NOTES

STRIKING THE RIGHT BALANCE: TOWARD A BETTER UNDERSTANDING OF PRISON STRIKES

From August 21, 2018, to September 9, 2018, incarcerated individuals across America orchestrated a daring and seemingly improbable coordinated protest: they went on strike. From California to North Carolina and in roughly fifteen other states,[1] thousands of prisoners engaged in peaceful work stoppages, hunger strikes, sit-ins, and commissary boycotts.[2] This nationwide strike emerged in part as a response to a deadly riot, kindled by poor living conditions and guard understaffing, at the Lee Correctional Institution in South Carolina in April 2018.[3] But more broadly, the prison strikers sought to draw public attention to longstanding grievances over inhumane treatment within prisons across the country and to call for significant criminal justice reforms. The strikers, through the inmate organization Jailhouse Lawyers Speak, issued a list of ten national demands, calling for, among other things, improved prison conditions, better access to rehabilitation programs, voting rights for all current and former prisoners, and the "immediate end to the racial overcharging, over-sentencing, and parole denials of Black and brown humans."[4] Most critically, the strikers passionately called for the "immediate end to prison slavery"[5] — the label that activists use to describe the exploitative labor practices within prisons of putting prisoners to work, sometimes compulsorily, for just "cents an hour or even for free."[6]

---

[1] Incarcerated individuals in Canada also participated. *See* Padraig Moran, *U.S. Prison Strikes Spread to Canada, as Advocates Call for End to "Prison Slavery,"* CBC RADIO (Aug. 27, 2018), https://www.cbc.ca/radio/thecurrent/the-current-for-august-27–2018–1.4800048/u-s-prison-strikes-spread-to-canada-as-advocates-call-for-end-to-prison-slavery-1.4800051 [https://perma.cc/FL6A-WH6L].

[2] *See* Molly Olmstead, *Prisoners Launch National 19-Day Strike to Protest Unpaid Labor and Poor Prison Conditions*, SLATE (Aug. 21, 2018, 1:10 PM), https://slate.com/news-and-politics/2018/08/national-prison-strike-launches-over-underpaid-labor-and-prison-conditions.html [https://perma.cc/V2Q3-DDWG]. The total number of inmates participating has been difficult to estimate, as corrections officials almost uniformly denied that any protests were underway. *See* Madison Pauly, *No One Knows How Big the Prison Strike Is, But Organizers Are Already Calling It a Success*, MOTHER JONES (Aug. 29, 2018, 6:00 AM), https://www.motherjones.com/crime-justice/2018/08/prison-strike-conditions-organizers/ [https://perma.cc/G3PJ-VWJN].

[3] German Lopez, *America's Prisoners Are Going on Strike in at Least 17 States*, VOX (Aug. 22, 2018, 9:00 AM), https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018 [https://perma.cc/66GA-P22S].

[4] Jailhouse Lawyers Speak (@JailLawSpeak), TWITTER (Apr. 24, 2018, 6:28 AM), https://twitter.com/JailLawSpeak/status/988771668670799872 [https://perma.cc/5K9E-GG5U].

[5] *Id.*

[6] Lopez, *supra* note 3.

Although none of the strikers' ten demands have yet been met, the 2018 nationwide prison strike was still a remarkable event in its scope and coordination, as well as its ability to generate public support and attention. An estimated 150 different organizations endorsed the strike; citizens held numerous demonstrations outside of prisons in solidarity; and a range of national media publications provided detailed coverage of the protest's motivations, objectives, tactics, and status as potentially the "largest prison strike in U.S. history."[7]

Despite the 2018 prison strike's apparent gravity, it is difficult to fully contextualize its significance because surprisingly little attention has been paid to prison strikes previously. For instance, just two years prior, in 2016, a similar nationwide prison strike was described as "[t]he largest prison strike . . . *you [probably] haven't heard about*."[8] In light of this reality, this Note peers behind prison walls to improve our understanding of prison strikes — the end goal being to open the door to a broader discussion of why and how these strikes *should* receive legal protection. Part I briefly documents America's history of prison strikes, showing that the 2018 nationwide strike is the latest in a long, important tradition of prisoners using the only real means available to them — collective actions against prison administrators — to protest labor conditions and other deeply held grievances. Part II then evaluates the legal framework governing prison strikes, demonstrating that such strikes likely do not receive sufficient protections under either the Constitution or federal and state statutes and therefore can be shut down by prison administrators without fear of judicial oversight. Part III, informed by the rich history of prison strikes, argues that their potential and demonstrated value demands, at the very least, consideration of the merits of protecting incarcerated individuals' right to strike, and it contends that the First Amendment framework offers one potential avenue to allow prisoners to peacefully surface pressing problems in our carceral system and to collectively express their humanity and dignity.

I. PRISON STRIKE BACKGROUND AND HISTORY

The term "prison strike" encompasses a range of nonviolent collective actions by prisoners — namely work stoppages, sit-ins, spending boycotts, hunger strikes, and other forms of protest — that challenge the rule or order of prison administration and generally disrupt "business as

---

[7] Summer Meza, *Inmates Across 17 States Launch What Could Be the Largest Prison Strike in American History*, THE WEEK (Aug. 21, 2018), https://theweek.com/speedreads/791524/inmates-across-17-states-launch-what-could-largest-prison-strike-american-history [https://perma.cc/C24L-93UY].

[8] Alice Speri, *The Largest Prison Strike in U.S. History Enters Its Second Week*, THE INTERCEPT (Sept. 16, 2016, 9:19 AM), https://theintercept.com/2016/09/16/the-largest-prison-strike-in-u-s-history-enters-its-second-week/ [https://perma.cc/V7UA-VWJ6] (emphasis added).

usual" within the prison.[9] Prison strikes differ from other forms of collective action in prisons, including prison riots and rebellions, in that they are *peaceful* forms of resistance: they do not involve the threat or the use of force against persons or property.[10] And prison strikes differ from other forms of prison disturbances, like individual inmate protests, that are not collective in nature and therefore do not disrupt normal prison activity or obstruct prison officials' control.[11]

Generally speaking, prison strikes (and prisoner collective action more broadly) have not received rigorous scholarly or media analysis until very recently. Social scientists, legal scholars, and the press have largely failed to provide a systematic accounting of the history and place of prisoner protest in the American penal system, particularly prior to the early to mid-twentieth century.[12] Against this backdrop of scarce attention, this Part briefly considers the history of prison strikes, both to illuminate an important but overlooked aspect of prison life and to inform the legal analysis that follows. In particular, this Part provides an abbreviated overview of strikes across four key periods of prison development in the United States: (1) the inception of the American prison during the early American republic, (2) the creation of modern legal punishment and penitentiaries between the antebellum period and Reconstruction, (3) the explosion of prison systems and prison labor between Reconstruction and World War II, and finally (4) the prisoners' rights and reform movements emerging between the end of World War II and our present-day mass incarceration system.

This overview suggests that as the carceral state has expanded and evolved, so too have prison strikes — thus placing actions like the latest

---

[9] *About*, INCARCERATED WORKERS ORGANIZING COMMITTEE, https://incarceratedworkers.org/about [https://perma.cc/E2H8-LBF8].

[10] *See* Bert Useem & Michael D. Reisig, *Collective Action in Prisons: Protests, Disturbances, and Riots*, 37 CRIMINOLOGY 735, 744–45 (1999).

[11] *See id.*

[12] *See id.* at 735–36; *see also* ROBERT ADAMS, PRISON RIOTS IN BRITAIN AND THE USA 1–15 (2d ed. 1994) (describing how "for most of the two-hundred-year history of the majority of prisons, prison riots have not been in the foreground of debates about penal policy and practice," *id.* at 1, and noting "[t]he general lack of research into prisons, prison conditions and prison riots until the last third of the twentieth century," *id.* at 15); Michelle Lise Tarter & Richard Bell, *Introduction* to BURIED LIVES: INCARCERATED IN EARLY AMERICA 1, 7 (Michelle Lise Tarter & Richard Bell eds., 2012) (discussing how some "scholars banished matters of penal practice and inmate resistance to dependent clauses and footnotes"). The lack of attention to prison strikes is, to some extent, understandable given that (1) major prison disturbances appear in general to be rare, *see* ADAMS, *supra*, at 1 (discussing the public record of prison disturbances as a "discontinuous" one, "marked by dramatic incidents interspersed with long silences"); FRANK VALENTINO FERDIK & HAYDEN P. SMITH, NAT'L INST. JUSTICE, CORRECTIONAL OFFICER SAFETY AND WELLNESS LITERATURE SYNTHESIS 8 (2017); (2) prisons are closed universes, thereby making contemporary or historical study of their goings-on notoriously difficult, *see id.* at 2; and (3) prison studies and related disciplines are novel fields, Micol Seigel, *Critical Prison Studies: Review of a Field*, 70 AM. Q. 123, 123–24 (2018) (book review).

2018 strike in a long tradition of prisoners organizing to express deeply held grievances. Further, examining the history of prison strikes reveals that strikes are often the only way for the incarcerated to act on those grievances — and that while strikes have rarely brought about immediate changes, they have helped initiate longer-term prison reforms and have periodically been successful in drawing attention to the otherwise unnoticed plight of those behind bars.

A. Early American Republic (1770s–1810s)

Prior to the Revolutionary War, no prison institutions as we know them today existed; only small colonial jails existed for housing poor defendants for pretrial and presentencing purposes.[13] In the aftermath of the Revolution, however, the nascent republic experienced a radical transformation in penal practices. Driven by great dissatisfaction with the British system's liberal use "of the death penalty and other sanguinary punishments" seen as "inherently despotic,"[14] the new American states began to reform their criminal codes to make incarceration (largely with hard labor sentences) the primary form of criminal punishment.[15] Laborers and journeymen, from whose ranks early prison populations tended to be drawn, viewed this new system as a pernicious form of indentured servitude.[16] These laborers therefore protested America's newly constructed prisons not only outside the penitentiary walls,[17] but also within them. Prisoners frequently engaged in various violent acts of insurrection, as well as subtler, nonviolent protest actions between the 1790s and 1810s.[18] For instance, prisoners in Philadelphia's Walnut Street Prison, America's first prison, routinely engaged in "Blue Monday[s]": laying down their tools and stopping work.[19] Such actions,

---

[13] *See, e.g.*, ADAM JAY HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 7–9 (1992); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 52–56 (rev. ed. 1990); *cf.* SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 59–63 (1998) (discussing the colonial use of jails "to enforce the laws of bondage and to uphold the authority of masters," *id.* at 60).

[14] REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 19 (2008); *see id.* at 17–20. Other factors like rapid population and urban growth, which rendered traditional, community-based corporal punishments largely ineffective, also prompted the new American states to consider new forms of punishment like incarceration. *See* HIRSCH, *supra* note 13, at 32–46 (discussing the sociological factors that contributed to the rise of penitentiaries).

[15] ROTHMAN, *supra* note 13, at 61.

[16] MCLENNAN, *supra* note 14, at 41–43. Laborers felt that these new penitentiaries challenged their self-conception as "free-born men," violated their natural and customary rights, and therefore had no place in the new American republic. *Id.*

[17] *Id.* at 43, 47–48.

[18] *See* Tarter & Bell, *supra* note 12, at 16–17 (discussing various forms of collective protest, including noncompliance and other forms of passive resistance, in early American jails and prisons).

[19] MCLENNAN, *supra* note 14, at 44.

initiated to "eas[e] their working conditions, acquir[e] various perquisites, and otherwise soften[] their circumstances,"[20] bore remarkable resemblance to the prison strikes of today.

B. Antebellum to Reconstruction (1820s–1860s)

Beginning in the 1820s, America's nascent prison system underwent a second transformation. A "crisis of legitimacy" surrounding early penitentiaries like Walnut Street — prompted in part by a growing perception that these institutions enabled and exacerbated social disorder (like Blue Monday strikes) — led states to reckon, for the first time, with prescribing *what* precisely should go on within prison walls.[21] The system that ultimately emerged, the "Auburn system," involved isolated, fortresslike prison structures where the state (1) sold inmates' labor power to private manufacturers by day, (2) locked inmates in solitary stone cell houses by night, and (3) enforced strict forms of discipline.[22]

Although the Auburn system's physical structure and strict discipline regime certainly hindered inmates' ability to engage in collective action — putting an end to mass nonviolent resistance like Blue Monday strikes[23] — inmates nonetheless managed to work together and mount subtler forms of protest. They found ways to circumvent mandates of silence and to develop clandestine methods of communication;[24] they destroyed workshop tools to sabotage prison labor; they staged demonstrations over prison conditions;[25] and, at times, they also went on strike.[26] In short, inmates in antebellum America, like those in the early republic era, responded to shifts in legal punishment with shifts in their means of collective action.

---

[20] Larry Goldsmith, *"To Profit by His Skill and to Traffic on His Crime": Prison Labor in Early 19th-Century Massachusetts*, 40 LABOR HIST. 439, 441 (1999); *see also* Larry Goldsmith, *History from the Inside Out: Prison Life in Nineteenth-Century Massachusetts*, 31 J. SOC. HIST. 109, 118 (1997) (discussing a collective, peaceful protest for larger meal portions in a Massachusetts prison); Simon P. Newman & Billy G. Smith, *Incarcerated Innocents: Inmates, Conditions, and Survival Strategies in Philadelphia's Almhouse and Jail*, *in* BURIED LIVES, *supra* note 12, at 60, 72–78 (exploring various protest forms in jails and prisons in the early republic).

[21] MCLENNAN, *supra* note 14, at 49; *see also* MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878, at 164 (1980).

[22] *See* MCLENNAN, *supra* note 14, at 17; ROTHMAN, *supra* note 13, at 79–83; *see also* CHRISTIANSON, *supra* note 13, at 114. This system departed from early republican penitentiaries, which were workhouse imitations where "inmates ate, slept, and worked together in one large household and, theoretically, submitted to the hard, Christian labor of repenting for their sins and repairing their souls." MCLENNAN, *supra* note 14, at 17.

[23] *See* MCLENNAN, *supra* note 14, at 61; *see also* Ashley T. Rubin, *The Consequences of Prisoners' Micro-Resistance*, 42 LAW & SOC. INQUIRY 138, 149–50 (2017).

[24] MCLENNAN, *supra* note 14, at 69.

[25] Jennifer Graber, *Engaging the Trope of Redemptive Suffering: Inmate Voices in the Antebellum Prison Debates*, 79 PENN. HIST. 209, 227 (2012); *see also* Rubin, *supra* note 23, at 145–47.

[26] *See* MCLENNAN, *supra* note 14, at 58; *see also* Tarter & Bell, *supra* note 12, at 22.

C. Reconstruction to World War II (1870s–1940s)

In the aftermath of the Civil War and the formal abolition of chattel slavery, the United States underwent yet another important prison transformation: an explosion of the exploitation of prison labor. Indeed, the penal contract system that had first emerged during the antebellum years became a "large-scale, highly rationalized," and profitable industry across the country.[27] Accompanying this rapid expansion of prison labor systems was the development of new regimes of prison discipline. Prison keepers and contractors routinely imposed strict work penalties (such as longer workdays and sentence extensions), corporal punishments (such as liberal use of a lash or paddle), and deprivation punishments (such as solitary confinement in a dark cell) even for minor transgressions[28] — all "with the undisguised purpose of . . . driving [inmates' bodies] to render up immediate, unceasing, bountiful labor" for contractors.[29]

In the face of such exploitative labor and harsh discipline, and with little recourse from prison monitoring boards[30] or state and federal judges,[31] prisoners instead turned to collective action to resist contractors and prison administrators and to air their grievances. Prisoners mounted more than a dozen major riots and full-blown insurrections at penitentiaries between 1879 and 1892.[32] And in many instances, these riots and insurrections morphed into well-disciplined and peaceful labor strikes engulfing entire prisons.[33] Strikes occurred at a number of large industrial Northern prisons during the period: at Sing Sing in New York in 1877 and in 1883, at the Concord state prison in Massachusetts in 1882, at Kings County penitentiary in New York in 1885, and at the

---

[27] MCLENNAN, *supra* note 14, at 127; *see* Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, 8 LABOR 15, 16 (2011). In the North, prison labor mainly took the form of prison factories; in the South, prison labor primarily took the form of convict leases to work in mines and fields. *See* CHRISTIANSON, *supra* note 13, at 181–84.

[28] MCLENNAN, *supra* note 14, at 127–31; *see also* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 19–21 (1980).

[29] MCLENNAN, *supra* note 14, at 135; *see also* Robert P. Weiss, *Humanitarianism, Labour Exploitation, or Social Control? A Critical Survey of Theory and Research on the Origin and Development of Prisons*, 12 SOC. HIST. 331, 336 (1987).

[30] *See* ROTHMAN, *supra* note 28, at 24–25.

[31] *See* MCLENNAN, *supra* note 14, at 116–19 (describing the "hands-off" policy of Southern courts, *id.* at 116, and how in the North, the courts did not attempt to "temper" the endeavor of convict labor, *id.* at 119).

[32] *Id.* at 139.

[33] *Id.* These protests occurred in parallel to (and often with support from) the reinvigorated, organized movements of laborers and other reformers outside of prison walls. *See id.* at 149; *see also* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 210–11 (1984).

Trenton state prison in 1890.[34] And the same was true to varying degrees in the South and other regions, as shown by strikes at the Missouri State Prison in 1875,[35] at San Quentin in 1891,[36] and across "the mines, swamps, and plantations of Florida, Georgia, Alabama, Mississippi, and South Carolina," where black men and women "struck, sometimes by the hundreds."[37]

Although all of these prison strikes were quickly (and often violently) quelled by prison authorities, the strikes were significant in that they symbolically empowered inmates, who could no longer be considered "powerless, broken men who could do nothing but toil obediently for their masters."[38] The strikes, alongside organized labor protests, also generated considerable media attention and public outcry about prison conditions that ultimately catalyzed the demise of contract prison labor in the late nineteenth and early twentieth centuries,[39] as well as the rise of penal reform efforts during these years.[40] Progressive Era legislators and prison administrators began to adopt modern prison practices like parole and to reconceptualize prison labor — now run directly by the state — as part of broader efforts to rehabilitate inmates.[41]

Despite these reforms, inmates still faced oppressive conditions in prisons during the early to mid-twentieth century. Prisoners across the South toiled in fields as part of repressive state-operated chain gangs.[42] Prisoners across the North still endured long workdays and abuse while working on factory floors for the state.[43] And while Progressive Era reformers initially experienced success in their efforts to humanize the incarcerated and dignify incarceration, these efforts quickly gave way to a penal management philosophy oriented around establishing social order and strict discipline within prisons.[44] As a result, just as they had done in the aftermath of Reconstruction, prisoners during this era —

---

[34] MCLENNAN, *supra* note 14, at 144–46.

[35] *Id.* at 142–44.

[36] *Convicts Go on Strike*, N.Y. TIMES, Sept. 14, 1891, at 2.

[37] *Id.*; *see also A Prison Strike*, CINCINNATI ENQUIRER, Feb. 10, 1893, at 5 (discussing a strike of prisoners who served as teachers within the penitentiary).

[38] MCLENNAN, *supra* note 14, at 147.

[39] *See, e.g.*, Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 586 (2015); *see also* MCLENNAN, *supra* note 14, at 137–39.

[40] *See* MCLENNAN, *supra* note 14, at 193–97.

[41] *Id.* at 441, 447; *see also* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS 37 (2006).

[42] *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 8 (2008) ("The brutal forms of physical punishment employed against 'prisoners' in 1910 were the same as those used against 'slaves' in 1840."); Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict Is a Slave,"* 59 J. SOUTHERN HIST. 85 (1993).

[43] *See* CHARLES BRIGHT, THE POWERS THAT PUNISH: PRISON AND POLITICS IN THE ERA OF THE "BIG HOUSE," 1920–1955, at 76–77, 82–83 (1996).

[44] *See id.* at 3–4, 16.

armed with new Progressive ideologies and supported externally by ever-growing labor movements — continued to strike sporadically. Most prominent was the Sing Sing prison strike in 1913, which precipitated a political crisis within New York;[45] strikes like this, on a smaller scale, also popped up in prisons in states like California,[46] Illinois,[47] Kansas,[48] Maryland,[49] Massachusetts,[50] Michigan,[51] Minnesota,[52] Ohio,[53] Oklahoma,[54] Pennsylvania,[55] Tennessee,[56] and Wisconsin,[57] up until World War II.

D. Post–World War II Era to Present Day (1950s–2010s)

Between the end of World War II and the present day, American prisons have experienced three distinct waves of prison strikes, each of which has represented increasingly large and more organized efforts by prisoners to collectively protest. First, in the decade immediately following World War II, prisons across the United States experienced a series of significant work stoppages and sit-down protests. As Professor Heather Ann Thompson documents in her history of labor movements in prisons, thousands of prisoners across much of the country — in Northern states like Connecticut and New York, Southern states like Georgia and Louisiana, and Midwestern states like Ohio and

---

[45] *Id.* at 1–2, 280–83. Other notable strikes occurred at Sing Sing in the early to mid-twentieth century, *see, e.g.*, *Prisoners on Strike in Sing Sing Prison*, S.F. CHRON., Oct. 22, 1911, at 96, as well as at other New York prisons, *see, e.g.*, *Prison Strike Extended*, N.Y. TIMES, June 8, 1913, at 3.

[46] *Folsom Strike Quest Ordered*, L.A. TIMES, Nov. 26, 1939, at 10; *Prison Hunger Strike at San Quentin Ends*, THE SUN (Balt.), Feb. 5, 1939, at 16; *Prison "Sit-Down" Strike Ended*, L.A. TIMES, May 15, 1938, at 2; *Alcatraz Prison Puts Down Strike*, N.Y. TIMES, Jan. 22, 1936, at 40; *24 Suspected Reds End Prison Hunger Strike*, CHI. DAILY TRIB., Aug. 12, 1934, at 2; *A Prison Strike*, L.A. TIMES, Aug. 16, 1922, at 114 (describing how political prisoners at San Quentin decided to go on strike at the prison jute mill); *I.W.W. in Prison Row*, L.A. TIMES, Oct. 10, 1918, at 14.

[47] *Editorial of the Day: Prison Hunger Strike*, CHI. DAILY TRIB., Oct. 20, 1937, at 14.

[48] *Federal Prison Strike Halts Making of Shoes for Army*, THE SUN (Balt.), July 6, 1941, at 1; *Kansas Prison Official Moves to Balk Strikes*, WASH. POST, Oct. 29, 1927, at 21; *Convicts on Strike*, IRISH TIMES, June 23, 1927, at 7; *Prison Strike Starts Reform*, L.A. TIMES, Feb. 7, 1919, at 17.

[49] *Prison "Strike" Results in Melee at Roxbury Farm*, THE SUN (Balt.), Dec. 3, 1943, at 24; *600 at Maryland Prison on Strike*, WASH. POST, Dec. 8, 1932, at 5; *see also 800 Convicts on Idle List in Penitentiary*, THE SUN (Balt.), Dec. 4, 1932, at 3; *Convicts Strike at Maryland Prison*, AUSTIN STATESMAN, Sept. 18, 1928, at 1.

[50] *Prison Farm Strike Places 20 in Cells*, DAILY BOS. GLOBE, Oct. 18, 1937, at 1.

[51] *State Grants Prison Demand*, DETROIT FREE PRESS, Aug. 29, 1922, at 22.

[52] *Prison Inmates Eat Breakfast, Strike Falters*, AUSTIN STATESMAN, Mar. 5, 1936, at 1.

[53] *128 Inmates Find Strike Prison Life Okeh*, AUSTIN STATESMAN, Sept. 19, 1934, at 5; *Ohio Prison Convicts in Open Revolt*, HARTFORD COURANT, Apr. 25, 1930, at 1.

[54] *Prison Strike in Oklahoma Still Holds*, AUSTIN STATESMAN, July 29, 1943, at 2.

[55] *Meat, Potato Bait Ends Prison Hunger Strike*, HARTFORD COURANT, Sept. 3, 1938, at 7; *Prison Hunger Strike Goes into Third Day*, THE SUN (Balt.), Aug. 22, 1938, at 7.

[56] "*Xmas in Cells" Fate Meted Out in Prison Strike*, NASHVILLE TENNESSEAN, Dec. 19, 1919, at 7.

[57] *Prison Strike Is Blamed on Sausage Diet*, CHI. DAILY TRIB., July 30, 1941, at 14.

Wisconsin — went on strike against prison administrators,[58] largely to protest what some have characterized as "long hours, trifling pay, and grueling work environments."[59] Labor figured prominently in these strikes, because in the years immediately preceding and following the Second World War, America's prison industry experienced a renaissance, driven by federal legislation "regular[izing] the public sector's use of inmate labor and put[ting] state and federal prisons in the business of manufacturing clothing, furniture, and other items for use by state and federal government agencies."[60]

The prison strikes of the postwar years, while only minimally successful in generating immediate concrete changes for prisoners, did, for the first time, elevate strikes to a truly national scale — generating national headlines (alongside the broader labor unrest of the postwar years[61]).[62] More crucially, these strikes laid the foundation for a second wave of modern prison protests in the 1960s and 1970s. Like their predecessors, many of these strikes were labor protests. For example, nearly a thousand inmates went on strike at a Virginia state prison in 1968 for higher wages.[63] But the prison strikes of this era also had a

---

58 Thompson, *supra* note 27, at 21–22.

59 Christie Thompson, *Do Prison Strikes Work?*, MARSHALL PROJECT (Sept. 21, 2016, 2:31 PM), https://www.themarshallproject.org/2016/09/21/do-prison-strikes-work [https://perma.cc/3TGA-XXCZ]; *see also* John Pallas & Bob Barber, *From Riot to Revolution*, 7 ISSUES CRIMINOLOGY 1, 3–5 (1972).

60 Thompson, *supra* note 27, at 20.

61 Ross E. Davies, *Strike Season: Protecting Labor-Management Conflict in the Age of Terror*, 93 GEO. L.J. 1783, 1811 (2005); *Strikes Face Five of Key Industries*, L.A. TIMES, May 1, 1948, at 1.

62 *See, e.g.*, Thompson, *supra* note 27, at 21–22, 21 nn.24–27, 22 nn.28–30 (citing articles on prison strikes from prominent national publications like the *New York Times*); *see also Connecticut Acts on Prison Strike*, N.Y. TIMES, July 29, 1956, at 30 (reporting that an estimated 200 prisoners engaged in a sit-down, "demand[ing] various concessions, including abolition of solitary confinement and release of a prisoner from the 'hole,' the term they use for the place of such confinement"); *100 at State Prison Stage Brief Strike*, HARTFORD COURANT, Feb. 28, 1956, at 1 (reporting strike by an estimated 100 prisoners at a Connecticut prison, sparked by complaints of "[o]vercrowded conditions," "[l]ack of recreation facilities," "inadequate rehabilitation," "[u]nsatisfactory" food preparation, and "[u]nsatisfactory statutory allowances for good time"); *Gas Routs Prisoners on Sitdown Strike Friday*, ATLANTA DAILY WORLD, June 11, 1952, at 1 (reporting strike of an estimated 200 black prisoners demanding better living conditions in a Louisiana prison); *Ammonia Gas Quells 4-Day Prison Strike*, N.Y. TIMES, May 13, 1952, at 18 (reporting strike of an estimated 120 prisoners at the Louisiana State Penitentiary over "long hours in the prison's sugar cane fields and brutality"); *Convict Strike Seems at End; 1,200 Get Food*, CHI. DAILY TRIB., Aug. 22, 1951, at A6 (reporting Oregon prison strike); *Prison Strike Continues*, N.Y. TIMES, Aug. 16, 1951, at 19 (reporting a prison strike in Oregon over a "troublemak[ing]" prison guard); *N.J. Prison Strike Ended After Week*, N.Y. HERALD TRIB., Dec. 5, 1950, at 22 (reporting that an estimated 900 convicts struck "for better food and clothing and parole policies"); *Prison Strike Is Over, Danbury Warden Says*, WASH. POST, May 7, 1947, at 2 (reporting on a prison strike of an estimated 500 inmates in Connecticut); *Second Prison Strike Ended*, L.A. TIMES, Feb. 20, 1947, at 1 (reporting on a strike over food and working conditions at San Quentin).

63 *See* Thompson, *supra* note 27, at 23.

broader vision. Inmates protested against a host of inequities and dehumanizing aspects of their imprisonment.[64] Over a thousand inmates in a New York prison engaged in a sit-down strike in 1961 to protest against the state's unfair parole regulations;[65] more than 450 inmates struck in the metal shop of another New York prison, the Attica State Correctional Facility, because they were forced to live under conditions "tantamount to slavery," unable to afford even basic necessities like soap and toilet paper;[66] and prisoners in the California prison system went on strike repeatedly, most notably at the Folsom State Prison in 1971.[67]

On the one hand, the prison strikes of the 1960s and 1970s crumbled under "extraordinary repression,"[68] became somewhat tarnished in the public eye by violent incidents like the famed Attica riot of 1971,[69] and were thwarted by nationwide forces aggressively expanding the prison-industrial complex, initiating a wave of mass incarceration and curbing prisoners' legal protections.[70] But these increasingly sophisticated and large strikes did achieve some immediate success. They led to slight increases in pay and triggered noteworthy reform efforts within prisons, including the establishment of inmate-run grievance committees and advisory boards.[71] And more importantly, these strikes were critical in raising public awareness of prison conditions; occurring alongside the civil rights movement and broader prison organizing and reform efforts both inside and outside of prisons, demonstrations like the Folsom strike helped usher in an energetic prisoners' rights movement, comprised of

---

[64] *See, e.g.*, DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER 95–96 (2012) (discussing the nonviolent resistance of black prisoners); *Organizing the Prisons in the 1960s and 1970s: Part One, Building Movements*, PROCESS (Sept. 20, 2016), http://www.processhistory.org/prisoners-rights-1/ [https://perma.cc/DGY4-7LLX]; *cf.* Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of Carceral States Through the Lens of the Prisoners' Rights Movement*, 102 J. AM. HIST. 73, 74–76, 79 (2015) (describing how prisoner protests became part of the broader civil rights struggles of the era, "drawing on the language and ideology of the black power and brown power movements" in their demands to reconceptualize "how the state punished those who committed crimes," to "remind[] the public of prisoners' humanity and their constitutional rights," and to "be seen and heard in a crucial national debate over the growing power of America's rising carceral state," *id.* at 75).

[65] *Prison Strike Ends; Reprisals Barred*, N.Y. TIMES, Nov. 18, 1961, at 4.

[66] Thompson, *supra* note 27, at 22.

[67] Over two thousand inmates at Folsom struck for nineteen days over a broad range of civil rights and other reform demands. Pallas & Barber, *supra* note 59, at 13; *see also* TIBBS, *supra* note 64, at 107–12 (detailing the strike of black inmates at Folsom); Ronald Huff, *The Development and Diffusion of Prisoners' Movements*, 55 PRISON J. 4, 10–11 (1975) (noting the response of "prisoners' unions").

[68] Thompson, *supra* note 27, at 28; *see also* TIBBS, *supra* note 64, at 111; Pallas & Barber, *supra* note 59, at 13–14; Thompson, *supra* note 27, at 23.

[69] *See* GOTTSCHALK, *supra* note 41, at 181–82; TIBBS, *supra* note 64, at 168–69.

[70] *See* Thompson, *supra* note 27, at 29–40. One manifestation of this expansion can be seen in the dramatic rise in the use of prison labor to produce consumer goods. *See* Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 957–62 (2016).

[71] *See* Thompson, *supra* note 27, at 28–29; Thompson, *supra* note 59.

inmate activists, lawyers, academics, journalists, and various other groups, that continues to this day.[72]

The past decade has witnessed a resurgence of this prisoners' rights movement and, correspondingly, a third wave of strikes within prison walls. Building off the legacy of the strikes in the 1960s and 1970s, these modern strikes have become increasingly organized — with strikers working with numerous advocacy groups outside of prisons to coordinate protests *across prisons*. In 2011, for example, 400 prisoners at California's supermax prison at Pelican Bay began a hunger strike — demanding changes to prison conditions and policies, most notably concerning solitary confinement — that eventually grew to 7000 inmates across the state; this strike, and a successor strike in 2013, successfully caused prison officials to reconsider why and for how long prisoners are kept in solitary.[73] In 2014, inmates across three Alabama prisons, organized by a prison group called the Free Alabama Movement, participated in work stoppages for over a week to protest deplorable conditions behind bars and to call for an end to mass incarceration.[74] The Free Alabama Movement expanded its efforts outside of Alabama in 2016 to organize the largest prisoner collective action protest in U.S. history: a nationwide prison strike involving more than 24,000 inmates.[75] Although they did not issue a "single, unified list of demands," the 2016 prison strikers generally protested for "fair pay for their work, humane living conditions, and better access to education and rehabilitation programs."[76]

While largely unsuccessful in effectuating major changes to the American prison system, the 2016 prison strike and the prison strikes of

---

[72] *See, e.g.*, TIBBS, *supra* note 64, at 5, 7, 106, 111–12.

[73] *See* Thompson, *supra* note 59 (reporting on Pelican Bay); John Washington, *This Week May See the Largest Prison Strike in US History*, THE NATION (Sept. 7, 2016), https://www.thenation.com/article/this-week-may-see-the-largest-prison-strike-in-us-history/ [https://perma.cc/L9JF-Y8VQ] (describing the expansion of prison strikes across the country). Another example of a cross-prison strike is the 2010 strike launched by thousands of prisoners across at least six Georgia prisons. Prisoners used contraband cell phones to coordinate a nonviolent protest for "better conditions and compensation." Sarah Wheaton, *Prisoners Strike in Georgia*, N.Y. TIMES (Dec. 12, 2010), https://nyti.ms/2PReTqy [https://perma.cc/AK7M-MXUQ].

[74] *See* Josh Eidelson, *Exclusive: Inmates to Strike in Alabama, Declare Prison Is "Running a Slave Empire,"* SALON (Apr. 18, 2014, 9:30 PM), https://www.salon.com/2014/04/18/exclusive_prison_inmates_to_strike_in_alabama_declare_they%E2%80%99re_running_a_slave_empire/ [https://perma.cc/5EKJ-EQ8E]; Beth Schwartzapfel, *A Primer on the Nationwide Prisoners' Strike*, MARSHALL PROJECT (Sept. 27, 2016, 10:00 PM), https://www.themarshallproject.org/2016/09/27/a-primer-on-the-nationwide-prisoners-strike [https://perma.cc/MJ3K-4BUG].

[75] Speri, *supra* note 8; *see also* Schwartzapfel, *supra* note 74. "Using a system of contraband cell phones, and with help from family members and organizers on the outside," prisoners in at least twelve states did not show up to work on September 9 (the anniversary of the Attica prison uprising). *Id.*

[76] Schwartzapfel, *supra* note 74; *see also* Fink, *supra* note 70, at 972–73 ("Like the prisoners' unions of the 1970s, the new wave of inmate organizing does not limit its focus to labor matters, but seeks changes in prison conditions more generally.").

the past decade have raised the salience of prisoner collective action efforts on the national level. For the first time, prisoners are collectively making their voices *loudly* heard across the country — injecting their viewpoints and demands into our national debates on mass incarceration, forced labor, and other injustices of our carceral state.

E. The 2018 Prison Strike in Historical Context

The brief and likely incomplete[77] background on prison strikes presented above is critical in two respects. First, it sheds light on an unexplored, important area of prison history — one that requires deeper scholarly attention. Second, and more relevant to this Note, this historical accounting provides critical context for the 2018 nationwide prison strike — showing how it is part of a significant, two-century-old tradition that has enabled prisoners, otherwise deprived of an outlet, to air intensely held grievances, express themselves, and demand reform from prison administrators, courts, lawmakers, and the broader public.

In light of this background, this Note considers a first-order question about the strikes that bears critically upon their success: What is the legal status of prison strikes? Are they protected activities that prisoners can legally engage in? While the analysis above would suggest that strikes merit some protection, Part II below indicates that this is not the case under current law.

II. LEGAL FRAMEWORK GOVERNING PRISON STRIKES: STATE LAW AND FEDERAL STATUTES

A. Statutes and Regulations

As a threshold matter, state and federal statutory law provides no recourse for protecting prison strikes. Incarcerated individuals are not included as protected "employees" in the text of federal labor laws like the Fair Labor Standards Act[78] and the National Labor Relations Act,[79] and courts have refused to extend the protections that these statutes offer to those confined within prison walls.[80] Further, this Note is aware

---

[77] Additional research beyond this Note is necessary to develop a more complete, thorough understanding of the history of prison strikes in America. For example, detailed data on the frequency, scope, and location of strikes over time, as well as primary source materials providing richer details of (a) the strikes themselves (from their actual mechanics to their immediate and deeper-rooted motivations) and (b) the responses from prison administrators and political actors, would help further bring to life the critical importance of these strikes.

[78] 29 U.S.C. §§ 201–219 (2012).

[79] *Id.* §§ 151–169.

[80] *See, e.g.*, Fink, *supra* note 70, at 966–68; Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 373 n.265 (1998); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 867–79 (2008).

of no state labor laws, or for that matter any state constitutional provisions, that have been interpreted to allow prisoners to strike.

Not only are prison strikes not protected by statutory law — they also are often *explicitly prohibited*. State statutes and prison regulations pose the most immediate barrier to prison strike activity, as states across the union appear to categorically bar prison strikes and other forms of inmate collective organizing. For instance, Alaska's administrative code lists "participation in an organized work stoppage" and "encouraging others to engage in a food strike" as "[h]igh-moderate infractions."[81] The same is true at the federal level, as the Bureau of Prisons has made "[e]ngaging in or encouraging a group demonstration" and "[e]ncouraging others to refuse to work, or to participate in a work stoppage" prohibited acts.[82]

Further research is certainly necessary to develop a fuller, more nuanced treatment of the various state and federal statutory schemes that impact prison strikes.[83] But even this brief overview drives home a clear bottom line: that state and federal laws, in their current forms, likely offer no viable protection for prison strikes and indeed often prohibit them outright.

B. Constitutional Law

The Supreme Court has not spoken directly on the question of whether peaceful prison protests merit constitutional protection. However, two areas of constitutional analysis — prisoners' rights broadly and prisoners' First Amendment rights specifically — suggest that under current law, the answer to this question is likely also a resounding no.

---

[81] ALASKA ADMIN. CODE tit. 22, § 05.400 (2019). Some other states have adopted similar statutory or administrative provisions. *See, e.g.*, CONN. GEN. STAT. § 53a-179c (2012); FLA. ADMIN. CODE ANN. r. 33-601.314 (2018); 103 MASS. CODE REGS. 924.04 (2017); N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2 (2018); OHIO ADMIN. CODE 5120-9-06 (2018); OKLA. STAT. ANN. tit. 57, § 545 (West 2017). For a related analysis of state statutes and prison regulations governing prison "protest speech," see Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW. L.J. 221, 232–34 (2016).

[82] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, INMATE DISCIPLINE PROGRAM 47 (2011), https://www.bop.gov/policy/progstat/5270_009.pdf [https://perma.cc/3JKY-WGG2]. This program is authorized by 18 U.S.C. § 4042(a)(3). *Id.* at 1.

[83] Further research could reveal differences across states in the severity of punishment for prison strike activity, as well as the scope of permissible collective action by prisoners. This could, in turn, reveal possible avenues for potentially protecting prisoners' ability to strike. *See, e.g.*, *In re* Gomez, 201 Cal. Rptr. 3d 124 (Ct. App. 2016) (holding that an inmate participating in a broader hunger strike and work stoppage across California prisons did not violate a California regulation that requires inmates to "refrain from behavior that might lead to violence or disorder, or otherwise endangers the facility, outside community or other person," *id.* at 129 (quoting CAL. CODE REGS. tit. 15, § 3005(a) (2016))). As the court held in that case, none of the accusations against the inmate regarding striking "suggest[ed] prison operations were thrown into disorder." *Id.* at 137.

1. Prisoners' Constitutional Rights Generally. — Section 1 of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[84] By its express terms, the amendment creates an explicit exception for persons serving a sentence pursuant to conviction of a crime, and it therefore offers prisoners no basis to refuse to work or to engage in other forms of peaceful strikes.[85]

Despite the Thirteenth Amendment's clear textual carve-out, courts have not, in modern times, read the wording of the amendment literally to allow the State to treat inmates like slaves.[86] According to the Court, "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[87] Instead, as neither slaves nor free people,[88] inmates retain some (but not all) of their constitutional rights when they cross into the prison.[89] The Supreme Court has time and again asserted that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights."[90] This is the case not only because of the inherently "deprivat[ory]" nature of imprisonment,[91] but

---

[84] U.S. CONST. amend. XIII, § 1 (emphasis added).

[85] As a result, courts have universally held that incarcerated individuals may be forced to work. *See, e.g.*, Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1167 (5th Cir. 1990) (per curiam) (citing the Thirteenth Amendment to support the proposition that "[c]ompelling an inmate to work without pay is not unconstitutional"), *cert. denied*, 498 U.S. 1050 (1991); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir.), *cert. denied*, 375 U.S. 915 (1963).

[86] *See, e.g.*, Meachum v. Fano, 427 U.S. 215, 231 (1976) (Stevens, J., dissenting) ("At one time the prevailing view was that deprivation was essentially total. The penitentiary inmate was considered 'the slave of the State.'" (quoting Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871))); *id.* ("Although the wording of the Thirteenth Amendment provided some support for that point of view, 'courts in recent years have moderated the harsh implications of the Thirteenth Amendment.' The moderating trend culminated in this Court's landmark holding that notwithstanding the continuation of legal custody pursuant to a criminal conviction, a parolee has a measure of liberty that is entitled to constitutional protection." (footnotes omitted) (quoting Morales v. Schmidt, 489 F.2d 1335, 1338 (7th Cir. 1973), *modified on reh'g en banc*, 494 F.2d 85 (7th Cir. 1974))); *see also* Shaw v. Murphy, 532 U.S. 223, 228–29 (2001) ("In recent decades . . . this Court has determined that incarceration does not divest prisoners of all constitutional protections. Inmates retain, for example, the right to be free from racial discrimination . . . ." (citing Lee v. Washington, 390 U.S. 333 (1968) (per curiam))); Garvey, *supra* note 80, at 384 (noting a relaxing of state control over inmates beginning in the 1960s).

[87] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

[88] *See Morales*, 489 F.2d at 1338 ("[T]he tension remains between the view that a prisoner enjoys many constitutional rights, which rights can be limited only to the extent necessary for the maintenance of a person's status as prisoner (or parolee), and the view that a prisoner has only a few rudimentary rights and must accept whatever regulations and restrictions prison administrators and State law deem essential to a correctional system.").

[89] *See* Washington v. Harper, 494 U.S. 210, 223–24 (1990).

[90] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 545–46 (1979) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

[91] *See* Gray v. Levine, 455 F. Supp. 267, 268–69 (D. Md. 1978) ("To the extent that plaintiffs challenge the mere fact of their confinement or the reasons for confinement, the court finds that

also because prison administrators must be accorded wide latitude in the complex and difficult task of operating a penal institution.[92] This deference, however, "yield[s] to the strictures of the Constitution."[93] Indeed, courts recognize that inmates, despite being incarcerated, retain particular constitutional rights "that the courts must be alert to protect."[94] Such rights that an inmate retains are those "that are not inconsistent with his status as a prisoner or with the legitimate penological objective of the corrections system."[95]

However, as the Court explained in *Turner v. Safley*,[96] a prison regulation may *infringe* on a prisoner's retained constitutional rights as long as "it is reasonably related to legitimate penological interests."[97] *Turner* identified four relevant factors in determining the reasonableness of a prison regulation: (1) whether there is "a 'valid, rational connection' between the regulation and the legitimate governmental interest [advanced] to justify it";[98] (2) whether alternative means for exercising the asserted right remain available;[99] (3) whether accommodation of the asserted right will adversely affect "guards[,] other inmates, and . . . the allocation of prison resources generally";[100] and (4) whether there is a "ready alternative[]"[101] to the regulation "that fully accommodates the prisoner's right at *de minimis* cost to valid penological interests."[102]

---

they have failed to state a claim of constitutional dimensions." *Id.* at 269.), *aff'd*, 605 F.2d 1202 (4th Cir. 1979), *and aff'd sub nom.* Duvall v. Levine, 605 F.2d 1201 (4th Cir. 1979).

92 *See, e.g.*, *Harper*, 494 U.S. at 224 (reviewing case law in which the "needs of prison administration" weighed against inmates' constitutional rights); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.").

93 *Levine*, 455 F. Supp. at 269 (citing Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974)).

94 McKune v. Lile, 536 U.S. 24, 59 (2002) (Stevens, J., dissenting) (quoting Meachum v. Fano, 427 U.S. 215, 225 (1976)).

95 Pell v. Procunier, 417 U.S. 817, 822 (1974). *Pell v. Procunier*, 417 U.S. 817, discussed this principle in the context of the First Amendment, but this principle has subsequently been discussed as a general one, *see, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 131 (2003) ("An inmate does not retain rights inconsistent with proper incarceration."), applying across constitutional rights, *see, e.g.*, Samson v. California, 547 U.S. 843, 864 (2006) (Stevens, J., dissenting) (disagreeing with the majority on the correct application of this principle to the Fourth Amendment).

96 482 U.S. 78 (1987).

97 *Id.* at 89.

98 *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

99 *Id.* at 90.

100 *Id.*

101 *Id.*

102 *Id.* at 91. Note that this general legal framework does not apply to two specific constitutional rights: the protection against "cruel and unusual punishments," U.S. CONST. amend. VIII, and the right to be free from racial discrimination under the Equal Protection Clause, U.S. CONST. amend. XIV. The Court has held that these two rights are exempt from the *Turner* analysis, meaning that they apply with equal force inside and outside of prison walls. *See* Johnson v. California, 543 U.S.

So, under the general legal framework for prisoners' rights, finding constitutional protection for peaceful collective actions like the 2018 prison strike will likely face an uphill battle. Such a right to strike not only must fit within the confines of a "retained right," which appears to be narrowly defined; it also must go up against *Turner* and its progeny, which mandate rational basis review for any prison regulation — providing prison officials with broad deference to curtail any rights that a prisoner might retain.[103] Turning to prisoner First Amendment jurisprudence specifically, it becomes even clearer that a right to strike likely cannot navigate either difficulty successfully.

2. Prisoners' First Amendment Rights. — The First Amendment of the Constitution includes within its guarantees political rights to communicate, associate, and present grievances to the government.[104] These rights go to the very heart of our political system — one that, as a democracy, values the participation of its citizens.[105] Outside of prison walls, the Supreme Court has recognized that individuals may, in many situations, exercise their First Amendment associational rights by peacefully engaging in a work strike.[106] Inside prison walls, however, the right to strike is a legal gray area. The Court has analyzed a number of

499, 509–15 (2005). While prison strikers have, over time, certainly highlighted violations of such rights, these sorts of claims are beyond this Note's focus on the legal status of the strikes themselves.

[103] *See* James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y.C. L. REV. 97, 124–25 (2006) (discussing the impact of the *Turner* test on prisoners' rights).

[104] U.S. CONST. amend. I.

[105] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 444–45 (1963) ("For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."); Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960) ("Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry — a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." (internal citation omitted)).

[106] *See, e.g.*, Lyng v. Int'l Union, UAW, 485 U.S. 360, 366 (1988) ("'[O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means,' and our recognition of this right encompasses the combination of individual workers together in order better to assert their lawful rights." (internal citation omitted) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982))); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 475 (1955) ("Congress ha[s] guaranteed under § 7 of the Taft-Hartley Act — the right to strike peacefully to enforce union demands for wages, hours and working conditions."); *cf.* Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (recognizing a right to picketing). But this "right to strike" is not necessarily clear-cut even outside of the prison context, and thus it is important to recognize that arguments and restrictions on strikes outside of prisons cut even more strongly against such a right within prisons. *See* TIBBS, *supra* note 64, at 195 ("A useful analogy is a limitation that states place on the freedom of public employees to act collectively. In order for the states to protect the general public from inconvenience and possible threats to safety, public employees may be denied the right to strike. Similarly, in the prison context, a prohibition on inmate strikes would be justified by considerations of safety and order both inside and outside the institution.").

First Amendment rights, including those implicating concerted political activity and association, in the prison context — asking whether (1) the First Amendment right in question is inconsistent with an inmate's status as a prisoner and (2) prison officials' interference with such a right reasonably relates to a legitimate penological interest.[107] However, the Court has yet to perform such an analysis for prison strikes specifically.

But one seminal Supreme Court case — *Jones v. North Carolina Prisoners' Labor Union, Inc.*[108] — casts serious doubt on prisoners' collective right to strike. In *Jones*, a prisoners' labor union[109] brought an action under 42 U.S.C. § 1983, claiming that the North Carolina Department of Corrections violated its First Amendment rights[110] by promulgating a prison rule that prohibited, among other things, union meetings among inmates.[111] The three-judge district court agreed, granting substantial injunctive relief to the union.[112] The Supreme Court reversed, however, doing so on two main grounds. Writing for the majority, then-Justice Rehnquist first invoked the familiar notion that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights," especially First Amendment associational rights.[113] Then, without engaging with the specific nature of the potentially retained associational interest in question (that is, that of organizing as a union), Justice Rehnquist concluded that the challenged regulation did not unduly abridge inmates' First Amendment rights.[114] He did so by adopting a rational basis test — emphasizing the

---

107 *See* Overton v. Bazzetta, 539 U.S. 126, 131–32 (2003).

108 433 U.S. 119 (1977).

109 *Id.* at 122 ("Appellee, an organization self-denominated as a Prisoners' Labor Union, was incorporated in late 1974, with a stated goal of 'the promotion of charitable labor union purposes' and the formation of a 'prisoners' labor union at every prison and jail in North Carolina to seek through collective bargaining . . . to improve . . . working . . . conditions.' . . . By early 1975, the Union had attracted some 2,000 inmate 'members' in 40 different prison units throughout North Carolina." (first three omissions in original)).

110 The Union "also alleged a deprivation of equal protection of the laws in that the Jaycees and Alcoholics Anonymous were permitted to have meetings and other organizational rights." *Id.* at 122–23.

111 *Id.* at 122 ("While the State tolerated individual 'membership,' or belief, in the Union, it sought to prohibit inmate solicitation of other inmates, meetings between members of the Union, and bulk mailings concerning the Union from outside sources.").

112 N.C. Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119.

113 *Jones*, 433 U.S. at 125; *see also id.* at 125–29 (discussing how "the inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates," *id.* at 126, especially since "[p]risons, it is obvious, differ in numerous respects from free society. They . . . are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance," *id.* at 129).

114 *See id.* at 130.

critical importance of "wide-ranging [judicial] deference" to prison officials and their informed discretion in carrying out penological goals.[115] In particular, Justice Rehnquist argued that "[r]esponsible prison officials must be permitted to take reasonable steps to forestall" the "ever-present potential for violent confrontation" within prisons.[116] And as he highlighted, North Carolina prison administrators had testified that the presence of, and potentially even the very objectives of, a prisoners' union *did* potentially pose a danger[117] — likely resulting in increased friction between inmates themselves or between inmates and prison personnel, as well as in "easily foreseeable" outcomes like "*[w]ork stoppages*."[118]

In light of *Jones*, it is unlikely that the Supreme Court would, if the question came before it, recognize inmates' First Amendment right to strike. Although the case concerned the specific issue of prison unions, the *Jones* Court's holding was, in its methodology and reasoning, far-reaching — (1) providing prison administrators with wide latitude to curtail any inmate collective activity that, in their "reasonable" judgment, threatened institutional order and security[119] and, as a result, (2) appearing to severely curtail inmates' First Amendment rights.[120] The Court's broad deference and narrow First Amendment view should

---

[115] *Id.* at 125–26 ("The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." *Id.* at 125.); *see also id.* at 128 ("The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.").

[116] *Id.* at 132. This is especially so because "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 823 (1974)).

[117] *Id.* at 127 ("Appellant David Jones, the Secretary of the Department of Correction, stated: 'The existence of a union of inmates can create a divisive element within the inmate population. In a time when the units are already seriously over-crowded, such an element could aggravate already tense conditions. The purpose of the union may well be worthwhile projects. But it is evident that the inmate organizers could, if recognized as spokesman for all inmates, make themselves to be power figures among the inmates. If the union is successful, these inmates would be in a position to misuse their influence. After the inmate union has become established, there would probably be nothing this Department could do to terminate its existence, even if its activities became overtly subversive to the functioning of the Department.'"). Justice Rehnquist himself appeared to agree with this testimony, stating that "[t]he case of a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." *Id.* at 133.

[118] *Id.* at 127 (emphasis added).

[119] *See id.* at 132.

[120] *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 247 (2012) ("[D]efendant prison officials . . . are . . . freed from the usual expectation that their own evidence characterizing the situation will be subject to challenge and to meaningful judicial scrutiny."); Regina Montoya & Paul Coggins, Case Comment, *The Future of Prisoners' Unions:* Jones v. North Carolina Prisoners' Labor Union, 13 HARV. C.R.-C.L. L. REV. 799, 802–04, 826 (1978) (discussing how the Court "emasculated the doctrine of retained rights," *id.* at 802, and failed "to treat the case as raising important [F]irst [A]mendment issues," *id.* at 826).

therefore naturally be expected to extend to prison strikes and other forms of collective protest, about which prison officials have consistently offered similar safety concerns and which they have uniformly sought to ban,[121] and which *Jones* specifically acknowledged as a possible unwelcome outcome of allowing prisoners to unionize.

That *Jones* likely prevents any constitutional protection for prison strikes — and therefore liberally protects prison regulations banning strike activities — is reinforced by how the Supreme Court has applied the case over the past forty years. In *Turner*, for example, the Court rejected efforts to cabin *Jones* to barring only "'presumptively dangerous' inmate activities."[122] The Court specifically discussed *Jones* as part of a line of "prisoners' rights" cases permitting "reasonable" prison regulations to impinge on inmates' constitutional rights[123] and ultimately relied in part on *Jones* to fashion its general four-part framework for assessing "reasonableness" across prison regulations.[124] And in *Overton v. Bazzetta*,[125] the Supreme Court again invoked *Jones* to emphasize that "freedom of association is among the rights least compatible with incarceration"[126] — though it declined to draw any precise boundaries that would be helpful for determining what, if any, associational rights inmates retain within prison walls, and whether those include strikes.[127]

Lower courts have not been as wary to draw such boundaries. Under *Jones*, lower federal courts have uniformly held that prisoners have no constitutionally protected right under the First Amendment to strike. One district court interpreted *Jones* to hold that prison officials may act to prevent such strikes whenever they have a "good faith" belief that such strikes "threaten the security of the institutions they manage."[128]

---

121 *See infra* text accompanying notes 128–135.

122 Turner v. Safley, 482 U.S. 78, 87–88 (1987) (quoting Safley v. Turner, 777 F.2d 1307, 1313 (8th Cir. 1985), *rev'd*, 482 U.S. 78).

123 *Id.* at 86–87.

124 *Id.* at 89–91. To better understand the relationship between *Jones* and *Turner*, see generally *Johnson v. California*, 543 U.S. 499 (2005), in which Justice Thomas explained in dissent: "Well before *Turner*, this Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country. *Turner* made clear that a deferential standard of review would apply across the board to inmates' constitutional challenges to prison policies." *Id.* at 529–30 (Thomas, J., dissenting) (internal citations omitted) (citing *Jones*, 433 U.S. at 125; Procunier v. Martinez, 416 U.S. 396, 405 (1974)); *see also* Washington v. Harper, 494 U.S. 210, 223–24 (1990). In short, *Jones* predates *Turner*, but it still has significance, as (a) *Turner* drew upon *Jones* (and similar cases) to fashion its test for assessing prison regulations generally, and (b) *Jones* has specific application to questions of inmate organizing.

125 539 U.S. 126 (2003).

126 *Id.* at 131 (citing *Jones*, 433 U.S. at 125–26; Hewitt v. Helms, 459 U.S. 460 (1983)).

127 *See id.* at 131–32.

128 Gray v. Levine, 455 F. Supp. 267, 269 (D. Md. 1978), *aff'd*, 605 F.2d 1202 (4th Cir. 1979), *and aff'd sub nom.* Duvall v. Levine, 605 F.2d 1201 (4th Cir. 1979). *Jones*'s notable lower court progeny demonstrate that the case is not, as Justice Marshall hoped, "an aberration, a manifestation of the

Lower courts have rejected a right to strike by simply citing to or briefly discussing *Jones* and contending that it naturally compels such a result,[129] or by drawing an explicit connection between the prohibited prison unions at issue in *Jones* and prison strikes, dubbing strikes to be "a species of 'organized union activity.'"[130] They have also done so by delving into the specifics of why strikes purportedly pose safety and security risks within prisons and why prison regulations barring strikes are therefore rationally related to legitimate penological goals.[131]

Lower courts also have justified upholding prison regulations barring strikes by explicitly or implicitly turning to the general *Turner* framework that *Jones* helped create — including by arguing that there are ready alternatives to prison strikes,[132] or that such regulations are generally permissible exercises of penal authority.[133] And finally, it is worth noting that lower federal courts have, in deferring to prison offi-

---

extent to which the very phrase 'prisoner union' is threatening to those holding traditional conceptions of the nature of penal institutions." *Jones*, 433 U.S. at 147 (Marshall, J., dissenting). Instead, as the United States District Court for the Western District of Wisconsin put it, *Jones* has become "the leading case on the First Amendment rights of prisoners to engage in group speech." Ajala v. Swiekatowski, No. 13-cv-638, 2015 WL 1608668, at *5 (W.D. Wis. Apr. 10, 2015).

[129] *Levine*, 455 F. Supp. at 269 ("It is clear, of course, that the work stoppage was not an activity protected by the Constitution." (citing *Jones*, 433 U.S. 119)); *see also, e.g.*, Graham v. Henderson, 89 F.3d 75, 80 (2d Cir. 1996) ("[A prisoner] has no constitutional right to organize a prison work slowdown."). Even before *Jones*, lower courts had already denied prisoners a right to strike under the First Amendment. *See, e.g.*, McKinnon v. Patterson, 425 F. Supp. 383, 389 (S.D.N.Y. 1976), *aff'd as modified*, 568 F.2d 930 (2d Cir. 1977); Paka v. Manson, 387 F. Supp. 111, 123 (D. Conn. 1974).

[130] Pilgrim v. Luther, 571 F.3d 201, 205 (2d Cir. 2009) (quoting *Jones*, 433 U.S. at 132).

[131] *Id.* ("Work stoppages are deliberate disruptions of the regular order of the prison environment and are a species of 'organized union activity.' They are plainly inconsistent with legitimate objectives of prison organization." (internal citation omitted)); *see also* Duamutef v. O'Keefe, 98 F.3d 22, 24 (2d Cir. 1996) (holding that prison regulation banning petitions among inmates did not violate First Amendment right of association because prison had legitimate interest in maintaining order and safety and provided other methods for inmates to express grievances); Liptschen v. Pollock, No. 93-civ-6585, 1996 WL 412019, at *3 (S.D.N.Y. July 22, 1996); Jauregui v. Forth, No. 89-c-0519, 1992 WL 309619, at *4 (N.D. Ill. Oct. 19, 1992); *cf.* Hanrahan v. Mohr, No. 13-cv-1212, 2017 WL 1134772, at *6 (S.D. Ohio Mar. 24, 2017) (explaining prison officials' view that "any form of protest has the ability to quickly devolve into a disruptive, potentially deadly incident"), *reconsideration denied*, 2017 WL 4221458 (S.D. Ohio Sept. 21, 2017), *and aff'd*, 905 F.3d 947 (6th Cir. 2018).

[132] *See, e.g.*, *Pilgrim*, 571 F.3d at 205; *Liptschen*, 1996 WL 412019, at *3 ("[T]here are other alternatives by which the prisoners can exercise their right to complain about prison practices. The inmate grievance system, letters to the DOCS and the Superintendents, and lawsuits such as the instant one are examples of alternatives that would enable prisoners to voice their concerns about prison practices without implicating security concerns inherent to sit-ins, work stoppages and other group protests.").

[133] *See, e.g.*, Cabassa v. Kuhlmann, 569 N.Y.S.2d 824, 825 (App. Div. 1991); *cf. Ajala*, 2015 WL 1608668, at *4 (explaining that because "courts must give more deference to the judgment of prison officials," "speech restrictions in prison are not subject to the same standard of review" and need only be "reasonably related to a legitimate penological interest" (citing Turner v. Safley, 482 U.S. 78 (1987))).

cials' judgments regarding security, also permitted all manner of regulations designed to punish strikers[134] and aid officials in preventing strikes from occurring.[135] In short, there exists little, if any, room under current constitutional case law for protecting prison strikes.

III. CONSIDERING A RIGHT TO PRISON STRIKES

Many have critiqued the legal framework governing prisoners' rights. For example, a number of scholars compellingly argue that employment and labor laws should cover inmates working in prisons — placing them within "the scope of protections and support gathered around the honored figure of the worker."[136] Scholars have also critiqued courts' stringent interpretation of the Thirteenth Amendment as allowing for forced labor within prisons.[137] And many scholars have roundly criticized the *Jones* decision, and *Turner*'s framework more broadly, for granting far too much deference to prison administrators and paying only lip service to prisoners' constitutional rights. Prison law scholar Professor Sharon Dolovich, for instance, critiques both *Jones* and *Turner* for prescribing such strong deference to prison officials, who are consequently able to violate inmates' constitutional rights simply by asserting unsupported security concerns.[138]

---

134 *See, e.g.*, *Ajala*, 2015 WL 1608668, at *5 ("*Jones* forecloses plaintiff's First Amendment claim. If it is permissible for prison officials to ban group activity because of a *risk* of a work stoppage at some point in the future, then it is also permissible for officials to discipline prisoners for *threatening* not only a prison-wide work stoppage for several months, but also a boycott of classes and programming."); *see also* Fulton v. Lamarque, No. C 03-4709, 2008 WL 901860, at *5 (N.D. Cal. Mar. 31, 2008); Porter v. Hanson, No. 94-3188, 1995 WL 404946, at *3 (D. Kan. June 2, 1995); James-Bey v. Freeman, 638 F. Supp. 758, 761 (D.D.C. 1986).

135 *See, e.g.*, Guajardo v. Estelle, 580 F.2d 748, 761 (5th Cir. 1978) (holding that prison officials can censor material regarding the manufacture of explosives, weapons, or drugs and material about how to engage in prison strikes or riots); *see also* Willis v. Comm'r of Ind. Dep't of Corr., No. 16-cv-02053, 2017 WL 2797786, at *6 (S.D. Ind. June 28, 2017) (holding that officials can censor newspaper material regarding striking); *Jauregui*, 1992 WL 309619, at *4 (holding that officials can refuse to reinstate a prisoner's employment following his prior strike). For additional discussion of case law on this subject, see generally Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1010–12 (1993).

136 Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J.C.R. & ECON. DEV. 679, 682 (2015); *see also, e.g.*, Zatz, *supra* note 80, at 956.

137 *See, e.g.*, Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 872–91 (2012); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395 (2009).

138 As she articulates, such "mandated deference is more than an acknowledgment that people with expertise in running the prisons are likely to have a deeper understanding of the matter" — it "tilt[s] the scales of judicial deliberation strongly toward prison officials at the outset," Dolovich, *supra* note 120, at 247, and does so in a seemingly unprincipled manner, *id.* at 253. *See also* Armstrong, *supra* note 81, at 257–61 (critiquing *Jones* and *Turner*).

Despite these critical appraisals of prisoners' rights more broadly, no similar concerns have been raised regarding the constitutionality of barring prison strikes. Indeed, commentators (and even many prisoners' rights activists), while arguing that courts should afford less deference to prison administrators and protect inmates' right to form and join unions, have stopped well short of arguing for protecting prison strikes.[139] For that matter, the subject has received little, if any, attention; no First Amendment or prison law scholars or advocates have questioned whether lower courts should apply *Jones* and *Turner* in such a rote fashion to broadly defer to prison officials in barring prison strikes, and to do so with little consideration of the potential value of these strikes.

Perhaps this is because the security- and safety-based arguments in favor of barring prison strikes are relatively straightforward and admittedly have some intuitive appeal. Prisons, in order to "function optimally," require "heavy rule orientation" — as chaotic institutions, they depend on rules governing "every aspect of prison life," and on the ability of prison officials to enforce these rules.[140] A prison strike — whether it involves inmates not showing up to work or refusing to eat — flouts these rules[141] and therefore inherently calls into question officials' authority and ability to run prisons. More specifically, strikes pose a nontrivial threat of causing violence within prisons. This is the case for many of the same reasons identified by the *Jones* Court in its evaluation of prisoners' unions. Prison strikes occur within already tense environments, where the threat of violence, from both prison administrators and other incarcerated individuals, is ever present; they occur in a dramatically different context than strikes outside of prisons, where each side is able to make comparable demands and concessions; and, as a result of these factors, they potentially exacerbate the friction and adversarial relationships between inmates and administrators.[142]

---

[139] *See, e.g.*, James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective*, 33 AM. CRIM. L. REV. 411, 428 (1996) ("Some commentators have suggested that inmates should be allowed to join unions provided that bargaining issues are limited to work related matters. Even these commentators, however, admit that prisoners should not be able to strike or engage in other forms of protest." (footnotes omitted)); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-7.4 cmt. (3d ed. 2011), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf [https://perma.cc/KA4X-EBRR].

[140] Donald F. Tibbs, *Peeking Behind the Iron Curtain: How Law "Works" Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 137 (2006); *see id.* at 137–40.

[141] *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1619–20 (2017).

[142] *See* Misrahi, *supra* note 139, at 428–29 (discussing the tension between the adversarial nature of prisoners' labor unions and administrative needs in operating a prison). A number of prominent examples of strikes devolving into violence — the clearest being the Attica work strikes in 1971, which sparked a violent riot — support these conclusions. In light of these considerations, there is certainly a credible argument to be made that courts should, per the reasoning in cases like *Jones* and *Turner*, rely on prison administrators and their "expert judgment" on the issue of prison strikes.

But in order to ensure that the Constitution truly does not stop at the prison walls, courts cannot simply accept prison administrators' fears regarding strikes at face value and instead should rigorously test their credibility and basis in fact.[143] And more importantly, by over-deferring and failing to engage in any analysis of the *merits* of prison strikes, courts miss an important opportunity. As this Note has argued, prison strikes represent an underappreciated aspect of prison life — the means by which prisoners have, throughout the course of American history, surfaced pressing problems of our carceral state and initiated important transformations in our prison system. Therefore, it is imperative to meaningfully consider why and how such strikes merit legal protection — even if such protection appears to fly in the face of the current state of the law and to defy conventional wisdom. To that end, this Part first explores the First Amendment as one potential avenue for considering the merits of prison strikes, by presenting three critical First Amendment values contained within prison strikes,[144] and it then briefly discusses other potential legal avenues for courts and scholars to consider.

As Chief Justice Burger pointed out in his *Jones* concurrence, "federal courts . . . are not equipped by experience or otherwise to 'second guess' the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances." *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring).

143 Doing so likely reveals three considerations. First, it is not necessarily true that strikes challenge prison authority to such an extent that they significantly override prison administrators' authority. After all, prison strikes, unlike unions, do not require the prison to legitimate and empower an actual "government" within prisons; they simply require prison administrators to tolerate peaceful, respectful protest. Second, prison administrators' fears regarding violence may be overstated. While it is certainly true that prison strikes *can* result in violence, many, including the nationwide strikes in 2016 and 2018, *have not*. And third, and most compelling, accepting that prison officials have institutional competency to maintain order and security in prisons does not, in and of itself, compel the need for total deference. Why should courts unconditionally accept prison administrators' judgment that all strikes must be banned, when it seems apparent that administrators could regulate strikes by less drastic means? *Cf.* Montoya & Coggins, *supra* note 120, at 805 ("If prison officials objected to interference with the daily routine, they could regulate the time and place of [union] meetings. If they feared that meetings might become unruly, the officials could post a correctional officer at the meetings. If one of the purposes of a union was found to be illegal, a regulation could be phrased to specifically enjoin that purpose." (footnotes omitted)).

144 The First Amendment offers a viable pathway to consider a right to strike in prison not only because *Jones* and its progeny are First Amendment cases (that themselves failed to consider the merits), but also because the protection of dissent against state power embodies a core First Amendment guarantee. Simonson, *supra* note 141, at 1613 ("[O]ur Constitution enshrines the value of protecting and even promoting resistance to state power. The First Amendment's protections for dissent, assembly, and publicity all underscore the idea that 'elections, political parties, and voting, while critical to democracy, are not the whole deal.'" (quoting Tabatha Abu El-Jah, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 1 (2011))); *see also* Texas v. Johnson, 491 U.S. 397, 408–09, 414 (1989); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 91–109 (1990). More broadly, the First Amendment presents a viable pathway because of two general considerations: first, the preeminence of the First Amendment's guarantees in the constitutional scheme, *see, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986) ("Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of

A. Considering the First Amendment Values of Prison Strikes

The right to strike within prisons may be conceptually viewed as a composite of three separate fundamental First Amendment freedoms: the freedom to peacefully associate, the freedom of speech, and the freedom to assemble and petition for redress of grievances.[145] Each is considered in turn.

1. Association. — The right to peaceful association is one that captures the right of individuals to commune with others for the expression of ideas and for effective advocacy.[146] Strikes, like prison unions, represent an important means of association for prisoners — allowing them to "lay claim to a social identity as 'workers' . . . and in doing so generate claims to respect and solidarity."[147] This identity and solidarity can, in turn, enable inmates to engage in productive and peaceful *bargains* with prison officials for better conditions, higher pay, and other reform desires.

Bargaining is, in many respects, already very common in prisons, "for the simple reason that [prison] administrators rarely have sufficient resources to gain complete conformity to all the rules."[148] However, such bargaining typically happens in an informal, ongoing, private process;[149]

---

freedom.'" (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937))), and second, the "astonishingly broad reach of [the] weaponized First Amendment" in recent years, Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 181 (2018).

145 *See* U.S. CONST. amend. I; *see also* NAACP v. Button, 371 U.S. 415, 444–45 (1963).

146 Although "association" does not appear in the text of the First Amendment, the Court has long recognized the right as both implicit in and derived from the First Amendment's other express guarantees (namely speech and assembly), and as a separate substantive due process right. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . [F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *see also Button*, 371 U.S. at 430–31. For an overview of the right of association, see generally Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 982–1002 (2011).

147 Zatz, *supra* note 80, at 924 n.308 (citing Chad Alan Goldberg, *Contesting the Status of Relief Workers During the New Deal: The Workers Alliance of America and the Works Progress Administration, 1935–1941*, 29 SOC. SCI. HIST. 337, 355 (2005)); *see also id.* at 923–24. This identity could give incarcerated individuals an alternative to harmful organizations like prison gangs. *Cf.* Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 550 (1997) ("Over the last several decades, a growing number of prisoners have adjusted collectively to deteriorating prison conditions by seeking strength and security in numbers through the formation of prison gangs.").

148 Note, *Bargaining in Correctional Institutions: Restructuring the Relations Between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 727 (1972).

149 James W. Marquart & Ben M. Crouch, *Judicial Reform and Prisoner Control: The Impact of* Ruiz v. Estelle *on a Texas Penitentiary*, 19 LAW & SOC'Y REV. 557, 579 (1985); *see also* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 681 (1976).

in their recurrent, day-to-day contact with inmates, prison administrators use their arsenal of tools[150] to "negotiate" only with select inmate leaders,[151] with the central goal of maintaining "short term surface order."[152] This informal bargaining is "dysfunctional" to the long-term stability of prison institutions and "the real needs of those incarcerated within" them[153] — creating hierarchical relationships[154] that breed mistrust[155] and leave many inmates powerless and feeling aggrieved.[156] As a result, inmates often feel that they have to resort to violence to protect themselves from exploitation, express their dissatisfaction, and obtain redress.[157]

Alternatively, peaceful, collective prison strikes avoid these harmful consequences by allowing for "open" and "formal" negotiations between all inmates and prison staff.[158] Such transparent and legitimated bargaining benefits both inmates and prisons as a whole. By initiating peaceful protests such as work stoppages, *all* inmates are able "to solve problems, maximize gains, articulate goals, develop alternative strategies, and deal with [administrators] without resorting to force or violence."[159] And by permitting peaceful strikes, prison administrators "provide inmates with a channel for airing grievances and gaining official response . . . giv[ing] the institution a kind of safety-valve for peaceful, rather than violent, change"[160] — avoiding potentially expensive and time-consuming litigation and even helping rehabilitate inmates,[161] all while deemphasizing hierarchical structures in prisons that harm institutional order.[162]

---

150 Note, *supra* note 148, at 730.

151 *Id.* at 738–39.

152 *Id.* at 729.

153 *Id.* at 738.

154 *Id.* at 739–40.

155 *Id.* at 741–42.

156 *Id.* at 741–43.

157 *See id.* at 744–45; Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062, 1065–66 (1979); *cf.* Haney, *supra* note 147, at 550–51 (discussing how prison gangs and violence "represent less a cause than a consequence of worsening prison conditions," *id.* at 551).

158 *See* Note, *supra* note 148, at 745–46.

159 *Id.* at 752; *cf.* Fink, *supra* note 70, at 955–56 (discussing similar benefits of prison unions).

160 Note, *supra* note 148, at 755; *see also* Raven Rakia, *A Prison Strike in Minnesota Actually Got Results*, THE APPEAL (Jan. 25, 2019), https://theappeal.org/a-prison-strike-in-minnesota-actually-got-results/ [https://perma.cc/3YX7-XCN4].

161 Note, *supra* note 148, at 751–52.

162 Much ink was spilled on prisoner collective bargaining, and the virtues of these associational efforts, at the height of the prison union movement in the 1970s and 1980s. *See, e.g.*, Susan Blankenship, *Revisiting the Democratic Promise of Prisoners' Labor Unions*, 37 STUD. L. POL. & SOC'Y 241, 244–47 (2005) (providing a literature review); Kara Goad, Note, Columbia University *and Incarcerated Worker Labor Unions Under the National Labor Relations Act*, 103 CORNELL L. REV. 177, 202–03 (2017) (similar). The modern-day resurgence of prison strikes and the ever-pressing problems of our criminal justice system compel revisiting this scholarship today. *Cf.* Blankenship, *supra*, at 248–54, 260–62 (positively reappraising prisoners' unions and associated

2. Speech. — A prison strike also represents a critical way by which inmates can express themselves.[163] First, as alluded to above, a strike allows inmates to claim and communicate an identity — as more than just marginalized, ignored convicts with little to no self-determination, but instead as workers and human beings entitled to basic dignity. Such collective actions represent the "performative declaration and affirmation of rights that one does not (yet) have."[164] And, as Professor Jocelyn Simonson discusses, these strikes are collective contestations to "demand *dignity*, calling attention to the ways in which [prisoners] are treated as less than human and in the process reclaiming their own agency."[165] Such dignitary considerations, which courts have sought to protect under First Amendment principles, should therefore naturally extend to prisoners attempting to, through strikes, express their basic self-worth.[166]

Beyond representing a form of inherent, individual expression for inmates, prison strikes also represent a broader form of expression, allowing inmates to be visible to and heard by the public at large. Over the course of American history, inmates — by virtue of being locked up in isolated, impregnable penitentiaries — have largely been a silent and ignored segment of the American population.[167] Through peaceful protests like the 2018 national prison strike, however, their suffering, their calls for reform, and their voices are, for the first time, directly expressed on a large scale, ringing out loudly beyond the prison walls and jumpstarting important conversations of criminal justice reform. It is

---

collective bargaining, noting benefits ranging from the enhancement of prisoners' ability to assert particular needs and problem-solve to the promotion of prisoners' autonomy, political action capacity, and therefore their rehabilitation).

163 *See* Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (holding that protestors had a First Amendment right to engage in a peaceful sit-in at a segregated public library, emphasizing that First Amendment rights "are not confined to verbal expression" and "embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities," *id.* at 142); *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989); Armstrong, *supra* note 81, at 224. For an argument that the text and original meaning of the First Amendment protect "symbolic expression," see Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1059 & n.11 (2009).

164 Simonson, *supra* note 141, at 1620 (quoting Lisa Guenther, *Beyond Guilt and Innocence: The Creaturely Politics of Prisoner Resistance Movements*, *in* ACTIVE INTOLERANCE: MICHEL FOUCAULT, THE PRISONS INFORMATION GROUP, AND THE FUTURE OF ABOLITION 225, 227 (Perry Zurn & Andrew Dilts eds., 2016)).

165 *Id.* (emphasis added).

166 *Cf.* Cohen v. California, 403 U.S. 15, 24 (1971) (describing the relationship between the "constitutional right of free expression" and "individual dignity"); United States v. Hamilton, 699 F.3d 356, 376–77 (4th Cir. 2012) (Davis, J., concurring) (similar); Kim Treiger-Bar-Am, *In Defense of Autonomy: An Ethic of Care*, 3 N.Y.U. J.L. & LIBERTY 548, 592 (2008) (discussing the dignity in autonomous self-expression).

167 *See, e.g.*, Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 463 (2018).

critical to protect such expression; "[i]ndeed, it is from the voices of those who have been most harmed by the punitive nature of our criminal justice system that we can hear the most profound reimaginings of how the system might be truly responsive to local demands for justice and equality."[168]

3. Petition for Redress. — Inmates' strikes can be seen not only as expressions of their dignity and general efforts to express their voices beyond prison walls but also as significant methods of assembly to call attention to specific grievances and seek redress from the government.[169]

While in theory "[t]here is no iron curtain drawn between the Constitution and the prisons of this country,"[170] in practice, "prisons often escape the daily microscope focused on other American institutions such as schools, churches, and government."[171] Courts grant prison administrators wide deference not only in running day-to-day life within prisons but also in restricting press access to prisons.[172] Therefore, much of the American public — already closed off from and largely indifferent to the lives of prisoners — is kept even more in the dark about prison conditions and the state of our carceral system as a whole.

Prison conditions, from what has been documented, are horrendous across states. Many prisons are severely overcrowded and seriously understaffed;[173] inmates routinely experience physical abuse and even death at the hands of prison guards,[174] receive inadequate protection from guards, are deprived of basic necessities,[175] are given substandard

---

168 Simonson, *supra* note 141, at 1613.

169 *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble, and to petition the government for a redress of grievances."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1876)). *But see* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1099 (2016) ("The Assembly Clause has not been addressed in over thirty years. The relevance of the Petition Clause has been limited to the peripheral issue of access to courts . . . ." (footnotes omitted)).

170 Tibbs, *supra* note 140, at 144 (quoting Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974)).

171 *Id.* at 145.

172 *See, e.g.*, Bill Keller, *Let the Press In*, MARSHALL PROJECT (Oct. 5, 2015, 11:01 AM), https://www.themarshallproject.org/2015/10/05/let-the-press-in [https://perma.cc/85RD-KS6S].

173 *See, e.g.*, Sara Mayeux, Opinion, *The Unconstitutional Horrors of Prison Overcrowding*, NEWSWEEK (Mar. 22, 2015, 2:55 PM), https://www.newsweek.com/unconstitutional-horrors-prison-overcrowding-315640 [https://perma.cc/KR4M-S44U]; *Prison Conditions*, EQUAL JUST. INITIATIVE, https://eji.org/mass-incarceration/prison-conditions [https://perma.cc/5YE8-Q3G3].

174 *See, e.g.*, Tom Robbins, *A Brutal Beating Wakes Attica's Ghosts*, N.Y. TIMES (Feb. 28, 2015), https://nyti.ms/1GAAkOo [https://perma.cc/832Y-Y7B8].

175 *See, e.g.*, Mary Ellen Klas, *Florida Prisons Have Toilet Paper, But They're Not Supplying It to Some Inmates*, MIAMI HERALD (July 20, 2017, 11:01 AM), https://www.miamiherald.com/news/special-reports/florida-prisons/article162565763.html [https://perma.cc/X2YY-AKRY].

medical care,[176] and are forced to live in squalor and tolerate extreme circumstances;[177] most prisoners have minimal, if any, access, to rehabilitative or mental health services;[178] and prisoners have little legal recourse, as internal prison grievance procedures are often stacked against inmates,[179] and judicial deference and federal legislation have effectively shut the courthouse doors on prisoners' civil rights claims.[180] And across prisons, criminal sentencing laws not only have contributed to an unprecedented era of mass incarceration, but also have forced African Americans and people of color broadly to bear much of this burden.[181]

As the Marshall Project states, "[s]ociety won't fix a prison system it can't see";[182] peaceful prison strikes like the 2018 strike, however, draw back the "iron curtain" of prison walls, bringing to light many of the pressing issues described above. Through these strikes, inmates are able not only to express their grievances to their prison administrators, but also to "publicize their on-the-ground realities to the larger world"[183] and, in turn, gain attention from and access to the political branches able to implement policy reforms.[184]

As recent history has shown, inmates have experienced some success by pressing their claims against the government through publicized strikes. For example, as described above, the California strikes in 2011 and 2013 generated public outcry that eventually resulted in transfor-

---

176 *See, e.g.*, Gabriel Eber & Margaret Winter, *New Lawsuit: Massive Human Rights Violations at Mississippi Prison (Video)*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/entry/east-mississippi-correctional-facility_b_3359864.html [https://perma.cc/NT8L-QB5Y].

177 *See, e.g.*, Maurice Chammah, *"Cooking Them to Death": The Lethal Toll of Hot Prisons*, MARSHALL PROJECT (Oct. 11, 2017, 7:00 AM), https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons [https://perma.cc/7489-DTG9].

178 *See, e.g.*, Alexa Lisitza, *Florida Prisons Face a Bleak Sentence*, POLITICO (June 11, 2018, 5:26 PM), https://www.politico.com/story/2018/06/11/florida-prisons-face-a-bleak-sentence-636583 [https://perma.cc/2VH3-5QM3].

179 *See, e.g.*, John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 513 (2006); *see also* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 11–17 (2009), https://www.hrw.org/sites/default/files/reports/us0609web.pdf [https://perma.cc/37BK-6877]; Caitlin Dewey, *With Few Other Outlets for Complaints, Inmates Review Prisons on Yelp*, WASH. POST (Apr. 27, 2013), https://wapo.st/2TBB5Dj [https://perma.cc/3B3R-PVGV].

180 *See, e.g.*, Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153–54 (2015).

181 *See, e.g.*, Judith Lichtenberg, *How US Prisons Violate Three Principles of Criminal Justice*, AEON (Sept. 19, 2016), https://aeon.co/ideas/how-us-prisons-violate-three-principles-of-criminal-justice [https://perma.cc/L49L-FP7H].

182 Keller, *supra* note 172.

183 Simonson, *supra* note 141, at 1620.

184 *See* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 476 (2014).

mations to the California prison system's solitary confinement policies.[185] In Alabama, inmates' participation in the 2016 nationwide prison strike helped prompt the Department of Justice to open an investigation into the state's prison conditions.[186] And more broadly speaking, strikes like the 2018 strike have begun to "remedy power imbalances, bring aggregate structural harms into view, and shift deeply entrenched legal and constitutional" barriers to critical prison reforms.[187]

B. Considering Additional Legal Avenues for Protecting Prison Strikes

The foregoing analysis suggests that the First Amendment is a critical, worthwhile vehicle for considering the merits of a right to strike for prisoners. As Justice Black recognized, the importance of such analysis likely transcends prisoners themselves. He wrote: "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."[188]

But this Note acknowledges that judicial recognition of prison strikes' First Amendment values requires *significant* doctrinal change. Convincing the Supreme Court to overturn its *Jones* and *Turner* precedents, and instead to adopt a test with less deference than is currently afforded to prison administrators, is unlikely. As a result, future research is necessary to identify other potential avenues to consider the legal status and merits of prison strikes. As alluded to above, labor law presents one such promising avenue, as does state constitutional and statutory law. Drawing from the broader jurisprudence around hunger strikes, and this area of the law's focus on the body, may present yet another avenue to consider.[189] And more fundamentally, reconsidering incarceration — including the nature of penal punishment, the constitutional status of prisoners, the judiciary's role in our carceral system, and the ability of social science and social movements to inform the law — may be needed to protect prison strikes and bring about the reforms that strikes have advocated for.

---

185 *See supra* note 73 and accompanying text.

186 Cora Lewis, *Guards Sympathize with Striking Prisoners: "We See It as a Moral Issue*," BUZZFEED NEWS (Oct. 9, 2016, 11:54 AM), https://www.buzzfeednews.com/article/coralewis/the-prison-strike-is-spreading [https://perma.cc/J5ZU-5JHP].

187 Simonson, *supra* note 141, at 1612.

188 Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1959 (2018) ("The freedoms of speech [and] association . . . have long been touted as the last nonviolent weapons by which the downtrodden can contest their subordination.").

189 *See, e.g.*, D. Sneed & H. Stonecipher, *Prisoner Fasting as Symbolic Speech: The Ultimate Speech-Action Test*, 32 HOW. L.J. 549, 556–60 (1989).

IV. CONCLUSION

There is a difficult tension in our jurisprudence on prisoners. On the one hand, prisoners are found to enjoy some constitutional rights. On the other hand, prisoners' rights are often curtailed and must give way to the regulations that prison officials employ to maintain security and order in our correctional system. Allowing prisoners to peacefully strike allows our criminal justice system to navigate this tension, preserving the goals of prison officials while allowing prisoners to surface critical problems in prison conditions and our criminal justice system as a whole. The strikes also represent an important end unto themselves: they are an important statement of prisoners' humanity, dignity, and entitlement to a life beyond "modern slavery."