://daily.jstor.org/what-the-prisoners-rights-movement-owes-to-the-black-muslims-of-the-1960s/>

*Brown v. Board of Education* and went on to rule in favor of prisoners' rights in the 1970s. Judge Motley ruled against the inhumane conditions of former Black Muslim, prisoners' rights activist and former prisoner of conscience<sup>8</sup> Martin Sostre's confinement. In 1961, Sostre was one of the first people to successfully litigate against deprivations of constitutional rights as a prisoner when he won a case involving the right to buy the Quran and practice Islam. After his release Sostre opened a radical leftist bookshop in Buffalo, New York which made him a target in the eyes of conservative local law enforcement. On riot and drug charges which Sostre continued to claim were falsified until his death, he returned to prison in 1967 where he was tortured for not only his activism but for insisting his basic bodily autonomy be acknowledged. Sostre spent six years in solitary confinement for arbitrary offenses (Shapiro 2017). Motley declared Sostre's stay in solitary confinement, "physically harsh, destructive of morale, dehumanizing in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time which should certainly not exceed 15 days," demonstrating newfound judicial concern for preservation of self and sanity through humane conditions of confinement. Sostre himself received his first political education through the Nation of Islam in prison--he credited this education--of which exercises in self-fashioning through food for moral gains are primary precepts--as the impetus for activism for prisoners' rights. Though an appeals court later backtracked much of Motley's ruling and cut back the damages awarded to Sostre:

Sostre's victory was so momentous that prisoners and wardens across the country paid attention. It gave prisoners 'the belief that if they take their story to the courts, that someone will listen to them and that human rights can, in fact, be had if you're heard in

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[http://www.freedomarchives.org/Documents/Finder/Black%20Liberation%20Disk/Black%20Power!/Sugah Data/Essays/Schaich.S.pdf](http://www.freedomarchives.org/Documents/Finder/Black%20Liberation%20Disk/Black%20Power!/Sugah%20Data/Essays/Schaich.S.pdf)



the court of law’ But it also frightened prison officials — and they would want to crack down on inmates who tried to assert these newfound rights.

Shapiro 2017

This energization of prisoners’ rights rhetoric was further realized during the Attica prison uprising in 1971. The Attica prisoners:

considered Sostre a hero and demanded the kinds of rights and better prison conditions that Sostre had sought: legal representation at parole hearings, better medical treatment, the right to read political newspapers and to form labor unions (Sostre had led strikes at a prison license plate shop), better food, regular showers and more than one bar of soap and one roll of toilet paper a month.

Shapiro 2017

Though the Attica uprising was met with violent suppression it demonstrated that prisoners were newly inspired to stand up for their rights, specifically those pertaining to conditions. Moreover, the Attica uprising in conjunction with key Supreme Court cases in the 1970s forced the judiciary and the legislature nationwide to seriously consider prison conditions for the first time. Overall, the prisoners’ rights victories of Black Muslims such as Martin Sostre extended beyond their own interests to general prison populations; their actions reframed prisoners’ relationships with the legal system.

## B. The Supreme Court and the NAACP

During the “civil rights explosion” private funding sources stimulated the fiscal growth of the NAACP’s Legal Defense and Educational Fund, Inc. (LDF), which allowed the Fund to initiate a campaign against the use of capital punishment. The Supreme Court recognized that the

NAACP employed litigation in as a tactic of activism. In 1962, the Supreme Court remarked, “in the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country,” (Muller 1995). The NAACP’s legal department pursued cases that presented themselves as opportunities to precipitate broader institutional changes. The Fund’s former director Jack Greenberg explained campaign litigation’s capacity to “affect persons similarly situated who are not themselves parties,” (Muller 1995). The LDF’s capital punishment campaign litigation resulted in the string of Supreme Court cases that are crucial to the legal status of prisoners’ rights today.

Historically, the NAACP’s legal department’s criteria for cases consisted of whether a case “involve[d] color discrimination” and “is some fundamental right of citizenship” (Muller 1995). The origins of the LDF’s capital punishment campaign, “flowed from a long history of Fund involvement in cases where racial discrimination worked most invidiously,” (Muller 1995). Evidence of racism in the distribution of death sentences as punishment for the crime of rape in the South attracted the LDF to the issue of capital punishment. The LDF prompted the Burger Court to examine cases in which the constitutionality of the irregular distributions of southern states’ use of capital punishment was in question.

The Warren Court’s Eighth Amendment “evolving decency” holding in *Trop v. Dulles* became critical to the Burger Court’s review of capital punishment. In 1984 legal scholars Franklin Zimring and Gordon Hawkins analyzed the developments in Eighth Amendment jurisprudence related to capital punishment between *Furman v. Georgia* in 1972 and *Gregg v. Georgia* in 1976. Zimring and Hawkins pondered, “what evidence is there to support the claim that ‘the passage of time’ has produced the relevant kind of evolutionary development in

standards of decency, from which the eighth amendment 'must draw its meaning'" (Zimring 1984). Zimring and Hawkins articulate the same type of oblivious perspective that dismissed the trend of aspirational social protest for progressive prison reform both in and out of prisons that emerged in the context of the prisoners' rights movement as unfounded. In reference to 1972, Zimring and Hawkins deliberated, "why is now the time to strike down the death penalty" (Zimrin 1984). If one considers the rationale that informed litigation campaigns' efforts to bring the issue of capital punishment to the Supreme Court within the larger context of the Civil Rights Movement (though a significant portion of the population was unwilling to acknowledge it) why the time to strike down the death penalty was then is extremely clear.

With regard to the distribution of the death penalty in America the ACLU insists, "nowhere is it more evident that race plays a major role in who is charged, convicted and executed,"<sup>9</sup>. The ACLU points to its own effort in addition to that of the NAACP to explain the Court's ruling in *Furman*:

In the 1960s, the ACLU joined forces with the NAACP in a long campaign challenging the constitutionality of death penalty. The effort resulted in the 1972 Supreme Court ruling in *Furman v. Georgia*.

(ACLU 2018)

The results of the LDF's capital punishment campaign became the foundation of a decade long struggle surrounding the constitutionality of the death penalty in light of the cruel and unusual punishment clause which mutated into further Eighth Amendment prisoners' rights debates.

When the Court heard *Furman v. Georgia* in 1972, it found that applications of the death penalty for rape were inconsistent to the point of producing arbitrary and discriminatory effects in Louisiana, Georgia, Florida, Texas and North Carolina. Each of the 9 justices filed a separate

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<sup>9</sup> <https://www.aclu.org/other/aclu-history-making-case-against-death-penalty>

opinion in *Furman* and “the Court majority was fractured five ways,” which reflected Chief Justice Burger’s characterization of the Eighth Amendment’s language as “less than self-defining” in his majority dissent. The Supreme Court’s interpretations of the cruel and unusual punishment clause over the following twenty years would continue to fluctuate between more interventionist judicial review and deferring to the expertise of penal authorities.

In 1976 the Court heard *Gregg v. Georgia*<sup>10</sup>. In *Gregg* the Burger Court consolidated *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina* and *Roberts v. Louisiana*, holding that the constitutionality of capital punishment in light of the Eighth Amendment could be determined through a two-pronged test. The first prong of the test the Court established in *Gregg* determined that “the Court is required to look to objective criteria that establish contemporary values with regard to a challenged sanction,” and the second that, “the punishment must comport with ‘the dignity of man’ which the *Gregg* court translated to mean that the punishment may not be ‘excessive,’” or ‘involve the unnecessary and wanton infliction of pain and the punishment may not be grossly disproportionate to the severity of the crime,’” (Newman 1992); the Court approved Texas, Florida and Georgia’s capital punishment schemes and rejected Louisiana and North Carolina’s. The objective criteria standard established in *Furman* proved to be critical when the Court undertook cases involving the constitutionality of conditions of confinement under the Eighth Amendment.

## 2.4 THE LEGACY OF CAPITAL PUNISHMENT CASES IN PRISONERS’ RIGHTS CASES

As the Court continued to formulate nascent interpretations of the constitutional rights of prisoners, justices referred to the holdings of the capital punishment cases of the 1970s. The Burger Court used the objective criteria analysis developed in *Gregg* in its examination of *Hutto*

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<sup>10</sup> 428 U.S. 155 (1976)

*v. Finney* in 1978. In *Hutto*, the Court applied the standard developed in *Gregg* to determine the constitutionality of the conditions of confinement in an Arkansas prison, specifically of a prisoner's extended stay in punitive isolation.

The Burger Court used its findings in *Hutto* when it addressed the applicable Eighth Amendment standard for prison conditions for the first time in 1981 in *Rhodes v. Chapman*. In *Rhodes*, the Court stated it was, "for the first time the limitation that the Eighth Amendment, which is applicable to the States through the Fourteenth Amendment, *Robinson v. California*, 370 U. S. 660 (1962), imposes upon the conditions in which a State may confine those convicted of crimes," (*Rhodes v. Chapman* 1981). Furthermore, in *Rhodes* the Court held:

No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U. S. 86, 356 U. S. 101 (1958) (plurality opinion). The Court has held, however, that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges. *Rummel v. Estelle*, 445 U. S. 263, 445 U. S. 275 (1980). To be sure, "the Constitution contemplates that, in the end, [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment. *Coker v. Georgia*, *supra*, at 433 U. S. 597 (plurality opinion); *Gregg v. Georgia*, *supra*, at 428 U. S. 182 (joint opinion). But such "*judgment[s] should be informed by objective factors to the maximum possible extent.*"

*Rhodes v. Chapman* 1981

The solely objective criteria standard for judging cruel and unusual conditions as punishment the Court developed in *Rhodes* became imperative to further conditions cases.

These conditions cases appear to be the navigable channel of case law for making a claim regarding deprivations of agency that manifest through the consumption of food. However, this channel is slight. The Burger Court's receptivity to prisoners' rights campaign litigation and its developments in prisoners' rights case law up until *Rhodes* seemed to be a valuable pathway for continued prisoners' rights reform in the Court. However, the Rehnquist Court did not deliver on expanding prisoners' rights. Rather, the Rehnquist Court severely narrowed possibilities for prisoners to litigate against inhumane, agency-depriving conditions of confinement.

Unjustly restricting people's consumption could be viewed as a type of censorship or infringement upon one's freedom of expression. Nevertheless, though it would seem logical to make a First Amendment claim to dispute unjust restrictions of freedom of expression through food, the Rehnquist Court developed a test that severely limits prisoners' ability to litigate against deprivations of First Amendment rights. In 1987, the Rehnquist Court ruled in *Turner v. Safley* that "prison walls do not form a barrier separating inmates from the protections of the Constitution," yet prisoners' First Amendment rights are subject to prison administrations impositions when "legitimate penological concerns<sup>11</sup>" are at stake. The prisoners' rights aftermath of *Turner* is a First Amendment right that is essentially rendered null through a clause that allows for it to be limitlessly filtered. Prison administrations can in practice prevent any activity that would resemble free exercise by raising a penological concern.

The Supreme Court's interpretation of the significance of the Eighth Amendment's as it pertains to conditions of confinement is the calculus that defines licit possibilities for prisoners to address questions of rights to food and its consumption. In *Wilson v. Seiter*, the Court classified

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<sup>11</sup> "Turner v. Safley." Oyez, 17 Mar. 2018, [www.oyez.org/cases/1986/85-1384](http://www.oyez.org/cases/1986/85-1384).

food as a discrete ‘single identifiable human need’<sup>12</sup> that the state is obligated to provide prisoners. According to the Supreme Court, prison officials are constitutionally mandated to ensure that prisoners’ identifiable human needs are met in order to maintain humane conditions of confinement. In certain conditions cases the role of food is examined as a nexus of both human and citizen development, yet at the foundation of all conditions cases is an explicit concern with the humanization of prisoner among the judiciary. Where First Amendment litigation produced a test<sup>13</sup> that pits prisoners’ First Amendment positive constitutional rights against prison administrations’ regulatory concerns,<sup>14</sup> Eighth Amendment litigation focuses on determining the constitutionality of punishment.

## 2.5 ANTON SCALIA, THE PUNITIVE TURN, AND THE FAILURES OF THE JUDICIARY

### 2.5 a *Wilson v. Seiter*

In 1991 the Court began to minimize the definition of cruel and unusual punishment as it applies to constitutional expectations of correctional facilities’ administrations. The Court’s move toward support for increased punitivity in the criminal justice system is part of what has been described by many as the “punitive turn” (Sexton 2012; 115). The phrase “punitive turn”

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<sup>12</sup> Conditions cannot deprive people of “a single identifiable human need such as food, warmth or exercise,” (*Wilson v. Seiter* 1991)

<sup>13</sup> Turner held: “When reviewing prisoners’ constitutional complaints, “inquiry is made into whether a prison regulation that impinges on inmates’ constitutional rights is ‘reasonably related’ to legitimate penological interests. In determining reasonableness, relevant factors include (a) whether there is a “valid, rational connection” between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational; (b) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates, which alternatives, if they exist, will require a measure of judicial deference to the corrections officials’ expertise; (c) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates’ liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to corrections officials; and (d) whether the regulation represents an ‘exaggerated response’ to prison concerns, the existence of a ready alternative that fully accommodates the prisoner’s rights at de minimis costs to valid penological interests being evidence of unreasonableness.” (*Turner v. Safley* 1987 482 U. S.84-91)

<sup>14</sup> “A Prisoner’s Rights to Religious Diet Beyond the Free exercise Clause” 51 *UCLA Law Review* 2004

refers to “the swinging of the criminal justice pendulum from the rehabilitative ideals of the 1960s back to the newly revitalized zeal for retributive justice,” (Sexton 2012; 115). This punitive turn has manifested in increasingly bleak prospects for the ensuring the rights of the incarcerated are realized with:

A public characterized by ‘populist punitiveness’, a criminal justice system that has ceded power to politically minded prosecutors who are ever responsive to public cries for harsh punishment, and a swollen correctional system that has forsaken rehabilitative programming in favor of increasingly austere prison conditions.

Sexton 2012: 115

The punitive turn creates problems for prisoners specifically in the vein of conditions. As previously discussed, food and eating as a factor of incarceration as punishment has been assigned the categorization of conditions through judicial reasoning. Thereby, the realization of demand for dour prison conditions has made the possibility for eating in prison to exist as a way for people to retain a sense of self and forge attempts at self-transformation more difficult. The sentiment that informs the punitive turn does not place the significance of rights of prisoners in a position of priority in the criminal justice agenda as it is primarily concerned with criminals living out a period of retribution for some immoral act. Supreme Court holdings support this punitive turn in law.

The majority opinion of the Court in *Wilson v. Seiter* written by the late justice Anton Scalia changed the way conditions of confinement can come under judicial review. Justice Scalia’s opinion in *Wilson* dismissed the precedent of relying only on objective criteria when considering what could constitute cruel and unusual punishment in prisons that was established in *Rhodes*. Many scholars find that the Court’s departure from solely objective criteria for cruel



and and unusual punishment which defines the current interpretation of the Eighth Amendment as it relates to prison conditions problematic.

Scalia's interpretation of cruel and unusual punishment as necessarily requiring a "a prisoner alleging that the conditions of his confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials," (Newman 1992) is faulty. Though "logically consistent" Justice Scalia's analysis relied on "an unwarranted definition of the term prison conditions" (Newman 1992). In *Wilson* Scalia "established a dichotomy between the 'per se' imposed sentence and the resulting imprisonment," (Newman 1992). The establishment of a dichotomy between 'per se' sentences and the lived experience of incarceration minimizes possibilities for characterizing prison officials' conduct as punishment and conditions of confinement as cruel and unusual. By providing greater justifications for prison officials' actions to go unquestioned, prisoners' ability to challenge the status quo of the correctional facility in which they are confined is greatly reduced.

According to Scalia, "the 'per se' sentence carries an intent to punish but the resulting imprisonment requires an additional intent to punish on the part of the prison officials before it can qualify as cruel and unusual punishment," (Newman 1992). As observable in *Rhodes*, intent was not always considered in judging cruelty or unusualness. Many argue that intent was not originally included in determining cruel and unusual conditions for not only the better but also because it is gratuitous. There is discordance between common sense and Scalia's articulation of punitive prison conditions as:

Common sense directs that anything that happens behind those prison bars that pertains to the existing state of the prison is a condition of the imprisonment. This would include, for example the size of the cell, food, clothing, general medical care, and the temperature

of the facilities. In sum, this translates into everything that the factfinder expects to exist at the prison when the sentence is imposed. Justice Scalia's definition of prison conditions defies common sense. He establishes a dichotomy between the 'per se' sentence and everything else which includes not only the existing state of the prison but everything that happens behind the prison bars [...] But, his definition includes the caveat that 'everything else' can only be punishment if it carries an intent to punish. Although a common sense interpretation is not a constitutional mandate, when a word is defined in a way that contradicts common sense, the conclusion must be reached that the definer is stretching to reach a predetermined outcome.

Newman 1992

The predetermined outcomes Scalia's opinion could have been reaching for have arguably unfolded. At the time Justice White found that the majority "erroneously interpreted" case law. Beyond his critique of the majority's interpretation of case law, White also maintained that, "the majority's intent requirement does not easily lend itself to practical application," as "prison conditions are the result of many interconnected factors at play over long periods of time," (Newman 1992). Moreover, White argued that the majority's opinion paved the way for "an economic defense which should have no bearing on whether punishment is cruel and unusual" as "fiscal restraints on the part of the prison officials will defeat any allegation of an Eighth Amendment violation" (Newman 1992). The potential prisoners' rights disaster a lack of resources defense could protect is a legitimate concern as:

Lack of resources is a very real constraint which prison officials face. It is beyond their control and thus, implicates no intent to mete out punishment. No matter how minimal the level of subjective intent is required, a lack of resources to improve a prison is the

ultimate impossibility to improvements. For example, if an inmate alleges a lack of food provisions, the prison officials can constitutionally defeat the inmate's allegation by asserting their own lack of resources.

(Newman 1992)

At the root of the problem a lack of resources defense presents is a concern that prison administrations could be enabled to reflexively refrain from reforming conditions despite urgent needs for change becoming apparent. Justice White portended troublingly defensible inadequacies in prisons as a result of the implementation of Justice Scalia's intent to punish requirement. Many of the concerns raised by Justice White have been realized in prisoners' rights controversies regarding destitute food systems in US prisons. To feed an exponentially increasing prison population requires a correlative exponentially expanded food budget and prison administrations have come under pressure to cut costs.

#### *B. Farmer v. Brennan*

Nearly twenty years after *Wilson v. Seiter* legal scholar Sharon Dolovich analysed the evolution of the Supreme Court's interpretation of the constitution's ban on Cruel and Unusual punishment as it relates to prison conditions. Dolovich is an expert on the constitutional law of prisons and prison conditions. Dolovich argues that "it is past time to address this question" in light of the rapid eventuation of mass incarceration over the last 35 years. Dolovich cites U.S. Department of Justice statistics on the swell of America's prison population, "from approximately 360,000 to over 2.3 million people" (Dolovich 2009) to illustrate pressing need for prison reform. Dolovich criticizes the Court's interpretation of Cruel and Unusual punishment thus far insisting that, "if the prohibition on cruel punishment is to mean anything in

a society where incarceration is the most common penalty for criminal acts, it must also limit what the state can do to prisoners over the course of their incarceration,” (Dolovich 2009). Amid incarceration having become a reflexively distributed punishment, Dolovich contends that the state is obligated to demonstrate the ability to prevent violations of prisoners’ Eighth Amendment rights:

When it puts people in prison, [the state] places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection. For this reason, the state has an affirmative obligation to protect prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners’ basic human needs, may be understood as the state’s carceral burden, ” (Dolovich 2009).

Dolovich and others maintain that the evolution of Supreme Court’s interpretation of the Eighth Amendment as it relates to prison condition does not facilitate the state’s evolved carceral burden and thus has failed and continues to fail prisoners. Dolovich argues that though the import of the state’s carceral burden has expanded as incarceration rates have risen exponentially, the Court has not addressed the urgent need for conditions reform.

Rather, the Court “has thus far avoided this question instead holding in *Farmer v. Brennan* that unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not ‘punishment’ within the meaning of the Eighth Amendment,” (Dolovich 2009). The Court’s holdings in *Farmer* echo Scalia’s majority opinion in *Wilson*. The Court’s treatment of prison conditions in defining cruel and unusual punishment in *Farmer* is a major hole in conditions case law.

The *Farmer* standard is “wholly unsuited to the task” as it limits prison officials’ liability to “cases where officials actually realized the risk of harm,” (Dolovich 2009). The way the *Farmer* standard privileges ignorance on the part of prison officials is extremely troublesome. The *Farmer* standard’s effect is, “to validate official inattention in the prisons [and thus] to guarantee that the people being held in those prisons will suffer gratuitous physical and psychological harm,” (Dolovich 2009). In conjunction with previous holdings in conditions cases, the *Farmer* standard reduces the possibilities for prisoners to make a litigatable claim about consumption. First in *Wilson* then in *Farmer* the Court produced definitions of cruelty and punishment in prisons that are narrow enough to justify the continued dysfunctionality of institutional structures within prisons. These definitions reduce the degree to which prison policies, practices and conditions are eligible for subjection to judicial review. Institutional structures of the total institutions correctional facilities are necessarily include the distribution of food, which limits the productivity of litigating against deprivations of agency as they manifest through consumption.

Dee Farmer, a trans woman was sentenced to prison in Indiana in 1989. After labeling her a ‘transsexual’, prison officials placed Farmer in the general male population “in accordance with prison policy” at U.S. Penitentiary Terre Haute<sup>15</sup> where within two weeks she was raped and beaten by another prisoner in the unit. It took five years for *Farmer* to be heard by the Supreme Court “and by that time she was represented by the ACLU,” (Strangio 2015). In *Farmer*, the Court held that “the Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments’” (Dolovich 2009). Though the Court ruled unanimously for Farmer, the case renewed the conditions of confinement debate within the

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<sup>15</sup> "Farmer v. Brennan." Oyez, 5 Feb. 2018, [www.oyez.org/cases/1993/92-7247](http://www.oyez.org/cases/1993/92-7247).

Court that surfaced in 1992 in *Wilson v. Seiter*. Scalia's analysis in *Wilson* "will potentially lead to horrendous conditions continuing in prisons due to a search for a superfluous intent on the part of prison officials," (Newman 1992) which was realized in *Farmer*. To return to *Farmer*,

Dolovich maintains:

"as a direct consequence of this series of actions, undertaken by agents empowered by the state to administer her prison sentence, Farmer was put at great risk of serious harm in a situation she was powerless to avoid. The treatment was the shape her punishment took, and, as such, it is appropriately subject to Eighth Amendment scrutiny [...] To determine whether the conditions under which Farmer was beaten and raped ought to constitute part of the punishment for Eighth Amendment purposes, the question should be whether Farmer was subjected to those conditions by state officials administering a duly authorized prison sentence. If so, those conditions ought to be constitutionally cognizable regardless of the classification officer's state of mind.

Dolovich 2009

The facts of *Farmer* embody the core of concerns Justice White raised during and immediately after the Court's decision in *Wilson* regarding the intent requirement Justice Scalia instituted two years prior. Since prison officials have little impetus to fix conditions, it is perfectly legal for conditions to remain indecent as long as prison officials are not deliberately indifferent to prisoners' needs. Moreover, referring to the Court's indolent reasoning in defining cruel and unusual punishment, Dolovich criticizes the judiciary's ineptitude as the mediating agent of the state:

There are [...] two serious conceptual problems with this reasoning [that supports the recklessness standard established in *Farmer*] First, even assuming that the question of

whether prison conditions constitute punishment turns on the mental state of the inflicting officer, to establish recklessness as the threshold standard makes no sense. As Justice Scalia noted in *Wilson*, punishment involves ‘deliberate act intended to chastise or deter’ an actor who is reckless, however, is by definition not acting intentionally and thus cannot be said to be punishing those harmed by their action

(Dolovich 2009)

The Court’s holdings in *Farmer* regarding the Eighth Amendment’s applicability to prison conditions claims is irresponsible. Given that the state determines, administers and ensures that people serve their sentences, “living in prison for that time under existing conditions is the punishment,” (Dolovich 2009) yet the Court defines punishment differently. While the Court’s obligation as agents of the state is to interpret the law such that prisoners’ basic needs are satisfied, its definitions of punishment and cruelty create room for the state actors to remain apathetic to cruel conditions of confinement. According to historical and contemporary accounts of US jails and prisons, cruel conditions are rampant. The Court’s interpretation of the Eighth Amendment as it pertains to regulating standards for conditions of confinement legitimizes an attitude of collective indifference to prisoners’ rights to humane conditions of confinement “under which prisoners suffer unnecessary and unavoidable harm,” (Dolovich 2009). The judiciary’s reluctance to regulate prison administrations actions beyond malicious intent “justifies a judgement of cruelty” as its attitude of collective indifference is “manifest in the institutional failure to protect prisoners from unnecessary harm” (Dolovich 2009). Justice White ended his concurring opinion in *Wilson v. Seiter* with the projection that, “the ultimate result of today’s decision, I fear, is that ‘serious deprivations of basic human needs will go unredressed due to an unnecessary and meaningless search for ‘deliberate indifference’” (Newman 1992)

which is indeed the case as prisoners endure inhumane conditions while the law protects those they are in the charge of.

While the decision in *Farmer* was lauded as a success in the reforming the “legal landscape for prison assault cases and the public dialogue about rape in prisons,” (Strangio 2015) the Court’s holdings in *Farmer* limit pathways for prisoners’ rights litigation that challenges conditions of confinement. *Farmer* is another example of the involvement of a high profile civil liberties group in prisoners’ rights litigation. *Farmer* prompted national attention to the epidemic of sexual violence in prisons and imperative protections for incarcerated people through Congress’ Prison Rape Elimination Act. Yet, the Court’s holdings in *Farmer* aided in distorting the definition of punishment as it pertains to prisoners’ legal rights. Ultimately, the developments in case law in *Wilson* and *Farmer* created obstacles to litigating against deprivations of prisoners’ rights.

## 2.6 PRISONERS’ RIGHTS CASES TODAY

Litigation indisputably is useful in advocating for prisoners’ rights, yet even if a person’s Eighth Amendment prison conditions claim reaches the Supreme Court, in cases like *Farmer* and *Hudson*, the harm is already done. Moreover, developments the Supreme Court are subject to the politics of sitting justices. Nevertheless, litigation is perhaps the only way to redress prisoners’ rights deprivations when the administrations of correctional facilities are unresponsive to calls for improving conditions. Only state actors with higher authority than state and federal prison administrations can judge policies that inform day to day administration of correctional facilities- the only state actors prisoners definitively have the right to access and be heard by outside of prison administrations are judges.



Thus, today, civil liberties groups strive to see prisoners' rights realized or redressed through litigation. Throughout the country jails and prisons are exposed for perpetrating inhumane conditions of confinement by groups such as the American Civil Liberties Union and the Southern Poverty Law Center. There are gaping holes in interpretations of constitutional rights that pertain to conditions law allow for inhumane conditions to persist unchallenged as prisoners incur deprivations. Despite the fact that, "prisons, jails and criminal justice institutions are among the least transparent and democratically accountable institutions in the United States," (Gottschalk 2015: 41) the administrations of correctional facilities have been awarded the legal upperhand compared to prisoners as current interpretations of the law provide for immense protection of their actions. Nevertheless, litigation is still prominently used to challenge the administrations of correctional facilities as prison conditions are awful throughout the country. In some states, prison conditions are especially problematic.

Currently, the ACLU and SPLC along with the Law Offices of Elizabeth Alexander and the law firm of Covington and Burling LLP are jointly litigating a case on behalf of the prisoners at East Mississippi Correctional Facility. The lawsuit, *Dockery v. Hall* (originally captioned *Dockery v. Epps*) alleges that East Mississippi Correctional Facility "is 'operated in a perpetual state of crisis'" (ACLU 2018). The ACLU, SPLC and prisoner rights attorney Elizabeth Alexander first filed a class action complaint on behalf of all of the prisoners held at ECMF in 2013 (Takei 2018). After "years of attempts by Mississippi to derail the lawsuit" (Takei 2018) the case proceeded to trial in the U.S. District Court for the Southern Mississippi in early March of this year.

ACLU senior staff attorney Carl Takei reports having witnessed horrific conditions at ECMF in 2011. Between 2011 and today, the state of Mississippi and the administration of

ECMF has made almost no attempt to remediate the conditions of the facility. According to Takei:

Despite repeated warnings from nationally renowned experts brought in to assess conditions at the prisons, a meeting with top Mississippi Department of Corrections officials, and an offer by the ACLU to help MDOC pay to diagnose and fix the problems at EMCF, Mississippi officials permitted these conditions to continue unabated. Rather than take responsibility for fixing this prison, these officials merely switched contractors. In 2012, they swapped out private prison giant GEO Group, Inc. and replaced them with another private prison company, Management & Training Corp., which is perhaps best known for its horrific record of abusing and neglecting immigrant detainees. The state has also switched prison medical contractors multiple times, with little improvement from one to the next.

(Takei 2018)

Despite seven years of urges for reform and criticism of conditions at ECMF without judicial intervention, the administration of ECMF failed to improve the conditions of the facility. As the State of Mississippi Department of Corrections was unresponsive to complaints, litigation became the only way to hold ECMF officials accountable for their abuses and override the State of Mississippi's Department of Corrections indifference.

The ACLU's case features expert reports detailing the conditions at ECMF. One expert report specifically examines the ways in which prisoners have endured dehumanization through the prison's methods of distributing meals:

Officers require prisoners who have previously broken the rules by 'bucking the tray flap' (refusing an order to remove an arm from the tray slot) to kneel on the floor at the back of their cell and to put their mattress on the floor next to the cell door when it is time for the

food tray to be delivered, so the officers can throw the container of food through the food port onto the mattress. If the prisoner refuses to put his mattress on the filthy floor and kneel on the floor behind it the officers refuse to deliver the meal. Some prisoners say that at times they go hungry rather than accept the humiliation of being fed like an animal.

(Kupers 2014: 25)

Officers charged with distributing food to prisoners at ECMF used food to construct additional layers of punishment rather than demonstrating concern or empathy for prisoners with mental health problems. During the case's trial, Erin Monju, litigation associate at Covington & Burling LLP argued:

Because of the Mississippi Department of Corrections' failure to address the unconstitutional conditions at the East Mississippi Correctional Facility, prisoners suffer irreparable harm that can make it even more difficult to re-enter society, in addition to worsened medical conditions that could have been treated, mental illnesses that have grown far worse, and psychological damage from being assaulted [...] The department is causing suffering far beyond the prisoners' sentences, also punishing families and communities.

SPLC 2018

The trial ended on April 9th--time will tell whether or not the court will intervene in Mississippi's DOC to see conditions improved, hold offending officers accountable for the inhumane treatment of prisoners or provide prisoners at ECMF with recompense for the abuses they have endured. While successful cases of litigation can address system-wide issues through reinterpreting the law that informs policy development for prison administration, legal redress is

a band-aid type fix for injustices prisoners have already endured. Addressing deprivations related to consuming food through litigation has the potential to elicit institutional changes, however litigation cannot expediently remedy the landscape of eating in prisons, thereby prisoners find extralegal ways of navigating problems related to food.

## SECTION 3: UNOFFICIAL RESISTANCE:

### 3.1 INTRODUCTION

There is no uncomplicated way to resist the loss of self that the conditions of living in incarceration cause. Yet, “people sustain themselves and struggle to live lives of dignity and purpose when assaulted by the state,” (Price 2015: 129). A number of difficulties are associated with challenging the actions of prison administrations through law. Seeking legal redress presents itself as a daunting, tedious method of exerting agency, the law is written in favor of prison administrations and litigation as a tactic can often only be implemented after deprivations and abuses have run their course. It is also important to note that incarcerated people who view the legal system as having a role in upholding structural inequalities in the US willfully eschew the law. Thereby, many find extralegal ways to ameliorate the loss of freedom and control over their bodies.

Inmates’ unauthorized responses to the dehumanization prison conditions stimulate through attempting to control prisoners’ food consumption manifest through varied schemes. While certain resistance measures confront prison administrations directly, many are clandestine; where some are the product of political organizing or coalition building, others are discrete. Discreet measures prisoners take to regain agency are so prevalent that there is significant discussion of stealing and covert economies within prison literature. Since the 1960s unofficial retaliation against prison administrations in the United States in the form of highly-publicized riots turned national attention to the criminal justice system at distinct junctures.

Prisoners who challenge the actions of prison administrations outside of legally available methods run the risk of facing additional punishments of varying severity. However, incarcerated people have to respond to the reality of their position in the prison system. Despite the reach of

institutional control, prisoners strive to regain agency in managing their lives through subversion as:

The philosopher Jean-Paul Sartre once said--more or less--that freedom is what you do with what's been done to you. To make your way through a system that's designed not just to take your freedom away, but also to destroy you as a person is extremely difficult. To be able to find a space of freedom, to make a life of dignity and respect while you are confined there is a special kind of work. Some prisoners can do it, some can't.

Gordon 2011: 15

The potential ramifications of defying prison policies are escalations in punitive measures leveled against offenders. In the past fifty years, prison administrations have responded to insurgencies with severe consequences for agitators. Yet, eating is of such significance in exacting a sense of self--and especially so in prison life--that many endeavor to rectify infamously problematic food systems in US prisons and jails through extralegal means of self-expression despite the threat of increased punishment. Conspicuously, prisoner protest and subversion in the US returns to the destitute nature of prison food systems recurrently.

### 3.2 ORGANIZED RESISTANCE

The exorbitant control prison administrations exercise over prisoners' consumption is a primary means of punishment. Issues with the food system at Attica Correctional Facility contributed to the stakes of the infamous 1971 rebellion. The Attica prisoners precisely identified the issues with the conditions at the facility in their manifesto, titled, "The Attica Liberation

Faction Manifesto of Demands and Anti-Depression Platform,” (Race and Class 2011). As a preface to their demands, the prisoners argued that:

It is a matter of documented record and human recognition that the administration of the New York prison system have restructured the institutions which were designed to socially correct men into the fascist concentration camps of modern America.

Race and Class 2011

The 25th demand of the manifesto criticized the landscape of eating at Attica directly:

We Demand that better food be served to the inmates. The food is a gastronomical disaster. We also demand that drinking water be put on each table and that each inmate be allowed to take as much food as he wants and as much bread as he wants, instead of the severely limited portions and limited (4) slices of bread. Inmates wishing a pork-free diet should have one, since 85% of our diet is pork meat or pork-saturated food.

Race and Class 2011

The inmates illuminated the degree to which the administration denied prisoners space to exercise agency over their bodies and minds through consumption within the 25th demand of the Attica manifesto. Descriptions of the deprivations generated by the inadequacies of Attica’s food system provided evidence for the prisoners’ claim that the administration was failing to facilitate any kind of rehabilitation at the prison. Overall, the manifesto articulated serious problems with conditions at Attica. By Governor Rockefeller’s order, the Attica rebellion was violently put to a stop. The cruelty of the intervention was unprecedented. In the process of retaking Attica 43 people were killed--not one died at the hands of an inmate. Unmitigated retributive violence was never the intention of the Attica demonstrators.

Before the riot erupted prisoners at Attica had been making peaceful demands “for quite some time,” (Gordon 2011: 16). Evidently, “inmates had been writing letters seeking improvements in their living conditions for years,” (Vogdes 2017). Prior to the uprising inmates “drew up a petition of protest” the demands of which “were, for the most part, piteously simple and human,” (Gopnik 2016). As belligerent as all out revolt is, the Attica uprising was the final action of a calculated series of prisoner efforts in organizing to elicit conditions reform at the facility that were ignored. Despite certain punitive consequences for the uprising undoubtedly impending, the insurgents did not devolve from the ethos of activism as, “the inmates organized themselves into surprisingly efficient security and administrative units, with inmate members of the Nation of Islam essential to this enterprise,” (Gordon 2011: 16). The prisoners maintained the spirit of organized civil disobedience for the duration of the rebellion.

The Attica uprising was a distinct manifestation of the ideas that emerged, “in the context of a prisoners’ rights movement in the US that began in the 1920s, peaked in the early 1950s and exploded from 1960 to 1971,” (Gordon 2011: 16). The Attica Manifesto began:

We, the imprisoned men of Attica prison, seek an end to the injustice suffered by all prisoners. Regardless of race, creed or color. The preparation and content of this document has been constructed under the unified efforts of all races and social segments of this prison.

(Race and Class 2011: 29)

The dissidents at Attica were sure to clarify that their rebellion was neither random, nor a compulsive response to the news of civil rights activist George Jackson having been murdered by prison guards at San Quentin State Prison in California two weeks earlier; their declaration articulated that:



The entire incident that has erupted here at Attica is not a result of the dastardly bushwhacking of the two prisoners on September 8, 1971, but of the unmitigated oppression wrought by the racist administrative network of this prison throughout the years.’

Gordon 2011: 16

Though it fell on deaf ears, the Attica revolutionaries made the aim of the rebellion unquestionably coherent.

The state of New York responded to the sophistication of prisoner organization and the nonviolent stance the revolutionaries at Attica with brutality. The riot’s aftermath saw, “a terrible and cruel reaction to restore ‘law and order’ that contributed its part to the largest prison expansion the world has ever seen,” (Gordon 2011: 16). Reactionary fear in the aftermath of Attica “stopped prison reform dead in its tracks,” (Gopnik 2016) as it provided the impetus for prison administrations to make a move toward increased punitiveness in the US penal system at large.

### 3.3 EVERYDAY DEFIANCE

Seemingly petty acts of resistance--prisoners engaging in theft, contraband trade, or simply willfully evading prison rules and policies--are extremely prevalent in American jails and prisons. Prison food narratives indicate that the current state of prison food systems and policies “are divisive in terms of institution-inmate relationships,” (Smoyer and Lopes 2017: 251) and “foster a traumatic environment of punishment and degradation,” (Smoyer and Lopes 2017: 252). Even if food policy is “created without any deliberate punitive intent” prisoners perceive its execution as “unbearably harsh and humiliating” (Smoyer and Lopes 2017: 252). Further

examination of prison food systems and of accounts of incarcerated and formerly incarcerated peoples' responses to prison food systems indicate that prisoners live with constant provocation to act in non-compliance with prison rules and policies.

As previously discussed in Section 2, the 8th Amendment requires adequate food to be served to inmates. However, the content and quality of what inmates are served varies. As, "the consumption of unappetizing food has long been identified as a punitive feature of prison life [Sykes 1958]" (Smoyer and Lopes 2017) the status of food a source of degrading punishment is an established standard in American prisons and jails.

Prison food systems heavily restrict inmates' access to agency in consumption. Correctional facilities allow for prisoners to consume food items purchased from the facility's commissary. Commissary relies on prisoners having access to funds either transferred to them from outside sources or generated by prison wages (the average maximum daily wage in US prisons is \$3.45 [Sawyer 2017]). Federal prisoners are fed according to the Federal Bureau of Prison's dietary standards. In facilities within the Federal Bureau of Prisons, "removal of food from the dining hall is prohibited," (BOP 2012: 10). Prisoners are prohibited from possessing any contraband:

any item or thing not authorized or issued by the institution, received through approved channels, or purchased through the commissary. [...] An altered item, even if an approved or issued item, is considered contraband.

BOP 2012: 53

Moreover, prisoners within the Federal Bureau of Prisons:

have the responsibility to comply with the health care policies of your institution, and follow recommended treatment plans established for you, by your health care providers

to include proper use of medications, proper diet, following all health related instructions with which you are provided [...],” in addition to, “ the responsibility to eat healthy and not abuse or waste food or drink

BOP 2012: 49

Additionally, rioting is considered a “greatest severity level act”--theft, “engaging in or encouraging a group demonstration”, or “adulteration of any food or drink,” are considered “high level severity act[s]” (BOP 2012: 68) punishable by months of “disciplinary segregation” or “recommended parole date recession or retardation,” according to the BOP handbook.

Ultimately, prisoners within the BOP are obligated to eat by institutional mandate, but only internally approved food available for purchase and institutionally provided meals; inmates are not sanctioned to rectify food concerns on their own outside of accepted inmate grievance procedures. The BOP is responsible for 225,000 prisoners--those outside of the BOP’s jurisdiction, the majority of the 2.3 million people who are imprisoned, are at the discretion of state and local department of corrections policies. While “all detention facilities must have a licensed dietician review their menus in order to be accredited by the American Correctional Association”, and “the association recommends--but does not mandate--that prisons offer inmates three meals a day,” detention facilities outside of the federal system are governed by “a patchwork of state laws, local policies, and court decisions,” (Santo 2015). Some states have a better prison food reputation than others. For example, the state of Minnesota has “committed to providing real food for inmates even if it costs more money,” (Neate 2016). In 2016 Minnesota’s commissioner for corrections explained:

We don’t want to fill a bowl with a substance that might meet the calorie requirement and vitamins and minerals [the state requires], but has no appeal, [...] Being in prison is

punishment enough, they don't have to be tortured by bad food. [Minnesota] has been able able to spend a little bit more than most other states as Minnesota has one of the lowest per capita incarceration rates in the country at less than 200 per 100,000 people compared to more than 800 per 100,000 in Louisiana, the state with the highest. There is no nationally collected data on prison food spending, which is set at the state or individual prison level [...] Minnesota spends an average of just under \$3 a day on food for its 10,000 prisoners [...] That is on the high end, there are some states that do it for considerably less.

Neate 2016

There is an abundance of stories of state and local authorities underfeeding prisoners or feeding prisoners inadequate food in the South. In 2014 the Southern Center for Human Rights responded to complaints about food in Gordon County Jail in Calhoun, Georgia. In their news brief, the SCHR acknowledged that they receive “many complaints about food served in prisons and jails across the South,” (SCHR 2014). The SCHR recognized that food-related complaints were commonplace and what made “the reports from the Gordon County Jail stand out as abnormal and worthy of prompt attention,” (SCHR 2014) were credible sources indicating that prisoners were starving. While some states are more progressive in their approach to food systems in prisons, the Constitution only mandates adequate food, so many state and local policies reflect only that obligation. Though prison food reform projects exist, they are exceptional against the overarching landscape of eating in American correctional facilities.

Sociological scholarship on the role of food in carceral experience and penal consciousness contends:

Punishment falls into two categories: concrete and symbolic. The categories are not mutually exclusive: punishment may be perceived as concrete, symbolic, or both.

Concrete punishments refer to material deprivations, ‘hinging on the presence or absence of concrete, material things,’ while symbolic punishments are ‘losses of autonomy, self, and personhood’ that exist along a ‘continuum of the loss of freedom’. In the research with incarcerated people [...] conducted to articulate and test this theory, food was a ubiquitous example of concrete punishment [...] food-related issues were also included in the examples of symbolic punishment, namely the inability to shop, make food choices, and control timing of consumption were experienced as a loss of freedom.

Smoyer and Lopes 2017: 243

This research (which was conducted to examine “women’s perception of the prison experience”-specifically “the punishing dimensions of their confinement,” [Smoyer and Lopes 2017: 243]) articulates the landscape of eating in incarceration as a site through which prison administrations enforce and execute food policy such that prisoners are rendered degraded, deprived and humiliated. The dysfunctionality that pervades the experience of eating in prison creates both a tangible and conceptual deficit of control over food and its consumption--a primary means for understanding and articulating one’s self--that prisoners are left to reckon with while they serve time.

Without extraneous legal efforts prisoners’ complaints are constricted to remain internally processed by the grievance system of their institution. However, perceptions of prison administrations’ apathy toward incarcerated peoples’ food-related issues are recurrent in

accounts of prison life. When interviewed about their experience eating in prison, inmates discussed, “poorly designed, haphazard food systems that left them feeling uncared for, ignored, frustrated and humiliated,” and correctional officers failing to pay “humane attentions,” to prisoners’ dietary needs (Smoyer and Lopes 2017: 244). The idea that, “the correctional system does not care about people in its custody,” (Smoyer and Lopes 2017: 247) surfaced as a theme in sociological research. Since prisoners perceive the correctional system as remaining apathetic to excessively punitive prison conditions, they are not inclined to believe the issues they raise will be seriously considered by penal institutions. Moreover, penal institutions do not sanction any expedient solutions to food-related problems. Thereby, prisoners seek to ameliorate everyday issues related to food by forming patterns of illicitly acquiring, preparing and distributing food.

When quotidian rule-breaking is related to food it is imbued with the significance of resisting carceral control that impedes self-fashioning. Narratives of life in prison share the theme of recounting the ways in which prisoners furtively handle problems with prison food systems. These anecdotes are not framed as measures taken as acts of resistance, but rather as acts of desperation. In sociological research prisoners “articulated experiences of hunger that reflected both a deprivation of adequate food” (Smoyer and Lopes 2017: 244). In countless anecdotes of life in prison people describe breaking rules because they are hungry and dissatisfied with available food. Author and inmate Erin George published a depiction of her experience serving a 603 year sentence in the Virginia state prison system thus far titled *A Woman Doing Life: Notes from a Prison for Women*. In a section of *A Woman Doing Life: Notes from a Prison for Women* devoted to a discussion of breaking rules, George characterized most infractions as petty attempts at making life in prison more bearable. Nearly all of George’s examples of ordinary infractions are related to eating:

borrowing commissary, bringing a pack of mayonnaise back to the chow hall (to make the food more palatable), or smuggling sugar packets back into the wing from your breakfast tray.

George 2010: 67

Each of these actions seems innocuous, yet they are all prohibited and considered acting in noncompliance with prison policy. With control over one's circumstances of consumption forbidden to the point of restrictions placed on the movement of condiments, even maintaining agency through preferences that are entirely inconsequential to the institution necessitate sneaking around.

In recounting an anecdote of narrowly avoiding consequences for harassing another inmate about a commissary debt, George explains the use of solitary confinement as punishment for breaking prison rules. Sharing commissary, trading commissary, or modifying commissary products is generally prohibited in prisons. Despite strict rules around the consumption of commissary, commissary is one place where prisoners can exercise some agency in the personal experience of eating provided that they have the monetary means to do so. In solitary confinement inmates were barred from commissary, "so most women who ended up there for any significant period of time staggered out at the end of their confinement dazed and half-starved," (George 2010: 14). The slight access to the meaningful agency commissary provides is leveled against prisoners as a punishment if prisoners are found even marginally engaging with commissary outside of its designated use.

Nevertheless, prisoners describe commissary as inadequate in its ability to counter prisoners' needs related to consuming food. Therefore, on a daily basis prisoners knowingly break rules related to commissary, acquiring food from other sources, preparing and distributing

food anyway in order to appropriate methods of retaining agency in consuming food as a constitutive process while incarcerated.

Mentions of food-related theft are abundant in prison narratives. Participants in a sociological examination of “how food is a part of prison relations” related a story of their incarcerating institution expressing, “apprehension over allowing certain appliances in the units in medium-security institutions because the administration believed that the availability of appliances would cause an increase in the amount of food stolen from the prison’s kitchen,” (Godderis 2006: 66). Participants disagreed with the institution’s assessment, arguing that, “if the prisoners wanted kitchen food they would steal it and find a way to cook it, regardless of whether the appliances were available,” (Godderis 2006: 66). The suggestion that forming policy that would prohibit access to resources that could be used to facilitate increased agency in consuming food in order to reduce theft would not deter inmates from stealing from kitchen facilities is consistent with the degree to which food theft reportedly occurs.

The problematic nature of stealing in prison is not lost on prisoners. Yet, prisoners have an existential interest in finding ways to consume food at their discretion. The Marshall Project published excerpts of a 65 page report written by Aaron Flaherty and four other Texas inmates,” (Chammah 2016). The inmates’ report consists of recommendations for making Texas prisons more rehabilitative. Flaherty, who is serving a life sentence at Darrington Unit in east Texas, maintains, “it has often been said that those who are closest to a problem are closest to its solution,” (Chammah 2016). Much of the report identifies problematic aspects of the landscape of eating in prison from the perspective of its affected population and discusses potential reform. The report specifically addresses the inadequacies of commissary and prisoners’ understandings of its effects:



Commissary also preserves the black market because of its limited selection [...]  
Likewise, commissary will not sell food seasonings such as onion powder, garlic, dehydrated onions and bell peppers, etc., so inmates buy these stolen items from the kitchen.

Chammah 2016

The prisoners who authored this report attribute the existence of food black markets in prison to a dearth in content available for purchase at commissary. Flaherty and his co-authors recommend reforming the system of commissary in Texas prisons to minimize theft that occurs in response to the shortcomings of available food:

Inmates overwhelmingly agree that if fruits and vegetables were sold in commissary, they would buy them regularly. TDCJ will object that inmates would make wine if fruit were sold in commissary. However, inmates make wine without fruit by using fruit juice, mint sticks, raisins stolen from the kitchen...The wine is still being made!...At units where horticulture classes are offered, inmates buy black-market salads every day because they are not available in commissary. Inmates would eat healthier if given the option.

Chammah 2016

Similar to the aforementioned prisoners' insistence that prisoners would continue to steal from kitchens in spite of institutional bans on certain appliances to prevent theft, these Texas prisoners insist that contraband alcohol is produced without sanctioning the sale of produce in commissary. With fresh produce banned in order to prevent the production of one form of contraband, prisoners participate in prison black markets on a daily basis in order to consume salad. The Texas prisoners maintain:

TDCJ should make accessible through commissary all the things that inmates normally steal from the state, such as pillows, bleach, spices, sandwich bags, containers for drink and food storage, onions, [...] Policy states inmates are not allowed to have these things, but everybody has these things anyway and they are stolen from the state, at taxpayer expense... Furthermore, the state encourages theft and immorality by banning such comforts that border on necessity.

Chammah 2016

When considering reform based on their experiences, these inmates suggest that proscriptions on typically innocuous products in prison food systems to combat the disregard of in place rules does not curtail the continuation of patterns of illicitly consuming food, but may in fact inspire this kind of activity. The authors of this report characterize theft in prison as immoral yet realize that these banned things prisoners steal “border on necessity” (Chammah 2016). The many reasons prisoners cite for stealing foodstuffs--health, hunger and reappropriating control over a fundamental personal process--indicate that prisoners who break food rules are more concerned with their individual well-being and sense of self than following rules.

## CONCLUSION:

The first section of this project attempted to articulate the constitutive quality of food in order to emphasize the power of its consumption in self-development. This constitutive power is contradictorily intensified in prison environments and discordant with the formulation and execution of food systems in total institutions. This contradiction is a specific dilemma in US prisons and jails that have yet to make energetic efforts to move away from the sentiment of retribitional apathy toward the effects of prison conditions on the incarcerated criminal that plagues the history of the US penal system examined in the second section of this project. The second section of this project sought to examine the evolution of prisoners' legal rights in the United States to understand how the current interpretation of the Constitution as it applies to laws surrounding US prison conditions establishes standards that can be used to litigate food-related issues and how this interpretation came to be. The third chapter of this project considered the perspectives of people who break US prison rules in attempts to reclaim agency in the constitutive process of eating.

Ultimately, it became clear that though prison food systems in the United States vary in overall quality on a jurisdictional basis, they are all derivative of a long history of a 'bread and water' mentality that was part of an overall designation of prisoners as slaves that remained largely unchallenged until the litigation successes of the Civil Rights movement. This mentality informed the tradition of inflicting punitiveness unto prisoners through what and how they eat without consideration for the significance of food in self-fashioning that is still prevalent in much of the country today. Admittedly, this project acknowledges that prison food systems in America are generally thought of as less than ideal, but does not delve into the specifics of the food systems of every level of corrections systems in America to categorically evidence this.

However, it does seek to communicate how little US prisoners are entitled to retain control over the constitutive process of eating in contrast to the immense legal protection prison administrations' authority over prisoners. The current interpretation of the US Constitution mandates only that prison administrations serve adequate food to prisoners. In contrast, prisoners' legal rights to challenge food-specific deprivations of agency and autonomy caused by prison conditions and constitutional standards for prison conditions in the United States are nascent, scant and unconcerned with unintentionally punitive, secular and non biological manifestations of these deprivations. Foucault recounts that the penitentiary's initial rise to prominence was a solution concocted to reckon with the criminal in a democratic fashion as:

For the theoreticians of the Enlightenment, someone who committed a crime broke the contract that bound him to his fellows. Society put him aside and reformed him by carefully regulating his every action and every moment of his life in prison.

Droit 1998

Examination of the circumstances people are expected to eat under in American prison systems that have not yet or are not actively engaged in food reform on volition of their own indicate that they are infantilizing to the point of degradation and humiliation; this alone reflects a place where these facilities fail to facilitate the social reform they purport to exist for. Prisoners as individuals are denied adequate legally explicit channels for independently maintaining a sense of self through food--some steal or riot to ameliorate this truncation of agency. Prison food reform efforts are more pragmatic than reparative; these reform efforts are exceptional and do not yet meet the needs of a population of 2.3 million as evidenced by the national trend of prison food budget cuts.

Without considering food specifically amid the rest of the factors that contribute to the experience of incarceration from the perspective of a nuanced understanding of self-cultivation and agency, incarceration is a perfunctory solution to the problem of crime. Prison administrations can acknowledge prisoners as agents through reconfiguring prison food systems to allow prisoners more explicit control over the circumstances under which they consume food. Reconfigurations of prison food systems that make concessions to the constitutive quality of food are beyond warranted--without creating an environment of rehabilitation, solving the problem of crime in society by incarcerating criminals renders the solution to the crime problem the erasure of criminals in dehumanizing spaces; this can change. Mass incarceration makes examining the degree to which manifestations of food problems in US prisons affect the significance of prison experiences and accordingly repairing food systems an enormous, expensive task against a gargantuan aggregate of concerns with the crisis overall. Yet, in select corrections systems in the United States progressive prison food reform initiatives have been undertaken; this project does not analyze these reform initiatives, but should make the case for these initiatives to transpire such that they realize the constitutive quality of food and what eating means to a prisoner. This project neither makes a case for alternatives to incarceration in the US, nor does it suggest strategies for regulating or improving conditions; this project does seek to emphasize that prison food systems under the basic organization of US prisons and jails—the total institution does not facilitate self-fashioning.

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